No. _____

In The
Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is a federal crime to "transmit[] in interstate or foreign commerce any communication containing * * * any threat to injure the person of another." 18 U.S.C. § 875(c). This Court held two terms ago, in this case, that a prosecution under Section 875(c) requires the government to prove that the defendant subjectively knew or intended that the communication at issue was a threat. 575 U.S. ___, 135 S. Ct. 2001 (2015). (The Court did not reach the question of whether recklessness is also sufficient to meet this subjective intent requirement. *Id*.)

The first question presented is whether, as a matter of either statutory or constitutional law, liability under Section 875(c) requires an analysis of whether a *reasonable person* would be threatened by the communication, or whether it is instead sufficient to examine whether a particular recipient, whether reasonable or not, would have considered it threatening.

The second question presented is under what circumstances, if any, an erroneous pre-trial holding that the defendant's subjective mental state is not an element of the crime, followed by jury instructions and government argument to the same effect, can be harmless error.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS IN THE CASE

The opinion of the court of appeals after remand from this Court, App. 1a, is reported at 841 F.3d 589. The opinion of this Court, reversing and remanding, App. 27a, is reported at 575 U.S. ___, 135 S. Ct. 2001 ("*Elonis I*"). The opinion of the court of appeals before *certiorari*, App. 84a, is reported at 730 F.3d 321. The opinion of the district court denying Petitioner's post-trial motions, App. 114a, is reported at 897 F. Supp. 2d 335. The opinion of the district court denying Petitioner's motion to dismiss, App. 134a, is unreported, but available at 2011 WL 5024284.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2016, and a timely petition for panel rehearing and rehearing *en banc* was denied on January 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech[.]

Section 875(c) of title 18 of the United States Code provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

In *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015) ("*Elonis I*"), this Court held that a prosecution under 18 U.S.C. § 875(c) required proof going to the defendant's actual, subjective state of mind. This case presents a critical follow-on question: whether the foreseeable reaction of a *reasonable* listener to the speech is a necessary part of the analysis.

Petitioner Anthony Elonis was indicted in 2011 for violations of 18 U.S.C. § 875(c) (communicating threats in interstate commerce), over communications – some of which took the form of rap lyrics – that he made via Facebook. At trial, Petitioner testified that he was "not trying to threaten anyone," and that he did not consider the communications at issue to objectively constitute threats, saying "I would not classify that as a threat." But the district court, following Third Circuit precedent, instructed the jury that Petitioner's

subjective mental state as to the ostensibly threatening character of the statements need not factor into their decision. He was convicted.

After an appeal, this Court, having granted *certiorari*, rejected the district court's decision on mental state, explaining that "wrongdoing must be conscious to be criminal." App. 38a. This Court held that "Elonis's conviction cannot stand," and remanded to the Third Circuit for "further proceedings consistent with this opinion." App. 46a, 49a.

Nonetheless, the Third Circuit affirmed the conviction. The Third Circuit reached this outcome by coming to two key conclusions:

- ***First***, that Petitioner's testimony that he (a) did not subjectively intend to threaten and (b) did not subjectively believe his statements were threats were both inapposite, because he could *also* have been convicted if he knew that some *particular potential reader* of his online communications would find them threatening, regardless of whether they would be viewed as objective threats by a reasonable recipient. App. 14a-17a. The court held that such potential readers include all of the defendant's Facebook "followers," App. 17a n.7, plus, evidently, some number of undefined others (none of Petitioner's putative victims were his Facebook followers).

- ***Second***, the error at trial was harmless beyond a reasonable doubt, because (a) while testifying Petitioner never denied knowing that a particular potential reader would find his speech threatening, and (b) in the Third Circuit's view, if hypothetically he *had* testified to that effect, "no reasonable juror would have believed him." App. 17a-25a.

Petitioner submits that the Third Circuit's approach on each of these issues was both wrong and inconsistent with that of other circuit courts of appeal.

As to the first issue, the Third Circuit held that a jury hearing a "threats" case need not consider, as a component of the defendant's subjective state of mind, whether the defendant understood that a reasonable recipient of the defendant's speech would have considered it threatening, as long as the defendant knew that some particular potential audience member – whether reasonable or not – would have considered it so. In an age of social media, in which communications can be broadcast virtually instantly to a potentially-massive audience, often affording the speaker little control over who ultimately receives them, this standard is untenable. It risks allowing meritorious speech to be banned or chilled just because some potential audience member has convinced the speaker that he or she will unreasonably react to it negatively, in effect giving the "heckler's veto" the force of federal law. The Second, Fourth, Ninth, Tenth, and Eleventh Circuits all have

developed standards that avoid this problem, which the Third Circuit declined to apply.

As to the second issue, the Third Circuit decided that record evidence was sufficient to remove any reasonable doubt that the trial court's error affected the verdict. This approach conflicts with the approach taken in the Fifth Circuit, overlooks that the court ruled *pre-trial* that Petitioner's subjective mental state need not be considered, "ignor[es] the possibility that [Petitioner] might have done more to counter that evidence if he had known that it mattered for the verdict," *United States v. Stanford*, 823 F.3d 814 (5th Cir. 2016), and fails to fully examine whether "the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Both issues are exceptionally important: the first implicates the jealously-guarded protections of the First Amendment,[1] and the "buffer zone" required to avoid chilling meritorious speech, as well as principles of statutory construction addressed by this Court in *Elonis I*. The second involves the correct analysis for reviewing whether a criminal defendant has been wrongfully convicted when the jury considered less than all of the elements of the crime.

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[1] *Cf. Perez v. Florida*, No. 16-6250, 580 U.S. ___, 2017 U.S. LEXIS 1570, at *3 (Mar. 6, 2017) (Sotomayor, J., concurring) ("Statutes criminalizing threatening speech . . . 'must be interpreted with the commands of the First Amendment clearly in mind' in order to distinguish true threats from constitutionally protected speech." (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969) (*per curiam*))).

A. Factual Background

This case arises out of posts Petitioner made during 2010 on the social media website Facebook. At the time, Petitioner was 27 years old; his wife of nearly seven years had left him, taking their two children with her. Petitioner's supervisor at Dorney Park & Wildwater Kingdom, an amusement park in Allentown, Pennsylvania, observed him "with his head down on his desk crying, and he was sent home on several occasions because he was too upset to work." Soon afterwards, he lost his job. Petitioner made a series of posts about his situation, frequently in the form of rap lyrics, using "crude, spontaneous and emotional language expressing frustration." Although the language was – as with popular rap songs addressing the same themes[2] – sometimes violent, Petitioner posted explicit disclaimers explaining that his posts were "fictitious lyrics," and he was "only exercising [his] constitutional right to freedom of speech." Petitioner explained about his posts, "for me, this is therapeutic. It help[ed] me to deal with the pain."

1. Facebook provides its users with a home page on which the user can post comments, photos, and links

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[2] At trial, Petitioner testified that he was influenced by the rap artist Eminem's songs "Guilty Conscience," "Kill You," "Criminal," and "97 Bonnie and Clyde" as influences. Eminem repeatedly fantasized in songs about killing his ex-wife. *See, e.g.*, Eminem, *Kill You*, on The Marshall Mathers LP (Interscope Records 2000) ("Slut, you think I won't choke no whore/Til the vocal cords don't work in her throat no more?" "Put your hands down bitch, I ain't gonna shoot you/I'ma pull you to this bullet, and put it through you.").

to other websites. Facebook users may become "friends" with other users; after a member requests to be "friends" with another user, the requested friend receives an email, in which they can elect to accept or reject the friend request. Depending on the user's privacy settings, a Facebook user's home page may be visible only to that user's "friends" (also referred to as "followers"), or it may be viewable by any Facebook member. A user may also restrict the ability of someone who is not a "friend" to find that user's profile without knowing the user's unique identification number or username.

Posts that a member makes on his or her own Facebook page may automatically appear in their friends' "news feed," a listing of recent postings. When a member posts a comment on his or her own Facebook page, he or she has the option of "tagging" other Facebook users (including users who are not friends); doing so makes the "tagged" post appear on the "tagged" member's own Facebook page. Unless two users are friends, have a friend in common, or one user has "tagged" the other user, a Facebook member must affirmatively visit the other user's page to view posts written on that Facebook page. *See generally Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928, at *4 n.4 (D. Nev. June 30, 2012).

2. Petitioner had a "public" Facebook profile, meaning that his page was viewable by any member of the public who located and visited his page. In October 2010, Petitioner's sister-in-law posted in a status update on Facebook that she was shopping for Halloween

costumes with Petitioner's children. Petitioner responded that his son "should dress up as matricide for Halloween," adding, "I don't know what his costume would entail though. Maybe [Petitioner's wife's] head on a stick?" Petitioner ended the post with an "emoticon" of a face sticking its tongue out, which he understood to be an indication a post is meant in "jest."

In November 2010, Petitioner's wife obtained a Protection from Abuse order ("PFA") against Petitioner. Petitioner then posted on his Facebook page a virtually word-for-word adaptation of a satirical sketch by the "Whitest Kids U Know" comedy troupe that he and his ex-wife had previously watched together. In that sketch, a member of the troupe explains that it is illegal for a person to say that he wishes to kill the President, but not illegal to explain that it is illegal to say that one wants to kill the President. Petitioner replaced references to the President with references to his now-estranged wife:

> Did you know that it's illegal for me to say I want to kill my wife?
>
> It's illegal.
>
> It's indirect criminal contempt.
>
> It's one of the only sentences that I'm not allowed to say.
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.
>
> I'm not actually saying it.

I'm just letting you know that it's illegal for me to say that.

It's kind of like a public service.

I'm letting you know so that you don't accidently go out and say something like that

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

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

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

Perfectly legal.

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

Insanely illegal.

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

===[__] =====house

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

Petitioner included a link to the original video. *See* https://www.youtube.com/watch?v=QEQOvyGbBtY. Petitioner ended the post with the statement, "Art is about pushing limits. I'm willing to go to jail for my constitutional rights. Are you?" Petitioner was not Facebook friends with his wife and there is no evidence that he tagged her in that (or any other) post.

In another post he made in November 2010, Petitioner commented bitterly on his wife's PFA, invoking the First Amendment doctrine of "true threat jurisprudence," and suggesting that imprisoning him for his postings would be tortious and result in a civil settlement.

> Fold up your PFA and put in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> That was improperly granted in the first place
>
> Me thinks the judge needs an education on true threat jurisprudence
>
> And prison time will add zeros to my settlement
>
> Which you won't see a lick
>
> Because you suck dog dick in front of children
>
> And if worse comes to worse
>
> I've got enough explosives
>
> to take care of the state police and the sheriff's department

Above and beneath this post, Petitioner had posted a link to the Wikipedia entry on "freedom of speech," including photographs of the Westboro Baptist Church's controversial signs stating, "Thank God for Dead Miners." *See generally Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011). A post beneath it praised the ACLU for bringing suit to challenge a nearby school district's decision to prohibit wearing "I [heart] Boobies" bracelets in school. *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013).

On November 16, 2010, 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?

The post was made more than two years before the Sandy Hook shootings; one of Petitioner's Facebook friends "liked" the post. Petitioner testified that his post was a reference to an Eminem song in which the rapper coarsely criticized his ex-wife and fantasized about participating in the Columbine school shootings.[3]

After learning of Petitioner's Facebook posts, FBI Agent Denise Stevens visited Petitioner at his house. After the visit, Petitioner posted a "note" on his Facebook page, a type of composition that requires a reader

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[3] *See* n.2, *supra*; Eminem, *I'm Back*, on The Marshall Mathers LP (Interscope Records 2000):

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

to click on a link on the user's homepage to be taken to a separate page. The post, entitled "Little Agent Lady," was styled as a rap song, and suggested – counterfactually – that Petitioner had been wearing a bomb during the visit. He concludes the rap by joking, "if you really believe this shit, I'll have some bridge rubble to sell you tomorrow."

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

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

[BOOM!]

Are all the pieces comin' together?

Shit, I'm just a crazy sociopath

that gets off playin' you stupid fucks like a fiddle

And if y'all didn't hear, I'm gonna be famous

Cause I'm just an aspiring rapper who likes the attention

who happens to be under investigation for terrorism

cause y'all think I'm ready to turn the Valley into Fallujah

But I ain't gonna tell you which bridge is gonna fall

into which river or road

And if you really believe this shit

I'll have some bridge rubble to sell you tomorrow

[BOOM!][BOOM!][BOOM!]

Petitioner did not mail, email, or post this to Agent Stevens, nor did he "tag" her in this (or any other) post. Petitioner never posted any of his comments that were

subjects of the Indictment anyplace but his own pseudonymous Facebook page, nor did he "tag" anyone in them.

B. Procedural History

1. On December 8, 2010, Petitioner was arrested and charged with violating 18 U.S.C. § 875(c). The grand jury indicted Petitioner on five counts: threats to patrons and employees of Dorney Park (Count One); threats to his wife (Count Two); threats to police officers (Count Three); threats involving a kindergarten class (Count Four); and threats to a FBI agent (Count Five).

Petitioner moved to dismiss the indictment on the ground that the indictment failed to allege that he subjectively intended to threaten, which he argued was required under the true threat exception to the First Amendment. The district court denied the motion, App. 134a, and ruled before trial that under Third Circuit precedent, the government need only show that "the defendant intentionally made the communication, but not that he intentionally aimed to make a threat," and that this test "focuses on the objective speaker and not the objective recipient." D.C. App. 67-68.

Petitioner requested that the jury be instructed that (a) a "true threat" is one that "a reasonable person . . . would take as a serious expression of an intention to inflict bodily harm"; and (b) "the government must prove that [Petitioner] intended to communicate a

true threat." The district court denied the request, instead instructing the jury based on an objective standard that turned on what a reasonable person in the defendant's position would understand about the communication's effect on "those to whom the maker communicates the statement":

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

In closing, the government repeatedly emphasized the point, arguing that Petitioner's testimony in his own defense was immaterial: "It doesn't matter what he thinks."

So instructed, the jury convicted Petitioner on counts two through five of the indictment. Petitioner filed post-trial motions to dismiss the indictment, based in part on his argument that a subjective standard should apply. The district court denied the motions, and sentenced Petitioner to 44 months' imprisonment, followed by three years of supervised release.

2. The court of appeals affirmed, holding that the district court's instruction, that a true threat is one that "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," was a correct statement of the law. App. 85a. A petition for rehearing *en banc* was denied.

3. This Court granted *certiorari* and reversed. A majority of this Court, with Justice Alito concurring in part and dissenting in part and Justice Thomas dissenting, held that, generally, "wrongdoing must be conscious to be criminal," and Section 875(c) should therefore be read to include a subjective mental state element. App. 38a. The Court explained, "the crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication"; the subjective "mental state requirement must therefore apply to the fact that the communication contains a threat." App. 41a. Because the district court proceedings rested on the determination that the government need not prove the defendant's subjective intent, this Court held, "Elonis's conviction cannot stand," reversed the decision below, and remanded to the Third Circuit for "further proceedings consistent with this opinion." App. 46a, 49a.

4. Nonetheless, after briefing and argument, the Third Circuit again affirmed the conviction, holding that the trial error identified by this Court was harmless. In its opinion, the Third Circuit found that "Section 875(c) contains both a subjective and objective component." App. 14a. The "subjective component" can be met with proof that the defendant had "knowledge that the recipient will view [the communication] as a

threat." App. 17a. As to the "objective component," the Third Circuit held that "[t]he District Court's instruction in this case properly states the objective component." App. 15a n.5. The court approved a "reasonable speaker" instruction, which required the government to prove that a "reasonable person would foresee that the [defendant's] 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." App. 14a.[4]

Despite the fact that (a) Petitioner's trial followed the district court's erroneous ruling, which undoubtedly influenced both sides' trial strategy, and (b) Petitioner did specifically testify that he was "not trying to threaten anyone," the Third Circuit found that, if hypothetically he had been asked if he knew some recipient of his communications would find his posts threatening, and hypothetically he had answered in the negative, "no rational juror would have believed him." App. 20a.

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[4] The Third Circuit's express approval of this instruction resolves any ambiguity in its description of the objective component: it does not require a "reasonable recipient." While the court refers to requiring a communication that "a reasonable person would view as a threat," App. 15a, directly following this passage, it notes that the district court's instruction was correct. Its reference to a "reasonable person" can only refer to a communication that a reasonable speaker would view as something that would be taken as a threat by *those to whom he communicates the statement*.

On this basis, the Third Circuit found the trial error harmless. A petition for panel and *en banc* rehearing was denied. App. 147a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. *Certiorari* Is Warranted to Resolve Disarray Over Whether a "Threats" Prosecution Requires an Examination of Whether the Communication at Issue Would Have Been Understood by a *Reasonable Recipient* as a Threat.

Following this Court's decision in *Elonis I*, it is clear that the government must put on evidence going to the defendant's subjective mental state in a prosecution under Section 875(c). A conflict has emerged, however, over whether the government must also put on evidence in a "threat" case going to whether the communication would have been understood by a *reasonable* recipient – as opposed to some *particular* recipient, whether reasonable or not – as a threat.

A. The Circuits Are In Conflict.

1. On remand following *Elonis I*, Petitioner argued that this Court's holding meant that the government must prove a defendant subjectively intended or knew[5]

[5] This Court did not reach whether a recklessness standard would adequately meet Section 875(c)'s *mens rea* requirement. App. 47a. For concision, the wording of Petitioner's argument here is framed around the "knowledge or intent" standard that this

that a *reasonable* recipient of the communication – as opposed to *any* recipient, whether reasonable or not – would consider the communication a threat. Without a reasonable recipient component to the standard, Petitioner argued, the statute threatened to criminalize all manner of innocent, even meritorious speech, even if it was done only with the knowledge that *some* recipient – even if entirely unreasonably – would consider it threatening. Petitioner argued that this is a particular concern in the social media age when the speaker has little control over the broadcast of frequently unguarded speech.

The Third Circuit rejected that argument. Instead, it announced a *mens rea* standard that requires no analysis of whether a reasonable recipient of the communication would consider it a threat. The Third Circuit's standard is met when (a) the defendant had "knowledge that **the recipient** will view [the communication] as a threat," and (b) a reasonable person in the defendant's position would foresee that his statement "would be interpreted by **those to whom the maker communicates the statement**" as a threat. App. 15a-17a (emphasis added). In other words, if the defendant (a) subjectively and (b) reasonably knows that a *particular recipient* would consider the communication a threat – even if that recipient is wholly unreasonable in that view – the defendant can have violated Section 875(c). The Third Circuit's standard applies to speech transmitted to a wide, heterogeneous

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Court held certainly meets that requirement. *Id*. However, Petitioner's argument applies equally in a recklessness context.

collective of recipients just as it does to direct person-to-person communications.

2. Among federal appeals courts who have unambiguously considered this question post-*Elonis I*, the Third Circuit stands alone in including no reasonable-recipient component in its analysis.

The Second, Fourth, Ninth, Tenth, and Eleventh Circuits have each confirmed after *Elonis I* that whether a reasonable recipient would consider the communication a threat must be analyzed, as a matter of either constitutional or statutory doctrine. *United States v. Wright-Darrisaw*, 617 F. App'x 107, 108 (2d Cir. 2015) ("[A] statement is a true threat if a reasonable person hearing or reading the statement would understand it as a serious expression of intent to inflict bodily injury[.]" (quotations omitted)); *United States v. White*, 810 F.3d 212, 220-21 (4th Cir. 2016) ("[T]o establish the third ['true threat'] element [of Section 875(c)], . . . the prosecution must show that an ordinary, reasonable recipient who is familiar with the context in which the statement is made would interpret it as a serious expression of an intent to do harm."); *United States v. Zagorovskaya*, 628 F. App'x 503, 504 (9th Cir. 2015) ("[T]he evidence establishes that a reasonable person who heard [defendant's] statements would have interpreted them as a threat." (quotations omitted)); *United States v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015) ("The question is whether those who hear or read the threat reasonably consider that an actual threat has been made." (quotations omitted)); *United States v. White*, 654 F. App'x 956, 967 (11th Cir.

2016) (noting that Eleventh Circuit pattern jury instructions define "true threat" as one "that is made under circumstances that would lead a reasonable person to believe that the Defendant intended to [kidnap] [injure] another person").[6]

While it is not entirely clear, it appears that the First and Seventh Circuits may stand with the Third in this regard, although the First Circuit has not revisited the issue subsequent to this Court's holding in *Elonis I*, and the Seventh Circuit has done so only in *dicta*.

The First Circuit's pre-*Elonis I* jurisprudence is similar to the Third's in that it requires only an examination of whether the defendant "should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made," and does not analyze the reasonable recipient at all. *United*

[6] These courts generally frame the reasonable-recipient test as the objective prong of a two-prong test, requiring (a) speech that a reasonable recipient would understand as a threat (the objective prong) and (b) some level of subjective intent to threaten on the part of the defendant (the subjective prong). This approach differs somewhat from the test that Petitioner advocated for below – (a) speech that a reasonable *speaker* would know would threaten someone in his audience (the objective prong), and (b) the defendant's *subjective knowledge or intent* that a *reasonable person* would understand the speech as a threat (the subjective prong). It remains, however, that a circuit conflict exists, and that, under one set of tests (the majority view, and the one advocated by Petitioner), the reaction of a *reasonable recipient* is included somewhere in the analysis; under the other (the Third Circuit's), the reaction of a *reasonable recipient* is omitted from the analysis.

States v. Fulmer, 108 F.3d 1486, 1491-92 (1st Cir. 1997).[7] And the Seventh Circuit noted in a recent opinion that a jury instruction in a "threats" case requiring the government to prove that the defendant "knew that other people **reasonably** would view his statement as a true threat" "**might** have given [defendant] an unwarranted break," because it "not only [required the defendant] to know that his listener would take his statement as a true threat, but also that the listener's understanding was reasonable." *United States v. Dutcher*, No. 16-1767, 2017 U.S. App. LEXIS 5076, at *9 (7th Cir. Mar. 22, 2017) (emphasis added).

B. The Issue Is Exceptionally Important.

It is important that this conflict among the circuits be resolved. The Department of Justice has brought nearly 200 Section 875(c) prosecutions in the five most recent years for which data is available. *See* U.S. Dep't of Justice, *Bureau of Justice Statistics: Federal Criminal Case Processing Statistics*, http://www.bjs.gov/fjsrc/tsec.cfm (last accessed March 13, 2017). That represents just a fraction of the total number of criminal prosecutions implicating "true threats" doctrine. There are a number of other federal statutes that

[7] The Sixth and Eighth Circuits have not yet addressed the issue post-*Elonis I*, but both courts held prior to *Elonis I* that they do examine a reasonable recipient's perspective in determining whether a communication is a threat. *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012); *United States v. Jongewaard*, 567 F.3d 336, 339 n.2 (8th Cir. 2009). The Fifth and D.C. Circuits have not clearly addressed the issue.

also implicate the issue, such as Section 871 (involving presidential threats). And most, if not all, states have enacted statutes analogous to Section 875(c).[8] These authorities require clarity as to whether a person can be prosecuted for transmitting a communication if he knows that some potential recipient – albeit one who is wholly unreasonable in this regard – will consider it threatening even if many do not.

Further, the issue is growing in importance as communication online by email and social media has become commonplace, even as the norms and expectations for such communication remain unsettled. The inherently impersonal nature of online communication makes such messages susceptible to misinterpretation and to wide dissemination, to an audience including both the reasonable and the unreasonable, with no affirmative act on the part of the speaker. *See* Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. Rev. 43, 72 (2011). It is therefore unsurprising that online statements have proven to be a major basis (perhaps the *leading* basis) for criminal threat prosecutions. *See, e.g.*, *Bagdasarian*,

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[8] *See, e.g.*, Ala. Code § 13A-10-15 (West 2013); Ark. Code Ann. § 5-13-301 (West 2013); Cal. Penal Code § 140 (West 2014); Conn. Gen. Stat. Ann. § 53a-183 (West 2014); D.C. Code § 22-407 (West 2013); Fla. Stat. Ann. § 836.10 (West 2013); Haw. Rev. Stat. § 707-716 (West 2013); Iowa Code Ann. § 712.8 (West 2013); Mich. Comp. Laws Ann. § 750.411i (West 2013); Okla. Stat. Ann. tit. 21, § 1378 (West 2013); Va. Code Ann. § 18.2-60 (West 2013); Wash. Rev. Code Ann. § 9.61.160 (West 2013); Wis. Stat. Ann. § 940.203 (West 2013).

652 F.3d 1113 (Yahoo message board posting); *United States* v. *Stock*, No. 11-182, 2012 WL 202761 (W.D. Pa. Jan. 23, 2012) (defendant charged for threatening Craigslist advertisement); Bianca Prieto, *Polk County Man's Rap Song Called Threat to Cops, So He's in Jail for 2 Years*, Orlando Sentinel, Aug. 1, 2009, http://goo.gl/WRGOQ3.

C. The Third Circuit's Rule on State of Mind Is Wrong.

A standard that makes ostensibly threatening speech proscribable, without examining whether a reasonable recipient would consider it a threat, makes little sense and risks sweeping in innocent or meritorious speech solely because of the known proclivities of some eccentric audience member. It effectively gives the "heckler's veto" – the power to unilaterally silence a message that the listener personally dislikes – the imprimatur of federal law. *Cf. Reno v. ACLU*, 521 U.S. 844, 880, (1997). The Third Circuit's standard is supremely ill-suited to deal with speech in a public forum that is broadcast to a wide audience. This is a particular danger in the age of internet and social media, when online speakers often have little control over who receives their communiqués.[9]

[9] The Third Circuit acknowledged and sought to avoid this problem, saying, "We recognize it may sometimes be difficult to pinpoint the recipient of the communication. This is especially so in the age of social media, when the recipient of the communication may be a defendant's Facebook followers or even the general public." App. 17a n.7. But its solution – allowing for a violation if

In 1965, then-aspiring politician Ronald Reagan reportedly said, "I favor the Civil Rights Act of 1964[,] and it must be enforced at the point of a bayonet, if necessary."[10] Had he been convinced that some atypical audience member would be unreasonably put in fear by the reference to a bayonet (or, indeed, by any other element of the statement), the Third Circuit's standard could have subjected Reagan to prosecution for his statement. Similarly, a public figure could effectively chill speech on some unwelcome topic by publicly declaring that he felt personally threatened by it. A political protester with a valuable message wholly inoffensive to a reasonable person could commit a crime if she knew she was likely to encounter a particular counter-protester with idiosyncratic sensitivities. An internet user who marked an exciting moment with the phrase, familiar among a certain milieu, "Boom goes the dynamite!,"[11] could be prosecuted if he knew

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the communication is transmitted "with knowledge that it would be viewed as a threat by [defendant's] **Facebook followers**," *id*. (emphasis added) – is erroneous for the reasons stated above and also untethered to this case: none of the putative targets of Petitioner's alleged threats *were* his Facebook followers.

[10] S. O'Hanlon, DISCUSSION: FEDERALIST 37: MAN, LANGUAGE, AND THEORY, 25 Can. J.L. & Juris. 137, 152 n.76 (2012).

[11] " 'Boom goes the dynamite!' is a catchphrase coined by Ball State University student Brian Collins, popularized after a video of him delivering an ill-fated sports broadcast that included the phrase was shared on YouTube in 2005. In the ensuing years it has become a popular phrase, used to indicate a pivotal moment." *Boom Goes the Dynamite*, Wikipedia, https://en.wikipedia.org/wiki/Boom_goes_the_dynamite (last visited March 10, 2017).

some frequenters of his online community were not familiar with its meaning. And as has been debated in this case, Eminem's raps, say about a school shooting, could be criminal, depending on the artist's expectations as to the reaction of particular audience members.

These results, which follow from the Third Circuit's approach, are incongruous, and are easily avoided by including a "reasonable recipient" component in the analysis.

1. The First Amendment to the United States Constitution demands greater protection for speech than the Third Circuit's standard would afford. As this Court has long held, freedom of expression is "the matrix, the indispensable condition, of nearly every other form of freedom," and is "essential to the common quest for truth and the vitality of society as a whole." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). The values enshrined in the First Amendment are to be "jealously guarded," *Dresner v. Tallahassee*, 375 U.S. 136, 146 (1963), even – *especially* – to the point of allowing speech that makes some uncomfortable:

> [Speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have

> profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

Certainly, the Constitution's protection of speech is not absolute. It is well-settled that certain "well-defined and narrowly limited classes of speech" merit no First Amendment protection, and that "true threats" comprise one such category. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *Watts v. United States*, 394 U.S. 705, 707-08 (1969).

But this Court has recognized such categories of speech as unprotected because they are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. In the context of ostensible threats, the effect of otherwise-meritorious speech on a particular, unreasonable, recipient – even if that effect is one of fear, and is known to the speaker – bears no connection to the value of the speech as a "step to truth." It makes little sense, in the face of the First Amendment, to allow speech to be categorically banned based solely on its known effect on a particular recipient, if that recipient's reaction is unreasonable and unconnected to the merits of the speech.

Indeed, impassioned speech on issues of public concern can and often does turn "crude," "offensive," "vituperative," "vehement," "caustic," "unpleasantly sharp," and even "abusive." *Watts*, 394 U.S. at 707-08.

But such speech "may nevertheless be part of the marketplace of ideas, broadly conceived to embrace the rough competition that is so much a staple of political discourse." *United States v. Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985). Witness the defendant in *Watts*, who was prosecuted for saying at an anti-draft rally, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," 394 U.S. at 706, or the defendant in *NAACP v. Claiborne Hardware Co.*, a civil rights activist in 1966 Mississippi, who told his audience that individuals who violated his boycott could "have their necks broken." 458 U.S. 886, 900 n.28 (1982).

Even when the type of speech at issue is "vituperative, abusive, and inexact" – perhaps even *particularly* then, given the close connection between such speech and deeply-held ideas about public affairs – care must be taken to avoid a rule that threatens to sacrifice core political speech. *Watts*, 394 U.S. at 708. Even speech that may carry with it a risk of being *unreasonably* misinterpreted can have value as speech. As this Court has explained, "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

Allowing prosecutions for speech that no reasonable recipient would consider threatening does not provide this constitutionally-mandated breathing space.

2. Putting aside the demands of the Constitution, it follows that the *statute* requires an analysis of the reasonable recipient's reaction to the defendant's speech. This is so for the same reasons that the Constitution requires it: to not require such an analysis could lead to absurd and unjust results, which could be easily avoided.

Moreover, this reading of the statute follows from this Court's reasoning in *Elonis I*. This Court held that "awareness of some wrongdoing" is the touchstone for criminal *mens rea*. App. 43a (emphasis, quotations, and citations omitted). The "wrongdoing" at issue in a case involving threatening speech – that of which the defendant must be aware – is the transmission of speech that *is a threat*. If the requisite "wrongdoing" were knowledge only that some individual, even unreasonably, would be threatened by a communication, then Ronald Reagan, with his "bayonet" comment, would have committed "wrongdoing" if he had known some unreasonable audience member would find it threatening.

To the extent that knowledge is the line between innocent and criminal conduct, to avoid sweeping in innocent speech, the requirement must be that the defendant acted with knowledge of a reasonable person's interpretation of the speech as threatening.

II. *Certiorari* Is Warranted to Review the Third Circuit's Idiosyncratic Approach to Its Harmless Error Analysis.

The Third Circuit concluded that it was beyond reasonable doubt that the error in this case – a pre-trial ruling that Petitioner's subjective mental state was not relevant to his criminal liability, followed by a trial, jury instructions, and argument (culminating with the government telling the jury, "It doesn't matter what he thinks") geared toward that objective test – did not contribute to the conviction. App. 18a; *see also Chapman*, 386 U.S. at 24 (harmless error analysis "require[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."). It reached this outcome despite the fact that at trial (a) the court ruled pre-trial that the defendant's subjective mental state would not matter to liability, undoubtedly shaping defense counsel's strategy; (b) there was no evidence of contemporaneous statements indicating an intent to threaten or knowledge of threatening, no evidence of threatening behavior, and no evidence that the communications at issue were direct statements of an intent to harm (rather, they were generally couched as hypotheticals, often in lyric form, frequently surrounded by disclaimers and references to the First Amendment); (c) the defendant took the stand and testified that he was "not trying to threaten anyone"; but (d) between the jury charge and the government's closing, the jury was told *seventeen times* that,

in effect, the defendant's testimony and his subjective mental state could be ignored.

The Third Circuit focused its analysis on evidence in the record that Petitioner had known that certain *prior* statements – statements that were not part of the indictment, and were different in character than the communications that were indicted – had been taken as threatening, concluding based on that evidence that, had Petitioner been directly asked at trial whether he knew the *communications in the indictment* would be understood as threatening, "no rational juror would have believed him" if he had denied it. App. 20a. Yet the court did not consider that, had the erroneous pre-trial decision not occurred, the parties' trial strategy would have been different. Its emphasis on the absence of exculpatory *mens rea* evidence in a record built on and pervaded by the trial court's error misplaced.

A. There Is Disagreement Among the Circuits Regarding Harmless Error Analysis.

The Third Circuit's approach in this case differs from that of a variety of other circuits considering similar questions.

1. The Third Circuit's approach is inconsistent with that of the Fifth Circuit in a case bearing key similarities to this one. In *United States v. Stanford*, 823 F.3d 814 (5th Cir. 2016), the defendant was accused of conspiracy to distribute a controlled substance analogue ("CSA") and related crimes. *Id*. at 822. The

district court, following then-prevailing circuit precedent, held prior to trial that the defendant's subjective mental state mattered only insofar as the government could prove that he knew *what substance he was conspiring to distribute* – there was no need for proof that the defendant was aware of the features of the substance that made it a CSA. *Id*. at 826. Subsequently, while *Stanford* was on appeal, this Court overturned that circuit precedent, deciding that such a case *did* require proof that the defendant knew of the features of the substance making it a CSA. *McFadden v. United States*, 576 U.S. ___, 135 S. Ct. 2298 (2015). The Fifth Circuit was therefore tasked with determining whether the error at trial was harmless.

The similarities to this case are clear: a trial based on a then-prevailing *mens rea* rule that required no proof of scienter with respect to the character of the conduct that makes it wrongful, followed by a correction by this Court, and a subsequent harmless-error analysis. But the Fifth Circuit, unlike the Third, declined to "become in effect a second jury to determine whether the defendant is guilty," *Neder v. United States*, 527 U.S. 1, 19 (1999), parsing the bits of evidence in the existing record and casting its vote for guilt or innocence; instead, it focused on the *likelihood that the error could have affected the verdict*:

> The government misses the point in focusing only on the evidence actually presented at trial. Cobbling together evidence that the prosecution offered for other issues to demonstrate that Stanford likely had the requisite

> knowledge ignores the possibility that he might have done more to counter that evidence if he had known that it mattered for the verdict. . . . Assuming arguendo that the government presented sufficient evidence of knowledge to convict, if Stanford was not on notice that he needed to combat such proof, we cannot conclude that he had the chance to present a complete defense. . . . Without awareness of the relevant legal standards, he could not have determined the best way to defend against proof of knowledge.

823 F.3d at 836-38. *See also United States v. Bays*, No. 15-10385, 2017 U.S. App. LEXIS 3419, at *13-14 (5th Cir. Feb. 24, 2017) (taking a similar approach). The same analytical approach would have fit this case, but the Third Circuit did not take it.

2. Other circuits take still other approaches to analyzing whether an "omitted element" error is harmless. The Second Circuit follows a multi-step process, asking first whether evidence in the government's favor on the missing element is "overwhelming and essentially uncontroverted" – in which case the error was harmless – and, if not, asking "(a) whether there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element, and, if there was, (b) whether the jury would nonetheless have returned the same verdict of guilty." *United States v. Nouri*, 711 F.3d 129, 140 (2d Cir. 2013). The Fourth Circuit employs a similar two-step test, but specifically declines to use part "b" of the second step. *United States v. Brown*, 202 F.3d 691, 701 n.19 (4th Cir. 2000).

The Ninth Circuit finds such error essentially *per se* harmful when the defendant has contested the omitted element, *see United States v. Guerrero-Jasso*, 752 F.3d 1186, 1193-95 (9th Cir. 2014), but in the Eleventh Circuit, whether the element was contested "may be considered but is not the pivotal concern." *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999).

3. This confusion requires correction. The harmless error rule, which is potentially triggered each time an error occurs in a criminal trial court, has been called "probably the most cited rule in modern criminal appeals," William M. Landes & Richard A. Posner, Harmless Error, 30 J. LEGAL STUD. 161, 161 (2001). More fundamentally, the misapplication of harmless error analysis – which surely occurs regularly, given the multiplicity of approaches seen among the circuits – means that criminal defendants whose trials were infected with inexcusable error are nonetheless facing conviction and the loss of life and liberty. This is untenable and should be rectified.

B. The Third Circuit's Approach to Harmless Error Is Wrong.

1. The Third Circuit's approach in this case was to focus on the volume of evidence in the record supporting the conviction; by contrast, the Fifth Circuit's approach in *Stanford* was, consistent with this Court's mandate in *Chapman*, to holistically examine whether "the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

The effect of the Third Circuit's approach is to shift the burden to Petitioner to establish, on an incomplete record developed for a different purpose, that he did *not* have the requisite state of mind.[12] Powered by this analytical frame, the Third Circuit repeatedly emphasized what Petitioner did *not* say in his testimony, noting for example that he "d[id] not address whether he knew his [putative victims] would feel threatened by" his speech, and that he "never testified that he was unaware of the threatening nature of his posts[.]" App. 20a n.9, 21a. In sum, the Third Circuit collects record evidence favoring the government, while "ignor[ing] the possibility that [Petitioner] might have done more to counter that evidence if he had known that it mattered for the verdict." *Stanford*, 823 F.3d at 837. This approach, which is inherent in an analysis that looks exclusively at the strength of the record evidence in the government's favor instead of examining the likelihood that the error affected the verdict, gives short shrift to the fact that it was, and remains, the government's burden to establish Petitioner's state of mind beyond a reasonable doubt.

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[12] Indeed, the Third Circuit relies on case law arising on collateral attack under 28 U.S.C. § 2254, in which the convicted defendant explicitly bears the burden of *disproving* harmless error. *See* App. 18a (citing *Whitney v. Horn*, 280 F.3d 240 (3d Cir. 2002). *Whitney* applies "the harmless error test announced in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)." 280 F.3d at 257. The *Brecht* test requires the habeas Petitioner – not the Government – to establish that the trial error prejudiced the defendant. *Brecht*, 507 U.S. at 637.

2. The distinction between this case and this Court's holding in *Neder v. United States*, 527 U.S. 1, 19 (1999) is instructive. In *Neder*, the trial court failed to submit to the jury the materiality of defendant's failure to report $5 million in income on his taxes, and this Court held the error harmless. *Id*. at 15. In that case, unlike in this one, the parties and the court all agreed prior to trial that materiality was an element of the crime; the error was only that the court reserved for itself the decision on that element. *See United States v. Neder*, 136 F.3d 1459, 1461 (11th Cir. 1998). In that posture – knowing that materiality was to be an element – the defendant did nothing to contest it, which this Court found significant in its analysis. 527 U.S. at 15.

In this case, the trial court made clear before the trial that the defendant's subjective mental state as to the nature of his speech would *not* enter into the liability analysis at all. That is the context in which the defense strategy was conceived. Had that error not occurred, the record in this case may have been quite different – defense counsel might, for example, have put on witnesses to Petitioner's state of mind, witnesses who could speak to his worldview when he made the indicted communications; defense counsel might have made more effort to contextualize the speech at issue, putting on evidence of other communications by Petitioner and others to help show Petitioner's thinking; defense counsel might have done more to bring out Petitioner's other Facebook followers' reactions to his posts, and his real-life interactions with those people.

Indeed, either attorney might have directly asked him whether he knew or intended to threaten.

Unlike *Neder*, therefore, the fact that the record in this case does not conclusively establish that Petitioner *did not* have the requisite mental state does not speak to the strength of whatever evidence on that element may or may not exist – there was no reason to directly seek to bring such evidence out in Petitioner's trial.

3. The difference between this case and *Pope v. Illinois*, 481 U.S. 497 (1987) is similarly enlightening. In *Pope*, the jurors were instructed to apply a community standard of "social value" in a criminal obscenity case, rather than the correct standard (an objective one, untethered to any particular community). This Court remanded to the court of appeals for a harmless error analysis. *Id*. at 502. In holding that the instructional error could be harmless, this Court explained that "the jurors were not precluded from considering the question of value: they were informed that to convict they must find, among other things, that the magazines petitioners sold were utterly without redeeming social value." *Id*. at 503 (likening the situation to that in *Rose v. Clark*, 478 U.S. 570 (1986), in which the jurors were erroneously instructed that malice could be presumed from certain predicate facts but this Court held the error harmless, and explaining, "The error in *Rose* did not entirely preclude the jury from considering the element of malice.").

In this case, by contrast, the jurors *were* "entirely preclude[d]" from considering Petitioner's subjective state of mind: the jury charge was explicit that his subjective mental state should not enter the analysis, and the government repeatedly reminded the jurors, "It doesn't matter what he thinks." App. 35a. In a case where the defendant testified – even saying in so many words, "I'm not trying to threaten anyone" – the jury was told *not* to consider his mental state.

It is submitted that it would not be unreasonable to suppose that the trial court's error in this case (a) contributed to the fact that Petitioner's testimony and the other record evidence did not fully address Petitioner's state of knowledge, and (b) constricted the jury's thinking on the evidence that was presented, and that that error contributed to the verdict.

III. This Case Presents an Ideal Opportunity to Resolve These Important and Recurring Issues.

This case presents an ideal opportunity to resolve both of these important and recurring issues. Both issues have been squarely presented and thoroughly discussed below. The case's procedural history reveals no disputed issues of fact or any jurisdictional questions that would interfere with this Court's resolution of either question.

Both issues have been thoroughly examined by multiple courts, and the disagreement among the

courts on both issues appears entrenched. Nothing would be gained from delaying further.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APRIL 2017

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3798

UNITED STATES OF AMERICA

v.

ANTHONY DOUGLAS ELONIS,
Appellant

On Appeal from the District Court
for the Eastern District of Pennsylvania
D.C. Criminal No. 5-11-cr-00013-001
District Judge: Honorable Lawrence F. Stengel

On Remand from the Supreme Court
of the United States on June 1, 2015

Argued after Remand on May 2, 2016

Before: MCKEE*, Chief Judge,
HARDIMAN, and SCIRICA, Circuit Judges

(Filed: October 28, 2016)

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* Judge McKee was Chief Judge at the time this appeal was argued. Judge McKee completed his term as Chief Judge on September 30, 2016. Judge D. Brooks Smith, assumed Chief Judge status on October 1, 2016.

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*

Anthony Elonis was convicted of violating 18 U.S.C. § 875(c), which prohibits transmitting in interstate commerce a communication containing a threat to injure the person of another. We affirmed his conviction on appeal, but the Supreme Court reversed our judgment. It held that the jury instruction regarding Elonis's mental state was insufficient and therefore erroneous. On remand, we will once again affirm Elonis's conviction because we hold the error was harmless.

I.

In May 2010, Elonis's wife left him, moved out of their home, and took their two children with her. Shortly thereafter Elonis began having problems at work. He was an operations supervisor and communications technician at Dorney Park & Wildwater Kingdom amusement park. His supervisors observed him with his head down on his desk crying, and he was sent home on several occasions because he was too upset to work.

One of the employees Elonis supervised, Amber Morrissey, made five sexual harassment reports against him. According to Morrissey, on one occasion Elonis came into her office late at night and began to undress in front of her. She left after he removed his shirt. Morrissey also reported another incident in which Elonis made an employee who was a minor female uncomfortable when he placed himself close to her and told her to stick out her tongue.

Elonis's problems came to a head on October 17, 2010, when he posted a photograph from a Halloween event at the park to his Facebook page, showing him holding a knife to Morrissey's neck. He added the caption "I wish" under the photo. When his supervisor saw the Facebook post, Elonis was fired.

Two days later, on October 19, Elonis posted another violent statement to his Facebook page. He wrote:

> Someone once told me that I was a firecracker. Nah. I'm a nuclear bomb and Dorney Park just f***ed with the timer. If I was the general manager, I'd be on the phone with Sandusky[1] discussing a damage control plan. But I'm not and y'all haven't heard the last of Anthony Elonis.

This post raised concern among Elonis's coworkers, who followed him on Facebook. They voiced their concern in Facebook posts of their own. One post stated, "I hope that Dan Hall [chief of patrol at Dorney Park] is aware that security needs to be looking out for him . . . ," and another expressed fear that Elonis would "hurt or kill" someone. Elonis was aware of these fears. He admitted at trial that he had saved screenshots of the posts on his computer.

The fear among Dorney Park employees was not limited to these Facebook posts. Hall, the chief of patrol, testified at trial that he took steps to enhance park security and informed local police and the FBI of Elonis's statements. Morrissey testified that she had chosen a hiding place in case Elonis ever came back to Dorney Park.

Despite his knowledge that his violent post had scared coworkers, Elonis posted another violent message two days after viewing his coworkers' exchanges. He wrote:

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[1] Sandusky, Ohio is the location of Dorney Park's corporate headquarters.

> Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the f***ing 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 f*** ing scary?

This post became the basis for Count One of Elonis's indictment, threatening park patrons and employees. He was acquitted of the charges in this count.

Around the same time, Elonis began posting crude, degrading, and violent material to his Facebook page about his (soon-to-be former) wife. One post states, "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,[2] and made it look like a rape and murder." Another post was in response to a status update posted to Facebook by Elonis's sister-in-law. Her status update read, "Halloween costume shopping with my niece and nephew should be interesting." Elonis commented on this status, writing, "Tell [their son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [his mother's] head on a stick?" Elonis also posted in October 2010:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until

[2] Toad Creek runs behind Elonis's father-in-law's house, where Elonis's wife was living at the time of the post.

> your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, b****, 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, b****, so I can forgive you.

At trial, Elonis's wife testified that her husband's posts "made [her] extremely afraid for [her] life." The posts made her feel "like [she] was being stalked," and made her feel "extremely afraid for [her] and [her] children's and [her] families' lives." She sought a Protection From Abuse order – essentially, a restraining order – against Elonis in state court. Elonis attended the proceeding at which the court issued the restraining order on November 4, 2010.

The issuance of the restraining order did not stop Elonis's violent rhetoric. On November 7, 2010, he posted an adaptation of a stand-up comedy routine to his Facebook. In the actual routine, a comedian explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that. Elonis's version substituted his wife for the President:

> Hi, I'm Tone Elonis.
>
> Did you know that it's illegal for me to say I want to kill my wife? . . .
>
> 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. . . .
>
> Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. . . .
>
> But not illegal to say with a mortar launcher.
>
> Because that's its own sentence. . . .
>
> 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. . . .
>
> Yet even more illegal to show an illustrated diagram.
>
> [diagram of the house]. . . .

The diagram of the home was accurate. At the end of the post, Elonis linked to a YouTube video of the original stand-up routine, writing, "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?"

This was not the last violent remark Elonis made about his wife on his Facebook page. On November 15, referencing the Protection From Abuse order, Elonis wrote:

Fold up your PFA 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 zeros to my settlement

Which you won't see a lick

Because you suck dog d*** in front of the children . . .

And if worse comes to worse

I've got enough explosives to take care of the state police and Sheriff's Department.

These posts formed the basis of Count Two of Elonis's indictment, threatening his wife. The reference to the police at the bottom of the November 15 post formed the basis of Count Three of his indictment, threatening law enforcement officers.

The next day, November 16, Elonis escalated his violent rhetoric to include elementary schools:

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?

This post formed the basis of Count Four of Elonis's indictment.

By this point, the FBI was monitoring Elonis's Facebook posts, because Dorney Park had contacted the FBI regarding Elonis's violent rhetoric against Dorney Park and its employees. The threat to initiate a school shooting prompted the FBI to visit Elonis at his house on November 30. Elonis did not cooperate with the agents who attempted to interview him. Later that day, he posted:

> You know your s***'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 b*** 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 ya'll to handcuff me and pat me down

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

[BOOM!]

Are all the pieces comin' together?

S***, I'm a crazy sociopath

that gets off playin' you stupid f***s like a fiddle

And if y'all didn't hear, I'm gonna be famous

Cause I'm just an aspiring rapper who likes the attention

who happens to be under investigation for terrorism

cause y'all think I'm ready to turn the Valley into Fallujah

But I ain't gonna tell you which bridge is gonna fall into which river or road

And if you really believe this s***

I'll have some bridge rubble to see you tomorrow

[BOOM!][BOOM!][BOOM!]

This post formed the basis of Count Five of Elonis's indictment.

II.

Elonis was arrested on December 8, 2010, and charged with transmitting in interstate commerce communications containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c). Following his indictment, he moved to dismiss all five counts, contending his speech was protected by the First Amendment. The District Court denied his motion and his case proceeded to trial.

Elonis testified in his own defense at trial. He claimed he did not intend to make any threats, and would never act violently. He testified, "These were – these were lyrics. These – these were for entertainment purposes only. They weren't intended for anyone to feel like I was threatening them or feel scared. I didn't want anyone to feel scared." When asked how he thought people might interpret his posts, Elonis responded, "You know, I didn't really care what other people thought." He further testified, "I made an on-line persona and I figured the worse I made myself seem, you know, I didn't care what people said about me."

Applying circuit precedent, the District Court instructed the jury that

> 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.

The government's closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats, saying:

> Even if you were to believe absolutely everything that he said to you today, it has absolutely no[] impact on whether or not you should find him guilty or not. . . . Again, it doesn't matter what he thinks.

The jury convicted Elonis on Counts Two through Five of his indictment, acquitting him only of Count One, threatening park patrons and employees. He was sentenced to forty-four months' imprisonment.

On appeal, Elonis argued that the Supreme Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003), requires a jury to find that a defendant subjectively intended his statements to be understood as threats for them to fall under the true-threat exception to the First Amendment. Applying circuit precedent, we upheld his conviction.[3]

---

[3] Except for the Court of Appeals for the Ninth Circuit, *see United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); *United States v. Cassel*, 408 F.3d 622, 631-32 (9th Cir. 2005), our opinion conformed to the general agreement at the time among other sister circuits that an objectively threatening communication falls into the true-threat exception to the First Amendment,

The Supreme Court granted certiorari and reversed. *Elonis v. United States*, 135 S. Ct. 2001 (2015). The Court did not reach the First Amendment issues presented by the case. Instead, it based its ruling on its interpretation of the statute under which Elonis was convicted, Section 875(c). Reasoning that "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state," the Court rejected the objective standard under which the jury was instructed. *Id.* at 2012. While the Court added that in this case, there was no dispute that a knowledge or purpose standard would satisfy Section 875(c)'s mental state requirement, it declined to address whether a recklessness standard would be sufficient. *Id*. Accordingly, it reversed our judgment and remanded the case for further proceedings consistent with its opinion.

Justice Alito concurred in part and dissented in part from the majority's opinion. He would have decided the recklessness issue and held that a recklessness standard satisfies Section 875(c)'s mental state requirement. *Id.* at 2016 (Alito, J., concurring). He also suggested that on remand we "consider whether [Elonis's] conviction can be upheld on harmless-error grounds." *Id.* at 2018 (Alito, J., concurring).

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see, e.g., *United States v. White*, 670 F.3d 498, 510 (4th Cir. 2012) (collecting cases), *abrogated by Elonis v. United States*, 135 S. Ct. 2001 (2015). None have had a chance to reconsider in light of the Supreme Court's opinion in this case.

III.

A.

The jury at Elonis's trial was instructed it could convict him under Section 875(c) if it found that "a reasonable person in [his] position" would have "foreseen that the communication he made would have been interpreted by the recipient as a serious expression of an intention to inflict bodily injury or take the life of an individual." The Supreme Court held this instruction was insufficient and therefore erroneous, because "negligence is not sufficient to support a conviction under Section 875(c)." *Elonis*, 135 S. Ct. at 2013. Instead, the Court explained, the jury should have been instructed it could convict Elonis if it found he "transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that the communication w[ould] be viewed as a threat." *Id.* at 2012. The Court left open the question of whether an instruction on a standard of recklessness would be sufficient under Section 875(c) or under the First Amendment.

We believe Section 875(c) contains both a subjective and objective component, and the Government must satisfy both in order to convict a defendant under the statute. The Supreme Court focused on the subjective component. It held that to satisfy the subjective component of Section 875(c), the Government must demonstrate beyond a reasonable doubt that the defendant transmitted a communication for the purpose

of issuing a threat or with knowledge that the communication would be viewed as a threat.[4]

The Government must also satisfy the objective component, which requires it to prove beyond a reasonable doubt that the defendant transmitted a communication that a reasonable person would view as a threat.[5] The objective component of Section 875(c) shields individuals from culpability for communications that are not threatening to a reasonable person, distinguishing true threats from hyperbole, satire, or humor. *See Watts v. United States*, 394 U.S. 705, 708 (1969). It requires the jury to consider the context and circumstances in which a communication was made to determine whether a reasonable person would consider the communication to be a serious expression of an intent to inflict bodily injury on an individual. *See Virginia v. Black*, 538 U.S. 343, 360 (2003).[6]

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[4] As noted, the Court did not address whether a finding of recklessness would be sufficient.

[5] The District Court's instruction in this case properly states the objective component.

[6] We recognize that, in addition to this objective component, the Ninth Circuit requires proof of a specific intent to threaten to satisfy the First Amendment. *See Bagdasarian*, 652 F.3d at 1118. *But see United States v. Jeffries*, 692 F.3d 473, 485 (6th Cir. 2012) (Sutton, J., dubitante) (explaining that as a matter of statutory interpretation, Section 875(c) requires a subjective component, but "as a matter of constitutional avoidance . . . threat prohibitions like [Section 875(c)] cover only 'real' threats, threats in other words that a reasonable observer would take as true and real"), *abrogated by Elonis*, 135 S. Ct. 2001 (2015).

While it is clear that a defendant can be convicted under Section 875(c) for transmitting an objectively threatening communication "with knowledge that the communication will be viewed as a threat," Elonis and the Government disagree on the application of that standard. Elonis contends the Government must show the defendant "acted with knowledge of *a reasonable person's* interpretation of the speech as threatening," reasoning that "knowledge that particular persons would consider the communications threatening is not necessarily equivalent to knowledge of how a reasonable person would understand them." Were this not the standard, Elonis argues, a defendant could violate Section 875(c) merely by "post[ing] photos of his pit bull on Facebook . . . knowing that some members of the Facebook community unreasonably found photos of such dogs threatening. . . ."

Elonis's concerns are unfounded. The objective component of Section 875(c) ensures that a defendant can only be convicted for transmitting communications that are objectively threatening. Moreover, his approach would render the objective component meaningless. Instead of asking the jury whether the defendant's communication was objectively threatening, Elonis would ask only whether the defendant believed his communication was objectively threatening. But it is not for the defendant to determine whether a communication is objectively threatening – that is the jury's role. If a defendant transmits a communication for the purpose of

issuing a threat or with knowledge that the recipient[7] will view it as a threat, and a jury determines that communication is objectively threatening, then the defendant has violated Section 875(c) whether or not he agrees the communication was objectively threatening.

With this understanding of Section 875(c) in mind, we will turn to Elonis's trial to determine whether the error at his trial was harmless.

B.

For a trial error to be harmless, we must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 19 (1999). Our inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). When the error involves a *mens rea* instruction, "[a] verdict may still

[7] We recognize it may sometimes be difficult to pinpoint the recipient of the communication. This is especially so in the age of social media, when the recipient of the communication may be a defendant's Facebook followers [sic] or even the general public. But Section 875(c) operates the same whether the communication has one recipient or many. For example, if a defendant transmits a communication on Facebook, he violates Section 875(c) if the communication is objectively threatening and the defendant transmitted it for the purpose of issuing a threat or with knowledge that it would be viewed as a threat by his Facebook followers.

stand, despite erroneous jury instructions, where the predicate facts 'conclusively establish [*mens rea*], so that no rational jury could find that the defendant committed the relevant criminal act'" without also finding the requisite *mens rea*. *Whitney v. Horn*, 280 F.3d 240, 260 (3d Cir. 2002) (quoting *Rose v. Clark*, 478 U.S. 570, 580-81 (1986)).[8]

Elonis was convicted on four counts of violating 18 U.S.C. § 875(c), which prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another. . . ." The jury was erroneously instructed under an objective standard. The parties dispute whether a recklessness standard or a knowledge standard is sufficient. But under either standard, we find the District Court's error was harmless. The record contains overwhelming evidence demonstrating beyond a reasonable doubt that Elonis knew the threatening nature of his communications, and therefore would have been convicted absent the error.

1.

Count Two of the indictment charged Elonis with violating Section 875(c) by communicating a threat to

[8] In *Whitney*, the jury was improperly instructed regarding the element of intent in a first-degree murder case. We found that, due to the strong circumstantial evidence of intent within the record, no "reasonable jury could have had any doubt about whether Whitney . . . form[ed] the intent to kill." 280 F.3d at 261.

injure his ex-wife. The jury convicted Elonis on this count under an objective standard, finding that the Facebook posts about his ex-wife would be regarded as threatening by a reasonable person. A review of the evidence surrounding these posts unequivocally demonstrates the jury would have convicted Elonis were it required to find that he either knew his ex-wife would feel threatened by the posts or that he purposely threatened her.

In October 2010, just five months after Elonis's wife left him, Elonis posted three messages to Facebook that referenced, among other things, his desire to rape her, kill her, put her head on a stick, and "bust this nut all over [her] corpse." Following these posts, Elonis's wife sought a restraining order against him. Elonis attended the proceeding at which the order was issued, on November 4, 2010. Despite knowing his wife felt threatened enough to seek a restraining order against him, Elonis continued his violent rhetoric with his November 7 post expressing, once again, his desire to kill his ex-wife. Just eight days later, he again posted a violent message about his ex-wife that explicitly referenced the restraining order she had obtained and asked whether it was thick enough to stop a bullet.

Elonis contends the jury may have acquitted him had it not been instructed on an incorrect objective standard. According to Elonis, these errors "rendered irrelevant" his testimony regarding his mental state at the time he posted the messages to Facebook. But as Elonis concedes, Section 875(c)'s mental state requirement can be met with proof of purpose or knowledge.

His testimony at trial focused on his purpose of his Facebook posts, but never contested that he knew his posts would be viewed as threats.[9] Thus, even if the jury believed Elonis's testimony, it could still have found that he knew the threatening nature of his posts.

Moreover, even if Elonis had testified he did not know his ex-wife would feel threatened, "harmless-error cases do not turn on whether the defendant conceded the factual issue on which the error bore." *Rose*, 478 U.S. at 583. "[T]he fact that [Elonis] denied that he had [the requisite *mens rea*] does not dispose of the harmless-error question." *Id.* at 583-84. Instead, harmless error review "mandates consideration of the entire record" to determine whether the error was harmless beyond a reasonable doubt. *Id.* at 583.

Reviewing the whole record, we find that even if Elonis had contested the knowledge element in his testimony, no rational juror would have believed him. Considering the graphic nature of the three messages Elonis posted in October, it is not at all credible that Elonis did not know his ex-wife would interpret them as threats. But it is less credible still that, having attended the court proceeding at which she sought a restraining order against him, Elonis remained unaware

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[9] For example, Elonis testified his posts "weren't intended for anyone to feel like I was threatening them or feel scared." He further testified, "I'm not trying to threaten anyone." These statements offer his explanation for the purpose of his posts, but do not address whether he knew his ex-wife would feel threatened by them.

of his ex-wife's fears as he posted more violent messages on November 7 and 15. The evidence overwhelmingly shows that Elonis posted those two messages with either the purpose of threatening his ex-wife, or with knowledge that she would interpret the posts as threats. No rational juror could conclude otherwise.

2.

Count Three of the indictment charged Elonis with violating Section 875(c) by communicating a threat to injure employees of the Pennsylvania State Police and Berks County Sheriff's Department. Just as with Count Two, the jury convicted Elonis of this Count under an objective standard, finding that the Facebook post about the police would be regarded as threatening by a reasonable person.

Elonis's post regarding the police came at the end of his November 15 post about his ex-wife. It stated, "And if worse comes to worse / I've got enough explosives to take care of the state police and Sheriff's Department." Elonis advances several arguments for why the jury would not have convicted him had it been instructed under a knowledge standard.

First, he contends again that the objective standard prevented the jury from considering his testimony that he did not know his posts would be regarded as threatening. This argument fails for the same reasons as above. Contrary to his suggestion, Elonis never testified that he was unaware of the threatening nature of his posts referencing the State Police and the

Sheriff's Department. Elonis knew that both his coworkers and his ex-wife felt threatened by the violent rhetoric in his previous Facebook posts. Despite that, he posted yet another violent message stating his intention to detonate explosives near State Police officers and the Sheriff's Department if "worse comes to worse." If anything, this post is a more explicit threat than those that he knew had frightened his coworkers and ex-wife. It is difficult to imagine how Elonis could have believed it would be interpreted as anything but a threat.

Second, Elonis contends the fact that his statements were in lyric form suggests he did not know they would be regarded as threats. The evidence suggests otherwise. This was not the first time Elonis used a lyric form to post threatening statements. He previously posted statements about Dorney Park on October 19 and 22 with a lyric form similar to his post about the police. But despite the use of a lyric form, several of Elonis's coworkers at Dorney Park regarded the posts as threatening, and Elonis was aware of their fears. He knew that his use of a lyric form did not lessen the threatening nature of his posts. His continued use of the form only heightens the likelihood he knew a reasonable person would interpret his post as a threat.

Third, Elonis contends the fact he communicated his statements on Facebook – which he claims is "a medium that magnifies the potential for disconnect between the speaker's intent and the audience's understanding" – suggests he did not know his statements

would be regarded as threats. But whatever disconnect there may have been surely disappeared when Elonis read his coworkers' posts about how they felt threatened, and when he discovered his ex-wife was seeking a restraining order against him. By the time he made his statement regarding the police, he was clearly aware of how his audience would understand it. His Facebook post was written either with the purpose to threaten the police, or with knowledge that the post would be interpreted as a threat.

3.

Count Four of the indictment charged Elonis with violating Section 875(c) by communicating a threat to injure a kindergarten class of elementary school children. The Facebook post that formed the basis for this charge states:

> 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?

As with the other counts, Elonis contends the jury may not have convicted him of this count were it required

to find he knew the post would be threatening to a reasonable person. We disagree.

Elonis's post is graphic and specific in ways that make it impossible to believe he was unaware it would be interpreted as a threat. He specifically threatens elementary schools in a ten-mile radius, narrows his threat further to kindergarten classes within those elementary schools, and ends his post with a haunting question that suggests he will carry out his threat imminently. Given the understandable sensitivity regarding school shootings in this country, of which Elonis was no doubt aware, no rational juror could conclude that Elonis did not have the purpose to threaten, or did not know that a reasonable person would feel threatened, when he said he would "initiate the most heinous school shooting ever imagined."

4.

Finally, Count Five of the indictment charged Elonis with violating Section 875(c) by communicating a threat to injure an FBI agent. As with the other counts, the jury convicted Elonis under an objective standard, finding that the Facebook post about the FBI agent would be regarded as threatening by a reasonable person.

The post forming the basis for Count Five stated, referring to the FBI agent that visited Elonis's house earlier in the day, "Little Agent Lady stood so close / Took all the strength I had not to turn the b**** ghost / Pull my knife, flick my wrist, and slit her throat /

Leave her bleedin' from her jugular in the arms of her partner." The post further stated that if the FBI returned, he would detonate an explosive device he had strapped to his body.

Elonis once more contends the jury may not have convicted him of threatening the FBI agent had it not been erroneously instructed under an objective standard. Once again, we disagree. By the time the FBI visited Elonis on November 30, he knew his former coworkers felt threatened by his posts. The chief of patrol at Dorney Park, a friend of Elonis's on Facebook, felt so threatened that he enhanced park security, informed the local police, and notified the FBI. Elonis knew his ex-wife felt threatened enough by his posts to take out a restraining order against him. And when FBI agents showed up at his door, Elonis knew his followers on Facebook felt threatened enough to contact the FBI, and the FBI took those concerns seriously. Despite that knowledge, Elonis posted yet another violent message, this time about one of the FBI agents that visited him. The evidence overwhelmingly demonstrates Elonis knew how this post would be interpreted. No rational juror could have found Elonis did not have the purpose of threatening FBI agents or did not know his post about FBI agents would be regarded as a threat.

C.

Our disposition on the issue of harmless error decides this case. Accordingly, we have no occasion to determine whether a finding of recklessness would be sufficient to satisfy the mental state requirement of Section 875(c). We will leave that question for another day.

IV.

Based on our review of the record, we conclude beyond a reasonable doubt that Elonis would have been convicted if the jury had been properly instructed. We therefore hold that the error was harmless, and uphold his conviction.

SUPREME COURT OF THE UNITED STATES

No. 13-983

ANTHONY DOUGLAS ELONIS, PETITIONER *v.* UNITED STATES.

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

[June 1, 2015]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Federal law makes it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." 18 U. S. C. §875(c). Petitioner was convicted of violating this provision under instructions that required the jury to find

that he communicated what a reasonable person would regard as a threat. The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and – if not – whether the First Amendment requires such a showing.

I

A

Anthony Douglas Elonis was an active user of the social networking Web site Facebook. Users of that Web site may post items on their Facebook page that are accessible to other users, including Facebook "friends" who are notified when new content is posted. In May 2010, Elonis's wife of nearly seven years left him, taking with her their two young children. Elonis began "listening to more violent music" and posting self-styled "rap" lyrics inspired by the music. App. 204, 226. Eventually, Elonis changed the user name on his Facebook page from his actual name to a rap-style nom de plume, "Tone Dougie," to distinguish himself from his "on-line persona." *Id*., at 249, 265. The lyrics Elonis posted as "Tone Dougie" included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons." *Id.*, at 331, 329. Elonis posted an explanation to another Facebook user that "I'm doing this for me. My writing is therapeutic." *Id.*, at 329; *see also id.*, at 205 (testifying that it "helps me to deal with the pain").

Elonis's co-workers and friends viewed the posts in a different light. Around Halloween of 2010, Elonis posted a photograph of himself and a co-worker at a "Halloween Haunt" event at the amusement park where they worked. In the photograph, Elonis was holding a toy knife against his co-worker's neck, and in the caption Elonis wrote, "I wish." *Id.*, at 340. Elonis was not Facebook friends with the co-worker and did not "tag" her, a Facebook feature that would have alerted her to the posting. *Id.*, at 175; Brief for Petitioner 6, 9. But the chief of park security was a Facebook "friend" of Elonis, saw the photograph, and fired him. App. 114-116; Brief for Petitioner 9.

In response, Elonis posted a new entry on his Facebook page:

> "Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility 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 f***in' scary?" App. 332.

This post became the basis for Count One of Elonis's subsequent indictment, threatening park patrons and employees.

Elonis's posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife. Shortly after he was fired, Elonis posted an adaptation

of a satirical sketch that he and his wife had watched together. *Id.*, at 164-165, 207. In the actual sketch, called "It's Illegal to Say . . . ," a comedian explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that. When Elonis posted the script of the sketch, however, he substituted his wife for the President. The posting was part of the basis for Count Two of the indictment, threatening his wife:

> "Hi, I'm Tone Elonis.
>
> Did you know that it's illegal for me to say I want to kill my wife? . . .
>
> 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. . . .
>
> Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. . . .
>
> But not illegal to say with a mortar launcher.
>
> Because that's its own sentence. . . .
>
> 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. . . .

> Yet even more illegal to show an illustrated diagram. [diagram of the house]. . . .” *Id.*, at 333.

The details about the home were accurate. *Id.*, at 154. At the bottom of the post, Elonis included a link to the video of the original skit, and wrote, “Art is about pushing limits. I’m willing to go to jail for my Constitutional rights. Are you?” *Id.*, at 333.

After viewing some of Elonis’s posts, his wife felt “extremely afraid for [her] life.” *Id.*, at 156. A state court granted her a three-year protection-from-abuse order against Elonis (essentially, a restraining order). *Id.*, at 148-150. Elonis referred to the order in another post on his “Tone Dougie” page, also included in Count Two of the indictment:

> “Fold up your [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’ll add zeros to my settlement
> . . .
>
> And if worse comes to worse
>
> I’ve got enough explosives

> to take care of the State Police and the Sheriff's Department." *Id.*, at 334.

At the bottom of this post was a link to the Wikipedia article on "Freedom of speech." *Ibid.* Elonis's reference to the police was the basis for Count Three of his indictment, threatening law enforcement officers.

That same month, interspersed with posts about a movie Elonis liked and observations on a comedian's social commentary, *id.*, at 356-358, Elonis posted an entry that gave rise to Count Four of his indictment:

> "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?" *Id.*, at 335.

Meanwhile, park security had informed both local police and the Federal Bureau of Investigation about Elonis's posts, and FBI Agent Denise Stevens had created a Facebook account to monitor his online activity. *Id.*, at 49-51, 125. After the post about a school shooting, Agent Stevens and her partner visited Elonis at his house. *Id.*, at 65-66. Following their visit, during which Elonis was polite but uncooperative, Elonis

posted another entry on his Facebook page, called "Little Agent Lady," which led to Count Five:

> "You know your s***'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 b**** ghost
>
> Pull my knife, flick my wrist, and slit her throat
>
> Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?
>
> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all goin'
>
> [BOOM!]
>
> Are all the pieces comin' together?

> S***, I'm just a crazy sociopath that gets off playin' you stupid f***s like a fiddle
>
> And if y'all didn't hear, I'm gonna be famous
>
> Cause I'm just an aspiring rapper who likes the attention who happens to be under investigation for terrorism cause y'all think I'm ready to turn the Valley into Fallujah
>
> But I ain't gonna tell you which bridge is gonna fall into which river or road
>
> And if you really believe this s***
>
> I'll have some bridge rubble to sell you tomorrow
>
> [BOOM!][BOOM!][BOOM!]" *Id.*, at 336.

B

A grand jury indicted Elonis for making threats to injure patrons and employees of the park, his estranged wife, police officers, a kindergarten class, and an FBI agent, all in violation of 18 U. S. C. §875(c). App. 14-17. In the District Court, Elonis moved to dismiss the indictment for failing to allege that he had intended to threaten anyone. The District Court denied the motion, holding that Third Circuit precedent required only that Elonis "intentionally made the communication, not that he intended to make a threat." App. to Pet. for Cert. 51a. At trial, Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem, some of which involve fantasies about killing his ex-wife. App. 225. In Elonis's view, he

had posted "nothing . . . that hasn't been said already." *Id.*, at 205. The Government presented as witnesses Elonis's wife and co-workers, all of whom said they felt afraid and viewed Elonis's posts as serious threats. *See*, *e.g.*, *id.*, at 153, 158.

Elonis requested a jury instruction that "the government must prove that he intended to communicate a true threat." *Id.*, at 21. *See also id.*, at 267-269, 303. The District Court denied that request. The jury instructions instead informed the jury that

> "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 301.

The Government's closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats – "it doesn't matter what he thinks." *Id.*, at 286. A jury convicted Elonis on four of the five counts against him, acquitting only on the charge of threatening park patrons and employees. *Id.*, at 309. Elonis was sentenced to three years, eight months' imprisonment and three years' supervised release.

Elonis renewed his challenge to the jury instructions in the Court of Appeals, contending that the jury should have been required to find that he intended his

posts to be threats. The Court of Appeals disagreed, holding that the intent required by Section 875(c) is only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat. 730 F. 3d 321, 332 (CA3 2013).

We granted certiorari. 573 U. S. ___ (2014).

II

A

An individual who "transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another" is guilty of a felony and faces up to five years' imprisonment. 18 U. S. C. §875(c). This statute requires that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat.

Elonis argues that the word "threat" itself in Section 875(c) imposes such a requirement. According to Elonis, every definition of "threat" or "threaten" conveys the notion of an intent to inflict harm. Brief for Petitioner 23. *See United States v. Jeffries*, 692 F. 3d 473, 483 (CA6 2012) (Sutton, J., *dubitante*). *E.g.*, 11 Oxford English Dictionary 353 (1933) ("to declare (usually conditionally) one's intention of inflicting injury upon"); Webster's New International Dictionary 2633

(2d ed. 1954) ("*Law*, specif., an expression of an intention to inflict loss or harm on another by illegal means"); Black's Law Dictionary 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another").

These definitions, however, speak to what the statement conveys – not to the mental state of the author. For example, an anonymous letter that says "I'm going to kill you" is "an expression of an intention to inflict loss or harm" regardless of the author's intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.

For its part, the Government argues that Section 875(c) should be read in light of its neighboring provisions, Sections 875(b) and 875(d). Those provisions also prohibit certain types of threats, but expressly include a mental state requirement of an "intent to extort." *See* 18 U. S. C. §875(b) (proscribing threats to injure or kidnap made "with intent to extort"); §875(d) (proscribing threats to property or reputation made "with intent to extort"). According to the Government, the express "intent to extort" requirements in Sections 875(b) and (d) should preclude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c). *See Russello v. United States*, 464 U. S. 16 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The Government takes this *expressio unius est exclusio alterius* canon too far. The fact that Congress excluded the requirement of an "intent to extort" from Section 875(c) is strong evidence that Congress did not mean to confine Section 875(c) to crimes of extortion. But that does not suggest that Congress, at the same time, also meant to exclude a requirement that a defendant act with a certain mental state in communicating a threat. The most we can conclude from the language of Section 875(c) and its neighboring provisions is that Congress meant to proscribe a broad class of threats in Section 875(c), but did not identify what mental state, if any, a defendant must have to be convicted.

In sum, neither Elonis nor the Government has identified any indication of a particular mental state requirement in the text of Section 875(c).

B

The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." *Morissette v. United States*, 342 U. S. 246, 250 (1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." *Id.*, at 252. As Justice Jackson explained, this principle is "as universal and persistent in mature systems of

law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id.*, at 250. The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. *Id*., at 252; 1 W. LaFave, Substantive Criminal Law §5.1, pp. 332-333 (2d ed. 2003). Although there are exceptions, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States v. Balint*, 258 U. S. 250, 251 (1922). We therefore generally "interpret [] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 70 (1994).

This is not to say that a defendant must know that his conduct is illegal before he may be found guilty. The familiar maxim "ignorance of the law is no excuse" typically holds true. Instead, our cases have explained that a defendant generally must "know the facts that make his conduct fit the definition of the offense," *Staples v. United States*, 511 U. S. 600, 608, n. 3 (1994), even if he does not know that those facts give rise to a crime.

Morissette, for example, involved an individual who had taken spent shell casings from a Government bombing range, believing them to have been abandoned. During his trial for "knowingly convert[ing]" property of the United States, the judge instructed the

jury that the only question was whether the defendant had knowingly taken the property without authorization. 342 U. S., at 248-249. This Court reversed the defendant's conviction, ruling that he had to know not only that he was taking the casings, but also that someone else still had property rights in them. He could not be found liable "if he truly believed [the casings] to be abandoned." *Id.*, at 271; *see id.*, at 276.

By the same token, in *Liparota v. United States*, we considered a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner. 471 U. S. 419, 420 (1985). The Government's argument, similar to its position in this case, was that a defendant's conviction could be upheld if he knowingly possessed or used the food stamps, and in fact his possession or use was unauthorized. *Id.*, at 423. But this Court rejected that interpretation of the statute, because it would have criminalized "a broad range of apparently innocent conduct" and swept in individuals who had no knowledge of the facts that made their conduct blameworthy. *Id.*, at 426. For example, the statute made it illegal to use food stamps at a store that charged higher prices to food stamp customers. Without a mental state requirement in the statute, an individual who unwittingly paid higher prices would be guilty under the Government's interpretation. *Ibid*. The Court noted that Congress *could* have intended to cover such a "broad range of conduct," but declined "to adopt such a sweeping interpretation" in the absence of a clear indication that Congress intended that result. *Id.*, at 427. The Court instead construed the

statute to require knowledge of the facts that made the use of the food stamps unauthorized. *Id.*, at 425.

To take another example, in *Posters 'N' Things, Ltd. v. United States*, this Court interpreted a federal statute prohibiting the sale of drug paraphernalia. 511 U. S. 513 (1994). Whether the items in question qualified as drug paraphernalia was an objective question that did not depend on the defendant's state of mind. *Id.*, at 517-522. But, we held, an individual could not be convicted of selling such paraphernalia unless he "knew that the items at issue [were] likely to be used with illegal drugs." *Id.*, at 524. Such a showing was necessary to establish the defendant's culpable state of mind.

And again, in *X-Citement Video*, we considered a statute criminalizing the distribution of visual depictions of minors engaged in sexually explicit conduct. 513 U. S., at 68. We rejected a reading of the statute which would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers. *Id.*, at 68-69. We held instead that a defendant must also know that those depicted were minors, because that was "the crucial element separating legal innocence from wrongful conduct." *Id.*, at 73. *See also Staples*, 511 U. S., at 619 (defendant must know that his weapon had automatic firing capability to be convicted of possession of such a weapon).

When interpreting federal criminal statutes that are silent on the required mental state, we read into

the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U. S. 255, 269 (2000) (quoting *X-Citement Video*, 513 U. S., at 72). In some cases, a general requirement that a defendant *act* knowingly is itself an adequate safeguard. For example, in *Carter*, we considered whether a conviction under 18 U. S. C. §2113(a), for taking "by force and violence" items of value belonging to or in the care of a bank, requires that a defendant have the intent to steal. 530 U. S., at 261. We held that once the Government proves the defendant forcibly took the money, "the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking – even by a defendant who takes under a good-faith claim of right – falls outside the realm of . . . 'otherwise innocent'" conduct. *Id.*, at 269-270. In other instances, however, requiring only that the defendant act knowingly "would fail to protect the innocent actor." *Id.*, at 269. A statute similar to Section 2113(a) that did not require a forcible taking or the intent to steal "would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his." *Ibid.* In such a case, the Court explained, the statute "would need to be read to require . . . that the defendant take the money with 'intent to steal or purloin.'" *Ibid.*

C

Section 875(c), as noted, requires proof that a communication was transmitted and that it contained a

threat. The "presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U. S., at 72 (emphasis added). The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating *something* is not what makes the conduct "wrongful." Here "the crucial element separating legal innocence from wrongful conduct" is the threatening nature of the communication. *Id.*, at 73. The mental state requirement must therefore apply to the fact that the communication contains a threat.

Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct – *awareness* of some wrongdoing." *Staples*, 511 U. S., at 606-607 (quoting *United States v. Dotterweich*, 320 U. S. 277, 281 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat – regardless of what the defendant thinks – "reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F. 3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U. S. 35, 47 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U. S. 246). *See* 1 C. Torcia, Wharton's Criminal Law §27, pp. 171-172 (15th ed. 1993); *Cochran v. United States*, 157

U. S. 286, 294 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind"). Under these principles, "what [Elonis] thinks" does matter. App. 286.

The Government is at pains to characterize its position as something other than a negligence standard, emphasizing that its approach would require proof that a defendant "comprehended [the] contents and context" of the communication. Brief for United States 29. The Government gives two examples of individuals who, in its view, would lack this necessary mental state – a "foreigner, ignorant of the English language," who would not know the meaning of the words at issue, or an individual mailing a sealed envelope without knowing its contents. *Ibid.* But the fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence. Criminal negligence standards often incorporate "the circumstances known" to a defendant. ALI, Model Penal Code §2.02(2)(d) (1985). *See id.*, Comment 4, at 241; 1 LaFave, Substantive Criminal Law §5.4, at 372-373. Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. That is precisely the Government's position here: Elonis can be convicted, the Government contends, if he himself knew the contents and context of

his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

In support of its position the Government relies most heavily on *Hamling v. United States*, 418 U. S. 87 (1974). In that case, the Court rejected the argument that individuals could be convicted of mailing obscene material only if they knew the "legal status of the materials" distributed. *Id.*, at 121. Absolving a defendant of liability because he lacked the knowledge that the materials were legally obscene "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Id.*, at 123. It was instead enough for liability that "a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Ibid*.

This holding does not help the Government. In fact, the Court in *Hamling* approved a state court's conclusion that requiring a defendant to know the character of the material incorporated a "vital element of scienter" so that "not innocent but *calculated purveyance* of filth . . . is exorcised." *Id.*, at 122 (quoting *Mishkin v. New York*, 383 U. S. 502, 510 (1966); internal quotation marks omitted). In this case, "calculated purveyance" of a threat would require that Elonis know the threatening nature of his communication. Put simply, the mental state requirement the Court approved in *Hamling* turns on whether a defendant knew the *character* of what was sent, not simply its contents and context.

Contrary to the dissent's suggestion, *see post*, at 4-5, 9-10 (opinion of THOMAS, J.), nothing in *Rosen v. United States*, 161 U. S. 29 (1896), undermines this reading. The defendant's contention in *Rosen* was that his indictment for mailing obscene material was invalid because it did not allege that he was aware of the contents of the mailing. *Id.*, at 31-33. That is not at issue here; there is no dispute that Elonis knew the words he communicated. The defendant also argued that he could not be convicted of mailing obscene material if he did not know that the material "could be properly or justly characterized as obscene." *Id.*, at 41. The Court correctly rejected this "ignorance of the law" defense; no such contention is at issue here. *See supra*, at 10.

* * *

In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding "took deep and early root in American soil" and Congress left it intact here: Under Section 875(c), "wrongdoing must be conscious to be criminal." *Morissette*, 342 U. S., at 252.

There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing

a threat, or with knowledge that the communication will be viewed as a threat. *See* Tr. of Oral Arg. 25, 56. In response to a question at oral argument, Elonis stated that a finding of recklessness would not be sufficient. *See id.*, at 8-9. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it. *See Department of Treasury, IRS v. FLRA*, 494 U. S. 922, 933 (1990) (this Court is "poorly situated" to address an argument the Court of Appeals did not consider, the parties did not brief, and counsel addressed in "only the most cursory fashion at oral argument"). Given our disposition, it is not necessary to consider any First Amendment issues.

Both JUSTICE ALITO and JUSTICE THOMAS complain about our not deciding whether recklessness suffices for liability under Section 875(c). *Post*, at 1-2 (ALITO, J., concurring in part and dissenting in part); *post*, at 1-2 (opinion of THOMAS, J.). JUSTICE ALITO contends that each party "argued" this issue, *post*, at 2, but they did not address it at all until oral argument, and even then only briefly. *See* Tr. of Oral Arg. at 8, 38-39.

JUSTICE ALITO also suggests that we have not clarified confusion in the lower courts. That is wrong. Our holding makes clear that negligence is not sufficient to support a conviction under Section 875(c), contrary to the view of nine Courts of Appeals. Pet. for Cert. 17. There was and is no circuit conflict over the question JUSTICE ALITO and JUSTICE THOMAS would have us decide – whether recklessness suffices for liability under Section 875(c). No Court of Appeals has even addressed that question. We think that is more than sufficient

"justification," *post*, at 2 (opinion of ALITO, J.), for us to decline to be the first appellate tribunal to do so.

Such prudence is nothing new. *See United States v. Bailey*, 444 U. S. 394, 407 (1980) (declining to decide whether mental state of recklessness or negligence could suffice for criminal liability under 18 U. S. C. §751, even though a "court may someday confront a case" presenting issue); *Ginsberg v. New York*, 390 U. S. 629, 644-645 (1968) (rejecting defendant's challenge to obscenity law "makes it unnecessary for us to define further today 'what sort of mental element is requisite to a constitutionally permissible prosecution' "); *Smith v. California*, 361 U. S. 147, 154 (1959) (overturning conviction because lower court did not require any mental element under statute, but noting that "[w]e need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution"); cf. *Gulf Oil Co. v. Bernard*, 452 U. S. 89, 103-104 (1981) (finding a lower court's order impermissible under the First Amendment but not deciding "what standards are mandated by the First Amendment in this kind of case").

We may be "capable of deciding the recklessness issue," *post*, at 2 (opinion of ALITO, J.), but following our usual practice of awaiting a decision below and hearing from the parties would help ensure that we decide it correctly.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is

remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13-983

ANTHONY DOUGLAS ELONIS, PETITIONER *v.* UNITED STATES.

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

[June 1, 2015]

JUSTICE ALITO, concurring in part and dissenting in part.

In *Marbury v. Madison*, 1 Cranch 137, 177 (1803), the Court famously proclaimed: "It is emphatically the province and duty of the judicial department to say what the law is." Today, the Court announces: It is emphatically the prerogative of this Court to say only what the law is not.

The Court's disposition of this case is certain to cause confusion and serious problems. Attorneys and judges need to know which mental state is required for

conviction under 18 U. S. C. §875(c), an important criminal statute. This case squarely presents that issue, but the Court provides only a partial answer. The Court holds that the jury instructions in this case were defective because they required only negligence in conveying a threat. But the Court refuses to explain what type of intent was necessary. Did the jury need to find that Elonis had the *purpose* of conveying a true threat? Was it enough if he *knew* that his words conveyed such a threat? Would *recklessness* suffice? The Court declines to say. Attorneys and judges are left to guess.

This will have regrettable consequences. While this Court has the luxury of choosing its docket, lower courts and juries are not so fortunate. They must actually decide cases, and this means applying a standard. If purpose or knowledge is needed and a district court instructs the jury that recklessness suffices, a defendant may be wrongly convicted. On the other hand, if recklessness is enough, and the jury is told that conviction requires proof of more, a guilty defendant may go free. We granted review in this case to resolve a disagreement among the Circuits. But the Court has compounded – not clarified – the confusion.

There is no justification for the Court's refusal to provide an answer. The Court says that "[n]either Elonis nor the Government has briefed or argued" the question whether recklessness is sufficient. *Ante*, at 163. But in fact both parties addressed that issue. Elonis argued that recklessness is not enough, and the Government argued that it more than suffices. If the Court thinks that we cannot decide the recklessness

question without additional help from the parties, we can order further briefing and argument. In my view, however, we are capable of deciding the recklessness issue, and we should resolve that question now.

I

Section 875(c) provides in relevant part:

> "Whoever transmits in interstate or foreign commerce any communication containing . . . any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."

Thus, conviction under this provision requires proof that: (1) the defendant transmitted something, (2) the thing transmitted was a threat to injure the person of another, and (3) the transmission was in interstate or foreign commerce.

At issue in this case is the *mens rea* required with respect to the second element – that the thing transmitted was a threat to injure the person of another. This Court has not defined the meaning of the term "threat" in §875(c), but in construing the same term in a related statute, the Court distinguished a "true 'threat' " from facetious or hyperbolic remarks. *Watts v. United States*, 394 U. S. 705, 708 (1969) (*per curiam*). In my view, the term "threat" in §875(c) can fairly be defined as a statement that is reasonably interpreted as "an expression of an intention to inflict evil, injury, or damage on another." Webster's Third New International Dictionary 2382 (1976). Conviction under

§875(c) demands proof that the defendant's transmission was in fact a threat, *i.e.*, that it is reasonable to interpret the transmission as an expression of an intent to harm another. In addition, it must be shown that the defendant was at least reckless as to whether the transmission met that requirement.

Why is recklessness enough? My analysis of the *mens rea* issue follows the same track as the Court's, as far as it goes. I agree with the Court that we should presume that criminal statutes require some sort of *mens rea* for conviction. *See ante*, at 9-13. To be sure, this presumption marks a departure from the way in which we generally interpret statutes. We "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U. S. 23, 29 (1997). But this step is justified by a well-established pattern in our criminal laws. "For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intention, knowledge, recklessness or – more rarely – negligence)." 1 W. LaFave, Substantive Criminal Law §5.5, p. 381 (2003). Based on these "background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded," we require "some indication of congressional intent, express or implied, . . . to dispense with *mens rea* as an element of a crime." *Staples v. United States*, 511 U. S. 600, 605-606 (1994).

For a similar reason, I agree with the Court that we should presume that an offense like that created by

§875(c) requires more than negligence with respect to a critical element like the one at issue here. *See ante*, at 13-14. As the Court states, "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" *Ante*, at 12 (quoting *Carter v. United States*, 530 U. S. 255, 269 (2000)). Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.

Once we have passed negligence, however, no further presumptions are defensible. In the hierarchy of mental states that may be required as a condition for criminal liability, the *mens rea* just above negligence is recklessness. Negligence requires only that the defendant "should [have] be [en] aware of a substantial and unjustifiable risk," ALI, Model Penal Code §2.02(2)(d), p. 226 (1985), while recklessness exists "when a person disregards a risk of harm of which he is aware," *Farmer v. Brennan*, 511 U. S. 825, 837 (1994); Model Penal Code §2.02(2)(c). And when Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we

have gone as far as we can without stepping over the line that separates interpretation from amendment.

There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable. *See*, *e.g.*, *Farmer*, *supra*, at 835-836 (deliberate indifference to an inmate's harm); *Garrison v. Louisiana*, 379 U. S. 64, 75 (1964) (criminal libel); *New York Times Co. v. Sullivan*, 376 U. S. 254, 279-280 (1964) (civil libel). Indeed, this Court has held that "reckless disregard for human life" may justify the death penalty. *Tison v. Arizona*, 481 U. S. 137, 157 (1987). Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway.

Accordingly, I would hold that a defendant may be convicted under §875(c) if he or she consciously disregards the risk that the communication transmitted will be interpreted as a true threat. Nothing in the Court's non-committal opinion prevents lower courts from adopting that standard.

II

There remains the question whether interpreting §875(c) to require no more than recklessness with respect to the element at issue here would violate the First Amendment. Elonis contends that it would. I would reject that argument.

It is settled that the Constitution does not protect true threats. *See Virginia v. Black*, 538 U. S. 343, 359-360 (2003); *R.A.V. v. St. Paul*, 505 U. S. 377, 388 (1992); *Watts*, 394 U. S., at 707-708. And there are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself.

Elonis argues that the First Amendment protects a threat if the person making the statement does not actually intend to cause harm. In his view, if a threat is made for a " 'therapeutic' " purpose, "to 'deal with the pain' . . . of a wrenching event," or for "cathartic" reasons, the threat is protected. Brief for Petitioner 52-53. But whether or not the person making a threat intends to cause harm, the damage is the same. And the fact that making a threat may have a therapeutic or cathartic effect for the speaker is not sufficient to justify constitutional protection. Some people may experience a therapeutic or cathartic benefit only if they know that their words will cause harm or only if they actually plan to carry out the threat, but surely the First Amendment does not protect them.

Elonis also claims his threats were constitutionally protected works of art. Words like his, he contends, are shielded by the First Amendment because they are

similar to words uttered by rappers and singers in public performances and recordings. To make this point, his brief includes a lengthy excerpt from the lyrics of a rap song in which a very well-compensated rapper imagines killing his ex-wife and dumping her body in a lake. If this celebrity can utter such words, Elonis pleads, amateurs like him should be able to post similar things on social media. But context matters. "Taken in context," lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person. *Watts*, *supra*, at 708. Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously. To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar.

The facts of this case illustrate the point. Imagine the effect on Elonis's estranged wife when she read this: "'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.'" 730 F. 3d 321, 324 (CA3 2013). Or this: "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 cuts." *Ibid.* Or this: "Fold up your [protection from abuse order] and put it in your pocket[.] Is it thick enough to stop a bullet?" *Id.*, at 325.

There was evidence that Elonis made sure his wife saw his posts. And she testified that they made her feel

"'extremely afraid'" and "'like [she] was being stalked.'" *Ibid.* Considering the context, who could blame her? Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace. *See* Brief for The National Network to End Domestic Violence et al. as *Amici Curiae* 4-16. A fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech.

It can be argued that §875(c), if not limited to threats made with the intent to harm, will chill statements that do not qualify as true threats, *e.g.*, statements that may be literally threatening but are plainly not meant to be taken seriously. We have sometimes cautioned that it is necessary to "exten [d] a measure of strategic protection" to otherwise unprotected false statements of fact in order to ensure enough "'breathing space'" for protected speech. *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 342 (1974) (quoting *NAACP v. Button*, 371 U. S. 415, 433 (1963)). A similar argument might be made with respect to threats. But we have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity. *See New York Times*, 376 U. S., at 279-280 (civil liability); *Garrison*, 379 U. S., at 74-75 (criminal liability). Requiring proof of recklessness is similarly sufficient here.

III

Finally, because the jury instructions in this case did not require proof of recklessness, I would vacate the judgment below and remand for the Court of Appeals to decide in the first instance whether Elonis's conviction could be upheld under a recklessness standard.

We do not lightly overturn criminal convictions, even where it appears that the district court might have erred. To benefit from a favorable ruling on appeal, a defendant must have actually asked for the legal rule the appellate court adopts. Rule 30(d) of the Federal Rules of Criminal Procedure requires a defendant to "inform the court of the specific objection and the grounds for the objection." An objection cannot be vague or open-ended. It must *specifically* identify the alleged error. And failure to lodge a sufficient objection "precludes appellate review," except for plain error. Rule 30(d); *see also* 2A C. Wright & P. Henning, Federal Practice and Procedure §484, pp. 433-435 (4th ed. 2009).

At trial, Elonis objected to the District Court's instruction, but he did not argue for recklessness. Instead, he proposed instructions that would have required proof that he acted purposefully or with knowledge that his statements would be received as threats. *See* App. 19-21. He advanced the same position on appeal and in this Court. *See* Brief for Petitioner 29 ("Section 875(c) requires proof that the defendant

intended the charged statement to be a 'threat' " (emphasis in original)); Corrected Brief of Appellant in No. 12-3798 (CA3), p. 14 ("[A] 'true threat' has been uttered only if the speaker acted with *subjective intent to threaten*" (same)). And at oral argument before this Court, he expressly disclaimed any agreement with a recklessness standard – which the Third Circuit remains free to adopt. Tr. of Oral Arg. 8:22-23 ("[W]e would say that recklessness is not justif[ied]"). I would therefore remand for the Third Circuit to determine if Elonis's failure (indeed, *refusal*) to argue for recklessness prevents reversal of his conviction.

The Third Circuit should also have the opportunity to consider whether the conviction can be upheld on harmless-error grounds. "We have often applied harmless-error analysis to cases involving improper instructions." *Neder v. United States*, 527 U. S. 1, 9 (1999); *see also*, *e.g.*, *Pope v. Illinois*, 481 U. S. 497, 503-504 (1987) (remanding for harmless-error analysis after holding that jury instruction misstated obscenity standard). And the Third Circuit has previously upheld convictions where erroneous jury instructions proved harmless. *See*, *e.g.*, *United States v. Saybolt*, 577 F. 3d 195, 206-207 (2009). It should be given the chance to address that possibility here.

SUPREME COURT OF THE UNITED STATES

No. 13-983

ANTHONY DOUGLAS ELONIS, PETITIONER *v.* UNITED STATES.

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

[June 1, 2015]

JUSTICE THOMAS, dissenting.

We granted certiorari to resolve a conflict in the lower courts over the appropriate mental state for threat prosecutions under 18 U. S. C. §875(c). Save two, every Circuit to have considered the issue – 11 in total – has held that this provision demands proof only of general intent, which here requires no more than that a defendant knew he transmitted a communication, knew the words used in that communication, and understood the ordinary meaning of those words in the relevant context. The outliers are the Ninth and Tenth Circuits, which have concluded that proof of an intent to threaten was necessary for conviction. Adopting the minority position, Elonis urges us to hold that §875(c) and the First Amendment require proof of an intent to threaten. The Government in turn advocates a general-intent approach.

Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place. Lower courts are thus left to guess at the appropriate mental state for §875(c). All they know after today's decision is that a requirement of general intent will not do. But they can safely infer that a majority of this Court would not adopt an intent-to-threaten requirement, as the opinion carefully leaves open the possibility that recklessness may be enough. *See ante*, at 16-17.

This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty. This uncertainty could have been avoided had we simply adhered to the background rule of the common law favoring general intent. Although I am sympathetic to my colleagues' policy concerns about the risks associated with threat prosecutions, the answer to such fears is not to discard our traditional approach to state-of-mind requirements in criminal law. Because the Court of Appeals properly applied the general-intent standard, and because the communications transmitted by Elonis were "true threats" unprotected by the First Amendment, I would affirm the judgment below.

I

A

Enacted in 1939, §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." Because §875(c) criminalizes speech, the First Amendment requires that the term "threat" be limited to a narrow class of historically unprotected communications called "true threats." To qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely "political hyperbole"; "vehement, caustic, and sometimes unpleasantly sharp attacks"; or "vituperative, abusive, and inexact" statements. *Watts v. United States*, 394 U. S. 705, 708 (1969) (*per curiam*) (internal quotation marks omitted). It also cannot be determined solely by the reaction of the recipient, but must instead be "determined by the interpretation of a *reasonable* recipient familiar with the context of the communication," *United States v. Darby*, 37 F. 3d 1059, 1066 (CA4 1994) (emphasis added), lest historically protected speech be suppressed at the will of an eggshell observer, cf. *Cox v. Louisiana*, 379 U. S. 536, 551 (1965) ("[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise" (internal quotation marks omitted)). There is thus no dispute that, at a minimum, §875(c) requires an objective showing: The communication must be one that "a reasonable observer would construe as a true threat to another." *United States v. Jeffries*, 692 F. 3d 473, 478 (CA6 2012). And there is no dispute that the posts at issue here meet that objective standard.

The only dispute in this case is about the state of mind necessary to convict Elonis for making those

posts. On its face, §875(c) does not demand any particular mental state. As the Court correctly explains, the word "threat" does not itself contain a *mens rea* requirement. *See ante*, at 8-9. But because we read criminal statutes "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded," we require "some indication of congressional intent, express or implied, . . . to dispense with *mens rea* as an element of a crime." *Staples v. United States*, 511 U. S. 600, 605-606 (1994) (citation omitted). Absent such indicia, we ordinarily apply the "presumption in favor of scienter" to require only "proof of *general intent* – that is, that the defendant [must] posses[s] knowledge with respect to the *actus reus* of the crime." *Carter v. United States*, 530 U. S. 255, 268 (2000).

Under this "conventional *mens rea* element," "the defendant [must] know the facts that make his conduct illegal," *Staples*, *supra*, at 605, but he need not know *that* those facts make his conduct illegal. It has long been settled that "the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." *Bryan v. United States*, 524 U. S. 184, 192 (1998) (internal quotation marks omitted). For instance, in *Posters 'N' Things, Ltd. v. United States*, 511 U. S. 513 (1994), the Court addressed a conviction for selling drug paraphernalia under a statute forbidding anyone to "'make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia,'" *id.*, at 516 (quoting 21 U. S. C. §857(a)(1) (1988

ed.)). In applying the presumption in favor of scienter, the Court concluded that "although the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are 'drug paraphernalia' within the meaning of the statute." 511 U. S., at 524.

Our default rule in favor of general intent applies with full force to criminal statutes addressing speech. Well over 100 years ago, this Court considered a conviction under a federal obscenity statute that punished anyone "'who shall knowingly deposit, or cause to be deposited, for mailing or delivery,'" any "'obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character.'" *Rosen v. United States*, 161 U. S. 29, 30 (1896) (quoting Rev. Stat. §3893). In that case, as here, the defendant argued that, even if "he may have had . . . actual knowledge or notice of [the paper's] contents" when he put it in the mail, he could not "be convicted of the offence . . . unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious." 161 U. S., at 41. The Court rejected that theory, concluding that if the material was actually obscene and "deposited in the mail by one who knew or had notice at the time of its contents, the offence is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." *Ibid.* As the Court explained, "Congress did not intend that the question as to the character of the paper should depend upon the opinion

or belief of the person who, with knowledge or notice of [the paper's] contents, assumed the responsibility of putting it in the mails of the United States," because "[e]very one who uses the mails of the United States for carrying papers or publications must take notice of . . . what must be deemed obscene, lewd, and lascivious." *Id.*, at 41-42.

This Court reaffirmed *Rosen*'s holding in *Hamling v. United States*, 418 U. S. 87 (1974), when it considered a challenge to convictions under the successor federal statute, *see id.*, at 98, n. 8 (citing 18 U. S. C. §1461 (1970 ed.)). Relying on *Rosen*, the Court rejected the argument that the statute required "proof both of knowledge of the contents of the material and awareness of the obscene character of the material." 418 U. S., at 120 (internal quotation marks omitted). In approving the jury instruction that the defendants' "belief as to the obscenity or non-obscenity of the material is irrelevant," the Court declined to hold "that the prosecution must prove a defendant's knowledge of the legal status of the materials he distributes." *Id.*, at 120-121 (internal quotation marks omitted). To rule otherwise, the Court observed, "would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law." *Id.*, at 123.

Decades before §875(c)'s enactment, courts took the same approach to the first federal threat statute, which prohibited threats against the President. In 1917, Congress enacted a law punishing anyone

> "who knowingly and willfully deposits or causes to be deposited for conveyance in the mail . . . any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President." Act of Feb. 14, 1917, ch. 64, 39 Stat. 919.

Courts applying this statute shortly after its enactment appeared to require proof of only general intent. In *Ragansky v. United States*, 253 F. 643 (CA7 1918), for instance, a Court of Appeals held that "[a] threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him," and "is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution," *id.*, at 645. The court consequently rejected the defendant's argument that he could not be convicted when his language "[c]oncededly . . . constituted such a threat" but was meant only "as a joke." *Id.*, at 644. Likewise, in *United States v. Stobo*, 251 F. 689 (Del. 1918), a District Court rejected the defendant's objection that there was no allegation "of any facts . . . indicating any intention . . . on the part of the defendant . . . to menace the President of the United States," *id.*, at 693 (internal quotation marks omitted). As it explained, the defendant "is punishable under the act whether he uses the words lightly or with a set purpose to kill," as "[t]he effect

upon the minds of the hearers, who cannot read his inward thoughts, is precisely the same." *Ibid.* At a minimum, there is no historical practice requiring more than general intent when a statute regulates speech.

B

Applying ordinary rules of statutory construction, I would read §875(c) to require proof of general intent. To "know the facts that make his conduct illegal" under §875(c), *see Staples*, 511 U. S., at 605, a defendant must know that he transmitted a communication in interstate or foreign commerce that contained a threat. Knowing that the communication contains a "threat" – a serious expression of an intention to engage in unlawful physical violence – does not, however, require knowing that a jury will conclude that the communication contains a threat as a matter of law. Instead, like one who mails an "obscene" publication and is prosecuted under the federal obscenity statute, a defendant prosecuted under §875(c) must know only the words used in that communication, along with their ordinary meaning in context.

General intent divides those who know the facts constituting the *actus reus* of this crime from those who do not. For example, someone who transmits a threat who does not know English – or who knows English, but perhaps does not know a threatening idiom – lacks the general intent required under §875(c). *See Ragansky*, *supra*, at 645 ("[A] foreigner, ignorant of the

English language, repeating [threatening] words without knowledge of their meaning, may not knowingly have made a threat"). Likewise, the hapless mailman who delivers a threatening letter, ignorant of its contents, should not fear prosecution. A defendant like Elonis, however, who admits that he "knew that what [he] was saying was violent" but supposedly "just wanted to express [him]self," App. 205, acted with the general intent required under §875(c), even if he did not know that a jury would conclude that his communication constituted a "threat" as a matter of law.

Demanding evidence only of general intent also corresponds to §875(c)'s statutory backdrop. As previously discussed, before the enactment of §875(c), courts had read the Presidential threats statute to require proof only of general intent. Given Congress' presumptive awareness of this application of the Presidential threats statute – not to mention this Court's similar approach in the obscenity context, *see Rosen*, 161 U. S., at 41-42 – it is difficult to conclude that the Congress that enacted §875(c) in 1939 understood it to contain an implicit mental-state requirement apart from general intent. There is certainly no textual evidence to support this conclusion. If anything, the text supports the opposite inference, as §875(c), unlike the Presidential threats statute, contains no reference to knowledge or willfulness. Nothing in the statute suggests that Congress departed from the "conventional *mens rea* element" of general intent, *Staples*, *supra*, at 605; I would not impose a higher mental-state requirement here.

C

The majority refuses to apply these ordinary background principles. Instead, it casts my application of general intent as a negligence standard disfavored in the criminal law. *Ante*, at 13-16. But that characterization misses the mark. Requiring general intent in this context is not the same as requiring mere negligence. Like the mental-state requirements adopted in many of the cases cited by the Court, general intent under §875(c) prevents a defendant from being convicted on the basis of any *fact* beyond his awareness. *See*, *e.g.*, *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 73 (1994) (knowledge of age of persons depicted in explicit materials); *Staples*, *supra*, at 614-615 (knowledge of firing capability of weapon); *Morissette v. United States*, 342 U. S. 246, 270-271 (1952) (knowledge that property belonged to another). In other words, the defendant must *know* – not merely be reckless or negligent with respect to the fact – that he is committing the acts that constitute the *actus reus* of the offense.

But general intent requires *no* mental state (not even a negligent one) concerning the "fact" that certain words meet the *legal* definition of a threat. That approach is particularly appropriate where, as here, that legal status is determined by a jury's application of the legal standard of a "threat" to the contents of a communication. And convicting a defendant despite his ignorance of the legal – or objective – status of his conduct does not mean that he is being punished for negligent conduct. By way of example, a defendant who is convicted of murder despite claiming that he acted

in self-defense has not been penalized under a negligence standard merely because he does not know that the jury will reject his argument that his "belief in the necessity of using force to prevent harm to himself [was] a reasonable one." *See* 2 W. LaFave, Substantive Criminal Law §10.4(c), p. 147 (2d ed. 2003).

The Court apparently does not believe that our traditional approach to the federal obscenity statute involved a negligence standard. It asserts that *Hamling* "approved a state court's conclusion that requiring a defendant to know the character of the material incorporated a 'vital element of scienter' so that 'not innocent but *calculated purveyance* of filth . . . is exorcised.' " *Ante*, at 15 (quoting *Hamling*, 418 U. S., at 122 (in turn quoting *Mishkin v. New York*, 383 U. S. 502, 510 (1966))). According to the Court, the mental state approved in *Hamling* thus "turns on whether a defendant knew the *character* of what was sent, not simply its contents and context." *Ante*, at 15. It is unclear what the Court means by its distinction between "character" and "contents and context." "Character" cannot mean *legal* obscenity, as *Hamling* rejected the argument that a defendant must have "awareness of the obscene character of the material." 418 U. S., at 120 (internal quotation marks omitted). Moreover, this discussion was not part of *Hamling*'s holding, which was primarily a reaffirmation of *Rosen*. *See* 418 U. S., at 120-121; *see also Posters 'N' Things*, 511 U. S., at 524-525 (characterizing *Hamling* as holding that a "statute

prohibiting mailing of obscene materials does not require proof that [the] defendant knew the materials at issue met the legal definition of 'obscenity' ").

The majority's treatment of *Rosen* is even less persuasive. To shore up its position, it asserts that the critical portion of *Rosen* rejected an " 'ignorance of the law' defense," and claims that "no such contention is at issue here." *Ante*, at 15. But the thrust of Elonis' challenge is that a §875(c) conviction cannot stand if the defendant's subjective belief of what constitutes a "threat" differs from that of a reasonable jury. That is akin to the argument the defendant made – and lost – in *Rosen*. That defendant insisted that he could not be convicted for mailing the paper "unless he knew or believed that such paper could be properly or justly characterized as obscene." 161 U. S., at 41. The Court, however, held that the Government did not need to show that the defendant "regard[ed] the paper as one that the statute forbade to be carried in the mails," because the obscene character of the material did not "depend upon the opinion or belief of the person who . . . assumed the responsibility of putting it in the mails." *Ibid.* The majority's muddying of the waters cannot obscure the fact that today's decision is irreconcilable with *Rosen* and *Hamling*.

D

The majority today at least refrains from requiring an intent to threaten for §875(c) convictions, as Elonis asks us to do. Elonis contends that proof of a

defendant's intent to put the recipient of a threat in fear is necessary for conviction, but that element cannot be found within the statutory text. "[W]e ordinarily resist reading words or elements into a statute that do not appear on its face," including elements similar to the one Elonis proposes. *E.g.*, *Bates v. United States*, 522 U. S. 23, 29 (1997) (declining to read an "intent to defraud" element into a criminal statute). As the majority correctly explains, nothing in the text of §875(c) itself requires proof of an intent to threaten. *See ante*, at 8-9. The absence of such a requirement is significant, as Congress knows how to require a heightened *mens rea* in the context of threat offenses. *See* §875(b) (providing for the punishment of "[w]hoever, with intent to extort . . . , transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another"); *see also* §119 (providing for the punishment of "[w]hoever knowingly makes restricted personal information about [certain officials] . . . publicly available . . . with the intent to threaten").

Elonis nonetheless suggests that an intent-to-threaten element is necessary in order to avoid the risk of punishing innocent conduct. But there is nothing absurd about punishing an individual who, with knowledge of the words he uses and their ordinary meaning in context, makes a threat. For instance, a high-school student who sends a letter to his principal stating that he will massacre his classmates with a machine gun, even if he intended the letter as a joke,

cannot fairly be described as engaging in innocent conduct. But *see ante*, at 4-5, 16 (concluding that Elonis' conviction under §875(c) for discussing a plan to "'initiate the most heinous school shooting ever imagined'" against "'a Kindergarten class'" cannot stand without proof of some unspecified heightened mental state).

Elonis also insists that we read an intent-to-threaten element into §875(c) in light of the First Amendment. But our practice of construing statutes "to avoid constitutional questions . . . is not a license for the judiciary to rewrite language enacted by the legislature," *Salinas v. United States*, 522 U. S. 52, 59-60 (1997) (internal quotation marks omitted), and ordinary background principles of criminal law do not support rewriting §875(c) to include an intent-to-threaten requirement. We have not altered our traditional approach to *mens rea* for other constitutional provisions. *See*, *e.g.*, *Dean v. United States*, 556 U. S. 568, 572-574 (2009) (refusing to read an intent-to-discharge-the-firearm element into a mandatory minimum provision concerning the discharge of a firearm during a particular crime). The First Amendment should be treated no differently.

II

In light of my conclusion that Elonis was properly convicted under the requirements of §875(c), I must address his argument that his threatening posts were nevertheless protected by the First Amendment.

A

Elonis does not contend that threats are constitutionally protected speech, nor could he: "From 1791 to the present, . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas," true threats being one of them. *R.A.V. v. St. Paul*, 505 U. S. 377, 382-383 (1992); *see id.*, at 388. Instead, Elonis claims that only *intentional* threats fall within this particular historical exception.

If it were clear that intentional threats alone have been punished in our Nation since 1791, I would be inclined to agree. But that is the not the case. Although the Federal Government apparently did not get into the business of regulating threats until 1917, the States have been doing so since the late 18th and early 19th centuries. *See*, *e.g.*, 1795 N. J. Laws p. 108; Ill. Rev. Code of Laws, Crim. Code §108 (1827) (1827 Ill. Crim. Code); 1832 Fla. Laws pp. 68-69. And that practice continued even after the States amended their constitutions to include speech protections similar to those in the First Amendment. *See*, *e.g.*, Fla. Const., Art. I, §5 (1838); Ill. Const., Art. VIII, §22 (1818), Mich. Const., Art. I, §7 (1835); N.J. Const., Art. I, §5 (1844); J. Hood, Index of Colonial and State Laws of New Jersey 1203, 1235, 1257, 1265 (1905); 1 Ill. Stat., ch. 30, div. 9, §31 (3d ed. 1873). State practice thus provides at least some evidence of the original meaning of the phrase "freedom of speech" in the First Amendment. *See Roth v. United States*, 354 U. S. 476, 481-483 (1957) (engaging in a similar inquiry with respect to obscenity).

Shortly after the founding, several States and Territories enacted laws making it a crime to "knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, . . . threatening to maim, wound, kill or murder any person, or to burn his or her [property], though no money, goods or chattels, or other valuable thing shall be demanded," *e.g.*, 1795 N. J. Laws §57, at 108; *see also*, *e.g.*, 1816 Ga. Laws p. 178; 1816 Mich. Territory Laws p. 128; 1827 Ill. Crim. Code §108; 1832 Fla. Laws, at 68-69. These laws appear to be the closest early analogue to §875(c), as they penalize transmitting a communication containing a threat without proof of a demand to extort something from the victim. Threat provisions explicitly requiring proof of a specific "intent to extort" appeared alongside these laws, *see*, *e.g.*, 1795 N. J. Laws §57, at 108, but those provisions are simply the predecessors to §875(b) and §875(d), which likewise expressly contain an intent-to-extort requirement.

The laws without that extortion requirement were copies of a 1754 English threat statute subject to only a general-intent requirement. The statute made it a capital offense to "knowingly send any Letter without any Name subscribed thereto, or signed with a fictitious Name . . . threatening to kill or murder any of his Majesty's Subject or Subjects, or to burn their [property], though no Money or Venison or other valuable Thing shall be demanded." 27 Geo. II, ch. 15, in 7 Eng. Stat. at Large 61 (1754); *see also* 4 W. Blackstone,

Commentaries on the Laws of England 144 (1768) (describing this statute). Early English decisions applying this threat statute indicated that the appropriate mental state was general intent. In *King v. Girdwood*, 1 Leach 142, 168 Eng. Rep. 173 (K. B. 1776), for example, the trial court instructed the jurors that, "if they were of opinion that" the "terms of the letter conveyed an actual threat to kill or murder," "and that the prisoner knew the contents of it, they ought to find him guilty; but that if they thought he did not know the contents, or that the words might import any thing less than to kill or murder, they ought to acquit," *id.*, at 143, 168 Eng. Rep., at 173. On appeal following conviction, the judges "thought that the case had been properly left to the Jury." *Ibid.*, 168 Eng. Rep., at 174. Other cases likewise appeared to consider only the import of the letter's language, not the intent of its sender. *See*, *e.g.*, *Rex v. Boucher*, 4 Car. & P. 562, 563, 172 Eng. Rep. 826, 827 (K. B. 1831) (concluding that an indictment was sufficient because "th[e] letter very plainly conveys a threat to kill and murder" and "[n]o one who received it could have any doubt as to what the writer meant to threaten"); *see also* 2 E. East, A Treatise of the Pleas of the Crown 1116 (1806) (discussing *Jepson and Springett's Case*, in which the judges disagreed over whether "the letter must be understood as . . . importing a threat" and whether that was "a necessary construction").

Unsurprisingly, these early English cases were well known in the legal world of the 19th century United States. For instance, Nathan Dane's A General

Abridgement of American Law – "a necessary adjunct to the library of every American lawyer of distinction," 1 C. Warren, History of the Harvard Law School and of Early Legal Conditions in America 414 (1908) – discussed the English threat statute and summarized decisions such as *Girdwood*. 7 N. Dane, A General Abridgement of American Law 31-32 (1824). And as this Court long ago recognized, "It is doubtless true . . . that where English statutes . . . have been adopted into our own legislation; the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority." *Pennock v. Dialogue*, 2 Pet. 1, 18 (1829); *see also*, *e.g.*, *Commonwealth v. Burdick*, 2 Pa. 163, 164 (1846) (considering English cases persuasive authority in interpreting similar state statute creating the offense of obtaining property through false pretenses). In short, there is good reason to believe that States bound by their own Constitutions to protect freedom of speech long ago enacted general-intent threat statutes.

Elonis disputes this historical analysis on two grounds, but neither is persuasive. He first points to a treatise stating that the 1754 English statute was "levelled against such whose intention it was, (by writing such letters, either without names or in fictitious names,) to conceal themselves from the knowledge of the party threatened, that they might obtain their object by creating terror in [the victim's] mind." 2 W. Russell & D. Davis, A Treatise on Crimes & Misdemeanors 1845 (1st Am. ed. 1824). But the fact that the ordinary

prosecution under this provision involved a defendant who intended to cause fear does not mean that such a mental state was *required* as a matter of law. After all, §875(c) is frequently deployed against people who wanted to cause their victims fear, but that fact does not answer the legal question presented in this case. *See*, *e.g.*, *United States v. Sutcliffe*, 505 F. 3d 944, 952 (CA9 2007); *see also* Tr. of Oral Arg. 53 (counsel for the Government noting that "I think Congress would well have understood that the majority of these cases probably [involved] people who intended to threaten").

Elonis also cobbles together an assortment of older American authorities to prove his point, but they fail to stand up to close scrutiny. Two of his cases address the offense of breaching the peace, *Ware v. Loveridge*, 75 Mich. 488, 490-493, 42 N. W. 997, 998 (1889); *State v. Benedict*, 11 Vt. 236, 239 (1839), which is insufficiently similar to the offense criminalized in §875(c) to be of much use. Another involves a prosecution under a blackmailing statute similar to §875(b) and §875(c) in that it expressly required an "intent to extort." *Norris v. State*, 95 Ind. 73, 74 (1884). And his treatises do not clearly distinguish between the offense of making threats with the intent to extort and the offense of sending threatening letters without such a requirement in their discussions of threat statutes, making it difficult to draw strong inferences about the latter category. *See* 2 J. Bishop, Commentaries on the Criminal Law §1201, p. 664, and nn. 5-6 (1877); 2 J. Bishop, Commentaries on the Law of Criminal Procedure §975,

p. 546 (1866); 25 The American and English Encyclopædia of Law 1073 (C. Williams ed. 1894).

Two of Elonis' cases appear to discuss an offense of sending a threatening letter without an intent to extort, but even these fail to make his point. One notes in passing that character evidence is admissible "to prove *guilty knowledge* of the defendant, when that is an essential element of the crime; that is, the *quo animo*, the *intent* or design," and offers as an example that in the context of "sending a threatening letter, . . . prior and subsequent letters to the same person are competent in order to show the intent and meaning of the particular letter in question." *State v. Graham*, 121 N. C. 623, 627, 28 S. E. 409, 409 (1897). But it is unclear from that statement whether that court thought an *intent to threaten* was required, especially as the case it cited for this proposition – *Rex v. Boucher*, 4 Car. & P. 562, 563, 172 Eng. Rep. 826, 827 (K. B. 1831) – supports a general-intent approach. The other case Elonis cites involves a statutory provision that had been judicially limited to "'pertain to one or the other acts which are denounced by the statute,'" namely, terroristic activities carried out by the Ku Klux Klan. *Commonwealth v. Morton*, 140 Ky. 628, 630, 131 S. W. 506, 507 (1910) (quoting *Commonwealth v. Patrick*, 127 Ky. 473, 478, 105 S. W. 981, 982 (1907)). That case thus provides scant historical support for Elonis' position.

B

Elonis also insists that our precedents require a mental state of intent when it comes to threat prosecutions under §875(c), primarily relying on *Watts*, 394 U. S. 705, and *Virginia v. Black*, 538 U. S. 343 (2003). Neither of those decisions, however, addresses whether the First Amendment requires a particular mental state for threat prosecutions.

As Elonis admits, *Watts* expressly declined to address the mental state required under the First Amendment for a "true threat." *See* 394 U. S., at 707-708. True, the Court in *Watts* noted "grave doubts" about *Ragansky*'s construction of "willfully" in the presidential threats statute. 394 U. S., at 707-708. But "grave doubts" do not make a holding, and that stray statement in *Watts* is entitled to no precedential force. If anything, *Watts* continued the long tradition of focusing on objective criteria in evaluating the mental requirement. *See ibid*.

The Court's fractured opinion in *Black* likewise says little about whether an intent-to-threaten requirement is constitutionally mandated here. *Black* concerned a Virginia cross-burning law that expressly required "'an intent to intimidate a person or group of persons,'" 538 U. S., at 347 (quoting Va. Code Ann. §18.2-423 (1996)), and the Court thus had no occasion to decide whether such an element was necessary in threat provisions silent on the matter. Moreover, the focus of the *Black* decision was on the statutory presumption that "any cross burning [w]as prima facie

evidence of intent to intimidate." 538 U. S., at 347-348. A majority of the Court concluded that this presumption failed to distinguish unprotected threats from protected speech because it might allow convictions "based solely on the fact of cross burning itself," including cross burnings in a play or at a political rally. *Id.*, at 365-366 (plurality opinion); *id.*, at 386 (Souter, J., concurring in judgment in part and dissenting in part) ("The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression"). The objective standard for threats under §875(c), however, helps to avoid this problem by "forc[ing] jurors to examine the circumstances in which a statement is made." *Jeffries*, 692 F. 3d, at 480.

In addition to requiring a departure from our precedents, adopting Elonis' view would make threats one of the most protected categories of unprotected speech, thereby sowing tension throughout our First Amendment doctrine. We generally have not required a heightened mental state under the First Amendment for historically unprotected categories of speech. For instance, the Court has indicated that a legislature may constitutionally prohibit " 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," *Cohen v. California*, 403 U. S. 15, 20 (1971) – without proof of an intent to provoke a violent reaction. Because the definition of "fighting words" turns on how the "ordinary citizen" would react to the language,

ibid., this Court has observed that a defendant may be guilty of a breach of the peace if he "makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended," and that the punishment of such statements "as a criminal act would raise no question under [the Constitution]," *Cantwell v. Connecticut*, 310 U. S. 296, 309-310 (1940); *see also Chaplinsky v. New Hampshire*, 315 U. S. 568, 572-573 (1942) (rejecting a First Amendment challenge to a general-intent construction of a state statute punishing "'fighting' words"); *State v. Chaplinsky*, 91 N. H. 310, 318, 18 A. 2d 754, 758 (1941) ("[T]he only intent required for conviction . . . was an intent to speak the words"). The Court has similarly held that a defendant may be convicted of mailing obscenity under the First Amendment without proof that he knew the materials were legally obscene. *Hamling*, 418 U. S., at 120-124. And our precedents allow liability in tort for false statements about private persons on matters of private concern even if the speaker acted negligently with respect to the falsity of those statements. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U. S. 767, 770, 773-775 (1986). I see no reason why we should give threats pride of place among unprotected speech.

* * *

There is always a risk that a criminal threat statute may be deployed by the Government to suppress legitimate speech. But the proper response to that risk is to adhere to our traditional rule that only a narrow class of true threats, historically unprotected, may be constitutionally proscribed.

The solution is not to abandon a mental-state requirement compelled by text, history, and precedent. Not only does such a decision warp our traditional approach to *mens rea*, it results in an arbitrary distinction between threats and other forms of unprotected speech. Had Elonis mailed obscene materials to his wife and a kindergarten class, he could have been prosecuted irrespective of whether he intended to offend those recipients or recklessly disregarded that possibility. Yet when he threatened to kill his wife and a kindergarten class, his intent to terrify those recipients (or reckless disregard of that risk) suddenly becomes highly relevant. That need not – and should not – be the case.

Nor should it be the case that we cast aside the mental-state requirement compelled by our precedents yet offer nothing in its place. Our job is to decide questions, not create them. Given the majority's ostensible concern for protecting innocent actors, one would have expected it to announce a clear rule – any clear rule. Its failure to do so reveals the fractured foundation upon which today's decision rests.

I respectfully dissent.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3798

UNITED STATES OF AMERICA

v.

ANTHONY DOUGLAS ELONIS,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Criminal No. 5-11-cr-00013-001
(Honorable Lawrence F. Stengel)

Argued: June 14, 2013

Before: SCIRICA, HARDIMAN, and ALDISERT,
Circuit Judges.

(Filed: September 19, 2013)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*

This case presents the question whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats. Anthony Elonis challenges his jury conviction under 18 U.S.C. § 875(c), arguing he did not subjectively intend his Facebook posts to be threatening. In *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) we held a statement is a true threat when a reasonable speaker would foresee the statement would be interpreted as a threat. We consider whether the Supreme Court decision in *Virginia v. Black*, 538 U.S. 343, 359 (2003), overturns this standard by requiring a subjective intent to threaten.

I.

In May 2010, Elonis's wife of seven years moved out of their home with their two young children. Following this separation, Elonis began experiencing trouble at work. Elonis worked at Dorney Park & Wildwater Kingdom amusement park as an operations supervisor and a communications technician. After his wife left, supervisors observed Elonis with his head down on his desk crying, and he was sent home on several occasions because he was too upset to work.

One of the employees Elonis supervised, Amber Morrissey, made five sexual harassment reports against him. According to Morrissey, Elonis came into the office where she was working alone late at night, and began to undress in front of her. She left the building after he removed his shirt. Morrissey also reported another incident where Elonis made a minor female employee uncomfortable when he placed himself close to her and told her to stick out her tongue. On October 17, 2010 Elonis posted on his Facebook page a photograph taken for the Dorney Park Halloween Haunt. The photograph showed Elonis in costume holding a knife to Morrissey's neck. Elonis added the caption "I wish" under the photograph. Elonis's supervisor saw the Facebook posting and fired Elonis that same day.

Two days after he was fired, Elonis began posting violent statements on his Facebook page. One post regarding Dorney Park 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?

Elonis also began posting statements about his estranged wife, Tara Elonis, including the following: "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." Several of the posts about Tara Elonis were in response to her sister's status updates on Facebook. For example, Tara Elonis's sister posted her status update as: "Halloween costume shopping with my niece and nephew should be interesting." Elonis commented on this status update, writing, "Tell [their son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [Tara Elonis's] head on a stick?" Elonis also posted in October 2010:

> 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 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.

Based on these statements a state court issued Tara Elonis a Protection From Abuse order against Elonis on November 4, 2010. Following the issuance of the state court Protection From Abuse order, Elonis posted several statements on Facebook expressing intent to harm his wife. On November 7 he wrote:[1]

> 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.

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[1] This statement was the basis of Count 2 of the indictment.

> I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.
> Insanely illegal.
> Ridiculously, wrecklessly, insanely illegal.
> Yet even more illegal to show an illustrated diagram.
> ===[__] =====house
> : : : : : : : ^ : : : : : : : : : : : : cornfield
> : : : : : : : ^ : : : : : : : : : : : :
> : : : : : : : ^ : : : : : : : : : : : :
> : : : : : : : ^ : : : : : : : : : : : :
> ######################getaway road
> Insanely illegal.
> Ridiculously, horribly felonious.
> Cause they will come to my house in the middle of the night and they will lock me up.
> Extremely against the law.
> Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

Tara Elonis testified at trial that she took these statements seriously, saying, "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives." Trial Tr. 97, Oct. 19, 2011. Ms. Elonis further testified that Elonis rarely listened to rap music, and that she had never seen Elonis write rap lyrics during their seven years of marriage. She

explained that the lyric form of the statements did not make her take the threats any less seriously.

On November 15 Elonis posted on his Facebook page:

> Fold up your PFA 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]

This statement was the basis both of Count 2, threats to Elonis's wife, and Count 3, threats to local law enforcement. A post the following day on November 16 involving an elementary school was the basis of Count 4:

> 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?

By this point FBI Agent Denise Stevens was monitoring Elonis's public Facebook postings, because Dorney Park contacted the FBI claiming Elonis had posted threats against Dorney Park and its employees on his Facebook page. After reading these and other Facebook posts by Elonis, Agent Stevens and another FBI agent went to Elonis's house to interview him. When the agents knocked on his door, Elonis's father answered and told the agents Elonis was sleeping. The agents waited several minutes until Elonis came to the door wearing a t-shirt, jeans, and no shoes. Elonis asked the agents if they were law enforcement and asked if he was free to go. After the agents identified themselves and told him he was free to go, Elonis went inside and closed the door. Later that day, Elonis posted the following on Facebook:

> 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!]

These statements were the basis of Count 5 of the indictment. After she observed this post on Elonis's Facebook page, Agent Stevens contacted the U.S. Attorney's Office.

II.

Elonis was arrested on December 8, 2010 and charged with transmitting in interstate commerce communications containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c). The grand jury indicted Elonis on five counts of making threatening communications: Count 1 threats to patrons and employees of Dorney Park & Wildwater Kingdom, Count 2 threats to his wife, Count 3 threats to employees of the Pennsylvania State Police and Berks County Sheriff's Department, Count 4 threats to a kindergarten class, and Count 5 threats to an FBI agent.

Elonis moved to dismiss the indictments against him, contending the Supreme Court held in *Virginia v. Black*, 538 U.S. 343, 347-48 (2003) that a subjective intent to threaten was required under the true threat exception to the First Amendment and that his

statements were not threats but were protected speech. The District Court denied the motion to dismiss because even if the subjective intent standard applied, Elonis's intent and the attendant circumstances showing whether or not the statements were true threats were questions of fact for the jury. *United States v. Elonis*, No. 11-13, 2011 WL 5024284, at *3 (E.D. Pa. Oct. 20, 2011).

Elonis testified in his own defense at trial. A jury convicted Elonis on Counts 2 through 5, and the court sentenced him to 44 months' imprisonment followed by three years supervised release. Elonis filed a post-trial Motion to Dismiss Indictment with Prejudice under Rule 12(b)(3); and for New Trial under Rule 33(a), to Arrest Judgment under Rule 34(b) and/or Dismissal under Rule 29(c). The District Court denied the motion to dismiss the indictment, finding the indictment correctly tracked the language of the statute and stated the nature of the threat, the date of the threat and the victim of the threat. The court also stated the objective intent standard conformed with Third Circuit precedent. The court found the evidence supported the jury's finding that the statements in Count 3 and Count 5 were true threats. Finally, the court held that the jury instruction presuming communications over the internet were transmitted through interstate commerce was supported by our precedent in *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006).

III.[2]

A.

Elonis was convicted under 18 U.S.C. § 875(c) for "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another. . . ." Elonis contends the trial court incorrectly instructed the jury on the standard of a true threat. The court gave the following jury instruction:

> 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.

Trial Tr. 127, Oct. 20, 2011. Elonis posits that the Supreme Court decision in *Virginia v. Black* requires that a defendant subjectively intend to threaten, and

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[2] The District Court had jurisdiction over this case under 18 U.S.C. § 3231. We exercise appellate jurisdiction under 28 U.S.C. § 1291. We review statutory interpretations and conclusions of law de novo. *Kosma*, 951 F.2d at 553. We exercise plenary review over the sufficiency of indictments. *United States v. Kemp*, 500 F.3d 257, 280 (3d Cir. 2007). "We apply a particularly deferential standard of review when deciding whether a jury verdict rests on legally sufficient evidence." *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998). Because Elonis failed to object to the jury instructions at trial, we review whether the jury instructions stated the correct legal standard for plain error. *United States v. Lee*, 612 F.3d 170, 191 (3d Cir. 2010).

overturns the reasonable speaker standard we articulated in *United States v. Kosma*, 951 F.3d 549, 557 (3d Cir. 1991).

> In *United States v. Kosma*, we held a true threat requires that
>
> the defendant intentionally make a statement, written or oral, 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 harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion.

Id. at 557 (quoting *Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir. 1969) (emphasis omitted)). We rejected a subjective intent requirement that the defendant "intended at least to convey the impression that the threat was a serious one." *Id.* at 558 (quoting *Rogers v. United States*, 422 U.S. 35, 46 (1975) (Marshall, J., concurring)). We found "any subjective test potentially frustrates the purposes of section 871 – to prevent not only actual threats on the President's life, but also the harmful consequences which flow from such threats." *Id.* (explaining "it would make prosecution of these threats significantly more difficult"). We have held the same "knowingly and willfully" mens rea *Kosma* analyzed under 18 U.S.C. § 871, threats against the president, applies to § 875(c). *United States v. Himelwright*,

42 F.3d 777, 782 (3d Cir. 1994) (holding "the government bore only the burden of proving that Himelwright acted knowingly and willfully when he placed the threatening telephone calls and that those calls were reasonably perceived as threatening bodily injury"). Since our precedent is clear, the question is whether the Supreme Court decision in *Virginia v. Black* overturned this standard.

The Supreme Court first articulated the true threats exception to speech protected under the First Amendment in *Watts v. United States*, 394 U.S. 705 (1969). During a rally opposing the Vietnam war, Watts told the crowd, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706 (internal quotation marks omitted). The Court reversed his conviction for making a threat against the president because the statement was "political hyperbole," rather than a true threat. *Id.* at 708. The Court articulated three factors supporting its finding: 1. the context was a political speech; 2. the statement was "expressly conditional"; and 3. "the reaction of the listeners" who "laughed after the statement was made." *Id.* at 707-08. The Court did not address the true threats exception again until *Virginia v. Black* in 2003.[3]

In *Virginia v. Black* the Court considered a Virginia statute that banned burning a cross with the

[3] The Court did discuss the constitutional limits on banning "fighting words" in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

"intent of intimidating" and provided "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." 538 U.S. at 348 (citation and internal quotation marks omitted). The Court reviewed three separate convictions of defendants under the statute and concluded that intimidating cross burning could be proscribed as a true threat under the First Amendment. *Id.* at 363. But the prima facie evidence provision violated due process, because it permitted a jury to convict whenever a defendant exercised his or her right to not put on a defense. *Id.* at 364-65.

The Court reviewed the historic and contextual meanings behind cross burning, and found it conveyed a political message, a cultural message, and a threatening message, depending on the circumstances. *Id.* at 354-57. The Court then described the true threat exception generally before analyzing the Virginia statute:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See Watts v. United States*, *supra*, at 708 . . . ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people

> "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

Id. at 359-60 (citation omitted). Elonis contends that this definition of true threats means that the speaker must both intend to communicate and intend for the language to threaten the victim.[4] But the Court did not have occasion to make such a sweeping holding, because the challenged Virginia statute already required a subjective intent to intimidate. We do not infer from the use of the term "intent" that the Court invalidated the objective intent standard the majority of circuits applied to true threats.[5] Instead, we read "statements

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[4] Elonis also points to the passage "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360. But this sentence explains when intimidation can be a true threat, and does not define when threatening language is a true threat.

[5] *See, e.g.*, *United States v. Whiffen*, 121 F.3d 18, 20-21 (1st Cir. 1997); *United States v. Francis*, 164 F.3d 120, 122 (2d Cir. 1999); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994);

where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to mean that the speaker must intend to make the communication. It would require adding language the Court did not write to read the passage as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence." *Id.* at 359. This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception.

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 360 (quoting *R.A.V.*, 505 U.S. at 388). Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from "the fear of violence" and the "disruption that fear engenders," because it would protect speech that a reasonable speaker would understand to be threatening. *Id.*

United States v. Myers, 104 F.3d 76, 80-81 (5th Cir. 1997); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991); *United States v. Hart*, 457 F.2d 1087, 1091 (10th Cir. 1972); *United States v. Callahan*, 702 F.2d 964, 965 (11th Cir. 1983); *Metz v. Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986).

Elonis further contends the unconstitutionality of the prima facie evidence provision in *Black* indicates a subjective intent to threaten is required. The Court found the fact that the defendant burned a cross could not be prima facie evidence of intent to intimidate. *Id.* at 364-65. The Court explained that while cross burning was often employed as intimidation or a threat of physical violence against others, it could also function as a symbol of solidarity for those within the white supremacist movement. *Id.* at 365-66. Less frequently, crosses had been burned outside of the white supremacist context, such as stage performances. *Id.* at 366. Since the burning of a cross could have a constitutionally-protected political message as well as a threatening message, the prima facie evidence provision failed to distinguish protected speech from unprotected threats. Furthermore, the prima facie evidence provision denied defendants the right to not put on a defense, since the prosecution did not have to produce any evidence of intent to intimidate, which was an element of the crime. *Id.* at 364-65.

We do not find that the unconstitutionality of Virginia's prima facie evidence provision means the true threats exception requires a subjective intent to threaten. First, the prima facie evidence provision did not allow the factfinder to consider the context to construe the meaning of the conduct, *id.* at 365-66, whereas the reasonable person standard does encompass context to determine whether the statement was a serious expression of intent to inflict bodily harm. Second, cross-burning is conduct that may or may not

convey a meaning, as opposed to the language in this case which has inherent meaning in addition to the meaning derived from context. Finally, the prima facie evidence provision violated the defendant's due process rights to not put on a defense, because the defendant could be convicted even when the prosecution had not proven all the elements of the crime. *Id.* That is not an issue here because the government had to prove that a reasonable person would foresee Elonis's statements would be understood as threats.

The majority of circuits that have considered this question have not found the Supreme Court decision in *Black* to require a subjective intent to threaten. *See United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("A careful reading of the requirements of § 875(c), together with the definition from *Black*, does not, in our opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement into § 875(c). . . ."); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) ("[T]he position reads too much into *Black*."); *United States v. Mabie*, 663 F.3d 322, 332-33 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 107 (2012) (noting the objective test had been applied many times after *Black*)[6]; *United States v. Nicklas*, 713 F.3d 435,

[6] The Eighth Circuit cited the following cases applying an objective standard after the Supreme Court's decision in *Black*:

> *United States v. Beale*, 620 F.3d 856, 865 (8th Cir. 2010) . . . ; *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) (applying an objective test in a true threat analysis); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616-17 (5th Cir. 2004) ("[T]o lose the protection of the First Amendment and be lawfully punished, the threat

440 (8th Cir. 2013) (quoting extensively from *Jeffries*, the court "concluded § 875(c) does not require the government to prove a defendant specifically intended his or her statements to be threatening").

The Fourth Circuit in *United States v. White* considered the same criminal statute, 18 U.S.C. § 875(c), and found the Court in *Black* "gave no indication it was redefining a general intent crime such as § 875(c) to be a specific intent crime." 670 F.3d at 509. The Fourth Circuit reasoned that *Black* had analyzed a statute that included a specific intent element, whereas § 875(c) had consistently been applied as a general intent statute. *Id.* at 508. The court further distinguished *Black* by noting the multiple meanings of cross-burning necessitated a finding of intent to distinguish protected speech from true threats. *Id.* at 511. The court in *White* found this same problem did not exist for threatening language because it has no First Amendment value. *Id.* Finally, the court found the general intent standard for § 875(c) offenses did not chill "statements of jest or political hyperbole" because "any such statements will, under the objective test, always be protected by the consideration of the context and of

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must be intentionally or knowingly *communicated* to either the object of the threat or a third person."); *United States v. Zavrel*, 384 F.3d 130, 136 (3d Cir. 2004) (applying an objective test in a true threat analysis).

Mabie, 663 F.3d at 332.

how a reasonable recipient would understand the statement." *Id.* at 509.[7]

In *United States v. Jeffries* the Sixth Circuit agreed that *Black* does not require a subjective intent to threaten to convict under 18 U.S.C. § 875(c). 692 F.3d at 479. Because *Black* interpreted a statute that already had a subjective intent requirement, the Sixth Circuit found the Court was not presented with the question whether an objective intent standard is constitutional. *Id. Jeffries* also found that the Court's ruling on the prima facie evidence provision did not address the specific intent question because "the statute lacked any standard at all." *Id.* at 479-80. Like the Fourth Circuit in *White*, the Sixth Circuit explained that the prima facie evidence provision failed to distinguish between protected speech and threats by not allowing for consideration of any contextual factors. *Id.* at 480. In contrast, "[t]he reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made." *Id.*

The Ninth Circuit took a different view, and found the true threats definition in *Black* requires the speaker both intend to communicate and "intend for his language to *threaten* the victim." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005). The Ninth Circuit reasoned that the unconstitutionality of the

[7] The Fourth Circuit test focuses on the reasonable recipient, but our test asks whether a reasonable speaker would foresee the statement would be understood as a threat.

prima facie provision meant that the Court required a finding of intent to threaten for all speech labeled as "true threats," and not just cross burning. *Id.* at 631-32 ("[T]he prima facie evidence provision rendered the statute facially unconstitutional because it effectively eliminated the intent requirement."). "We are therefore bound to conclude 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." *Id.* at 633.[8]

Regardless of the state of the law in the Ninth Circuit, we find that *Black* does not alter our precedent. We agree with the Fourth Circuit that *Black* does not clearly overturn the objective test the majority of circuits applied to § 875(c). *Black* does not say that the true threats exception requires a subjective intent to threaten. Furthermore, our standard does require a finding of intent to communicate. The jury had to find Elonis "knowingly and willfully" transmitted a "communication containing . . . [a] threat to injure the person of another." 18 U.S.C. § 875(c). A threat is made "knowingly" as when it is "made intentionally and not [as] the result of mistake, coercion or duress." *Kosma*, 951 F.2d at 557 (quotation omitted). A threat is made willfully when "a reasonable person would foresee that the statement would be interpreted by those to whom

[8] Similarly, in *United States v. Bagdasarian* the Ninth Circuit wrote in dicta that, in light of *Black*, "[a] statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal." 652 F.3d 1113, 1122 (9th Cir. 2011).

the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *Id.* (citation and emphasis omitted). This objective intent standard protects non-threatening speech while addressing the harm caused by true threats. Accordingly, the *Kosma* objective intent standard applies to this case and the District Court did not err in instructing the jury.

B.

Elonis contends the indictment was insufficient because it did not quote the language of the allegedly threatening statements. An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment is sufficient when it "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Vitillo*, 490 F.3d 314, 321 (3d Cir. 2007) (internal quotations omitted). We have found an indictment is sufficient "where it informs the defendant of the statute he is charged with violating, lists the elements of a violation under the statute, and specifies the time period during which the violations occurred." *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 422 (2012).

In *Huet* we found an indictment for aiding and abetting a felon in possession of a firearm was sufficient because it alleged the previous felony conviction of the principal, the time period of the violation and the specific weapon involved, and alleged the defendant "knowingly aided and abetted Hall's possession of that firearm." *Id.* at 596. "No more was required to allow Huet to prepare her defense and invoke double jeopardy." *Id.*

The Eighth Circuit considered an indictment that did not include the verbatim contents of a letter, the date it was written, or the name of the author. *Keys v. United States*, 126 F.2d 181, 184-85 (8th Cir. 1942). The indictment for communicating a threat to injure with the intent to extort merely stated the letter threatened to harm the reputation of the victim with intent to extort. *Id.* at 182-83. Since the indictment summarized the contents of the letter, provided the date it was mailed and the name of the addressee, the Eighth Circuit found there could be no confusion as to the elements and subject of the crime. *Id.* at 185 ("The fact that the defendant upon reading the indictment recognized the letter referred to and made no objection to the description at the time indicates the want of merit in his present criticism.").

To find a violation of 18 U.S.C. § 875(c) a defendant must transmit in interstate or foreign commerce a communication containing a threat to injure or kidnap a person. 18 U.S.C. § 875(c). Here the indictment on Count 2 stated:

> On or about November 6, 2010, through on or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant ANTHONY DOUGLAS ELONIS knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure and kill T. E., a person known to the grand jury. In violation of Title 18, United States Code, Section 875(c).

The indictment on the other counts was identical, but stated each date of the threat, the nature of the threat, and the subjects of the threat. Count 3 alleged "a threat to injure employees of the Pennsylvania State Police and the Berks County Sheriff's Department"; Count 4 alleged "a threat to injure a kindergarten class of elementary school children"; and Count 5 alleged "a threat to injure an agent of the Federal Bureau of Investigation." Elonis contends the indictment was deficient because they did not include the allegedly threatening statements.

The indictment was sufficient because the counts describe the elements of the violation, the nature of the threat, the subject of the threat, and the time period of the alleged violation. For example, Count Four alleged defendant communicated over the internet on November 16, 2010 "a threat to injure a kindergarten class." If Elonis had already been charged with this statement, the indictment provided enough information to challenge a subsequent prosecution. Based on the

indictment, defendant was notified he needed to dispute that the statement was a threat, that he communicated the statement, and that he transmitted the statement through interstate commerce. Moreover, like the defendant in *Keys*, Elonis was able to identify which internet communications the indictment described, since he did not raise the issue until after trial.[9]

C.

Elonis contends there was insufficient evidence to convict on Counts 3 and 5 of the indictment because the statements on which they were based were not threats. "A claim of insufficiency of evidence places a very heavy burden on the appellant." *United States v. Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted).

1.

Elonis contends Count 3 was based on a conditional statement, which he asserts cannot be a true threat. In *Watts* the Supreme Court found the conditional nature of defendant's statement to be one of the

[9] Elonis did challenge the sufficiency of the indictment prior to trial, but only on constitutional grounds. The indictment did not include a subjective intent to threaten.

three factors demonstrating it was not a true threat. *Watts*, 394 U.S. at 708 ("Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."). Elonis posted the following on his Facebook page:

> Fold up your PFA 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]

We considered the impact of conditional statements on the true threat analysis in *Kosma*, 951 F.2d at 554. We found that *Watts* did not hold conditional statements can never be true threats. *Id.* at 554 n.8 ("Even if Kosma's threats were truly conditional, they could still be considered true threats."). We explained the conditional statements in *Watts* "were dependent on the defendant's induction into the armed forces – a condition which the defendant stated would never happen." *Id.* at 554. Because the defendant's threats in

Kosma stated a precise time and place for carrying out the alleged threats, they were true threats. *Id.*

Here the District Court found that a reasonable jury could find the statement to be a true threat. *United States v. Elonis*, 897 F. Supp. 2d 335, 346 (E.D. Pa. 2012). Unlike in *Watts*, Elonis did not vow the condition precedent would never occur. However, this case is also unlike *Kosma*, where the statement included a particular time and place. Elonis's statement only conveys a vague timeline or condition. But, taken as a whole, a jury could have found defendant was threatening to use explosives on officers who "[t]ry to enforce an Order" of protection that was granted to his wife. Since there is no rule that a conditional statement cannot be a true threat – the words and context can demonstrate whether the statement was a serious expression of intent to harm – and we give substantial deference to a jury's verdict, there was not insufficient evidence for the jury to find the statement was a threat.

2.

Defendant contends that the statement on which Count 5 is based is a description of past conduct, not a future intent to harm:

> 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!]

A threat under § 875(c) is a communication "expressing an intent to inflict injury in the present or future." *United States v. Stock*, No. 12-2914, slip op. at 13 (3d Cir. Aug. 26, 2013). It was possible for a reasonable jury to conclude that the statement "the next time you knock, best be serving a warrant [a]nd bring yo' SWAT and an explosives expert" coupled with the past reference to a bomb was a threat to use explosives against the agents "the next time." Indeed, the phrase "the next time" refers to the future, not a past event. Accordingly, a reasonable jury could have found the statement was a true threat.

D.

Elonis contends the jury instruction stating communications that travel over the internet necessarily travel in interstate commerce violated his due process rights because the government was required to prove interstate transmission as an element of the crime. The District Court instructed the jury: "Because of the interstate nature of the Internet, if you find beyond a reasonable doubt that the defendant used the Internet in communicating a threat, then that communication traveled in interstate commerce." Trial Tr. 126, Oct. 11, 2011.

In *United States v. MacEwan* we explained the difference between interstate transmission and interstate commerce. 445 F.3d 237, 243-44 (3d Cir. 2006). The defendant in *MacEwan* contended the government failed to prove he received child pornography through interstate commerce because a Comcast witness testified it was impossible to know whether a particular transmission traveled through computer servers located entirely within Pennsylvania, or to any other server in the United States. *Id.* at 241-42. "[W]e conclude[d] that because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to [the] user, the data has traveled in interstate commerce." *Id.* at 244. "Having concluded that the Internet is an instrumentality and channel of interstate commerce. . . . [i]t is sufficient that MacEwan downloaded those images from the Internet,

a system that is inexorably intertwined with interstate commerce." *Id.* at 245.

Elonis distinguishes *MacEwan* by stating that in that case the government presented evidence on how the internet worked. But the government's evidence in *MacEwan* did not show that any one of the defendant's internet transmissions traveled outside of Pennsylvania.[10] We found that fact to be irrelevant to the question of interstate commerce because submitting data on the internet necessarily means the data travels in interstate commerce. *Id.* at 241. Instead, we held "[i]t is sufficient that [the defendant] downloaded those images from the Internet." *Id.* at 245. Based on our conclusion that proving internet transmission alone is sufficient to prove transmission through interstate commerce, the District Court did not err in instructing the jury.

IV.

For the foregoing reasons we will uphold Elonis's convictions under 18 U.S.C. § 875(c).

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[10] Notably, the government did present testimony on how Facebook works. A computer forensic expert, Michael Moore, testified about privacy settings and that when a Facebook account is made public the postings can be seen by "whoever has access to it through the internet throughout the world." Trial Tr. 15-17, Oct. 17, 2011.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
v.	:	**No. 11-13**
ANTHONY DOUGLAS ELONIS	:	

MEMORANDUM

STENGEL, J. **September 19, 2012**

Anthony Elonis was convicted by a jury of four counts of violating 18 U.S.C. § 875(c) by posting threatening comments to the social networking website, Facebook. The jury acquitted on one count. The Defendant filed post-convictions motions, which I will deny.

I. Discussion

A. Rule12(b)(3)(B)

Elonis asserts that the indictment, charging violations of § 875(c), was insufficient to state an offense because it did not include the specific threatening language posted on Facebook. The Government argues that filing a motion to dismiss the indictment well after the close of trial and verdict by the jury is grossly unfair to the prosecution because it allows the defense

to "sandbag" the Government by withholding its motion to dismiss until after jeopardy attaches.[1] The Government notes, correctly, the language in the indictment tracked the language of the statute, included the date and location of each violation, and stated the general content and identity of the target of the threat. Despite the patent untimeliness of the post-trial motions, I will consider it on the merits.[2]

Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure states that "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense."

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[1] The Court also notes the Government's objections to the timeliness of Defendant's motion as well after the fourteen (14) day time-limit imposed under the rules.

[2]For example, Count Two asserted:

> On or about November 6, 2010, through on or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant ANTHONY DOUGLAS ELONIS knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure and kill T.E., a person known to the grand jury. In violation of Title 18, United States Code, Section 875(c).

Similarly, Count Three alleged "a threat to injure employees of the Pennsylvania State Police and the Berks County Sheriffs Department" made on November 15, 2010; Count Four alleged "a threat to injure a kindergarten class of elementary school children" made on November 16, 2010; and Count Five alleged "a threat to injure an agent of the Federal Bureau of Investigation" made on November 30, 2010.

An indictment is sufficient if it: "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Rankin*, 870 F.2d 109, 112 (3d Cir. 1989). No greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." *Id*. at 112. "Generally, an indictment will satisfy these requirements where it informs the defendant of the statute he is charged with violating, lists the elements of a violation under the statute, and specifies the time period during which the violations occurred." *Huet*, 665 F.3d 588, 2012 U.S. App. LEXIS 133, 2012 WL 19378, at *3 (citing *United States v. Urban*, 404 F.3d 754, 771 (3d Cir. 2005)).

The content required for an indictment is set forth in Rule 7 of the Federal Rules of Criminal Procedure. Rule 7(c)(1) says an indictment must "be a plain, concise, and definite written statement of the essential facts constituting the offense charged" and "must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." The purpose of Rule 7 was to abolish detailed pleading requirements and the technicalities previously required in criminal pleading. *See Huet*, 665 F.3d 588, 2012 U.S. App. LEXIS 133,

2012 WL 19378, at *3 (citing *United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007)); *see also United States v. Bergrin*, 650 F.3d 257, 264 (3d Cir. 2011) (same citation). "Although detailed allegations may have been required under a common law pleading regime, they 'surely are not contemplated by [the Federal Rules].'" *Huet*, 665 F.3d 588, 2012 U.S. App. LEXIS 133, 2012 WL 19378, at *3 (quoting *Resendiz-Ponce*, 549 U.S. at 110).

Defendant is charged with violating 18 U.S.C. § 875(c), which criminalizes the "transmi[ssion] in interstate or foreign commerce [of] any communication containing any threat to kidnap any person or any threat to injure the person of another." "To prove a violation under this statute, the Government must prove that the defendant 'acted knowingly and willfully' in making the threatening communication and that the communication was 'reasonably perceived as threatening bodily injury.'" *United States v. Voneida*, 337 Fed.App'x 246, 247 (3d Cir. 2009) (quoting *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994)).

In *United States v. Kistler*, 558 F. Supp. 2d 655, 657 (W.D. Va. 2008), the court determined that the indictment was sufficient in almost identical circumstances. Specifically, in that case the defendant, Kistler, was charged with nine counts of transmitting in interstate commerce a communication containing a threat to injure the person of another, in violation of 18 U.S.C. § 875(c). The indictment returned against the defendant stated in its entirety: "The Grand Jury charges that: 1. On or about the following dates, in the Western

District of Virginia and elsewhere, Christopher Jason Kistler transmitted in interstate commerce a communication containing a threat to injure the person of another, namely victims 'A' and 'B'." *Id*. at 656. The indictment went on to state each of the dates, which correlated with the victim and the charge.[3] *Id*. The defendant moved to dismiss the indictment on the ground that it failed to allege the elements of the crime charged. He argued that the indictment did not contain the specific words of the threats alleged and without those words, it contained an insufficient statement of the elements of the crime, since to be proscribed, the communication must contain a "true threat." *Id*.

The court denied the motion, stating "the indictment is sufficient, if barely. Whatever the rule at common law, the modern rule is that all of the words of a threat need not be set forth in the indictment." *Id*. (citing *Keys v. United States*, 126 F.2d 181, 184 (8th Cir. 1942) (holding that indictment charging attempt to extort money by threat to injure property or reputation was not defective because of its failure to set forth the alleged threatening letter, or its date or author). The court went on to state that "[w]hile the indictment in the present case is bare bones, it narrowly passes constitutional muster, with its recitation of the dates of the communications and indication, at least by letter of alphabet, of the two victims." *Id*. *See also United States v. Ahmad*, 329 F. Supp. 292, 294-97 (M.D. Pa 1971) (holding that while it is not necessary to set forth

[3] For example, the table states Count One, 2/10/2007, Victim A.

in the indictment the threatening letters charged, it is not surplusage to do so); *Wilson v. United States*, 275 F. 307 (2d Cir. N.Y. 1921) (finding that the content of the letters in a conspiracy to defraud case were not required in the indictment and holding that even if the content of the letter should have been described or set forth in the indictments, defendants raised the question too late and the defect was cured by the verdict).

Similarly, in *United States v. Musgrove*, 2011 U.S. Dist. LEXIS 107775 (E.D. Wis. Apr. 20, 2011), the court found that, despite defendant's objections to the contrary, the indictment returned by the grand jury was constitutional.[4] In challenging the sufficiency of the indictment, the defendant stated that it failed to include the alleged threat at issue and the alleged victim. *Id*. at 5. The court found that the language "appropriately tracks the language of the statute which states '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.'" *Id*. at 4-5 (quoting 18 U.S.C. § 875(c)). The court held that Seventh Circuit does not require that an indictment charging the defendant with criminal use of threatening language allege a "true threat" nor has it reversed a conviction for failure

[4] The indictment provided, "On or about January 14, 2011, in the State and Eastern District of Wisconsin, Michael L. Musgrove knowingly transmitted in interstate commerce a communication containing a threat to injure the person of another. All in violation of Title 18, United States Code, Section 875(c)."

to include language defining what constitutes a "true threat" in an indictment. *Id*. at 11-12.

The indictment in this case alleges more than enough facts and certainly more than the cases discussed above. *See Kistler*, 558 F. Supp. 2d at 657. It states the nature of the threat, such as "to injure and kill" as well as the target of the threat and the date the threat was made. Therefore, the indictment tracks the statutory language of 18 U.S.C. § 875(c) as required and includes sufficient information to place the Defendant on notice of the offense. I will deny Defendant's motion as to the sufficiency of the indictment.

B. Fed. R. Crim. Pro. 33(a) and 34(b)

Elonis also requests a new trial under and arrest of judgment under Rules 33(a) and 34(b) of the Federal Rules of Criminal Procedure, respectively, claiming that the court incorrectly charged the jury on the element of "willfulness" of § 875(c). Under Rule 34, "[u]pon the defendant's motion or on its own, the court must arrest judgment if: (1) the indictment or information does not charge an offense; or (2) the court does not have jurisdiction of the charged offense." A motion to arrest judgment must be based on a defect on the face of the indictment, and not upon the evidence or its sufficiency. *United States v. Casile*, 2011 U.S.Dist. LEXIS 49437 at *10 (E.D. Pa May 9, 2011) (Baylson, J.).

Under Rule 33(a), "[a] district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted." *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). Unlike a motion for insufficiency of the evidence under Rule 29, in which the court views the evidence in the light most favorable to the Government, a Rule 33 motion permits the court to exercise its own judgment in assessing the Government's case. *United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003). The court "may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *United States v. Nissenbaum*, 2001 U.S.Dist. LEXIS 6039 at * 2-* 3 (E.D. Pa May 8, 2001) (Waldman, J.). Additionally, the Third Circuit has emphasized that motions for a new trial based upon weight of the evidence are not favored and should only be granted sparingly in exceptional cases. *Government of the Virgin Islands v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987).

Elonis claims that, in order to overcome the protections of the First Amendment, "willfully" must be construed to mean that the Defendant intended to violate the law or act with a "bad purpose." Defendant relies on *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) for this proposition. In that case, Himelwright was charged with transmitting a wire communication with the intent to injure another, in violation of 18 U.S.C. § 875(c). The court found that the

Government bore the burden of proving that Himelwright acted knowingly and willfully when he placed the threatening telephone calls, but the Government bore no burden of proving that Himelwright intended his calls to be threatening or that he had an ability at the time to carry out the threats. *Himelwright*, 42 F.3d at 782.

Section 875(c) is a general intent crime necessitating that the prosecution prove only that the act, i.e. the "statement," was performed knowingly and intentionally.[5] It is not required that the defendant intend to

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[5] In my charge to the jury regarding the term intentionally, I instructed them that:

> A statement is made 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. It is not necessary that the government prove that the defendant intended to carry out the threat or that he had the present ability to carry out the threat. This is called the objective "reasonable speaker" test.

In my charge to the jury regarding the term knowingly, I instructed them that:

> A person acts "knowingly" if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. The government is not required to prove that the defendant intended to carry out the threat. The intent required refers to an intent to make the communications in the first place.

make a threat.[6] The term "willfully" does not appear in the statute, the Government is correct that the language in *Himelwright* suggesting a requirement of willfulness is dicta and is not binding on this court or capable of changing the statutory language.

Under the direction of *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991), "[t] he objective, reasonable person test requires that the defendant intentionally make a statement, written or oral, 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 harm." This is known as the objective, reasonable speaker test. *See also*, *United States v. Elonis*, 2011 U.S. Dist. LEXIS 121401, 2011 WL 5024284, at *2 (E.D. Pa Oct. 20, 2011) (quoting *Kosma*, 951 F.2d at 559). Another example of willfully as interpreted and applied in this Circuit is *United States v. Richards*, 415 F. Supp. 2d 547 (E.D. Pa 2005), *rev'd on other grounds*,

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[6] In my charge to the jury regarding willfully, I instructed them that:

> The Indictment uses the term knowingly and willfully. The word intentionally subsumes willfully. Therefore, the defendant need only have the intent to make the communications in the first place. The Government is not required to prove that the defendant himself intended for the statement to be a true threat. Whether a statement or communication on the Facebook posting constitutes a "true threat" is determined by the objective standard I described for you earlier.

271 Fed. Appx. 174 (3d Cir. 2008). In that case, the district court held: "[T]he phrase 'willfully' as used in § 879 requires only that the Government demonstrate, beyond a reasonable doubt, that 'a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of Senator Clinton." 415 F. Supp. 2d at 558 (citing *Kosma*, 951 F.2d at 557).

In *United States v. Brahm*, 520 F. Supp. 2d 619, 629 (D.N.J. 2007), the court interpreted willfulness in the context of 18 U.S.C. § 1038(a)(1), stating that in *Kosma*, the Third Circuit interpreted the word "willfully" by describing the two prevailing views of the meaning of "willfully" as subjective and objective. 520 F. Supp. 2d at 629 (citing Kosma, 951 F.2d at 556). The objective standard, described by the court as a "reasonable" standard, required only that the defendant communicate a threat in a context where a reasonable person would recognize as a serious indication of intent. *Id*. (citing *Kosma*, 951 F.2d at 557). The court went on to say that the language used by the court in *Kosma* to define the "willful" standard for culpability is reminiscent of § 1038 and both statutes have similar purposes in protecting persons from harm resulting from threatening conduct or speech. 18 U.S.C. §§ 871, 1038.

None of the interpretations of "willfully" as first articulated in *Kosma* require that the Defendant must intend to violate a law. I find that the term willfully in

the context of § 875(c) denotes only an act which is intentional, knowing, or voluntary and that a reasonable speaker would foresee the statement would be perceived as expressing a threat or an intent to do harm. *See United States v. Starnes*, 583 F.3d 196, 201 (3d Cir. 2009) (discussing the three levels of the interpretation of the term "willfully"). The term willfully does not appear in the statutory language and requiring the Defendant have the requisite state of mind suggested by the Defendant undermines the objective test emphasized by the Third Circuit.

Under these circumstances, the jury's verdict is consistent with the weight of the evidence. There is no danger that a miscarriage of justice has occurred.[7] The instructions to the jury regarding intentionally and willfully were not unconstitutionally "collapsed." Instead, following Third Circuit precedent, the willfulness requirement of the statute requires only that the defendant intentionally make a statement in a context wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm.

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[7] The Government put forth substantial evidence concerning the posts made by the Defendant on his Facebook account. The Government submitted testimony and evidence that Defendant's estranged wife sought the Protection From Abuse Order, in part, because of the threats on Facebook, the Defendant was aware of this, and the Defendant continued to post the threating comments. Additionally, there was testimony from co-workers' and Defendant's estranged wife that Defendant was aware of comments from "friends" on Facebook telling Defendant the comments were threatening or inappropriate.

C. Jury Instruction Regarding Interstate Commerce

Elonis contends that a communication over the internet does not necessarily travel in interstate commerce. This is wrong. At trial I instructed the jury as follows:

> Because of the interstate nature of the Internet, if you find beyond a reasonable doubt that the defendant used the Internet in communicating a threat, then that communication traveled in interstate commerce. It does not matter whether the computer that the communication was transported to was in Pennsylvania, and it does not matter whether the communication was transmitted from within Pennsylvania If the Internet was used in moving the communications, then it traveled in interstate commerce.

The Third Circuit has held that "because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce." *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006). The instruction given to the jury was not in error, as it was consistent with the Third Circuit law.

Finally, the Defendant did not object to the instruction at the time of trial. Defendant concedes that he did not object to the Court's instruction at trial and that review is therefore limited to plain error review. "A plain error that affects substantial rights may be

considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). Accordingly, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)).

The instruction that one's use of the Internet, standing alone, is enough to satisfy the interstate commerce element of § 875(c) was the correct statement of law. Additionally, even if the instruction was somehow in error, given the Third Circuit jurisprudence, as well as other courts' findings regarding transmission of information via the Internet, it was certainly not plain error. In *MacEwan*, 445 F.3d 237, the Third Circuit found that "[b]ecause of fluctuations in the volume of Internet traffic and determinations by the systems as to what line constitutes the 'Shortest Path First,' a website connection request can travel entirely intrastate or partially intrastate." *Id*. at 244. Ultimately, the court held that "the Internet is an instrumentality and channel of interstate commerce" and it "does not matter whether [defendant] downloaded the images from a server located within Pennsylvania or whether those images were transmitted across state lines. It is sufficient that [defendant] downloaded those images from

the Internet, a system that is inexorably intertwined with interstate commerce." *Id*. at 245; *see also United States v. Schade*, Crim. A. No. 08-2388, 318 Fed. Appx. 91, 2009 U.S. App. LEXIS 6732, 2009 WL 808308, at *3 (3d Cir. Mar. 30, 2009) (reaffirming *MacEwan*). Other courts have similarly found that use of the Internet for transmission of images or messages satisfies the requirement of interstate commerce. *See, e.g.*, *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce."); *United States v. Lewis*, 554 F.3d 208, 214-16 (1st Cir. 2009) (holding one's use of the internet, "standing alone," is enough to satisfy a penal statute's "in interstate . . . commerce" element); *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002) ("We join the First Circuit in holding that 'transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce' for the purposes of 18 U.S.C. § 2251"); *United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006) (citing *MacEwan* and holding that proof of transmission over the Internet, i.e. communicating with the putative minor via the Internet, regardless of whether the transmission crosses state lines is all that is required to satisfy the jurisdictional element of § 2422(b)); *United States v. Pomerico*, Crim. A. No. 06-113, 2008 U.S. Dist. LEXIS 77783, 2008 WL 4469465, at *3 (E.D.N.Y. Oct. 30, 2008) ("use of the Internet satisfies the interstate commerce element of [the child pornography statute], 18 U.S.C.

§ 2252A(a)(2)(B)."); *United States v. Fumo*, 2009 U.S. Dist. LEXIS 51581 (E.D. Pa 2009) (same); *United States v. Gouin*, No. CR05-433RSL, 2008 U.S. Dist. LEXIS 33709, at *6-*7 (W.D. Wash. Apr. 24, 2008) (finding "compelling" the testimony of an expert witness about "why the use of the Internet to transmit the visual depictions at issue is inherently part of interstate commerce" and following *MacEwan*). Therefore, I will deny Defendant's motion as it pertains to the jury instructions regarding interstate commerce.

D. Rule 29(c)

Defendant argues that there was insufficient evidence to support a conviction on Counts Three and Five because, although offensive, his postings were not criminal. Specifically, Defendant argues that the words in Count Three are based on some future, unspecified and completely free-floating contingency: "And if worse comes to worse, I've got enough explosives to take care of the state police and sheriff's department." Defendant also argues Count Three is not directed at any Facebook friend and was a public posting, so it should have First Amendment protection because it was broadcast to a large group of people.[8] Defendant further argues that Count Five similarly fails to state a true threat because the post concerns a monologue about an event that had already occurred as well as

[8] Defendant argues that because the post was public in order to view it a person would have to log on to Facebook, search for the Defendant's website and read on his Facebook page to find the specific post.

conditional statements and demands, but not threats.[9] Defendant argues that Count Five contains no threats to inflict injury. Additionally, Defendant cites *Watts v. United States*, 394 U.S. 708 (1969), to support his argument that the comments were not threats because they were made to a public audience and were conditional in nature.

Because a trial court must give deference to a jury's verdict, the convicted defendant carries "a very heavy burden" in bringing a motion under Rule 29. *United States v. Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995); *see also United States v. Rosario*, 118 F.3d 160, 162-63 (3d Cir. 1997). In evaluating a motion challenging the sufficiency of the evidence introduced at trial, the court "must determine whether a reasonable jury believing the Government's evidence could find beyond a reasonable doubt that the Government proved all the elements of the offenses." *United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir. 1991); *see also United States v.*

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[9] The Facebook post referred to in Count Five states:

> You know your shit is ridiculous when you have the FBI knocking at the door. Little agent lady stood so close. Took all my strength I had not to turn the bitch ghost, pull my knife, flick my wrist, and slit her throat, leave her bleeding from her jugular in the arms of her partner. Laughter. So the next time you knock you best be serving a warrant and bring in a S.W.A.T. and an explosives expert while you are at it, because little did ya'll know I was strapped with a bomb. Why do you think it took me so long to get dressed with no shoes on? I was just waiting for ya'll to handcuff me and pat me down, touch the detonator in my pocket, and we're all going boom.

Brodie, 403 F.3d 123, 133 (3d Cir. 2005). Accordingly, the record is reviewed in the light most favorable to the Government. *United States v. Gibbs*, 190 F.3d 188, 197 (3d Cir. 1999). Additionally, a court may find that the Government introduced insufficient evidence to support a Conviction only where "the prosecution's failure is clear." *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984) (quoting *Burks v. United States*, 437 U.S. 1, 17 (1978)).

To convict the Defendant of transmitting threats in interstate commerce, the Government was required to prove beyond a reasonable doubt that the Defendant made a true threat that was transmitted in interstate commerce. 18 U.S.C. § 875(c). In determining whether a true threat was made, the jury may consider factors such as the reaction of those who received the threat, whether the threat was conditional, whether the threat was communicated directly to its victim, the history of the relationship between the defendant and the victim, the context in which the threat was made, and whether the defendant makes an argument completely inconsistent with the evidence adduced at trial. *Kosma*, 951 F.2d at 554.

However, these are factors only, and a jury need not find all factors present to find a true threat was made. The Government presented evidence at trial showing that the Berks County Sheriff's Department and the Pennsylvania State Police were aware of the Defendant's Facebook postings due to the Protection from Abuse Order obtained by the Defendant's estranged wife. The public nature of the comments

meant only that the intended recipient named in the post would receive the message as well as put any other readers in reasonable fear of the Defendant's behavior.

Further, the evidence at trial showed the Defendant's threats were not conditional. A threat is not to be construed as conditional if it "had a reasonable tendency to create apprehension that its originator will act in accordance with its tenor." *United States v. Cox*, 957 F.2d 264, 266 (6th Cir. 1992). Defendant's wife sought a Protection from Abuse Order, in part, due to the threatening posts. After the FBI agent went to Defendant's house to discuss the posts, the Defendant made additional threatening posts. The evidence presented at trial showed other recipients, other than those directly mentioned in the threatening communications, were also fearful of the defendant's threats.

This evidence is sufficient to support a reasonable jury's finding of guilt in Counts Three and Five. Drawing all reasonable inferences in the Government's favor, I find that the evidence introduced at trial was sufficient to support the jury's verdict that the Defendant was guilty, beyond a reasonable doubt, of making "true threats" in Counts Three and Five. A reasonable person making the Facebook postings in question would surely foresee that the statement would be considered threatening to its recipient. This was a question for the jury and the verdict was certainly supported by the evidence. Therefore, Defendant's motion for a judgment of acquittal will be denied.

I. Conclusion

For the reasons set forth above, I will deny Defendant's Post Trial Motions.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
v.	:	**No. 11-13**
ANTHONY DOUGLAS ELONIS	:	

MEMORANDUM

STENGEL, J. **October 20, 2011**

The defendant is charged with making threatening communications for comments posted to the social networking website, Facebook. It is a federal crime to transmit in interstate commerce a communication containing a threat to injure another person. Mr. Elonis' motion to dismiss the indictment raises constitutional challenges to the criminal charges and to the statute. For the reasons set forth below, I will deny the defendant's motion to dismiss.

I. Background

Mr. Elonis was employed as a supervisor in the operations department at Dorney Park and Wildwater Kingdom, an amusement park in Allentown, Pennsylvania. He was fired on October 17, 2010. After his termination, Mr. Elonis began posting statements on his Facebook page suggesting he would do damage to Dorney Park, that he had enough explosives to harm the Pennsylvania State Police and the Berks County

Sheriff's Department, and do violence to a kindergarten class. Additionally, Mr. Elonis posted threatening comments concerning his wife.[1] Mr. Elonis was arrested on December 8, 2010, and charged in a criminal complaint with transmitting in interstate commerce a communication containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c).[2]

On January 7, 2011, the grand jury returned a five-count indictment charging Mr. Elonis with making threatening communications (1) to patrons and employees of Dorney Park and Wildwater Kingdom, (2) to his wife, (3) to employees of the Pennsylvania State Police and Berks County Sheriff's Department, (4) to a kindergarten class, and (5) to an FBI agent.

II. Discussion

An indictment must allege sufficient facts to establish the legal requirements of the crimes charged. *See United States v. Cefaratti*, 221 F.3d 502, 507 (3d Cir. 2000). "In order to be valid, an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the law that he or she is

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[1] Mr. Elonis' wife subsequently obtained a Protection from Abuse Order (PFA) for herself and the couple's two children based in part on the threats in these comments

[2] The statute under which the defendant is charged, 18 U.S.C. § 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."

charged with violating." *United States v. Hedaithy*, 392 F.3d 580, 589 (3d Cir. 2004) (citing *United States v. Zauber*, 857 F.2d 137, 144 (3d Cir. 1988)). Dismissal of an indictment is an "extreme remedy," reserved only for the most egregious abuses of the criminal process. *United States v. Fisher*, 692 F. Supp. 495, 501 (E.D. Pa. 1988) (quoting *United States v. Birdman*, 602 F.2d 547, 559 (3d Cir. 1979)).

Mr. Elonis contends that his Facebook postings are protected speech under the First Amendment and, therefore, cannot be criminal. I recognize that "the bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). It is also well-established that there are certain categories of speech that are not protected under the First Amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). One of these categories is speech which is a "true threat." *See Watts v. United States*, 394 U.S. 705, 708 (1969).

A. Whether Mr. Elonis' Facebook Postings Communicate True Threats is a Question of Fact

In *United States v. Kosma*, 951 F.2d 549, 558 (3d Cir. 1991) the Third Circuit interpreted 18 U.S.C. § 871, a statute regarding threats on the President and containing very similar language to 18 U.S.C. § 875(c). The Third Circuit held that the "intent" required with respect to threatening speech means the government

must prove the defendant intentionally made the communication, not that he intended to make a threat. This intent requirement is limited to the defendant's state of mind when he made the statement or the communications. In this case, the "intent" element is satisfied if the government proves the defendant intended to make the posts on Facebook.

If the government proves the defendant intended to make the statement, i.e., the Facebook posting in question, the inquiry then becomes whether the statement is a true threat. If it is not a true threat, the statement is protected by the First Amendment and there can be no criminal liability. If the statement contains a true threat, it is not protected by the First Amendment and the defendant could be found guilty of communicating a threat under § 875.

Whether the Facebook postings contain true threats is a question of fact for the jury and cannot be decided by the court on a motion to dismiss.[3] What standard the jury should apply to decide if the postings contain a true threat is an interesting question.[4] There

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[3] *See United States v. Voneida*, 337 Fed. Appx. 246, 249 (3d Cir. 2009) (citing *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994)) (stating whether a statement is a "true threat" under 18 U.S.C.S. § 875(c) is a question best left to a jury). Courts in other jurisdictions have concluded that "whether words used are a 'true threat' is generally best left to the triers of fact." *See United States v. Carrier*, 672 F.2d 300 (2d Cir. 1982).

[4] In *Virginia v. Black*, the United States Supreme Court commented on whether courts can still use an objective test to determine whether speech constitutes a "true threat." The Court described "true threats" as

seems to be general agreement that the court should instruct the jury on an objective test. Some courts apply an objective test that focuses on the reaction of the "reasonable recipient" to the statements. Others focus on the "reasonable speaker" and what he or she might

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> those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur. Intimidation in the constitutionally prescribed sense of the word is a type of true threat, where a speaker directs a threat to a person or group of person with the intent of placing the victim in fear of bodily harm or death.

538 U.S. 343, 359-60 (2003). A plurality of the Court, however, held that a jury instruction stating that the act of burning a cross was prima facie evidence of an intent to intimidate was unconstitutional, because it did not differentiate between constitutionally protected speech and unprotected speech. *Id.* at 3.

Courts after *Virginia v. Black* are divided as to whether *Black* replaces the objective test with a subjective test. For example, the Ninth Circuit has adopted a subjective test. *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). The *Cassel* court stated 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." *Id.* Other courts have read *Black* as consistent with an objective test and continued to use their previous standard.

anticipate would be the reaction to the communications.[5] The Third Circuit in *Kosma* clearly adopted the "reasonable speaker" test:

> The objective, reasonable person test requires that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement

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[5] All Circuits, other than the Ninth Circuit, apply an objective test. However, these courts are split as to whether the focus of the reasonable person should be on the speaker or the recipient. While each of these "tests" focuses differently, they can both be viewed as "objective" tests. For instance, the Eighth Circuit, among others, adopted a "reasonable listener" test, holding that a "court must analyze an alleged threat in the light of its entire factual context, and decide whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *See United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996).

The Third Circuit, among others, adopted a "reasonable speaker" test, holding that a true threat exists when the "defendant intentionally make[s] 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 harm upon or to take the life of the [target]." *United States v. Kosma*, 951 F.2d 546, 553-54 (3d Cir. 1991). Even among Third Circuit decisions, there are some apparent inconsistencies regarding the "reasonable speaker" standard. *See United States v. D'Amario*, 330 Fed. Appx. 409, 414 (3d Cir. 2009) (nonprecedential) (quoting *Kosma*'s "reasonable speaker" language and mischaracterizing it as a "reasonable recipient" standard); *United States v. Zavrel*, 384 F.3d 130, 136 (3d Cir. 2004) (stating, in dicta, that the "reasonable recipient" test should be used in interpreting "true threat" under 18 U.S.C. § 876). However, *Kosma*'s "reasonable speaker" test remains the binding precedent.

> would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm.

Id. at 559. In considering whether a communication is a true threat all circuits seem to agree the jury should "consider context, including the effect of an allegedly threatening statement on the listener." *See Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1074-75 n.7 (9th Cir. 2002); *see also United States v. Kosma*, 951 F.2d at 553-54 (alleged threats must be analyzed in context).

The defendant argues the communications alleged to be threats in the indictment do not constitute "true threats," and are, in fact, protected speech under the First Amendment. Mr. Elonis contends that the Government did not show he had any subjective intent that the posts be understood as threats, that any third parties felt threatened by the posts, or that the posts provoked any third party listeners/readers. (Doc. #24 at 12.) Mr. Elonis states these posts are simply crude, spontaneous and emotional language expressing frustration, and that they were not sufficiently definite to constitute a true threat. *Id.* at 7. The Government contends Elonis' group of Facebook "friends" included those persons whom he unambiguously threatened, including his wife and former co-workers at Dorney Park. Further, the Government argues that

a reasonable person could see Mr. Elonis' posts as threats and, in fact, did.[6]

A reasonable jury could find Mr. Elonis' posts constituted true threats by applying the objective speaker test. For example, on November 15, 2010 Mr. Elonis posted:

> And if worse comes to worse
> I've got enough explosives
> to take care of the State Police and the Sheriff's Department.

The next day, on November 16, 2010 Mr. Elonis posted:

> 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?

Additionally, Mr. Elonis' wife was granted a PFA Order due to the threatening posts targeting her, which, even after the PFA was granted, Mr. Elonis continued to

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[6] At least three people, co-workers and friends of Mr. Elonis, will testify regarding their troubled reactions to Mr. Elonis' Facebook posts. (Doc. #33 at 10-11.)

make.[7] Therefore, whether the posts by defendant constitute threats within the proscription of 18 U.S.C. § 875(c) may not be decided as a matter of law at this stage of this case.[8] The defendant's intentions when posting the content, the reasonable expectation as to the effect of the posts on a recipient, and the circumstances surrounding the posts present issues of fact.

B. 18 U.S.C. § 875(c) is Constitutional

Mr. Elonis argues that 18 U.S.C. § 875(c) is overly broad and unconstitutionally vague. Specifically he contends: (1) § 875(c) covers a substantial amount of protected speech and (2) the statute fails to provide a person with a reasonable opportunity to know what speech is disallowed and what is not.[9] Courts review

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[7] *See* Mr. Elonis' post regarding his wife on or about November 15, 2010, which states "Fold up your PFA and put it in your pocket[.] Is it thick enough to stop a bullet?" (Doc. #1 at 5.)

[8] *See United States v. Fulmer*, 108 F.3d 1486, 1490, 1492 (1st Cir. 1997) (voicemail message to Federal agent that "the silver bullets are coming. . . . Enjoy the intriguing unraveling of what I said to you" was, given defendant's history of threats against the agent, reasonably understood as a "true threat" under 18 U.S.C. § 875[c]) and *United States v. Voneida*, 337 Fed. Appx. 246, 247 (3d Cir. Pa. 2009) (holding that statements, including one that defendant posted he would make the Virginia Tech shooting incident look like "a trip to an amusement park," demonstrated a serious intention to inflict bodily harm and could be viewed as a threat).

[9] The elements of § 875(c), as construed by the Third Circuit, are that the defendant said or transmitted a communication in interstate commerce; that the communication contained a threat to injure another person. To prove a violation under this statute, the Government must prove that the defendant "acted knowingly

these contentions applying a presumption of constitutionality to the challenged statute. *Marshall v. Lauriault*, 372 F.3d 175, 185 (3d Cir. 2004) (citing *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983)).

i. The Statute is Not Overly Broad

The defendant asserts that § 875(c) is overly broad since, absent a requirement of subjective intent, it permits conviction for a substantial amount of protected speech. To support his claim, the defendant points to a variety of communications that he contends are protected under the First Amendment, but would subject the speaker to criminal prosecution under the statute, including the following:

> – President Bush's comments in a national address in March 2003 that the United States would commence bombing Iraq within 48 hours if Saddam Hussein did not surrender and leave the country.
>
> – President Obama's comments to the members of a musical group that his daughters were huge fans, "but, boys, don't be getting any ideas. I have two words for you: predator drones."
>
> – Samuel L. Jackson's role in the 1994 film Pulp Fiction where he plays a hitman who recites a passage from the Book of Ezekiel 25:17 prior to murdering each of his victims.

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and willfully" in making the threatening communication. *See United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994).

The defendant contends that by defining "true threats" as "where the speaker means to communicate a serious expression of intent to commit an unlawful act of violence," the Supreme Court held that a requirement of subjective intent to threaten is a precondition to a finding of constitutionality. However, many courts have held that this language of the Supreme Court is more appropriately interpreted as stating that there must be an intentional, i.e., knowing, communication of what is an objectively serious threat. Therefore, proof of subjective intent to actually do harm is not required. So long as the defendant knowingly made the statement, whether it was a threat is determined by an objective reasonable speaker standard. *See United States v. Kosma*, 951 F.2d at 553-54 (3d Cir. 1991). Moreover, an objective interpretation does not sweep too broadly, and would not incorporate the "protected speech" envisioned in the defendant's motion because the statute criminalizes only "true threats." *See United States v. Francis*, 164 F.3d 120, 122-23 (2d Cir. 1999) (finding the statute constitutional, as it criminalizes only true threats even though there is no requirement that the Government prove that the defendant intended to carry out his threats).

ii. The Statute is Not Impermissibly Vague

The defendant also contends that the statute is impermissibly vague. The essence of this challenge is that § 875(c) does not define what is meant by a "threat;" and, that it therefore "fails to provide a person

with a reasonable opportunity to know what speech is disallowed and what is not."[10] (Doc. #24 at 28).

To survive vagueness review, a statute must (1) define the offense with sufficient definiteness that a person of ordinary intelligence can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. *United States v. Mariano*, 2006 U.S. Dist. LEXIS 7497 at *9 (E.D. Pa. Feb. 27, 2006) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)).

The defendant's argument is without merit. The examples of "convictions upheld under 18 U.S.C. § 875(c) are innumerable." *See United States v. Vaksman*, 2009 U.S. Dist. LEXIS 119287 at *11 (E.D. Wash. Dec. 4, 2009). Defendant's claim that the statute does not define "threat" and the case law provides the only interpretations of "threat" is misleading. Courts may legitimately look to interpretations in case law when determining whether a statute is unconstitutionally vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 109-10 (1972).

I find that § 875(c) is not unconstitutional either due to overbreadth or vagueness. The term, "threat to

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[10] Even considering the general intent requirement ("knowingly"), as compared to a specific intent requirement ("willfully"), an ordinary citizen can understand what is meant by the terms "transmit," "threat to kidnap," and "threat to injure the person of another" and the statute easily provides sufficient standards to allow enforcement in a non-arbitrary manner. *United States v. Tiller*, 2008 U.S. Dist. LEXIS 85243 at *3 (W.D. La. Oct. 21, 2008).

injure the person of another" is commonly understood. Every court to consider the issue has so held.[11] By construing the statute to apply only to "true threats," the Courts have limited its application so that it captures only speech that is unprotected under the First Amendment.

IV. Conclusion

For the reasons set forth in this memorandum defendant's Motion to Dismiss the Indictment (Doc. #24) is denied.

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[11] *See, e.g., United States v. Sutcliffe*, 505 F.3d 944, 953-54 (9th Cir. 2007) ("[W]e are convinced that the statute is not impermissibly vague. An ordinary citizen can understand what is meant by the terms 'threat to kidnap' and 'threat to injure,' and we are persuaded that the statute provides sufficient standards to allow enforcement in a non-arbitrary manner."); *United States v. Tiller*, No. 07-50067, 2008 U.S. Dist. LEXIS 85243, 2010 WL 4690511 at *1 (W.D. La. Oct. 21, 2008) ("Even considering the general intent requirement . . . an ordinary citizen can understand what is meant by the terms 'transmit,' 'threat to kidnap,' and 'threat to injure the person of another,' and the statute easily provides sufficient standards to allow enforcement in a non-arbitrary manner.").

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3798

UNITED STATES OF AMERICA

v.

ANTHONY DOUGLAS ELONIS,
Appellant

(D.C. Crim. No. 5-11-cr-00013-001)

SUR PETITION FOR REHEARING

(Filed Jan. 11, 2017)

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and SCIRICA*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and

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* As to panel rehearing only.

a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

s/Anthony J. Scirica
Circuit Judge

Dated: January 11, 2017
DWB/cc:
Michael L Levy, Esq.
Sherri A. Stephan, Esq.
Robert A. Zauzmer, Esq.
Ronald H. Levine, Esq.
Abraham J. Rein, Esq.