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IN THE SUPREME COURT OF THE UNITED STATES

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ANTHONY DOUGLAS ELONIS, :

Petitioner : No. 13-983

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Monday, December 1, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 a.m.

APPEARANCES:

JOHN P. ELWOOD, ESQ., Washington, D.C.; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice; Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:58 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 13-983, *Elonis v. United*
5 *States*.

6 Mr. Elwood.

7 ORAL ARGUMENT OF JOHN P. ELWOOD

8 ON BEHALF OF THE PETITIONER

9 MR. ELWOOD: Mr. Chief Justice and may it
10 please the Court:

11 The First Amendment permits restrictions on
12 the content of speech for a few well-defined, narrowly
13 limited classes of communication clearly supported by
14 history and tradition, including what this Court has
15 called "true threats." The government has failed to
16 justify --

17 JUSTICE KENNEDY: I'm not sure that
18 the Court did either the law or the English language
19 much of a good service when it said "true threat." It
20 could mean so many things. It could mean that you
21 really intend to carry it out, A; you really intend to
22 intimidate the person; or that no one could possibly
23 believe it. So I don't --

24 MR. ELWOOD: That's true.

25 JUSTICE KENNEDY: We can't fault you for

1 citing what the Supreme Court has said, but it's a most
2 unhelpful phrase.

3 MR. ELWOOD: And it also doesn't help that
4 it was announced in a per curiam decision that didn't
5 have the benefit of merits briefing or argument.

6 But if you look at the tradition,
7 threatening speech was not punishable at common law.
8 And until the late 20th Century, American threat
9 statutes required or were interpreted to require proof
10 of a subjective intent to place the listener in fear,
11 and because of that --

12 JUSTICE SCALIA: Well, that was an assault
13 at common law, wasn't it? If you threatened somebody
14 with violence and don't actually apply violence, it's
15 still an assault, isn't it?

16 MR. ELWOOD: I think assault is somewhat
17 different because assault can also be an attempted
18 battery. But it's my understanding there is law
19 that to the question that assault, when it involved
20 placing someone in fear, did require a specific intent.

21 JUSTICE GINSBURG: How does one prove what's
22 in somebody else's mind? This case, the standard was
23 would a reasonable person think that the words would put
24 someone in fear, and reasonable people can make that
25 judgment. But how would the government prove whether

1 this threat in the mind of the threatener was genuine?

2 MR. ELWOOD: I think two ways, generally
3 speaking. As we indicated in our brief, in order to
4 prove up these threats which are increasingly made
5 online using a cell phone or a computer, you will have
6 to search the computer and cell phone to show that it
7 was actually used to make these statements. You will
8 also find on there a wealth of information. As
9 the Court indicated in Riley, people conduct their
10 entire lives electronically --

11 CHIEF JUSTICE ROBERTS: Yeah, you are going
12 to find a lot of information on the cell phone that the
13 guy is really angry at his ex-wife and -- and, you know,
14 would like to see her suffer. And he's going to put it
15 online, and then you are going to say, well, that was
16 just therapeutic, as you said in your brief. It was
17 therapeutic. Yes, of course, it shows that he was going
18 to do something dangerous. It's a good thing that he
19 had this outlet of the internet so he didn't have to do
20 it.

21 MR. ELWOOD: I think -- but I think the
22 point is that there is a lot of information that you
23 could find. You could find, for example, that he had
24 visited a web page and she confided to someone else that
25 she was in fear. There is -- you know, you can find --

1 CHIEF JUSTICE ROBERTS: How does the fact --
2 I thought your whole point was the fact that she is in
3 fear doesn't tell you enough about what the defendant
4 wants.

5 MR. ELWOOD: No, but if he -- if you can see
6 that he visited her website at the time that she was
7 saying, I'm afraid of this guy or I'm afraid of what he
8 is saying, you could say -- you could prove up that he
9 knew at the time, that he was aware --

10 CHIEF JUSTICE ROBERTS: Based on your
11 submission, all he has to do is say either, as I
12 understood your brief, it's therapeutic, it's a good
13 thing I could do this, or it's art.

14 MR. ELWOOD: If he is on notice that she's
15 in fear, that is all we're asking for. That if he knows
16 she is in fear, he doesn't have a right to continue on.
17 That is what we view as stating an intent to cause fear.

18 JUSTICE KAGAN: Could I --

19 JUSTICE SOTOMAYOR: Can you tell me -- I'm
20 sorry. Go ahead.

21 Could you tell me -- I'm coming a little bit
22 off of Justice Ginsburg's question. You can infer what
23 a person's state of mind is from the circumstances of
24 how and what was said in words, correct?

25 MR. ELWOOD: That is correct.

1 JUSTICE SOTOMAYOR: So if that's the case,
2 isn't the jury acting like a reasonable person in
3 looking at the words and the circumstances and saying,
4 did he intend this or didn't he? I mean, I don't know
5 what the difference between the standard given and the
6 one -- the instruction you want.

7 MR. ELWOOD: As the government put it in
8 this case in the closing argument, under the instruction
9 that was given it doesn't matter what the defendant
10 thinks. What matters is whether a reasonable person
11 would foresee that the listener would be placed in fear
12 and so it is essentially --

13 JUSTICE SOTOMAYOR: But -- I mean, how is
14 that different from what you intend? If you know if a
15 reasonable person is going to read these words this way,
16 aren't they going to assume that's what the defendant
17 intended?

18 MR. ELWOOD: But that is -- it's a
19 negligence standard. It holds him to a reasonable
20 person standard regardless of whether he actually was
21 aware of that. It holds him to what a reasonable person
22 would have known --

23 JUSTICE KAGAN: Mr. Elwood, sort of along
24 the same lines, and getting back to what the
25 Chief Justice asked you, because I was a little bit

1 surprised by your answer: I'm trying to figure out what
2 exactly the level of intent you want is. So one, the
3 very, very highest level might be I affirmatively want
4 to place this person in fear; that's why I'm doing what
5 I'm doing. All right?

6 There's a step down from that which is: I
7 don't want to do that; I'm just fulfilling my artistic
8 fantasies, whatever you want to call it; but I know that
9 I am going to place this person in fear. All right? Is
10 that what -- which intent do you want?

11 MR. ELWOOD: The second.

12 JUSTICE KAGAN: The second.

13 MR. ELWOOD: That if you know that you are
14 placing someone in fear by what you are doing, that is
15 enough to satisfy our version of --

16 JUSTICE KAGAN: How about you just take it a
17 step down more but not get to the government's. How
18 about if you don't know to a certainty, but you know
19 that there is a substantial probability that you will
20 place that person in fear, which is what I take it we
21 would usually mean when we talk about recklessness?

22 MR. ELWOOD: I think that we would say that
23 recklessness is not enough. The Court said in U.S.
24 Gypsum that recklessness and negligence were not enough
25 for mens rea even for antitrust liability. So we would

1 say the same would apply here.

2 Traditionally courts have applied and in
3 Global-Tech the Supreme Court, this Court, said that
4 willful blindness satisfies knowledge, but the willful
5 blindness test spelled out in Global-Tech was beyond
6 recklessness and it took an extra step to try to
7 distinguish it from recklessness.

8 JUSTICE KAGAN: Well, what would be wrong
9 with a recklessness standard? Why is that too low? It
10 seems that a recklessness standard has a kind of buffer
11 zone around it. You know, it gets you up one level from
12 what the government wants, so what -- who is the person
13 that we should be worried is going to be convicted under
14 a recklessness standard?

15 MR. ELWOOD: I think many of the speakers
16 who are online and many of the people who are being
17 prosecuted now are teenagers who are essentially
18 shooting off their mouths or making sort of ill-timed,
19 sarcastic comments which wind up getting them thrown in
20 jail.

21 For example, there is pending now a case
22 involving a couple of Texas teenagers who were in a
23 video game chat room. One called the other one crazy,
24 apparently for something that he said about a video
25 game, and the other one responded: Yeah, I'm crazy; I'm

1 going to shoot up a kindergarten and eat one of their
2 still beating hearts. Neither one of them seemed to
3 think that -- they understood that as sarcasm. But as
4 it happens, there was a woman in Canada who was
5 watching. She reported them to the authorities. He was
6 arrested. He was held for four and a half months before
7 he was eventually bonded out. And he is still facing
8 trial.

9 Happily, Texas is one of the many states
10 with the subjective intent requirement. So there is a
11 good chance he'll be acquitted. But if you are
12 talking about what a reasonable person would view that
13 as, I would not want to bet a felony conviction that
14 that would not be covered--

15 CHIEF JUSTICE ROBERTS: It's not just a
16 reasonable person, at least as I understand the
17 government's submission. It's a reasonable person
18 familiar with the context of the statement. Right? So
19 you don't take what is on the Internet in the abstract
20 and say, this person wants to do something horrible.
21 You are familiar with the context. You are familiar
22 with the fact that this was a couple of teenagers in a
23 chat room playing a game, right?

24 MR. ELWOOD: That is true, but the thing is
25 everyone has a different view of what context matters.

1 And I don't know you can say ab initio in advance or a
2 priori that that is what is going to matter. All they
3 are going to say is, look, I was put in fear.

4 And one of the things that always matters in
5 these reasonable person prosecution is how do you
6 respond. And the fact of the matter is they
7 investigated, they informed the school, and that is --
8 there is a bootstrapping quality of the reasonable
9 person test, because if you reacted to it, and
10 presumably law enforcement will react in any case that's
11 prosecuted, you can be -- they can use that as a sign
12 that look, we took this seriously, a reasonable person
13 would take this seriously.

14 JUSTICE BREYER: And on the briefs, I
15 thought on the basis of the briefs that there are two
16 separate questions. One has to do with the state of
17 mind and the other doesn't. The one that doesn't has to
18 do with what the person does. What he does, and he has
19 to do this or he's not guilty, is he has to communicate
20 a true threat. What is a true threat?

21 MR. ELWOOD: Well --

22 JUSTICE BREYER: A true threat -- you've
23 seen the definitions, the instruction that was given is
24 similar to ones that are well-embodied in the law. What
25 you have to do is communicate a true threat, and a true

1 threat is a threat that a reasonable person would
2 understand to convey a serious expression of an
3 intention to inflict bodily injury or take the life of
4 an individual.

5 Now, there is a second question which I find
6 more difficult and that has nothing to do with what you
7 do. It has to do with the state of mind, and that is
8 what I want to know your view about. Because I saw
9 nothing in the government's brief that says a person
10 could be convicted through negligence. Rather, what
11 they say, and it seemed to me this is hornbook statement
12 of criminal law, is that you have to know that you are
13 doing those things that are the elements of the crime.
14 So you have to know that you are transmitting in
15 commerce a true threat, as I've just defined it. And if
16 you don't know that, you are out. You are home free.

17 Now, that I would say is Model Penal Code.
18 That is Brown Commission. That is every sort of
19 statement of criminal law that I've read, which may be
20 only a few, but I don't know many that contradict that.
21 And so why isn't that the end of this case?

22 MR. ELWOOD: Because I think the way -- the
23 way you are explaining it is different than the way I
24 think the government is explaining because you seem to
25 be suggesting that he knows that a reasonable person

1 would be placed in fear.

2 JUSTICE BREYER: He has to know that, and I
3 will ask the government. I will ask the government the
4 same question. I have in their brief things where I
5 think what they are saying is the way I said it. But
6 they will say perhaps something else, but that is up to
7 them.

8 MR. ELWOOD: But my understanding of the
9 government's position is that --

10 JUSTICE BREYER: Forgetting their position
11 for the moment, what do you think of the position I just
12 took, which is my question?

13 MR. ELWOOD: The way I understood your
14 position is he has to know that a reasonable person --

15 JUSTICE BREYER: Yes, he does. Just as if
16 you go into a bank, you have to know certain elements
17 for it to be bank robbery. You have to know that you
18 have a threat, you have to know -- et cetera. Now, here
19 one of the elements of the crime is to communicate, in
20 commerce, a true threat. So you have to know.
21 Communicate, in commerce, a true threat.

22 MR. ELWOOD: Well, the thing is, though --

23 JUSTICE BREYER: I wouldn't have asked it if
24 I didn't want your view, so what is your view?

25 MR. ELWOOD: I'm trying hard to give it to

1 you.

2 (Laughter.)

3 MR. ELWOOD: If -- if the government's view
4 is he has to know -- Mr. Elonis had to know that a
5 reasonable person would interpret that as a threat, I
6 would think that that would be a big improvement. I
7 would not view that as a bad thing at all.

8 JUSTICE SCALIA: Well, you wouldn't go along
9 with that.

10 MR. ELWOOD: I mean, I would prefer that he
11 has to know -- he has to know --

12 JUSTICE SCALIA: Well, that would cover the
13 situation in which somebody transmits in interstate
14 commerce a warning that Al-Qaeda is going to assassinate
15 a certain person. That is particularly covered by this
16 technically covered by this -- by this statute, isn't
17 it? "Whoever transmits interstate any communication
18 containing any threat to kidnap any person or any threat
19 to injure the person of another," this -- this contains
20 a threat.

21 MR. ELWOOD: Well, it --

22 JUSTICE SCALIA: The -- the threat of
23 Al-Qaeda, right?

24 MR. ELWOOD: It depends. I'm not sure that
25 that would be viewed as a threat because it's not, you

1 know, stating one's intention. It's stating your
2 intention to cause physical harm. So I think that
3 that's --

4 JUSTICE SCALIA: So you're back to what the
5 intention of the sender is. That statement eliminates
6 the intention of the sender, doesn't it?

7 MR. ELWOOD: Because I think -- again, we're
8 just talking a threat is only -- you know, the question
9 is whether it's your statement of intent to cause harm
10 versus your warning somebody of somebody else's intent
11 to cause harm.

12 JUSTICE SCALIA: Yes. Well --

13 MR. ELWOOD: But --

14 JUSTICE SCALIA: Exactly. That's a big
15 difference, and -- and I had thought that your position
16 took account of that difference, that you had to intend
17 to place somebody in -- in -- in fear.

18 MR. ELWOOD: That is right. It is our
19 position that you have to intend to place someone --

20 JUSTICE SCALIA: Once you eliminate that,
21 you -- you can accept Justice Breyer's position.

22 MR. ELWOOD: But among the many things that
23 is wrong with that is, I mean, I'm not the only one who
24 says this is a negligence standard. Justice Marshall
25 said it, Judge Sutton said it. And that's because you

1 are basing it not on what he knew, but on what a
2 reasonable person would have known under the
3 circumstances.

4 JUSTICE KENNEDY: But is it your position
5 that a properly instructed jury can convict if it is
6 instructed that the defendant in -- communicated the
7 threat with the intent to cause fear or intimidation to
8 the victim?

9 MR. ELWOOD: Yes, that's correct.

10 One of the things --

11 JUSTICE KENNEDY: And would in -- would you
12 accept anything less than that in this case?

13 MR. ELWOOD: I think that the closest thing
14 is that he knew that a reasonable person --

15 JUSTICE KENNEDY: I mean, you can say no.

16 MR. ELWOOD: -- would be placed in fear --

17 JUSTICE KENNEDY: But that's what this --
18 that's what -- that's the way I read this instruction.

19 MR. ELWOOD: And that's -- I disagree. It's
20 if a reasonable person -- not if he knew that a
21 reasonable person would have that reaction, but what a
22 reasonable person --

23 JUSTICE KENNEDY: But he intentionally makes
24 a statement.

25 MR. ELWOOD: He intentionally makes a

1 statement, and it happens -- he intentionally makes a
2 statement, he says these words and, full stop, a
3 reasonable person viewing those words would view it as a
4 threat.

5 JUSTICE KENNEDY: All right. But then it --

6 MR. ELWOOD: And that's why --

7 JUSTICE KENNEDY: -- then seems to me that
8 you can't accept anything lesser than the instruction
9 that we first agreed upon is your position -- is your
10 preferred position.

11 MR. ELWOOD: Again, it's my understanding
12 that the government is not accepting the idea that if he
13 knew that a reasonable person would be placed in fear,
14 he would be guilty. My understanding is they're saying
15 that if he knew the words he said, and also, a
16 reasonable person would view those as a threat, he is
17 guilty. It is, as you know, Justice Marshall said in
18 the Rogers case, a negligent argument.

19 And I want to point out something on page 15
20 of their brief. They say that he --

21 JUSTICE KENNEDY: Of the -- of the
22 government's brief?

23 MR. ELWOOD: Of the government's brief,
24 right.

25 It says that a general-intent requirement

1 allows him to be convicted so long as it is sufficient
2 to preclude a conviction based on facts that the
3 defendant could not reasonably have known. So they're
4 admitting there that he could be convicted of facts that
5 he didn't know but he reasonably could have known.

6 So it is --

7 JUSTICE ALITO: I thought your answer to
8 Justice Kagan a few minutes ago was that it is not
9 necessary for the defendant to have the purpose of
10 causing fear, but it's sufficient for the -- for the
11 defendant to have knowledge that it will cause fear.

12 MR. ELWOOD: That's right.

13 JUSTICE ALITO: Which of the two is it? I
14 thought a minute ago, though, in answering Justice
15 Kennedy, I thought you said that intent, which I take to
16 mean purpose, is what's necessary.

17 MR. ELWOOD: This is one of the things
18 that -- the reason why we all hate the pre-Model Penal
19 Code era, but if you look at LaFave. LaFave includes,
20 as subjective intent, it includes both purpose, which
21 we're not asking for, and knowledge that it's a virtual
22 certainty that something is going to happen and you do
23 it any way. It's kind of intent of the --

24 JUSTICE ALITO: So you say it's knowledge --
25 knowledge that will cause fear on the part of whom?

1 The -- an average recipient or the particular recipient?

2 MR. ELWOOD: What we're asking for is the
3 particular recipient. But even a reasonable person
4 would be a step up from what I understand the government
5 is offering.

6 JUSTICE GINSBURG: And could you continue,
7 you were telling me how that would be proved what is in
8 his head. He knew that she or a reasonable person would
9 be put in fear.

10 So how does the government prove that?

11 MR. ELWOOD: The government would prove it
12 by, you know, proving the circumstances, what he said,
13 you know, how he saw people reacting to it, his own
14 personal statements about things at the time.

15 JUSTICE KENNEDY: On the facts of this case
16 on remand, could the government proceed on this evidence
17 with your instruction? Would there be enough to go to
18 the jury with your preferred instruction?

19 MR. ELWOOD: I believe there would be enough
20 to go to a jury. We think that this is a triable case,
21 though, and if I could point, I mean, one thing in
22 particular --

23 JUSTICE SCALIA: Well, wait. Before --
24 before you depart from -- from your -- your view, I had
25 understood that to be your view. But if I understand it

1 correctly, when you have this disaffected divorced
2 husband who wants to place his former wife in fear, he
3 doesn't call her up, but a friend of his who knows about
4 his malicious intent calls up the former wife and says,
5 you know, your former husband has threatened to kill
6 you.

7 Now, why wouldn't that meet all of the --
8 all of the requirements that you insist upon, knowing
9 that this would cause fear in her? The only thing
10 missing is it is not his purpose to cause fear in her.
11 But once you depart from that purpose, you -- you open
12 the door to a situation like that which, it doesn't seem
13 to me, should be covered.

14 MR. ELWOOD: I -- I may have been
15 distracted, but I thought it was the idea that -- I
16 mean, he is -- he is causing a series of events that
17 results in his wife being told that he wants to kill
18 her. Am I correct about that?

19 JUSTICE SCALIA: I'm not -- no, no. I'm not
20 prosecuting him. I'm prosecuting his friend who calls
21 the former wife and says your -- your former husband has
22 threatened to kill you.

23 MR. ELWOOD: And --

24 JUSTICE SCALIA: He doesn't -- it's not his
25 purpose to put her in fear, but it certainly puts her in

1 fear. Any reasonable person would think it puts her in
2 fear.

3 MR. ELWOOD: Because I think maybe the thing
4 that is missing is that it is a warning, that it's not a
5 statement of his. He is not saying I'm going to
6 cause --

7 JUSTICE SCALIA: Exactly. Exactly. He does
8 not have the purpose of putting her in fear. So you're
9 back to purpose, which you keep denying, and I don't --
10 I don't see how you can --

11 MR. ELWOOD: Right.

12 JUSTICE SCALIA: -- get to where you want to
13 be without -- without putting purpose in there.

14 MR. ELWOOD: Well, in any event, it is our
15 position that it is a big step up from a reasonable
16 person standard to at least have it based on his
17 understanding that when I say this, it will put that
18 person in fear.

19 JUSTICE SCALIA: It's better -- it's better,
20 but not good enough.

21 MR. ELWOOD: But, Justice Ginsburg, if I
22 could return to your comment. I just want to point out
23 that, you know, there is a -- there are a plethora of
24 statutes that require subjective intent, you know, fraud
25 crimes, drug crimes. And it could be proved -- you

1 prove a person's intent the same way you do in all of
2 those other cases, through the, you know, circumstances
3 surrounding it and, you know, statements to cohorts and
4 things of this sort.

5 JUSTICE ALITO: Well, let me give you a
6 concrete example. This is one of the communications in
7 this case for which your -- your client was convicted.
8 This is on -- this is Government Exhibit 6 on 335 of the
9 Joint Appendix. "Tone Dougie: That's it. I've had
10 about enough. I'm checking out and making a name for
11 myself. Enough elementary schools in a ten-mile radius
12 to initiate the most heinous school shooting ever
13 imagined and hell hath no fury like a crazy man in a
14 kindergarten class. The only question is which one."

15 And then there's some individual who likes
16 this. He puts a thumb up to this -- to this comment.

17 Now, suppose that this was altered a little
18 bit, so at the bottom he puts, just kidding, just
19 kidding laughing out loud. And at the top he puts, Tone
20 Dougie, aspiring rap artist. Okay? What's a jury to do
21 with that under your theory? That you have to get into
22 the mind of this obsessed, somewhat disturbed individual
23 to tell -- to -- to figure out whether he really knew
24 that this would cause a panic on the part of the school
25 officials and parents who found out about this?

1 MR. ELWOOD: Yes.

2 JUSTICE ALITO: Yes, that's the answer?

3 MR. ELWOOD: Yes, exactly. And it's the
4 same thing that juries do all the time.

5 JUSTICE ALITO: You think that's what
6 Congress intended.

7 MR. ELWOOD: Yes.

8 JUSTICE ALITO: Congress wanted to say, this
9 is okay, it's all going to turn on this inquiry into a
10 really strange psychological state.

11 MR. ELWOOD: I will say -- I will say that
12 at the time, it was very well known. I mean, if you
13 look at that book -- there are two things that bookend
14 this. There is the Benedict case, I believe that's at
15 State v. Benedict in the -- out of Vermont from 1839,
16 and you have the Wharton Criminal Procedure, and both of
17 them say that you have to prove a threat statute, you
18 have to show intent to cause fear. And they don't say
19 anything about doing it under a reasonable person
20 standard.

21 JUSTICE BREYER: In the example just given,
22 I guess there would be a jury question of whether he
23 knew that a reasonable person would take this
24 communication as a threat. The fact that he put at the
25 top, rap lyrics, when he's not a rap artist and the fact

1 that he put at the bottom, just kidding, just kidding,
2 would perhaps, when well argued by the prosecution,
3 convince the jury that of course he knew that.

4 If, on the other hand -- I mean, you know, I
5 mean, we have many difficult factual questions as to
6 knowledge. Is this more difficult than any --

7 MR. ELWOOD: That's right. And, you know,
8 these are things that prosecutors face every day. They
9 always get somebody in court saying, you know, I didn't
10 mean it. I didn't think that -- you know, I thought
11 that the deal was going to work.

12 JUSTICE SCALIA: Counsel, you --

13 MR. ELWOOD: They convict people of fraud,
14 you know, hundreds --

15 JUSTICE SCALIA: You really have me confused
16 at this point. Your previous statement relied upon that
17 case and the Wharton by saying it requires an intent to
18 cause fear. I did not understand that to be your
19 position. I thought your position is you do not need
20 the intent to cause fear. It's enough if the reasonable
21 product of this statement is to cause fear --

22 MR. ELWOOD: I'm --

23 JUSTICE SCALIA: -- and you know that.

24 MR. ELWOOD: I'm sorry, I have not made
25 my -- oh. The --

1 JUSTICE SCALIA: And you know that.

2 MR. ELWOOD: They -- the intent we're asking
3 for --

4 JUSTICE SCALIA: That's not an intent to
5 cause fear. It's just a knowledge that fear will ensue.

6 MR. ELWOOD: It's our understanding that the
7 two things that Cohen is specific intent under the kind
8 of old, the premodel penal code standard are purpose and
9 doing something with the knowledge that something is
10 virtually certain to happen. So we believe that that is
11 an intent standard. And, you know --

12 JUSTICE KAGAN: Mr. Elwood, when we have
13 looked at fighting words statutes, we've never applied
14 this kind of heightened intent. As I understand
15 fighting words prosecutions, that all the government has
16 to show is that you've said something that would cause a
17 reasonable person to punch you in the face. And that's
18 all we ask. So why shouldn't this be basically the same
19 as that?

20 MR. ELWOOD: It's a very different
21 tradition. Fighting words -- I mean, traditionally
22 there wasn't an inquiry. There were some cases that
23 required it, but traditionally there wasn't. Whereas in
24 here it is pretty clear that there was this traditional
25 requirement, did the person have to intend to place the

1 person in fear.

2 But here is the reason behind it, which is
3 that, you know, fighting words has been essentially
4 whittled down to a very, very small category of speech
5 where it's you hurling epithets, nose to nose, and it
6 will result in a reflect -- result and reflex of
7 violence. There is no time for anything but a law
8 enforcement response. The only option at that point is
9 to put the cuffs on the guy before he lands -- lands a
10 punch.

11 And when we're talking about incitement,
12 when we're talking about true threats, you know, there
13 is much more time for sort of law enforcement inquiry.
14 There's options other than just immediately cuffing the
15 person. And because it involves a much broader category
16 of speech, it's important that you have inquiry into
17 what the speaker's intent was to avoid chilling the
18 speech. Because, you know, basically, under the
19 government standard, any sort of speech that uses, you
20 know, forceful language or violent rhetoric could
21 potentially be at risk. Like somebody who at -- in
22 Ferguson, Missouri the night of the riots tweets a photo
23 of law enforcement officers over the motto, the old
24 Jeffersonian motto, "The tree of liberty must be
25 refreshed...with the blood of...tyrants." I mean, would

1 I -- would a reasonable person foresee that that would
2 be viewed as a threat by the police officers? Again, I
3 wouldn't want to, you know, bet a felony conviction
4 against it.

5 JUSTICE SCALIA: And this is valuable First
6 Amendment language that you think has to be protected,
7 right?

8 MR. ELWOOD: I think that there is --

9 JUSTICE SCALIA: The kind of things that --
10 that were quoted earlier, right?

11 MR. ELWOOD: I think that the -- when you
12 are doing it as a category, yes, this is valuable
13 language because virtually any language that uses
14 forceful rhetoric could be penalized, like as they say,
15 the blood of tyrants quote, or --

16 JUSTICE SCALIA: It has to reasonably put
17 somebody in fear. That's -- that's all the government's
18 insisting on.

19 MR. ELWOOD: Exactly, which is a very low
20 standard, that --

21 JUSTICE SCALIA: It may be a low standard,
22 but to my mind it doesn't eliminate a whole lot of
23 valuable speech at all.

24 MR. ELWOOD: Well, for example, another --

25 JUSTICE SCALIA: It eliminates a lot of

1 valuable speech.

2 MR. ELWOOD: -- another example, and then I
3 would like to reserve the remainder of my time for
4 rebuttal, if someone puts on their Facebook page a
5 picture of a woman walking into a family planning clinic
6 over the phrase "turn or burn," you know, maybe that is
7 a statement of, you know, Christian doctrine and she's
8 saying she's going to be going to hell, maybe that is a
9 risk of a firebombing.

10 But with that, I would like to reserve the
11 remainder of my time for rebuttal.

12 JUSTICE SCALIA: That would be for the jury,
13 I assume.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Dreeben.

16 ORAL ARGUMENT OF MICHAEL R. DREEBEN

17 ON BEHALF OF RESPONDENT

18 MR. DREEBEN: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 This Court has made clear that true threats,
21 which may not be the best term in the world to describe
22 them but it is getting at an important point, cause fear
23 and disruption to society and to the individuals who are
24 targeted, and for that reason, Congress enacted a
25 statute that depends upon a mens rea component and an

1 actus reus component.

2 The mens rea component is that the
3 individual has to know and understand what the
4 individual is saying. Congress reasonably presumed that
5 people who are speakers of the English language and who
6 know that the words -- what the meaning of the words is
7 that they speak are accountable for the consequences of
8 those words.

9 JUSTICE SCALIA: And the minimum penalty is
10 what? A fine, right?

11 MR. DREEBEN: That's correct. There is a
12 minimum penalty -- there is no mandatory minimum prison
13 sentence here. The important point, I find --

14 JUSTICE KENNEDY: But it is a felony.

15 MR. DREEBEN: Yes, it is a felony and I
16 think that Congress was quite clear that when it enacted
17 this it did not prescribe any additional specific intent
18 or purpose to frighten or to threaten that Petitioner,
19 up until standing at the podium today, appeared to argue
20 for. Petitioner's position until today was that it's
21 not a threat if somebody can say, hey, didn't really
22 mean it, sorry, that wasn't my purpose or intent. I
23 knew that the words that I were speaking had the
24 language in them that they did. I can take it that a
25 reasonable person would have interpreted them that way.

1 Petitioner would even cut out recklessness.
2 Even if the speaker was consciously aware that it was
3 likely to cause fear, Petitioner would say --

4 JUSTICE BREYER: But that's -- can you go
5 back? That's exactly the point that is bothering me.
6 I'm -- I'm with you down to forget the purpose. I'm
7 with you there has to be a true threat; we'll assume
8 that. And now the question is knowledge, and that's the
9 general requirement for mens rea where there's just a
10 general -- that's the normal rule, knowledge.

11 And you have to know those portions that
12 make up an actus reus. You have to know the elements.
13 One of the elements is a true threat. So I thought:
14 What do you say you have to know there? And when I read
15 your brief, you first said he has to know, he has to
16 understand the meaning of the words he speaks in context
17 and must intentionally speak them, and is showing that
18 the defendant acted knowingly in transmitting a true
19 threat requires proof the defendant knew he transmitted
20 a communication and he comprehended its context and
21 context.

22 Now, when I first read that -- you hear my
23 clerks have disagreed with me -- I thought, well, that
24 means he has to know that it is a true threat; i.e.,
25 that a reasonable -- why did I think that?

1 MR. DREEBEN: So I --

2 JUSTICE BREYER: You just saw people being
3 sworn in. Suppose someone comes from, I don't know,
4 hears them say "I do, I do, I promise," does he know the
5 meaning of the words? Unless he knows the action -- so
6 a marriage is better. Someone who has never seen
7 marriages hears the bride say, "I do." Has the person
8 understood the meaning in context, in context of those
9 words, if he doesn't know that that means they're
10 married and go through a lot of legal proceeding? And
11 similarly, can a person know the meaning in context of
12 true threat unless he understands, just like the words
13 "I do," what a true threat is.

14 MR. DREEBEN: The individual can know the
15 meaning of the words without necessarily drawing the
16 same conclusion that the recipient of the communication
17 or a reasonable person would. That is, I think --

18 JUSTICE SOTOMAYOR: Are you quarreling with
19 Justice Breyer? Obviously, you are.

20 MR. DREEBEN: Yes.

21 JUSTICE SOTOMAYOR: Why are you -- why are
22 you quarreling?

23 MR. DREEBEN: This is the whole --

24 JUSTICE SOTOMAYOR: It's not enough for you
25 for us to say a true threat is when you intend to put

1 another person --

2 JUSTICE BREYER: In fear.

3 JUSTICE SOTOMAYOR: -- in fear --

4 JUSTICE BREYER: A reasonable person.

5 JUSTICE SOTOMAYOR: -- or you know that your
6 words will cause a reasonable person to feel fear. You
7 are quarreling with that formulation.

8 MR. DREEBEN: That's right.

9 JUSTICE SOTOMAYOR: You want something
10 broader.

11 MR. DREEBEN: What we want is a standard
12 that holds accountable people for the ordinary and
13 natural meaning of the words that they say in context --

14 CHIEF JUSTICE ROBERTS: Well, but in context
15 is right. What is it? Is it a reasonable person and
16 the examples that were given of the, you know, teenagers
17 on the internet, or is it a -- reasonable teenager on
18 the internet.

19 (Laughter.)

20 MR. DREEBEN: If there is such a thing.
21 Sorry, Mr. Chief Justice.

22 The context that was used under the jury
23 instruction in this case, and I think it is -- it's an
24 appropriate one, it's more protective of the defendant
25 perhaps than a reasonable listener approach, is a

1 reasonable speaker approach. Whether he would foresee
2 that a person to whom the communication is addressed
3 would interpret it as a true threat, and I think --

4 CHIEF JUSTICE ROBERTS: So it's -- but there
5 again, we're talking about what subculture you're
6 looking at. I mean, is the -- the internet exchange, is
7 it the -- what the reasonable teenager thinks how it
8 would be understood by the recipient of the text?

9 MR. DREEBEN: The speaker chooses their
10 audience, and the speaker can communicate in a
11 completely private manner on a Facebook page, the
12 speaker can make certain aspects of the communication
13 private, or the speaker can open it up more widely. I
14 don't think this Court requires -- this case requires
15 the Court to decide the full dimensions to what the
16 context is because here it was quite clear what the
17 context and the --

18 CHIEF JUSTICE ROBERTS: Well, I know, but
19 you are asking for a standard that presumably would
20 apply across the board. So if the teenager has a lot of
21 friends on his Facebook page then you are going to
22 evaluate it by a different standard; you know, friends
23 all over different age groups and everything else,
24 that's a different standard than if he has only a few
25 friends that have access to his statements?

1 MR. DREEBEN: It will depend on to whom he
2 is communicating the statement. We all know that if
3 we're communicating among friends, particularly in
4 face-to-face context, we can say certain things that
5 will be understood as sarcasm. But when we widen the
6 audience and put a statement out in a situation where
7 reasonable people are going to react to it by saying,
8 this requires attention, this is a threat against an
9 elementary school.

10 JUSTICE KENNEDY: But that doesn't seem to
11 me answers Justice Scalia's hypothetical of the friend
12 who calls to report the threat or another hypothetical,
13 when one student says, "I have a bomb in my lunch pail,"
14 and the other student hears it and tells the principal.
15 Under your view, the person who hears it and tells the
16 principal could be liable.

17 MR. DREEBEN: No, that's not our view and I
18 think it's important to clarify --

19 JUSTICE KENNEDY: But what is the -- what is
20 the suggested instruction you would have in order to
21 eliminate liability in my hypothetical or Justice
22 Scalia's hypothetical, it was the same thing with the
23 friend?

24 MR. DREEBEN: The statement has to express a
25 serious intention of the speaker to inflict bodily harm

1 on somebody.

2 JUSTICE KENNEDY: Oh, well, that was not in
3 the instruction that was given in this case.

4 MR. DREEBEN: Not literally and it wasn't
5 requested and I think that it is implicit in it.

6 JUSTICE KENNEDY: Well, I mean, if you are
7 saying it's waived, that's something else. But the
8 instruction given by the District Court in this case
9 does not meet the standard you just gave.

10 MR. DREEBEN: Well, Justice Kennedy, I think
11 that it does if you read it in entire context, that it
12 was understood as being a reference to the speaker's
13 intent to carry out the threats. And we're not asking
14 --

15 JUSTICE KENNEDY: But it seems to me that if
16 that's the case you should have no problem at all in
17 accepting Mr. Elwood's suggested instruction of specific
18 intent.

19 MR. DREEBEN: No, because --

20 JUSTICE KENNEDY: We all have specific
21 intent, as you well know, all the time.

22 MR. DREEBEN: Let me give you a couple
23 examples of what Mr. Elwood's position, as I understand
24 it, would cut out. It would certainly cut out people
25 who are reckless, people who are consciously aware that

1 this would be taken as a serious expression of an intent
2 to do harm and the speaker says I'm going to disregard
3 that and say it anyway because --

4 JUSTICE KAGAN: Well, how would using that
5 exact standard -- and it's pretty similar to the
6 standard that Justice Breyer had because the way Justice
7 Breyer had it, it's knowledge that a reasonable person
8 would cause fear. And you could say -- it's basically
9 the same thing to say -- to say, you know, substantial
10 probability that the person you're talking to would feel
11 fear. So either way, you know, there is a little bit of
12 a fudge factor as to -- but the critical point is that
13 you have to know something about the probability that
14 you're going to cause fear in another person. And if
15 you really don't know that thing, then you're not
16 liable. What would be wrong with that?

17 MR. DREEBEN: Well, the first thing that's
18 wrong with it is that it basically immunizes somebody
19 who makes that statement and then can plausibly say
20 later, hey, I was dead drunk, I realized that I just
21 called in a bomb threat and the police had to respond
22 and an elementary school had to be evacuated and I knew
23 what I was saying but I was too drunk, it really didn't
24 --

25 JUSTICE KENNEDY: Well, drunkenness is often

1 not a defense in a specific intent case.

2 MR. DREEBEN: No, drunkenness is a defense
3 in a specific intent case, it --

4 JUSTICE BREYER: With knowledge. I mean,
5 forget -- I mean, I want -- Justice Kagan and I were
6 just trying to get you to focus very specifically, I
7 think, on -- forget the First Amendment issue here.
8 Take it to the side. Forget it. Let's look at ordinary
9 Hornbook criminal law after the Model Penal Code.

10 There the normal -- as you say in your brief
11 -- requirement is that the person know the elements of
12 the offense. That's normal. If it is drugs, he has to
13 know that this is a drug. If it is a threat of force,
14 he has to know that he has a threat of force, I take it,
15 or that it's a bank. So why shouldn't he, here, have to
16 know what is an element of the crime; namely, that there
17 is a true threat as so defined? Just Hornbook criminal
18 law. Are we departing from it or not?

19 MR. DREEBEN: No. Actually, your
20 description of the bank robbery situation is
21 illustrative because if you just look at the statute
22 that this Court is going to consider tomorrow, 2113,
23 which was interpreted in Carter, to require knowledge
24 that you're engaging in the conduct, no intent element,
25 no specific intent element. So if somebody --

1 JUSTICE BREYER: I agree with you, no
2 specific intent. That is, you don't have to have it to
3 be your purpose. That's why I use the Model Code
4 term -- Model Penal Code terminology which, for me, is
5 easier. You don't have to have it as your purpose. But
6 you do have to know the elements of the offense. You
7 have -- you agree with that, I think.

8 MR. DREEBEN: You just have to know what
9 you're doing. You just have to know what you are doing.
10 You do not have to know --

11 JUSTICE BREYER: All right. You have to
12 know what you're doing. What you are doing is you have
13 to communicate a true threat.

14 MR. DREEBEN: And petitioner is not
15 disputing in this case that he knew the words that he
16 was saying. We're not disputing that the government has
17 to show that the individual is aware of the words that
18 they're speaking. The dispute here is over whether the
19 petitioner -- the government has to show that the
20 petitioner actually intended to cause fear or today
21 Mr. Elwood has proposed moving down a level to
22 knowledge. Justice Kagan has proposed moving down one
23 level further to recklessness.

24 My submission is that when Congress passed
25 this statute it intended to capture all of those people

1 by making no intent element in the statute beyond the
2 knowledge of what the speaker is saying. And the
3 presumption is that when you speak English words and
4 you're an English speaker, you're accountable for the
5 consequences --

6 JUSTICE SOTOMAYOR: So the drunken person
7 who says I don't know what I was saying, is he or she
8 guilty?

9 MR. DREEBEN: Yes. The drunken person who
10 creates panic and disruption and would be reasonably
11 interpreted as having uttered a threat under the
12 government's view is guilty. Under Mr. Elwood's
13 position in his brief, that individual would not be
14 because involuntary intoxication can negate specific
15 intent. It's Hornbook law that that is a defense.
16 Under the position that he's argued at the podium today,
17 perhaps not, because voluntarily intoxication doesn't
18 necessarily negate knowledge.

19 JUSTICE KENNEDY: I'm still not sure how you
20 answered Justice Scalia's hypothetical and mine --

21 MR. DREEBEN: Let me try one more time.

22 JUSTICE KENNEDY: The threat is just
23 repeated --

24 MR. DREEBEN: That's right. The person who
25 repeats the threat --

1 JUSTICE KENNEDY: -- with no bad purpose.

2 MR. DREEBEN: Let's say a newspaper prints
3 it on the front page. The newspaper is not expressing
4 its intent to -- or making a statement that reflects the
5 speaker's intent to inflict harm. What the threat is is
6 a statement that the speaker makes which on its face and
7 in context would be understood as an intent to inflict
8 harm. Repeating it doesn't have that characteristic.

9 And I think we discussed, Justice Kennedy,
10 that the jury instructions don't say that literally, but
11 I think in context that's exactly how they were
12 understood.

13 CHIEF JUSTICE ROBERTS: If you have -- if
14 you have a statement made in the style of rap music as
15 this one or several of these were, is the reasonable
16 person supposed to be someone familiar with that style
17 and the use of what might be viewed as threatening words
18 in connection with that music or is -- or not?

19 MR. DREEBEN: So, Mr. Chief Justice, it
20 depends on whom the speaker is speaking to. If the
21 person is speaking to --

22 CHIEF JUSTICE ROBERTS: To a general
23 audience.

24 MR. DREEBEN: -- to a general audience, then
25 I think that the individual has to understand that not

1 everybody will have the same private meanings that that
2 person attaches to rap music and will bring to the
3 table --

4 CHIEF JUSTICE ROBERTS: So that does subject
5 to prosecution the lyrics that a lot of rap artists use.

6 MR. DREEBEN: No, not at all, Mr. Chief
7 Justice, because in the context of those statements,
8 it's pretty clear that the purpose of the communication
9 is entertainment. People seek out rap artists because
10 they are seeking some form of entertainment and that is
11 a --

12 CHIEF JUSTICE ROBERTS: So how do you start
13 out if you want to be a rap artist? Your first
14 communication you can't say, I'm an artist, right?

15 MR. DREEBEN: I think that you have perfect
16 freedom to engage in rap artistry. What you don't have
17 perfect freedom to do is to make statements that are
18 like the ones in this case where, after the individual
19 receives a protection from abuse order from a court
20 which was based on Facebook posts that his wife took as
21 threatening, he comes out with a post and says fold up
22 that PFA and put it in your pocket, will it stop a
23 bullet?

24 He knows that his wife is reading these
25 posts. He knows that his posts, despite the fact that

1 they're in the guise of rap music, have instilled fear
2 in her, and he goes out and he ramps up and escalates
3 the threatening character of the statements. This is
4 completely different from a --

5 JUSTICE SOTOMAYOR: You've just made a
6 wonderful closing statement, but -- a summation. But
7 why is the instruction that -- or any of the
8 formulations suggested here going to harm them?

9 MR. DREEBEN: So I think, Justice Sotomayor,
10 the clearest problem would be if the Court goes with the
11 position that petitioner advocated in this case, which
12 is that there must be a purpose to frighten. Because
13 that would exclude the person who's conscious, yes, I
14 know that this would probably scare my wife but so what?
15 It cuts out recklessness. It cuts out voluntary --

16 JUSTICE GINSBURG: But I think Mr. Elwood
17 disavowed that. He said he has to know that she will be
18 in fear. He didn't --

19 MR. DREEBEN: Justice Ginsburg, he did
20 disavow it but the time to propose a jury instruction is
21 in the District Court, not from the podium as the
22 petitioner is arguing the case in the Supreme Court.

23 Now, I agree that this Court should decide
24 what the statute means and is properly interpreted and
25 what the Fourth Amendment requires, but there was no

1 request for a knowledge instruction, there was no
2 argument that the proper standard is knowledge let alone
3 recklessness.

4 JUSTICE ALITO: My understanding of the
5 Model Penal Code levels of mens rea is that there is a
6 distinction, but a razor-thin distinction, between
7 purpose and knowledge. So the idea that backing off
8 from purpose to knowledge is going to make very much
9 practical difference, I think is fanciful. There is a
10 considerable difference between -- distance between
11 knowledge and recklessness. Do you agree with that or
12 do I not understand that correctly.

13 MR. DREEBEN: I think you basically
14 understand it correctly. I think I would attribute a
15 little bit more distinction. Purpose is the conscious
16 intent to achieve the very goal. Knowledge under the
17 Model Penal Code is acting intentionally with knowledge
18 of -- to a practical certainty that the result will
19 follow. And then recklessness takes it down to, you are
20 actually, you know, aware of the risk and you are
21 indifferent to it; you act grossly negligently. It
22 doesn't have to be to the level of knowledge. It's just
23 that there is a significant risk and you disregard it.
24 So --

25 JUSTICE BREYER: Exactly. I -- I think that

1 is the distinction.

2 I -- I'm thinking that perhaps a lot of
3 these cases would come up in domestic relations disputes
4 and in such a case, the question would be -- because
5 people get into heated arguments -- do you have to show
6 the defendant used some words that, in context, would be
7 taken as a true threat, or do you have to show that the
8 defendant used some words that do have that
9 characteristic and he knew that they had that
10 characteristic?

11 Now, if I'm right about this --

12 MR. DREEBEN: The former.

13 JUSTICE BREYER: Hmm?

14 MR. DREEBEN: The former.

15 JUSTICE BREYER: I know. You think the
16 former --

17 MR. DREEBEN: Right.

18 JUSTICE BREYER: -- and the real issue is,
19 is it the former or the latter?

20 MR. DREEBEN: Correct.

21 JUSTICE BREYER: And the -- if it's totally
22 open in the history and so forth, I think, you know,
23 people do say things in domestic disputes that they are
24 awfully sorry about later, and -- and where the person
25 didn't know that he was saying something that a

1 reasonable person would take as a threat --

2 MR. DREEBEN: I think it --

3 JUSTICE BREYER: I'm -- I'm hesitating to
4 say that Congress wanted or it makes sense to -- he is
5 lacking something there. Maybe it's his fault that he
6 is lacking it but he is.

7 MR. DREEBEN: Well, so the jury instruction
8 in this case said right before the passage that we've
9 all been focused on, which is on page 301 of the Joint
10 Appendix among many other places, is that after giving
11 the definition of a true threat, Justice Breyer,
12 the court said, "This is distinguished from idle or
13 careless talk, exaggeration, something said in a joking
14 manner, or an outburst of transitory anger."

15 So the context of this very instruction took
16 into account Your Honor's concern and it cuts that out.

17 JUSTICE SCALIA: Counsel, lest we define
18 deviancy down, I don't -- I don't agree with the
19 proposition that in -- in -- well, intramarital disputes
20 people make physical threats to the person of the other.
21 I think that's rather unusual.

22 MR. DREEBEN: Well, I think that --

23 JUSTICE SCALIA: Even -- even in the heat
24 of -- of anger.

25 MR. DREEBEN: And it often will trigger just

1 what happened here. The spouse goes and gets a
2 protection from abuse order, and the individual is on
3 notice that that person's statements are being
4 interpreted as a threat and a judge has validated that,
5 and then you have Petitioner going on and continuing to
6 do that. So I actually think that domestic abuse
7 context is one of the best reasons for the Court not to
8 add a scienter element that ten -- you know, eight out
9 of the ten regional courts of appeals have not done for
10 decades. It's not lead to the kind of problems that --

11 JUSTICE KAGAN: Mr. Dreeben, you are asking
12 us to go down -- you know, it's not purpose, it's not
13 knowledge of causing fear, it's not a conscious
14 disregard of causing fear, it's just that you should
15 have known that you were going to cause fear,
16 essentially. And that's not the kind of standard that
17 we typically use in the First Amendment. The only time
18 I can think of is in the fighting words context, because
19 we typically say that the First Amendment requires a
20 kind of a buffer zone to ensure that even stuff that is
21 wrongful maybe is permitted because we don't want to
22 chill innocent behavior.

23 So I guess the question is shouldn't we
24 allow some kind of buffer zone here past the sort of
25 reasonable-man negligence standard that you are

1 proposing.

2 MR. DREEBEN: I don't think so, Justice
3 Kagan. And if you look at the kinds of cases that have
4 attracted this Court's buffer zone jurisprudence, like
5 New York Times v. Sullivan, you were talking about their
6 statements that were made to -- or about public
7 officials or public figures, perhaps expanded to matters
8 of public concern, where there really was a social
9 interest in preserving that kind of speech.

10 Here what you are talking about are criminal
11 threats, statements that, taking away any private
12 meanings that the individual attached to them, would
13 leave observers of the view, hey, this guy intends to
14 carry out an act of violence against somebody. That is
15 not something that has First Amendment value. There are
16 plenty of ways to express yourself without doing it in a
17 way that will lead people to think this guy is about to
18 hurt somebody.

19 CHIEF JUSTICE ROBERTS: What about the
20 language at pages 54 to 55 of the Petitioner's brief?
21 You know, "Da-da make a nice bed for mommy at the bottom
22 of the lake," "tie a rope around a rock," this is during
23 the context of a domestic dispute between a husband and
24 wife. "There goes mama splashing in the water, no more
25 fighting with dad," you know, all that stuff.

1 Now, under your test, could that be
2 prosecuted.

3 MR. DREEBEN: No. Because if you look at
4 the context of these statements --

5 CHIEF JUSTICE ROBERTS: Because Eminem said
6 it instead of somebody else?

7 MR. DREEBEN: Because Eminem said it at a
8 concert where people are going to be entertained. This
9 is a critical part of the context. It wasn't as if he
10 stated it to her in private or on a Facebook page after
11 having received a protection from abuse order. It
12 wasn't as if he appropriated a style of rap that wasn't
13 anything that he had been doing previously in the
14 marriage and all of a sudden tried to express violent
15 statements that way.

16 In the context, I think any reasonable
17 person would conclude at a minimum that there is
18 ambiguity about these statements being a serious
19 intention of an expression to do harm. And this is
20 critical here. We're talking about an area in which if
21 the jury finds that it's ambiguous, it has to acquit.
22 It has to conclude that this is how these statements
23 should be interpreted.

24 CHIEF JUSTICE ROBERTS: Well, yes, but
25 you're dealing with some very inflammatory language.

1 The question is whether or not the jury is going to be
2 swept away with the language as opposed to making the
3 subtle determinations you've been talking about.

4 MR. DREEBEN: Well, there are two
5 protections there. One is that the -- the government
6 has to prove its case beyond a reasonable doubt and that
7 is subject to appellate review. And the second
8 protection is that it needs to be a true threat as
9 expressed in the Watts case, whether it's a good term or
10 a bad term. It means that these statements are to be
11 taken seriously, that they are not in jest, they are not
12 exaggeration, they are not hyperbole, they are not
13 artistic expression. And this is not a standard that's
14 led to any problems --

15 JUSTICE SCALIA: And the third point is that
16 if the first two are correct, this language is not worth
17 a whole lot any way, right?

18 MR. DREEBEN: That is correct as well,
19 Justice Scalia. And the proof, I think, really is in
20 the pudding here. Petitioner claims that unless the
21 prevailing rule in 10 out of the 12 regional circuits is
22 overthrown, there is going to be a tremendous chill.
23 But I think what he is overlooking is the fact that
24 until recently, 11 out of the 12 circuits followed this
25 rule, the Tenth Circuit changed only while this case is

1 under submission, and there is no evidence of chilling.

2 The best evidence that Petitioner has come
3 up with of a case that was actually prosecuted that he
4 thinks shouldn't, was one in which an individual, after
5 having tried to urge an FBI agent to recommend a
6 prosecution and failing, called him up and said, you
7 know, have a good day, the silver bullets are coming.
8 And the jury was able to hear in that case a tape of the
9 statement, put the statement in the context in which it
10 was made and conclude that it was indeed a true threat.
11 Plus, the very statute of prosecution actually did
12 require proof of an intent to impede an official engaged
13 in his business.

14 So I don't think Petitioner has really come
15 up with a good reason for this Court to change course.

16 JUSTICE KENNEDY: In this statute there is
17 subparagraphs (a), (b), (c) and (d); (a), (b) and (d)
18 all have specific intent. I think you would agree with
19 that.

20 MR. DREEBEN: Yes.

21 JUSTICE KENNEDY: Is it proper for us then
22 to say that it's likely that section (c) also should be
23 a specific -- it's very odd to say that (a), (b) and (d)
24 are specific intents but this one isn't.

25 MR. DREEBEN: Well, Justice Kennedy, I think

1 that it actually cuts the other way because Congress, in
2 the other sections of this statute, focused on an intent
3 to extort. And when it came down to prohibiting threats
4 in 875(c), it did not do that.

5 I think it's also notable that Section 871,
6 which is the Threats Against the President statute,
7 requires that the threats be made knowingly and
8 willfully. And that statute has been universally
9 interpreted, except for the Fourth Circuit, as not
10 requiring any proof of an intent or knowledge that it
11 would be taken as threatening language that was designed
12 to put the President in fear. It has been interpreted
13 just the way the Third Circuit interpreted this statute,
14 and if Petitioner's statutory argument is accepted that
15 the word
16 "threat" has some sort of an inherent meaning of an
17 intent to put somebody in fear, it raises questions
18 about that almost uniform and longstanding
19 interpretation against -- the threat against the
20 president statute. And I think that statute only
21 exemplifies in a magnified way the problems that are
22 created by threats.

23 The problems are that they disrupt people's
24 activities and they put people in fear. Now, the
25 President is unlikely to be put in fear by an

1 assassination attempt that's -- or an assassination
2 threat that is made over the Internet, that the Secret
3 Service intercepts. He is made of hearty stuff. But
4 it's highly disruptive to society. And when the Secret
5 Service is considering what to investigate, it doesn't
6 have access to the private intentions of an individual
7 or his unreasonable interpretation of the language that
8 he actually speaks. The threat causes the harm
9 regardless of the subjective --

10 JUSTICE KAGAN: But, Mr. Dreeben, couldn't
11 you say that about a lot of criminal law, that the harm
12 is the conduct, irrespective of what was in the person's
13 head, and yet we insist on looking very often at what
14 was in the person's head?

15 MR. DREEBEN: Yes. And Congress writes
16 statutes against a background requirement of mens rea,
17 and we accept that here, but the mens rea question is
18 what has to be shown. Is it enough that the person had
19 knowledge of the words that he spoke as an English
20 language speaker understanding their meaning, or does
21 there have to be something more, namely that the
22 government must prove in each case that he intended the
23 bad outcome or that he had knowledge of it or that he
24 was conscious of it and disregarded?

25 There is nothing in the statute that

1 requires any of those things because the harms that are
2 inflicted are just as bad, just as serious, regardless
3 of those.

4 And one final point on the intent question
5 that Your Honor has raised, and that is I think Congress
6 would well have understood that the majority of these
7 cases probably were people who intended to threaten.
8 Some subset of them are people who are reckless. And
9 for Congress it was no matter which those things were.

10 The point was to impose a burden of proof on
11 the government that could potentially immunize --

12 JUSTICE SOTOMAYOR: Well, let's go to that
13 question. It may have been Congress's intent, but does
14 the First Amendment provide an umbrella that cabins
15 their intent?

16 MR. DREEBEN: I don't -- I don't think so,
17 Justice Sotomayor. The fighting words example that
18 Justice Kagan spoke of, which is longstanding in this
19 Court's jurisprudence, focuses on the effect that the
20 words will have on the person who hears them. In the
21 obscenity context, which I know my opponent says is sui
22 generis, there is no requirement that the person who has
23 the items in question has to --

24 JUSTICE SOTOMAYOR: We've been loathe to
25 create more exceptions to the First Amendment.

1 MR. DREEBEN: I don't think that these
2 are --

3 JUSTICE SOTOMAYOR: I don't know where in
4 the common law you have found a -- a hook to say that we
5 should create this as another exception.

6 MR. DREEBEN: Well, I don't think it's an
7 exception. I think it's just part of the
8 implementation.

9 Let me just give one more example. In the
10 defamation context, it's true that for public figures
11 and public officials, the Court has required actual
12 malice, but not for private figures on matters that
13 don't implicate private concern. There is no
14 requirement that there be anything more than negligence
15 in a defamation statute, and the harms that defamation
16 protects are much less serious than the harms that are
17 protected by a threat statute when you are dealing with
18 people's safety.

19 So this Court has calibrated the First
20 Amendment requirements, not with a broad brush that says
21 in all cases there must be mens rea, but in some cases
22 you do not need it. And the true threats doctrine, as
23 it's grown up under Watts and has been implemented and
24 applied by the circuits, has never been a context in
25 which the Court has thought it necessary to layer on

1 some kind of intent that is not in the statute.

2 JUSTICE ALITO: Well, this is -- well, why
3 is this really a question of mens rea? What was
4 required by the statute is that some thing be
5 transmitted in interstate commerce, and the thing is a
6 threat. So the question is what is this thing? Is it a
7 thing that is intended to cause fear, or is it a thing
8 that just naturally causes fear? Why is that -- I see
9 your time is up, but I wish you had time to answer it.
10 Why is that a question of mens rea?

11 MR. DREEBEN: May I try briefly?

12 CHIEF JUSTICE ROBERTS: You have time to
13 answer.

14 MR. DREEBEN: Justice Alito, there is a
15 background presumption of mens rea, which is we're not
16 going to punish people who have zero culpability. But I
17 entirely agree with Your Honor's evaluation of what this
18 statute focuses attention on. It focuses attention on
19 an expression of an intent to do harm. That's what you
20 have to look at, the expression and the context. Then
21 the question is did the individual know what he was
22 doing? If he did, the statutory analysis is complete.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 MR. DREEBEN: Thank you.

25 CHIEF JUSTICE ROBERTS: 5 minutes,

1 Mr. Elwood.

2 REBUTTAL ARGUMENT OF JOHN P. ELWOOD

3 ON BEHALF OF THE PETITIONER

4 MR. ELWOOD: Thank you.

5 Now, when we're trying to figure out what
6 Congress meant when it enacted the statute, I think it's
7 valuable to look at what the traditions were at the
8 time. And as I pointed out, in State v. Benedict, a 19 --
9 an 1839 Vermont case, and in the Wharton treatise from
10 1957, which bookend the period in which the statute was
11 enacted, both of those require showing that the speaker
12 knew he was putting the listener in fear.

13 And the first time the government had --

14 JUSTICE SCALIA: I thought you said it
15 required intent the last time you -- you -- you referred
16 to those two?

17 MR. ELWOOD: I've been -- I've been accused
18 of changing my position. Our point is that when you say
19 something with knowledge that something is certain to
20 happen, that that is intent. That is -- under the
21 LaFave. It's both purpose and that is kind of knowledge
22 plus are both a form of intent, which, by the way, JA-
23 22, we did ask for a knowledge instruction.

24 But on both sides of that bracketing the
25 period when it was enacted, they said you got to have

1 intent to place this person in fear. The first case the
2 government can point to that unequivocally says we're
3 going to hold people to the meaning of -- we're going to
4 hold people criminally responsible for what an English
5 speaker would understand this to mean is 1966 in I think
6 the Pierce case. And all the cases after that, it's a
7 relatively recent phenomenon that -- that this has
8 happened.

9 So, I mean, when you are looking at what
10 Congress would have been thinking at the time, the
11 standard understanding at the time was that a person had
12 to know that they are going to be putting someone into
13 fear.

14 Now, the government's theory is that it is
15 enough to make someone criminally responsible if you
16 know -- you're a speaker of English and you know the
17 words you are saying. But I don't think there is any
18 reason, really any different reason why, just as -- even
19 the government would say if you are not a native English
20 speaker, you'd give more slack. But we've all had
21 experiences where we all know that words can have two
22 different meanings. We give the example of Bob Woodward
23 in his book where the White House is saying, you'll
24 regret it. He interpreted that as a threat. The other
25 side just said, look, you're going to think better of

1 this down the road.

2 It's a mild example, but the government
3 wants to criminalize it when you have two people who
4 have -- I mean, we both know what these words are
5 capable of meaning. But for "the turn or burn for the
6 blood of tyrants" example, we know what -- English
7 speakers know what those, what those words generally are
8 capable of meaning, but what we don't know is what they
9 are meant to mean in this particular case. And the
10 Government wants to impose a 5-year felony liability on
11 any time there is a disagreement between those two
12 parts, between the understanding of the speaker and
13 understanding of the listener.

14 Now, I wanted to point out because
15 Mr. Dreeben, in his -- in his jury argument -- stage of
16 the argument, you know, talked about how, you know,
17 after the PFA was granted, he continued to make
18 arguments. I want to point out page 329 of the Joint
19 Appendix, which is 3 days before the protection from
20 abuse order was ordered, to the idea that he just came
21 upon rap as a way of threatening his wife. There is a
22 long and painful-to-read rap there which has nothing to
23 do with his wife. It's the standard stuff of rap
24 boasting. And he says -- you will notice he says there,
25 in response to a departing Facebook friend who he calls

1 an Al-Qaeda sympathizer, which tends to show that he
2 means this when he says that he is a First Amendment
3 advocate, he says: I do this for me; it's a
4 therapeutic.

5 So the idea that this is a recent invention,
6 there is something to -- there is stuff you can point to
7 to show that there was a misunderstanding between the
8 two of them because when both the speaker and the
9 listener focus on different things when they're talking
10 about context. If you could look at page 344, this
11 is a page that shows this is the only record of the
12 standard disclaimer which appeared on his web page which
13 says, "All content posted to this is strictly for
14 entertainment purposes only."

15 And, again, you can imagine a situation
16 where somebody says, I'm -- I'm posting this for
17 entertainment purposes only.

18 You can see the number of other things he
19 posts in the style of rap.

20 JUSTICE ALITO: Well, this sounds like a
21 roadmap for threatening a spouse and getting away with
22 it. So you -- you put it in rhyme and you put some
23 stuff about the Internet on it and you say, I'm an
24 aspiring rap artist.

25 And so then you are free from prosecution.

1 MR. ELWOOD: And the jury -- the prosecution
2 would be perfectly free to point out all the things that
3 they find on the phone that they can say, this is
4 inconsistent with that theory.

5 And I'll have to -- you have to point out
6 this is the only threats case I can think of where
7 somebody is saying, this isn't a threat, this isn't a
8 threat, this isn't a threat.

9 When you look at, for example, the Jeffries
10 case that came up from the Sixth Circuit and was in
11 front of the Court in October of 2013, there he says,
12 I'm not kidding, judge.

13 Ordinarily, I mean, it kind of diminishes
14 the value of a threat if the person doesn't know if
15 they're being threatened.

16 JUSTICE ALITO: Well, what do you say to the
17 to the amici who say that if your position is adopted,
18 this is going to have a very grave effect in cases of
19 domestic violence? They're just wrong, they don't
20 understand the situation?

21 MR. ELWOOD: I mean, it is in their interest
22 to have a standard that requires no mens rea because
23 it makes it much easier to prove these.

24 May I finish?

25 CHIEF JUSTICE ROBERTS: Mm-hmm.

1 MR. ELWOOD: But the fact of the matter is
2 many States, including the States that you would really
3 want to have if you're going to win the Electoral
4 College, California, Texas, New York, all of these
5 States have a subjective intent requirements, and the
6 government has never shown that those States, very
7 populous States, have had any trouble from protecting
8 their populace from fear.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 The case is submitted.

11 (Whereupon, at 12:01 p.m., the case was
12 submitted.)

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