

No. 13-983

IN THE
Supreme Court of the United States

ANTHONY D. ELONIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

**BRIEF *AMICUS CURIAE* OF
THE ANTI-DEFAMATION LEAGUE
IN SUPPORT OF RESPONDENT**

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**STATEMENT OF INTEREST OF
AMICUS CURIAE**

The Anti-Defamation League (ADL)¹ was founded in 1913 to combat anti-Semitism and other forms of

¹ No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the prepara-

discrimination, to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment for all. Today, ADL is one of the world's leading civil and human rights organizations, combating all types of prejudice and working to eradicate hate both online and offline. ADL has long played a leading role in raising awareness about hate on the Internet and working with major industry providers to address the challenge it poses. In September 2014, ADL released Best Practices for Responding to CyberHate, an initiative establishing guideposts for the Internet community to help prevent the spread of hate online.² This initiative was embraced by Facebook, Google/YouTube, Microsoft, Twitter, and Yahoo, reflecting the industry's concern about the growing problem of online hate speech, including anti-Semitism, anti-Muslim bigotry, racism, homophobia, misogyny, xenophobia, and other forms of online hate.

ADL is also a leader in developing anti-cyberbullying training, curriculum, and resources for youth, educators, youth providers, and adult family members. After authoring a model cyberbullying prevention statute, ADL created CyberALLY, a cyberbullying prevention program for middle and high school students, and Internet Guidelines for Families to help keep adolescents safe online.

tion and submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

² The Best Practices are available at <http://www.adl.org/cyberhatebestpractices>.

As a civil rights advocacy organization, ADL is committed to the preservation of democratic freedoms and the constitutional rights that gird them, including the rights to freedom of speech and freedom of expression. ADL's mission and work make it keenly aware of the importance of effectively distinguishing between speech protected by the First Amendment and unlawful true threats. By properly allowing a fact finder to consider the entire context of a case, an objective inquiry achieves this goal.

SUMMARY OF ARGUMENT

Using a reasonable-person, objective inquiry to determine whether threats are “true threats” remains faithful to the purpose of the true threat exception to the First Amendment – protecting individuals from fear of violence and the disruption caused by such fear, while at the same time avoiding unnecessarily chilling speech. The plain language of the statute at issue, 18 U.S.C. § 875(c), makes unlawful “*any* threat to injure the person of another.” (emphasis added.) Because the jury in this case found that petitioner’s Facebook posts conveyed an objective intent to harm his wife, local law enforcement, elementary school children, and an FBI agent, his conduct plainly fell within the scope of “any threat.”

The First Amendment does not change that analysis. This Court long has recognized that the State may punish “true threats,” including a “serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,” even when the speaker does not actually intend to carry out the threat. *Virginia v. Black*, 538

U.S. 343, 360 (2003). True threats fall outside the protections of the First Amendment because a prohibition on such speech “protects 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.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

An objective intent inquiry more effectively distinguishes true threats from constitutionally protected speech. As noted, fear of violence and the resulting societal disruption distinguish true threats from protected speech. *Id.* Thus, a test that accurately and effectively identifies true threats should focus on whether the speech at issue creates such fear and disruption. An objective test has this proper focus. It allows a fact finder to consider the full circumstances, such as the impact on the audience and historical context, and to weigh all the evidence, including information about the speaker’s state of mind. With all this in mind, a fact finder then determines if the speech at issue has reasonably created the fear and disruption that separates true threats from protected speech. By contrast, improperly focusing on subjective intent treats a subset of disruptive speech – that which lacks proof of subjective intent – as protected speech. Accordingly, by not focusing solely on a speaker’s state of mind, an objective inquiry more effectively separates protected speech from true threats.

An objective inquiry does not unnecessarily chill speech. By proscribing speech that instills fear in a target and causes societal disruption, rather than focusing on a hard-to-discern state of mind, an

objective test creates a more predictable standard. This predictability reduces any potential chilling effect. In addition, there is no liability under an objective inquiry for unforeseeable or unreasonable audience reactions.

This Court has never found that the First Amendment requires proof of subjective intent for true threat liability. True threats made with subjective intent are only one “type” of true threat. *Black*, 538 U.S. at 360. A government may choose, as it has in the past, to proscribe only this type of true threat. *See id.*; *Watts v. U.S.*, 394 U.S. 705, 706 (1969). The statute at issue here, however, prohibits “any threat,” not just those accompanied by proof of subjective intent. 18 U.S.C. § 875(c). Accordingly, requiring proof of subjective intent would unnecessarily limit the plain language of the statute.

Because an objective test effectively distinguishes between unlawful true threats and protected speech, this Court should affirm.

ARGUMENT

I. TRUE THREATS FALL OUTSIDE FIRST AMENDMENT PROTECTIONS.

Free speech is a cornerstone of American democracy. Our nation’s “profound national commitment” to “uninhibited, robust, and wideopen” debate recognizes that public discourse may well be “vehement, caustic [or] unpleasant[]” and yet still be protected by the First Amendment. *Watts*, 394 U.S. at 708. The expression of unpopular ideas or viewpoints is at the heart of our democracy and is rightfully protected by the First Amendment.

First Amendment protections, however, are not absolute. Certain categories of speech 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,” and thus fall outside the protections of the First Amendment. *City of St. Paul*, 505 U.S. at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). The government, consistent with the Constitution, may regulate the following categories of speech and expression:

advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called “fighting words”; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent.

United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (internal citations omitted). “True threats” are on this list; and as this Court has explained, they may be proscribed in order to protect “from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.” *Black*, 538 U.S. at 344; *Watts*, 394 U.S. at 707-08.

True threats are not simply extreme or unpopular opinions. Nor are they directionless or open-ended. They are targeted. They identify a specific individual or group. They intimidate others and prevent them from thinking, acting, and speaking freely. *Black*, 538 U.S. at 359-60; *Watts*, 394 U.S. at 707. By

doing so, true threats instill fear, disrupt society, and absorb law enforcement resources. In order to prevent this fear and societal disruption, a government may prohibit all true threats, not just those made with proof of subjective intent.

II. IT IS MORE DIFFICULT TO DISCERN A SPEAKER'S TRUE INTENT THROUGH NEW MEDIA.

New mediums of communication, such as those at issue here, have changed the way people interact. Today, the world lives both online and offline. While these worlds differ, they are fundamentally interconnected and together make up the full sphere of modern social and public interaction. Indeed, in the Internet age, it is nearly impossible to avoid online communications. From business communications to schoolwork, dating, and friendships, interaction through new media is as much a part of everyday life as face-to-face interaction. Today, it is virtually impossible to function fully “off the grid.”

The nature of online interactions – in which people often connect without face-to-face contact, sometimes with fewer than 140 character messages, or with photos that disappear in seconds – is changing the way people communicate information. In this context, discerning a speaker's subjective intent is particularly difficult. New media communications often lack the contextual clues and associated non-verbal communication inherent in face-to-face interaction. For example, body language and facial expressions cannot typically be judged online. Tone is often hard to decipher. There may be no clear distinction between an angry epithet and a lyric rapped to a beat, which a listener would clearly hear

in a face-to-face interaction. Because new media communications are often drafted in private, there are frequently no third-party witnesses to the contemporaneous context of a message. It is, therefore, often more difficult with new media for the audience to distinguish whether a message has been purposefully drafted to intimidate, crafted as an artistic expression, or written in jest.

In addition to opening new lines of communication, new media has also lowered many of the traditional barriers to intimidation and other true threats. With new media, an individual can threaten and harass from the comfort of home. Because it is easier to act outside of the public's view, there is less pressure to comport with traditional social norms that may have previously curtailed truly threatening behavior. *See, e.g.*, L. B. Lidsky, *Incendiary Speech and Social Media*, 44 *Tex. Tech. L. Rev.* 147, 149 (2011) (noting that “the actual or practical anonymity” of social media communications “fosters a sense of disinhibition in those contemplating violence”). Further, connecting with those that share hateful perspectives has become far easier in the Internet age. *See, e.g.*, A. H. Foxman & C. Wolf, *Viral Hate: Containing Its Spread on the Internet*, 14 (2013) (“Don Black, former grand dragon of the Ku Klux Klan, noted that, ‘as far as recruiting, [the Internet has] been the biggest breakthrough I’ve seen in the 30 years I’ve been involved in [white nationalism].’”). This leads to validation of hate and empowerment of tendencies to intimidate or act on violent thoughts. *See id.* at 29-30; *see also* Lidsky, *Incendiary Speech and Social Media*, *supra*, at 149 (noting that interactions through subcommunities on social media “may

serve to foster group violence or to ‘normalize’ individual violence”). Online supporters often encourage or enable would-be harassers to intimidate and threaten. *See, e.g.,* Lidsky, *Incendiary Speech and Social Media, supra*, at 157.

New media communications have lower cost, greater reach and specificity, and can be more persistent and pervasive. An attacker can make contact with a specific target, virtually anywhere, without ever having to know his or her physical location. An attacker has no need to track a victim, travel any distance, or expend effort ensuring that the intimidation reaches its intended target. With new media communications, the message instantly finds its target, regardless of time, distance, or location. And with social media, such as Facebook, an individual can threaten a target privately, or in full view of his or her peers. In these ways, the Internet has lowered the barriers to issuing a true threat.

And yet, in many ways, these new social media interactions mirror traditional social interactions. With new media, one can choose to interact with the public at large such as with a tweet on Twitter, much as in a town square or a shopping mall; with a reduced audience on a Facebook wall, such as at a private party; or with an exclusive audience through a personal message, such as in a private conversation. Unlike older forms of media, such as television broadcasting, new media can be as widely broadcast or as directly targeted as a user wishes.

Thus, true threats via new media, as much as those made face-to-face, can induce fear in a target, divert societal resources in the form of law enforcement

time and effort, and put targets in jeopardy of actual physical injury. *See, e.g.*, S. K. Schneider, *et al.*, *Cyberbullying, School Bullying, and Psychological Distress: A Regional Census of High School Students*, 102 *Am. J. Public Health* 171, 175 (2012) (finding that “victims of cyberbullying alone reported more distress than did school bullying victims alone”); *see also* D. K. Citron, *Intermediaries and Hate Speech: Fostering Digital Citizenship for our Information Age*, 91 *B.U. L. Rev.* 1435, 1448-50 (2011) (discussing examples of the disruptive effect of threatening behavior through new media); D.K. Citron, *Cyber Civil Rights*, 89 *B.U. L. Rev.* 61, 69-81 (2009) (same). Indeed, because threats through new media communications can be virtually omnipresent, they are often more damaging than those made through traditional mediums. Cyberbullying, for example, can become so pervasive that it can lead to psychological damages and self harm. *See, e.g.*, S. K. Schneider, *et al.*, *Cyberbulling, School Bullying, and Psychological Distress*, *supra*, at 175 (finding that “there is a robust relationship between cyberbullying victimization and all forms of psychological distress along the continuum from depression to suicide attempts”); *see also* C. Hay *et al.*, *Bully Victimization and Adolescent Self-Harm: Testing Hypothesis from General Strain Theory*, 39 *J. Youth & Adolescence* 5, 446 (2010); S. Hinduja *et al.*, *Bullying, Cyberbullying, and Suicide*, 14 *Archives of Suicide Research* 3, 206 (2010). It is this kind of targeted fear and disruption that the true threat exception was created to prevent.

Because of these ever-changing methods of communication, evolving social norms, difficulties dis-

cerning a speaker's intent, and profound impacts on a target, it is crucial to fully consider all context when evaluating threatening speech through new media. Only by doing so can speech that causes fear and disruption be properly separated from protected speech.

III. AN OBJECTIVE INQUIRY MORE EFFECTIVELY DISTINGUISHES TRUE THREATS FROM PROTECTED SPEECH, WITHOUT UNNECESSARILY CHILLING SPEECH.

The First Amendment does not require this Court to read subjective intent into the statute at issue here. To the contrary, an objective inquiry fulfills the purpose of the true threat exception by effectively distinguishing speech that causes fear and disruption from protected speech, is true to the plain language of the statute, and aligns with this Court's precedents.

A. Neither The Statute Nor This Court's Precedent Require Proof Of The Defendant's Subjective Intent To Threaten.

Congress elected not to include a subjective intent requirement in 18 U.S.C. § 875(c). This Court should refrain from reading one into the statute. The statute 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.

18 U.S.C. § 875(c) (emphases added). Unlike the statutes at issue in *Watts* and *Black*, the plain language of Section 875(c) does not require proof of subjective intent. *See Watts*, 394 U.S. at 706 (prohibiting, inter alia, “knowingly and willfully” threatening the President); *Black*, 538 U.S. at 348 (prohibiting cross burning “with the intent of intimidating any person or group of persons”). Here, the statute merely requires transmission of “any threat.”

This Court has never held that the First Amendment requires proof of subjective intent for true threat liability. In *Black*, this Court resolved a different question of intent raised by the statute. Unlike the statute at issue in this case, the statute in *Black* explicitly required proof of subjective intent and provided that “any” cross burning was “prima facie evidence of intent to intimidate.” 538 U.S. at 348. This Court viewed and discussed the circumstances of that case through the lens of the statutorily required intent. It had no need to address whether the First Amendment separately required proof of subjective intent because the statute set the necessary level of intent.

Further, this Court noted that true threats made with subjective intent were only a “type” of true threat. *See Black*, 538 U.S. at 360 (“a *type* of true threat” is one made “with the intent of placing the victim in fear of bodily harm or death” and “[t]rue threats’ *encompass* those statements where the speaker means to communicate” a threat) (emphases added). This Court did not find that this was the only type of true threat, nor all that true threats “encompass.” Indeed, this Court reaffirmed that the entire class of true threats are proscribable. *Id.* at

361-62. Thus, in order to fully protect from the fear and disruption that true threats create, the government may prohibit all “types” of true threats, not just those accompanied by proof of subjective intent. The statute at issue in this case does just that, proscribing “any threat.” 18 U.S.C. § 875(c). While “any threat” certainly includes true threats made with subjective intent, the plain meaning is not limited to this type of true threat. Thus, requiring proof of subjective intent would stray from the plain language of the statute.

B. An Objective Inquiry Draws A Clear Distinction Between Protected Speech And True Threats And Allows A Fact Finder To Fully Consider All The Circumstances.

Distinguishing between true threats and protected speech requires a highly factual, case-by-case determination. *Watts*, 394 U.S. at 707-08; *Black*, 538 U.S. at 364-67. In *Black*, this Court found that prejudging evidence would “ignore[] all of the contextual factors” related to the alleged threat and therefore “blur[] the line” between protected speech and true threats. *Id.* at 365, 367 (faulting statute at issue for deeming a cross burning as always being prima facie evidence of intent to threaten). *Black* explained that placing special evidentiary weight on one piece of evidence, in every case, would result in not properly considering all the circumstances. *Id.* at 367. There, the Court considered the full context, including the history of cross burning and related violence, the location of the land where the cross was burned, the likely audience, and whether the accused had permission to enter the land.

In *Watts*, the accused threatened the President but this Court examined the context and concluded that it was not a “true threat.” *Watts*, 394 U.S. at 708. This Court considered the location and timing of the speech, the audience’s reaction, the speaker’s tone and demeanor, the words used, and the location of the target. In *Watts*, the threat was not communicated to the target. The President was elsewhere and was highly unlikely to ever hear the potentially threatening speech, and consequently, highly unlikely to be placed in fear. Taking all this together, the Court found that the speaker’s actions were not a true threat. *Id.* at 708. Thus, when evaluating a true threat, this Court has repeatedly emphasized the importance of fully considering all the circumstances, such as audience reaction and historical context, and warned against prejudging the evidence. *Id.*; *Black*, 383 U.S. at 367, 365.

An objective inquiry aligns with this precedent and accurately separates targeted speech that causes fear and disruption from protected speech. Fear of physical harm and the resulting societal disruption separate true threats from protected speech, not a speaker’s state of mind. An objective inquiry is flexible and focuses on these actual, objective differences. An objective inquiry allows the fact finder to consider the speaker’s intent as part of the totality of the evidence. But it does not require the fact finder to consider evidence about the defendant’s state of mind to the exclusion of other evidence about context, history, and impact on the target. Accordingly, an objective inquiry views every case within its own context and clearly prohibits targeted speech that causes fear and disruption.

By contrast, a subjective inquiry would allow a subset of threatening speech – that which lacks proof of subjective intent – to avoid liability, despite instilling fear in a target and disrupting society. By not focusing solely on a speaker’s state of mind, an objective inquiry identifies all disruptive speech, thereby better separating protected speech from true threats.

An objective inquiry is particularly appropriate in the context of new media communications. As noted, new media communications often lack non-verbal indicia of intent and are frequently drafted in private, leaving the target (and later the finder of fact) very little record beyond the written communication itself. There is no face-to-face interaction to discern tone, volume, facial expression, body language, or other traditional indicia of intent. Thus, individuals have the perfect opportunity to craft messages that engender fear in a specific target and force law enforcement to divert resources to prevent physical harm, but make it difficult to interpret a speaker’s state of mind. Forcing a fact finder to determine a speaker’s state of mind in this manner requires a great amount of speculation and inference, “blur[ring] the line” between true threats and free speech. *Black*, 538 U.S. at 365.

By creating an accurate test to distinguish protected speech from that which causes targeted fear and disruption, the objective standard does not criminalize speech that should rightly be protected. True threats are undeserving of First Amendment protections because of the significant tolls they take on the target and society at large. *Watts*, 394 U.S. at 707-08; *Black*, 538 U.S. at 359-60. When a reasonable

person targeted by a true threat becomes afraid for his or her physical safety and engages law enforcement for protection, the costs are the same regardless of whether the speaker's intent is provable in a court of law. Under the objective standard, the finder of fact must effectively determine whether a reasonable person in the defendant's position knew or should have known that his or her actions would engender fear in the target. This does not subject defendants to the whims of an "eggshell" victim or punish speech that a reasonable person could not foresee would instill fear. Rather, it proscribes only that speech that the speaker should have known would exact the interpersonal and societal tolls that the true threats exception was intended to address.

The objective standard clearly distinguishes between protected speech and true threats, taking into account the impact on the target and society at large. In so doing, it effectively fulfills the purpose of the true threat exception by deterring the targeted fear and societal disruption that true threats create.

CONCLUSION

For the foregoing reasons, and for those in Respondent's brief, the Third Circuit's judgment should be affirmed.

Respectfully submitted,

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