No. 19-1051

In the
Supreme Court of the United States

STATE OF KANSAS,
Petitioner,
v.

TIMOTHY C. BOETTGER AND RYAN R. JOHNSON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the First Amendment prohibit a State from criminalizing threats to commit violence communicated in reckless disregard of the risk of placing another in fear?

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REPLY BRIEF

This Court should grant certiorari to decide whether the First Amendment permits imposition of criminal liability for a threat conveyed in reckless disregard of the fear it is likely to cause. Respondents concede that there is a clean split on this constitutional question between state courts of last resort, Opp. 11-13, fail in their attempts to dismiss disagreement among the federal courts of appeals, Opp. 8-11, and identify no vehicle issues with these cases. Opp. 23. Three members of this Court have stated it should resolve this important and recurring constitutional question that has confounded lower courts since *Virginia v. Black*, 538 U.S. 343 (2003). These cases permit this Court to resolve the fully developed split in authority on an important question of constitutional law.

I. The Split Is Mature and Intractable.

Nearly two decades ago, this Court decided *Virginia v. Black*, 538 U.S. 343 (2003). Since then, lower courts have been confounded about what level of intent a speaker must possess to communicate a true threat outside of the First Amendment's protections. A pronounced and fully developed split has emerged in the federal and state courts, as the Kansas Supreme Court recognized. *See* Pet. App. 20-21, 31-32. That split should be resolved.

Certiorari is appropriate because "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort." Sup. Ct. R. 10(b). Respondents concede that "three state courts of last resort have

addressed the question of whether a state statute that criminalizes reckless threats violates the First Amendment," with Georgia and Connecticut "uph[olding] recklessness provisions in their anti-threat statutes, contrary to the view of the Kansas Supreme Court." Opp. 11. This question is of substantial importance because it implicates the State's duty to protect its most vulnerable citizens. Pet. 21-27.

There is also a split among the federal courts that have considered this constitutional question. *Contra* Opp. 8. Contrary to the Kansas Supreme Court's conclusion that the First Amendment requires a specific intent to threaten the victim, most circuit courts of appeals have held that the First Amendment does not require *any* subjective intent to threaten. Pet. 12-13. If no subjective intent is required, then a reckless mens rea is more than sufficient.

Respondents undermine their assertion that there is no circuit split by acknowledging that the Kansas Supreme Court linked its decision to those in the Ninth and Tenth Circuits. Opp. 8-9. Both circuits, like the Kansas Supreme Court, held that a speaker must possess a specific intent to threaten. Pet. 8. But as the Tenth Circuit expressly recognized, its opinion conflicted with decisions from other circuits that read *Black* not to require a specific intent to threaten. *United States v. Heineman*, 767 F.3d 970, 979 (10th Cir. 2014) ("Other circuits have declined to read *Black* as imposing a subjective-intent requirement. But the reasons for their conclusions do not persuade us." (citations omitted)). The Kansas Supreme Court

expressly recognized this conflict and disagreed with the circuits on the other side of the split. Pet. 9.

Respondents attempt to minimize the conflict by conflating a statutory analysis with the constitutional question. Opp. 8-11. But this Court's holding in *Elonis v. United States*, 135 S. Ct. 2001, 2011-12 (2015), was limited to the mens rea prescribed by 18 U.S.C. § 875(c); it did not disturb the circuit courts' constitutional holdings. *See United States v. White*, 810 F.3d 212, 220 (4th Cir. 2016). Nor do the circuits' subsequent statutory interpretations of 18 U.S.C. § 875(c) undermine their earlier constitutional holdings as to what the First Amendment permits. *Contra* Opp. 11.

At bottom, there is an irreconcilable split among courts that have considered what level of intent, if any, the First Amendment requires to convey a true threat. The Kansas Supreme Court held that the First Amendment requires reversal of Respondents' convictions. While that rule is reflected in the Ninth and Tenth Circuit decisions, the supreme courts in Connecticut and Georgia have reached the exact opposite conclusion. Numerous federal and state courts have gone even further to hold the First Amendment requires no subjective mens rea. Pet. 12-14. This "Court should . . . decide precisely what level of intent suffices under the First Amendment—a question [it] avoided . . . in *Elonis*." *Perez v. Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in denial of certiorari).

II. Respondents' Attempts to Reinforce the Kansas Supreme Court's Decision Are Unavailing.

Respondents offer two primary arguments to support the Kansas Supreme Court's constitutional holding. Neither is persuasive.

First, Respondents claim that Kansas overlooked *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which they believe "strongly indicate[s] that in the context of true threats a culpable mind requires the prosecution to show subjective intent." Opp. 14. Not so. *Brandenburg*'s use of the word "directed" does not equate to a specific intent. *See United States v. White*, 670 F.3d 498, 511-12 (4th Cir. 2012) ("[T]he *Brandenburg* test only requires that the speaker use specific words advocating unlawful conduct. It does not require that the speaker have a specific intent to incite unlawful conduct."); Merits Brief of the United States, *Elonis v. United States*, No. 13-983, 2014 WL 4895283 at *50 (S. Ct.) (arguing that this Court's description of incitement "may refer to the objective manifestation of intent communicated by the statements" and not specific intent).

Even if *Brandenburg* stands for the proposition Respondents claim, the Court is left with an open question of what level of intent is required in the context of true threats. *Brandenburg*, after all, addressed the doctrinally distinct concept of incitement. *See* Merits Brief of the United States, *Elonis v. United States*, No. 13-983, 2014 WL 4895283 at *51 (S. Ct.) (contending incitement is not analogous to true threats because "[c]riminal conduct is never a

legally 'reasonable' reaction. A prophylactic subjective-intent requirement in incitement, where a reasonable-person inquiry cannot work, does not indicate that both are required in the distinguishable context of true threats"). And in other First Amendment contexts, this Court has held that a reckless state of mind—consciously disregarding a substantial and unjustifiable risk—is constitutionally sufficient. Pet. 20. At most, *Brandenburg* further muddies the First Amendment waters, making this Court's review all the more prudent.

Second, Respondents rely on inapt hypotheticals to assert that Kansas's statute is overbroad. Opp. 14-15. In doing so, they ignore that the context of the speech in question has long distinguished protected speech from true threats. *See, e.g.*, *Watts v. United States*, 394 U.S. 705, 708 (1969). Speech like political statements, artistic expressions, or hyperbolic rap lyrics cannot be interpreted as a serious expression of intent to threaten. The speaker's subjective intent is not what makes these statements permissible.[1]

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[1] Consider the context in which Johnson conveyed his threats: "I'm going to fucking kill your ass," "Try to call the sheriff now, bitch," and "I'm going to burn your shit up." Pet. App. 70-71. He forced his way into his mother's home and ripped the phone from the wall. This occurred the day after Johnson had a violent argument with his wife in the same home. Johnson's words and actions prompted his mother to repeatedly seek emergency intervention. Pet. App. 70-71. It is little wonder that the jury saw through the mother's attempt to later minimize her concern at trial. Indeed, this is a known pattern in cases of abuse. *See* Amicus Br. of Kansas Victims, 15; *see also Elonis v. United States*, 135 S. Ct. 2001, 2017 (2015) (Alito, J., concurring in part and dissenting in part) ("threats of violence and intimidation are among the most favored weapons of domestic abusers"). *Contra* Opp. 22.

Context matters when evaluating threats. A reckless mens rea properly guards the line of constitutional speech.

III. These Cases Are Proper Vehicles to Answer This Important and Recurring Question.

Respondents do not contend that there are any procedural defects in these cases precluding this Court's review. Instead, they attempt to diminish the reach of the Kansas Supreme Court's ruling in three ways. Each is illusory.

First, the semantic differences in state statutes that Respondents identify are immaterial. *Contra* Opp. 16-19. Respondents do not—and cannot—dispute that the Kansas statute shares a reckless mens rea with fourteen other states and the Model Penal Code. Instead, Respondents stray from the question presented by highlighting the "fear" and "commit violence" portions of the Kansas statute, which are irrelevant to the constitutional question presented. Opp. 16-19. The Kansas Supreme Court's holding had nothing to do with any perceived difference between fear and terror or threats to commit violence and threats to commit crimes of violence. Rather, it unequivocally held that the First Amendment demands that a true threat be communicated with a specific intent to threaten and that a recklessness mens rea is insufficient under the First Amendment. Pet. App. 34 (reading *Black* as requiring a specific intent: "This definition conveys that the conduct is intentional."). Nothing in the court's decision can be read as tethering its holding to the statute's use of the terms "fear" or "commit violence."

In any event, both *R.A.V.* and *Black* referred to "protecting individuals from the fear of violence" as a reason true threats enjoy no constitutional protection. *Black*, 538 U.S. at 359-60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). And the Kansas statute does not criminalize all "violent speech," as Respondents incorrectly suggest, Opp. 18, but only threats to *commit* violence. To the extent other statutes have different requirements, those differences matter not to the mens rea inquiry presented here.

Second, Respondents fail in their attempts to exclude statutes with a knowing mens rea from the scope of the Kansas Supreme Court's decisions. Respondents contradict themselves by repeatedly asserting that a "specific intent" is constitutionally mandated, as the Kansas Supreme Court held, while also asserting that the Kansas Supreme Court's decisions do not envelop crimes with a lesser intent. Opp. 14, 18, 22. Specific intent is a greater mens rea than knowingly. *See* Kan. Stat. Ann. § 21-5202(b), (h) and (i). By requiring a specific intent, the Kansas Supreme Court's reasoning necessarily invalidates criminal threat statutes with a mens rea less than "intentionally." Pet. 24-25; States' Amicus Br. 11-12.

Respondents' third criticism—that Kansas cannot identify how many of the 1,800 criminal threat convictions are reckless and how many are intentional—obscures the obvious gravity of the problem in Kansas and beyond. Opp. 16. Their lament is trivial. If even a fraction of those convictions involve

reckless threats (and they do[2]), then a substantial number of convictions in Kansas alone are implicated. Extrapolating that impact to the other states where recklessness has been accepted as an appropriate mens rea establishes that the numbers are significant.

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Kansas has separated criminally culpable threats to commit violence from protected speech by requiring a reckless mens rea. Properly drawing this constitutional line enables the States to fulfill their duty of protecting vulnerable populations from the fear that violence will be committed against them. This Court should grant review to remove uncertainty on this important and recurring constitutional question.

[2] Currently, there are at least twenty-one cases pending before the Kansas Court of Appeals or the Kansas Supreme Court that raise challenges to criminal threat convictions under the Kansas Supreme Court's decisions in these cases. Seven of those are direct challenges to a conviction based on a reckless theory of criminal threat. Case Nos. 16-116,937-AS, 18-120,095-A, 18-120,157-A, 18-120,394-A, 18-120,450-A, 18-119,677-A, 19-121,279-A. Another thirteen cases raise challenges involving defendants attempting to reduce their sentences based on the use of prior convictions for criminal threat. Case Nos. 19-120,151-A, 19-121,527-A, 19-121,542-A, 19-121,636-A, 19-121,640-A, 19-121,673-A, 19-121,696-A, 19-121,699-A, 19-121,706-A, 19-121,729-A, 19-121,770-A, 19-121,833-A, 19-122,167-A. Another case raises both challenges. Case No. 19-120,606-A.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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