

No. \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

ROCCO TINOCO — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROCCO TINOCO  
(Your Name)

37910 N. 45<sup>th</sup> AVE.  
(Address)

PHOENIX, ARIZONA 85086  
(City, State, Zip Code)

NA  
(Phone Number)

## QUESTION(S) PRESENTED

### Question #1

Whether a mental state of recklessness - absent subjective intent to threaten - in conveying a threat is sufficient to support a conviction under 18 U.S.C. § 875(c) and any other threat statute(s)? That is, as applied, may a defendant be wrongly convicted solely under a recklessness standard in true-threat prosecutions?

### Question #2

Whether interpreting 18 U.S.C. § 875(c) and other threat statutes to include statements made without a subjective intent to threaten, chills the expression of protected speech? That is, may allowing a conviction under § 875(c), as applied, to include statements made without a subjective intent to threaten violate the First Amendment?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 03/28/2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 05/14/2018, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### 18 U.S.C. §§ 115 (a)(1)(B) and (b)(1)

Whoever... threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b). A threat made in violation of this section shall be punished by a fine under this title or imprisonment for a term of not more than 10 years, or both, except that imprisonment for a threatened assault shall not exceed 6 years.

### 18 U.S.C. § 875 (c)

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

## STATEMENT OF THE CASE

### A. Nature of the Case; Course of Proceeds

On July 20, 2016, a federal grand jury in Las Cruces, NM, indicted the petitioner (hereafter referred to as Tinoco) on six counts of threatening a federal official, in violation of 18 U.S.C. §§ 115(a)(1)(B) and (b)(1), and four counts of using the internet to communicate a threat, in violation of 18 U.S.C. § 875(c). CR 131; APLEE. SUPP. APP. 141-145.<sup>1</sup> Tinoco pled not guilty to all charges and a jury convicted Tinoco of all charges on October 19, 2016. CR 221; APLEE. SUPP. APP. 154. On April 12, 2017, the district court imposed a sentence of 63 months, to be followed by three years of supervised release. RT 04/12/17 28-33; CR 246; APLEE. SUPP. APP. 146-153. Following the entry of judgment on April 14, 2017, Tinoco filed a timely notice of appeal on April 28, 2017. CR 247. On March 28, 2018,

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<sup>1</sup> "CR" refers to the Clerk's Record, followed by the document number(s). "RT" refers to the Reporter's Transcript, followed by a date and page number(s). "ER" refers to the Excerpts of Record, followed by the page number(s). "APLEE. SUPP. APP." refers to the Supplemental Appendix, followed by the relevant page number(s). "Op. Br." refers to the Opening Brief, followed by the page number(s). "Re. Br." refers to the Reply Brief, followed by the page number(s). "Pet. Reh'g" refers to the Petition for Rehearing, and Rehearing En Banc, followed by the page number(s). "Ex." refers to an Exhibit, followed by the number(s). "Ex. 7" is also referred to as "RT 03/18/15" followed by the page number(s). "Ante" or "Post" refers to this petition, followed by the page number(s).

the United States Court of Appeals for the Tenth Circuit affirmed the jury's conviction on all counts. CR Unknown. On April 24, 2018, Tinoco filed a timely Petition for Panel Rehearing and Rehearing En Banc that was denied on May 14, 2018. CR Unknown. On June 19, 2018, a Motion for Stay of Mandate was denied. CR Unknown. Tinoco now invokes the jurisdiction of this court under 28 U.S.C. § 1254(1).

## B. Statement of Facts

### 1. The Offense Conduct

#### a. The Threat at the Checkpoint

On March 18, 2015, Tinoco drove his vehicle southbound through the United States Border Patrol Checkpoint in Deming, NM, which is not controlled. RT 10/18/16 11, 25-26. After passing the checkpoint, Tinoco made a U-turn and entered the controlled northbound portion, telling the primary agent that he wished to speak with them. Id. 11-12. Tinoco entered the secondary checkpoint area and encountered several agents, including Agent R.F.. Id. 30; Ex. 102. Tinoco informed all the agents present he was recording the conversation (this transcript later became introduced as Ex. 7; RT 10/18/16 96.), and announced that he might have a pound of marijuana in his vehicle. RT 10/18/16 35, 37. Based on this

statement agents began a search of his vehicle. RT 10/18/16 37-38. As agents conducted the search, Tinoco continued speaking, mainly telling agents he did not think they had authority to search. Id. 41-42. R.F. who was actively involved in searching the vehicle, testified as follows:

I believe the first threat was... if we were iron deficient, he had banana clips for us, and he could give us iron and potassium. And I took the banana clip and all that to - a banana clip is a magazine for a gun, and the iron, I'm guessing he was talking about bullets.

Id. 44. In response to questions by the prosecutor, R.F. confirmed that Tinoco made the following threats: "[F.], I'm gonna have your head, [F.]... [F.], you are one of the ones I will have, sir ... If you're iron deficient... I will supply you with the necessary iron[.]" Id. 45. These statements became the basis for Count One of Tinoco's 3rd superseding indictment, Threatening to Assault a Federal Law Enforcement Officer. When asked to describe Tinoco's demeanor, R.F. testified "he was not [smiling]." Id. 46; Cf. Ex. 1-2. R.F. testified that Tinoco would "sometimes" use the phrase "figuratively speaking" but that he "didn't take him to be joking when he said 'figuratively,'" and that despite other agents that may have been joking or laughing with Tinoco, he "was still worried" and made clear he was taking all

threats seriously. RT 10/18/16 46-48. The agents finished their search of the vehicle and found no contraband. Id. 42. Despite Tinoco's threats toward Agent R.F., Supervisory Border Patrol Agent D.G. made the decision not to arrest him and allowed Tinoco to depart the scene. Id. 48. It should be noted that throughout these events, there was no objective manifestation of threatening physical conduct on behalf of Tinoco according to R.F.'s perspective as a reasonable officer. Id. 88-92; Ex. 154.

The transcript of this encounter reveals its version of events differently. As an introductory matter, Ex. 7 reveals Tinoco's intent of conducting an inquiry on officials and retaliating against their discretion by way of civil complaint. RT 03/18/15 2, 5-6. Additionally that his objective in visiting the checkpoint being to establish recognition of his constitutional rights. Id. 51; Re. Br. 3; Pet. Reh'g 7, 11-12.

Ex. 7 reveals Tinoco's frequent use of figurative and metaphorical language when speaking to agents. On multiple occasions he uses the expression of "having a shootout" with agents, or "shooting it out" to illustrate the concept of settling disputes in court. For instance, on one occasion, referencing his civil complaint against the Sheriff's Department (Id. 9), Tinoco states: "we'll sort it out in court... [B]elieve me, we will." Id. 11. "Look at this [civil complaint]. I've been shooting it out with officials since

I started, boss, and I'll shoot it out with all of you gentlemen, too." RT 03/18/15 12. Then, on another occasion in a conversation with Supervisory Agent D.G. regarding conflicting views on First Amendment rights (Id. 47-50.), he states: "Okay... [w]e'll shoot it out, too, boss, figuratively in court." Id. 52. In another example, Tinoco uses a metaphor of "having Franco" or "having his head" to illustrate the concept of relieving R.F. of his official duties:

[Tinoco]: Franco, you are one of the ones I will have, sir.

[BPA]: You're going to have me?

[Tinoco]: Yes. Do you want to talk right now? Your refusal to talk, Franco, I will punish you mercilessly, Franco.

[BPA]: Ooh.

[Tinoco]: You are the one... who carried out that illegal search, and you are the one who will pay.

Id. 30.

[BPA]: He's still conducting the search.

[Tinoco]: Oh, going through all the garbage, huh? Franco, I'm going to have your head, Franco. Figuratively speaking, in court, I will have your badge Franco. I will say in the paperwork he went through all [the] garbage ... th[inking] he had the authority... to find whatever fact.

Id. 32-33.

Next, in response to Tinoco's threat in Count One, Ex. 7 reveals the immediate conversation that ensued:

[BPA]: You're threatening a federal officer, bro.

[BPA]: He's a pretty good friend, (emphasis added.)

[Tinoco]: Figuratively. Figuratively.

[BPA]: [I]t's the 3rd time you did that.

[Tinoco]: What's that? [W]e can shoot it out, gentlemen. I will let you know from the beginning I will have established that I was speaking figuratively and that you took it out of proportion. Franco, shall we talk now or no?

[BPA]: I don't have anything to say.

[Tinoco]: [Y]ou don't want to talk to me, Franco?

[BPA]: Not that I want to.

RT 03/18/15 35-36; Op. Br. 10-12 (emphasis added).

Finally, an inquiry on behalf of Supervisory Agent D.G. reveals conclusive proof of Tinoco's state of mind on March 18, 2015:

[BPA]: I've got a couple questions for you, sir. ... Do you have any plans or intent to cause any harm physically to anybody?

[Tinoco]: Physically, no, sir... None whatsoever.

[BPA]: Do you intend or plan on causing any damage to any property?

[Tinoco]: No. Literally, no. Figuratively... Through the courts... Civil suits... that's about the only thing.

[BPA]: Do you intend to go and physically cause property damage?

[Tinoco]: No, sir. I can't do anything that would put me in jeopard[y] for not being a responsible parent to my son... So I will not go and blow up a building or hurt somebody or kill somebody, because that would take me away from my son[.]

Id. 100-102. "It was all an example, a figure of speech." Id. 106.

#### b. The Threat at Wal-Mart

A few days later on March 20, 2015, Agent R.F. and a friend of his who is also a Border Patrol Agent, R.B., were

both off-duty in civilian clothing, and shopping with their families at the Deming Wal-Mart when they saw Tinoco. RT 10/18/16 54, 114; Op. Br. 10, 15; Det. Reh'g 3, 11. Agent R.F. made sure his family left the store then approached (emphasis added) Tinoco and spoke with him while Agent R.B. stood by witnessing what occurred. RT 10/18/16 56-59. The Wal-Mart video of this incident, introduced as Ex. 188, captures Agent R.F. walking up to Tinoco while he has his back turned and confronting him, encroaching upon his personal space, meanwhile Agent R.B. is nowhere to be seen in this footage. Id. 178-180; Ex. 188 at 6:02:49. Agent R.F. testified that Tinoco made the following threat: "He stated that we could have a shootout, he's been having them since he was little..." RT 10/18/16 61; Cf. contextual factors, Ante at 7-8. In response to questions by the prosecutor, R.F. confirmed that Tinoco made the following threats: "Let's have a shootout and end this right now... I've been at shootouts before. I know what I'm doing." Id. These statements became the basis for Count Two of the 3rd superseding indictment, Threatening to Assault a Federal Law Enforcement Officer. When asked about Tinoco's demeanor when he issued the threats at Wal-Mart, R.F. testified that Tinoco "was serious... he was not laughing" and "was angry," and that "I believed him" when he made the threats. Id. Despite the life-threatening nature of this encounter, R.F. neglected to report this incident to authorities

(RT 10/18/16 102.), yet retained the common courtesy of shaking hands with Tinoco upon departure. Id. 63; Re. Br. 3.

### C. Threats Made on Facebook

The following day on March 21, 2015, Tinoco logged into his account on social media website Facebook and posted the following message: "[BPA D.G.] I CAN BE SURE TO COME AT YOUR BRAIN WITH A HAMMER DRILL AS IF I WAS SEARCHING FOR FUCKING GOLD..." Ex. 18 at 17:57:37 UTC; RT 10/18/16 129, 164; Op. Br. 3, 13-14; Cf. contextual factors, Ex. 18 at 17:56:32, 17:54:56 UTC, and RT 10/18/16 62, and Ante at 8. This post became the basis for Counts Three and Four of the 3rd superseding indictment, Threatening to Assault a Federal Law Enforcement Officer, and Use of Interstate Commerce to Transmit a Threat.

Based on the statements made toward Agent R.F., the United States Attorney's Office for the District of New Mexico sought a search warrant for the recording device, which the Federal Bureau of Investigation believed to be at Tinoco's residence. RT 10/18/16 131. On April 3, 2015, United States Magistrate Judge C.G. reviewed the application for a search warrant and authorized the FBI to search Tinoco's home. Id. 135-138. Based on this order, FBI agents searched Tinoco's home on April 6, 2015. Id.

On April 9, 2015, Tinoco logged into his account on the social media website Facebook and posted the following message:

[G.], I CAN TELL YOU RIGHT NOW YOU, YOU ARE A SUPERSTAR.. SUPERSTAR.. I CAN SEE THE CAMERAS EVERYWHERE... SMILE HONEY... YOU GONNA BE FAMOUS...! IM SO JOYEOUS I CAN HARDLY CONTAIN MYSELF... EXTRA, EXTRA, READ ALL ABOUT IT.. 32 HOLES IN YOUR BRAND NEW OUTFIT[.]

Ex. 20 at 01:41:58 UTC; Ex. 19 at 01:44:21 UTC; RT 10/18/16 165-166; Op. Br. 3-4; Cf. Contextual factors, Ex. 20 at 00:30:57, 00:49:56, 01:27:55 UTC (emphasis added). Tinoco's post toward Judge C.G. gave rise to Counts Five and Six of the 3rd superseding indictment, Threatening to Murder a United States Judge, and Use of Interstate Commerce to Transmit a Threat.

On April 10, 2015, Tinoco logged into his account on the social media website Facebook and posted the following message:

[§] 13-702... THE CONSTITUTION OF THE STATE OF NEW MEXICO HAS THE RIGHT BY LAW TO CONDEMN THE ACTIONS OF JUDGE [G.], AND HER ESTABLISHMENT... WHICH ARE FOUNDED UPON THE VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE CITIZENS OF NEW MEXICO... I SHALL [FIGURATIVELY SPEAKING] CUT YOUR FUCKING HEAD OFF WITH THIS SHIT... THIS IS MY MACHETE... FOR YOUR IGNORANCE DOES NOT CONSTITUTE AUTHORITY....

Ex. 19 at 23:27:31 UTC; Op. Br. 4-5; RT 10/18/16 167. This post forming the basis for Counts Seven and Eight of the 3rd superseding indictment, Threatening to Murder a United States Judge, and Use of Interstate Commerce to Transmit a Threat.

Finally, on April 11, 2015, Tinoco logged into his account on the social media website Facebook and posted an entry that

gave rise to Counts Nine and Ten of the 3rd superseding indictment, Threatening to Assault a United States Judge, and Use of Interstate Commerce to Transmit a Threat:

JUDGE [G.], I'VE EXPECT THIS FROM YOU... EITHER WAY, WHEN ALL IS SET AND DONE, SOMEONES MOTHERFUCKING FINGERS ARE BEING CUT OFF [SPEAKING FIGURATIVELY]. ARE THEY MINE OR YOURS?...

Ex. 21 at 03:25:07 UTC; RT 10/18/16 #8-1169; Op. Br. 5.

d. Tinoco's Comments Regarding his Statements on Facebook

Agent Downey testified that he was present for multiple statements by Tinoco which shed light on his state of mind and motive:

Q. What conversations, if any, did you have with the defendant about the actual words he used on Facebook [?]

A. We asked him... what he believed the people who received those threats... what their perception was of those threats... if (emphasis added) they would feel threatened by those threats, and he said, "Of course they would."

RT 10/18/16 145; Op. Br. 6; Re. Br. 2, 5; Pet. Reh'g 3, 9, 11.

Q. [R]eferring to the conversation that you've already testified about... do you recall Agent Davis... talking to him about... people feeling threatened?

A. Yes.

Q. [D]escribe the defendant's reaction to that. Describe the conversation that took place.

A. He felt it was a matter of fact that they wouldn't feel threatened (emphasis added).

Q. Did he seem to give a reason... [or] justification for why he was making the

statements he was making on Facebook?

A. He wanted the media attention. He wanted the attention... that Facebook would give him to his Constitutional rights.

Q. [F]or what?

A. For the violations... he felt... was being violated and... that he was going to solve the problem himself

RT 10/18/16 159-160; Op. Br. 6-7; Re. Br. 5-6; Det. Reh'g 7.

e Testimony Regarding Tinoco's Communications on Facebook

Agent Daoney also testified regarding Tinoco's communications on Facebook:

Q. [P]art of the settings on the Facebook account, right, is that I can post something... [Lor] Can actually send a message, right?... I think it's called messenger... You can actually send a message to a person?

A. Yes.

Q. And there was nothing in the Facebook accounts where Mr. Tinoco sent Judge [G.] any messages privately or publicly. Did he?

A. No.

Q. He didn't send any messages publicly or privately to... Agent [F.], did he?

A. No.

Q. Or any other Border Patrol agents that were there, right?

A. Correct.

Q. He's not even friends with them on his Facebook account, is he?

A. No.

Q. And he never asked to be their friends on Facebook, did he?

A. No.

Q. So again, the operative word is "if" somebody were to see this, they may think of it as a threat, right?

A. They may perceive a threat... Right.

RT 10/18/16 188-189; Op. Br. 7-8; Re. Br. 5; Det. Reh'g 3, 8-10.

Q. The operative word again being "if."  
If [they] didn't see it, there's no threat, is there?

A. Correct.

Id.; Cf. Ante at 13 (emphasis added).

Magistrate Judge C.G. testified regarding Tinoco's communications on Facebook:

Q. [B]ack in March of 2015, did you have a Facebook account?

A. No.

Q. In April of 2015, did you have a Facebook account?

A. No.

Q. And with regard to this case, did you ever see any threats by Mr. Tinoco?

A. Yes.

Q. And how did you see those threats?

A. The marshals came to my office and showed them to me... They put me on detail... [and] spent the night at my home and stayed with me until midafternoon the next day.

Q. You didn't ask them to do that, did you?

A. No, I did not.

RT 10/18/16 198-199; Op. Br. 7-8; Re. Br. 5; Pet. Reh'g 3, 8, 10.

Supervisory Border Patrol Agent D.G. did not testify at trial. RT 10/18/16 212.

B. 2. Issue

18 U.S.C. § 875(c) provides in relevant part:

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

At issue in this case is the mens rea with respect to the threatening nature of the communication. Tinoco was

convicted of violating this provision under instructions that required the jury to find "that the defendant intended the communication to be received as a threat, or had knowledge that his words would be viewed as a threat, and not as a joke, warning, or hyperbolic political argument." CR 218 at No. 33.

An analysis of the jury's instruction indicate that the mens rea may have been satisfied in either of two ways: (1) a showing of the defendant's subjective intent to threaten, that is, that the defendant made or transmitted a statement "to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Virginia v. Black, 538 U.S. 343, 360, 155 L. Ed. 2d 535, 123 S.Ct. 1536 (2003); or (2) applying a standard of recklessness to the transmission of the defendant's communication, that is, showing that the defendant acted in such a way as to have made or transmitted a statement with knowledge "that others could regard his statements as a threat, but h[aving] deliver[ed] them anyway." Elonis v. United States, 135 S.Ct. 2001, 2014, 192 L. Ed. 2d 1, 20 (2015). Additionally, the "threat must be distinguished from what is constitutionally protected speech." Watts v. United States, 394 U.S. 705, 707, 22 L. Ed. 2d 664, 89 S.Ct. 1399 (1969). As to what constitutes a threat, the definition may be said to implicate both objective and subjective components: (1) the intent of

what the statement conveys, an objective inquiry; and (2) the mental state, or intent, of the author, a subjective inquiry. See Elonis, 192 L Ed. 2d at 12.

On appeal, the United States Court of Appeals for the Tenth Circuit, in its Order and Judgment, filed March 28, 2018, affirmed the jury's conviction on all counts finding:

[a]mple evidence... from which a rational trier of fact could have found the statements to be "true threats," including (1) R.F.'s testimony that he took the threats seriously; (2) Tinoco's admission to Downey that people who received (emphasis added) his threats would feel threatened, and (3) Tinoco's statements: "I mean every word" and "You can quote me."

CR Unknown 7; See Appendix A.

First, R.F.'s testimony can hardly be considered credible evidence. See Ante at 7-7; Cf Ante at 8-9 (emphasis added).

Next, Tinoco's statements of "mean[ing] every word" and "you can quote me" can reasonably be disposed of as conclusive proof of a subjective intent to threaten, for to "quote" Tinoco to "mean every word" would require consideration of his statements in context, and not at their primary literal meaning:

Q. [O]ne of the things that the Government talked to you [SA Downey] was... "You may quote me, I mean every... word." Right?

A. Yes.

Q. [Two] of all the... words that he says [is] "figuratively speaking," right?

A. Yes.

Q. So you may quote him on that, that that's what he means, figuratively speaking?  
A. Yes.

RT 10/18/16 186; Op. Br. 3-5; Re. Br. 4; Pet. Reh'g 6.

Q. [S]peech can be very tricky sometimes, right?

A. Yes.

Q. [Y]ou can place conditions on speech, right?

A. Yes.

Q. You can put "figuratively speaking" in parens and that changes the meaning of the sentence, right?

A. Yes.

Q. And speech can be taken out of context. Isn't that right?

A. Yes.

RT 10/18/16 191-192; Id.; Id.; Id.

Thus, Tinoco's conviction was fundamentally upheld by the court under a recklessness standard in conveying a threat hinged upon a hypothetical question where the condition precedent was not satisfied, that is, the victims never received any statements on behalf of Tinoco. See Ante at 13-15 (emphasis added).

#### a. Question #1

whether a mental state of recklessness - absent subjective intent to threaten - in conveying a threat is sufficient to support a conviction under 18 U.S.C. § 875(c) and any other threat statute(s). That is, as applied, may a defendant be wrongly convicted solely under a recklessness standard in true-threat prosecutions? See Ante at 9, 13-14 (emphasis added).

This Court acknowledged in Black, Supra, that "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." 538 U.S. at 358. Given the metaphorical and figurative context of Tinoco's statements, as well as other forms of expression, Tinoco exhorts this Court to readily agree that this case should therefore be governed by First Amendment principles. See Ante at 7-8, 11-13; Op. Br. 2-15; Re. Br. 4; Pet. Reh'g 5-7, 9, 11-12.

In United States v. Heineman, 767 F.3d 970, 975, 978 (10th Cir. 2014), the court ruled as a matter of law, the First Amendment mandates the government to prove in true-threat prosecutions the defendant intended the recipient to feel threatened in order to be constitutionally convicted of making a "true threat." Id. In United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2015), the court "conclude[d]" that speech may be deemed unprotected by the First Amendment as a 'true-threat' only upon proof that the speaker subjectively intended the speech as a threat." Id.

In Elonis, 135 S.Ct. at 2013, 2018, this Court held that negligence (i.e. general intent) is insufficient to support a conviction under section 875(c), but "[l]e[ft] open the possibility that recklessness may be enough." Id.

In its opinion delivered by Chief Justice Roberts, expressing the view of 7 members of this Court, when federal criminal statutes are silent on the required mental state, as in this case, the Court reads into the statute "only the mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* 135 S.Ct. at 2010 (internal quotation marks omitted). "In some cases, a general requirement that a defendant act knowingly is [sufficient]" but "[i]n other instances, however, requiring only that a defendant act knowingly would fail to protect the innocent actor." *Id.* (internal quotation marks omitted). "In such a case... the statute would need to be read to require [specific intent]." *Id.* (internal quotation marks omitted). Hence, applying a particular standard in one case may be inappropriately applied in another, and Courts should therefore be pragmatic in applying standards on a case by case basis.

Upon examining all the facts of this case, there may easily be found an underlying political theme that is consistent throughout the entire record when viewing evidence in context with surrounding statements and events. See' Ante at <sup>7-8 13-14</sup> ~~4-5, 10-11~~; Op. Br. 3-15; Re. Br. 3-6; Pet. Reh'g 5-12. As opposed to the facts in Heineman, 767 F.3d at 972, Tinoco never communicated, or attempted

to communicate any statements to the victims, See' Ante at 14-15, and as opposed to the facts in Elonis, 135 S.Ct. at 2017, there is no evidence indicating Tinoco associated with the same group of individuals as the victims, nor that he possessed knowledge if they owned a Facebook account, much less knowledge if the victims would ever read his statements. Id. Based on these facts Tinoco "felt it was a matter of fact that they wouldn't feel threatened." See' Ante at 13. Tinoco's statements were simply threatening words (See' Ante at <sup>16-17</sup> 13-14 (objective/subjective components); Def. Reh'g 3) and that's where his statements ended.

As we apply the Elonis decision using X-Citement Video as one of the several examples the Court used in its opinion, the Court "considered a statute criminalizing the distribution of visual depictions of minors engaged in sexually explicit conduct" and "rejected a reading of the statute which would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers." Id., 192 L.Ed. 2d at 14. The Court reversed, "[h]olding" instead that a defendant must also know that those depicted were minors, because that was the crucial element separating legal innocence from wrongful conduct." Id. (internal quotation marks omitted). In this instance, "the crucial element separating legal innocence from wrongful

conduct" would be that Tinoco must also know that his statements were reaching the victims, otherwise there's no mens rea behind his communication, no intent to cause them fear or intimidation. Op. Br. 7-8. Thus, 18 U.S.C. § 875(c) would need to be read to require the additional element of specific intent under Heineman and Cassel, Supra. See Ante at 19.

Furthermore, using Black, Supra, as another example, See Post at 23, to allow a conviction solely on an act itself without considering the element of subjective intent, would "blur[] the line between [the] two meanings of [communicating a statement]," as opposed to burning a cross, Id., 538 U.S. at 365, and cause a jury to "ignore[]" all of the contextual factors that are necessary to decide whether a particular [statement] is intended to intimidate[,]" Id. at 367, or made with the intent of "engaging only in lawful political speech at the core of what the First Amendment is designed to protect." Id. at 365. The jury would convict a defendant on the act of recklessly communicating statements alone "regardless of the particular facts of the case" especially "where the evidence of an intent to intimidate is relatively weak[.]" Id. at 365-366, and the statute would ultimately "fail to protect the innocent actor." "The First Amendment [should] not permit such a

Shortcut." *Id.*, 538 U.S. at 367. "What is it about nonintimidation threats that makes them so much worse than [true] threats... that the First Amendment allows them to be prosecuted even when the speaker did not intend to instill fear?" Heineman, 767 F.3d at 981.

b. Question #2

whether interpreting 18 U.S.C. § 875(c) and other threat statutes to include statements made without a subjective intent to threaten, chills the expression of protected speech? That is, may allowing a conviction under § 875(c), as applied, to include statements made without a subjective intent to threaten violate the First Amendment? See *Ante* 9, 13-14.

First, it is well settled in Virginia v. Black, *Supra*, that because a cross-burning statute's prima facie provision made it unnecessary for the government to actually prove a defendant's intent, the plurality held the statute violated the First Amendment. *Id.*, 538 U.S. at 365. The court noted that "a burning cross is not always intended to intimidate" but is sometimes used as a "statement of ideology[.]" *Id.* However, the statute's provision as interpreted by the jury instruction "chills constitutionally protected political speech" in that it would allow the arrest, prosecution, and conviction of a person based solely on an act itself - crossburning - regardless of whether done to intimidate

or convey a political message. *Id.*, 538 U.S. at 365. "[T]he provision as so interpreted would create an unacceptable risk of the suppression of ideas." *Id.* (internal quotation marks omitted). See *Ante* at 22.

In *United States v. Gilbert*, 813 F.2d 1523 (9th Cir. 1987), the court upheld against an overbreadth challenge to a provision of the Fair Housing Act that criminalizes "willfully... intimidating" anyone for various reasons related to racial discrimination in housing under 42 U.S.C. § 3631. *Id.* The court observed that "the element of intent... [is] the determinative factor separating protected expression from unprotected criminal behavior" and that "[t]he [subjective] requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." *Id.* at 1529.

Lastly, in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc), the court rejected a First Amendment challenge to the Freedom of Access to Clinics Entrances Act (FACE) under 18 U.S.C. §§ 248(a)(1), (c)(1)(A), which provides a right of action against whoever by "threat of force... intentionally intimidates any person because that person is or has been... providing reproductive health services." *Id.* The court in its opinion wrote

that the reasonable-person definition of a true threat, "coupled with the statutes requirement of intent to intimidate, comports with the First Amendment," *Id.*, F. 3d at 1088, and "Cures whatever risk there might be of overbreadth." *Id.* at 1079.

### c. Petitioners Assertion

Restating *Ante* at 14, ¶ 1, a defendant may, in-fact, be wrongly convicted under a recklessness standard without more. See *Ante* at 9, 13-14, 19-23. Moreover, interpreting threat statutes to include statements or acts irrespective of subjective intent would violate the First Amendment. See *Ante* at 23-24. Perhaps this Court should consider adopting the 9th Circuits opinion in Gilbert, and Planned Parenthood, Supra, as a remedy to First Amendment issues. See *Ante* at 24-25.

"[D]ebate on public issues should be uninhibited, robust, and wide-open (emphasis added), and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L. Ed. 2d. 686, 701, 84 S. Ct. 710, 95 ALR2d 1412 (1964).

## REASONS FOR GRANTING THE PETITION

Tinoco exhorts this Honorable Court to grant this petition because it squarely presents a set of facts and circumstances perfect for answering the question Justice Alito and Justice Thomas believed this Court should have decided in Elonis v. United States, Supra, whether recklessness suffices for liability under Section 875(c). Id., 135 S. Ct. 2013. Contrary to Justice Alito's belief, and any other Justice who should choose to adopt his position that recklessness is enough, Id., 192 L. Ed. 2d 11, applying a recklessness standard to true threat prosecutions may also be insufficient without more. See' Ante at 13; Cf. Ante at 9, 14.

The facts of this case clearly indicate that because of the events on March 18, 2015, and the FBI's subsequent search on Tinoco's residence, he made several sharp attacks against federal officials on the social media website Facebook, roughly stating in a very offensive manner using figurative terminology: "I disagree with your discretion, and we will settle our differences in court." Ante at 7-8, 10-13. Statements which were originally and always intended as mere political speech, never to be received by the victims, and meant to underscore the idea that Tinoco was going to diligently, and lawfully,

rebeliate against their discretion in Court. Ante at 7-14, 20-21. A theme which is consistent throughout the entire record. Id. This in turn raises the very same question federal agent inquired from Tinoco, if, hypothetically speaking, the victims were to have personally received these statements on his behalf, would they possibly feel threatened? "Of course they would." Ante at 13. However, doing so would be to cross the line separating legal innocence (protected political speech), into wrongful conduct (unprotected statements intended to intimidate). Ante at 21-22. Based on this admission, the Court of Appeals decision to affirm makes evident it adopted the position that a recklessness standard alone suffices to support a conviction under 875(c). See Appendix A at 7. As a result, all contextual factors discerning political speech from statements intended to intimidate, erroneously, and improperly, become irrelevant which also has a chilling effect on protected political speech under the First Amendment. Ante at 22-24.

In the ever increasing age of technology and the use of social networking in cyberspace, the Court will find that conflicts regarding free speech under the First Amendment will

proliferate, and the Court should therefore choose to undertake the task of granting this petition now to help further define what the law is, what the law is not, where the confines of protected and unprotected speech may be said to begin and end, and the criterion that lower courts should use in deciding these parameters.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Rocco D. Tinoco

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