NO. _____

IN THE
Supreme Court of the United States

_____ TERM, 20__

CODY RAY LEVEKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa, and the United States Court of Appeals for the Eighth Circuit:

United States v. Leveke, 4:20-cr-00011-001 (S.D. Iowa) (criminal proceedings), judgment entered January 29, 2021.

United States v. Leveke, 21-1335 (8th Cir.) (direct criminal appeal), judgment entered June 21, 2022.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Cody Leveke respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 38 F.4th 662 (8th Cir. 2022) and is reproduced in the appendix to this petition at Pet. App. 26.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on June 22, 2022. Pet. App. 37. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. AMEND. I

> 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. § 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. Introduction

From the very outset of Mr. Leveke's federal threats prosecution, he has maintained that his statements were protected by the First Amendment and were not true threats. He requested a jury instruction that would require the jury to find he had the subjective intent to threaten physical harm. The district court rejected the request. The court also did not instruct the jury that it must find Mr. Leveke knew the communication would be considered threatening by a reasonable listener. In fact, in a *sua sponte* instruction, the court told the jurors they need not concern themselves with the First Amendment and whether Mr. Leveke's statements were true threats.

This Court should grant certiorari for three reasons.

First, lower courts are in disagreement regarding whether the First Amendment requires the government to prove that the defendant had the specific intent to threaten. For decades, courts have disagreed on the *mens rea* requirement for a true threat. In *Elonis v. United States*, 575 U.S. 723 (2015), this Court resolved a split on the interpretation of 18 U.S.C. § 875(c), but did so on statutory interpretation grounds. This Court did not address the disagreement on what the First Amendment requires in a threats prosecution.

As one court noted, "[t]hus, after *Elonis*, the proper test for true threats remains a doctrinal puzzle." *People in Interest of R.D.*, 464 P.3d 717 (Colo. 2020). Some courts require a defendant have the subjective intent to threaten injury. Others

find the First Amendment is satisfied by a reckless *mens rea*. Others, like the Eighth Circuit, only require an objective finding.

The disagreement between courts has created confusion and unfairness. In fact, if the federal government had chosen to charge Mr. Leveke in the jurisdiction the alleged threat was sent—the Ninth Circuit—a higher intent standard would have applied. Yet, because the case was charged in the Eighth Circuit, a lower intent requirement applied.

Second, Mr. Leveke's case is a proper vehicle to address this important and frequently reoccurring issue. The *mens rea* question often arises in threats prosecutions, both in federal and state courts. Several state supreme courts have addressed this question in the past five years. Instead of resolving this split, these courts have trended toward requiring subjective intent, only deepening the division.

Mr. Leveke's case is a clean vehicle to address the issue. The issue was preserved before the district court, and no harmless error or other procedural abnormalities are present. Finally, the *mens rea* question is more important in Mr. Leveke's trial, as his alleged threats were made to a politician.

Third, the Eighth Circuit's decision is wrong on the merits. An objective test is inconsistent with this Court's precedent, most notably *Virginia v. Black*, 538 U.S. 343 (2003). Further, a subjective requirement is more consistent with the need for the government to establish a guilty mind, and prevents the criminalization of speech solely based upon how it is interpreted by the listener.

B. Mr. Leveke is charged with two counts of transmitting threatening communications to a state senator, and the case goes to trial.

On January 21, 2020, Mr. Leveke was indicted on two counts of transmitting a threatening communication in interstate commerce, in violation of 18 U.S.C. § 875(c). R. Doc. 40.[1] The two counts were based upon two separate emails Mr. Leveke sent to Iowa State Senator Herman Quirmbach. *Id.* The first count was based upon a line in Leveke's email: "I'm angry enough to pull a mass shooting down at the State House." *Id.* The second count was based upon a sentence in an email that stated: "The 2nd Amendment exists so we can kill politicians when they don't act in accordance to law." *Id.*

Mr. Leveke requested to proceed pro se, and after a *Faretta* hearing on the issue, his request to proceed pro se was granted. R. Doc. 16. An attorney was appointed as stand-by counsel. *Id.*

Mr. Leveke repeatedly asserted that the prosecution violated his First Amendment rights. He filed motions to dismiss and asserted that his emails did not contain "true threats." R. Doc. 33, 34, 35, 54, 63, 67, 90, 118. The district court denied Mr. Leveke's motion to dismiss, finding the "true threats" issue was a jury question. R. Doc. 225, p. 2; App. 2.

[1] In this petition, "R. Doc." refers to the criminal docket in Southern District of Iowa Case No. 4:20-cr-00011-001, and is followed by the docket entry number. "Trial Tr." refers to the trial transcript in Southern District of Iowa Case No. 4:20-cr-00011-001, and is followed by the volume and page numbers.

The case proceeded to a jury trial. Below is a summary of the evidence presented at trial.

In 2009, Mr. Leveke contacted Iowa State Senator Herman Quirmbach regarding his struggles with removing himself from the sex offender registry for a conviction from when he was a juvenile. Trial Tr. Vol. II, p. 123, 173. Iowa statute allowed for individuals living in the state of Iowa to petition with their local county attorney's office for removal from the registry. Trial Tr. Vol. II, p. 174. However, the law did not provide a procedure for individuals who had moved out of state to petition for removal from the registry. Trial Tr. Vol. II, p. 174. Mr. Leveke lived in Arizona, so he could not petition for removal from the registry under Iowa law as it stood. Trial Tr. Vol. II, p. 174.

Senator Quirmbach introduced a bill to address Mr. Leveke's circumstances. Trial Tr. Vol. II, p. 125. The law did not pass. Trial Tr. Vol. II, p. 125. Senator Quirmbach communicated with Mr. Leveke throughout the process as he was trying to get the bill passed. Trial Tr. Vol. II, p. 126. Senator Quirmbach introduced the bill a second time, but could not get the law passed. Trial Tr. p. 128.

Mr. Leveke challenged the statute in Iowa state district court, and the statute was found unconstitutional. R. Doc. 266, Def. Ex. O-5. The state district court judge also granted Mr. Leveke's request to be removed from the sex offender registry. R. Doc. 266, Def. Ex. O-5. Yet Mr. Leveke's complications from his prior registration

requirement continued, and on September 3, 2019, Mr. Leveke sent Senator Quirmbach the following email:

> Senator Herman:
>
> Law Enforcment has become pretty aggressive against me since the court rulings ending my registration. The Tempe police department have spread more of this bullshit on the internet, and have attempted to file 10+ felonys on me. I have a civil suit against them for libel, however seeing how dirty they are I don't want to pursue it outta fear that they will retaliate against me.
>
> I'm angry enough to pull a mass shooting down at the State House. The law I had the court declare invalid is still on the books.
>
> The legislature is in violation of the constitution, and needs to pass the changes to the law I have proposed. Years have gone by, and you continue to violate.
>
> I am in need of an explanation for this illegal behavior, and the names of the individuals responsible for holding the bill up in the house.
>
> This is why the right to possess a weapon is protected in the constitution. Those that conspired to violate my civil rights and the rights of others under color of law should live in fear.
>
> Currently I'm homeless, $2 to my name, warrant for my arrest. I have done the peaceful thing and fled, as I'm out gunned.
>
> STOP BREAKING THE LAW ASSHOLE!

R. Doc. 242, Gov't Ex. 1A.[2] Attached to the email was a screenshot from a Google search of "Cody Leveke." R. Doc. 242, Gov't Ex. 1B. The screenshots showed his name and picture and indicated Mr. Leveke was a sex offender. *Id*.

[2] In the exhibit submitted to the jury, part of the text is highlighted. Senator Quirmbach highlighted the text about the mass shooting, it was not done by Mr. Leveke. Trial Tr. p. 119.

Later that day, Mr. Leveke sent Senator Quirmbach a second email, which stated:

> Just know you are powerless to stop it. I suggest the legislature walk the line, and stay 100 miles away from violating anyone's right. The police cannot take a gun they don't know about. The guy in Texas was a convicted felon barred from possing the AR but was able to buy buy one anyway. It's an example of how powerless the State is over guns. This guy killed a police officer trying to write him a ticket, after he was fired from his job. I bet that cop was sorry he decided to write that guy ticket when he saw the gun pointed at his head.
>
> This email is an order to the Iowa Legislature to stand down with any attempts to violate the civil rights of anyone. I demand the existing law be taken off the books. The continuing Disobedience to the Constitution by the legislature deserves a violent response at this point. Let's not have it go there senator respect our constitution.
>
> THE 2ND AMENDMENT EXISITS SO WE CAN KILL POLITICIANS WHEN THEY DONT ACT IN ACCORDANCE TO LAW.

R. Doc. 242, Gov't Ex. 2. Included in this email was a link to a news article. R. Doc. 242, Gov't Ex. 2B. The title of the article stated: "Gun law loophole allowed Odessa mass shooting suspect to buy AR-type assault rifle: Sources." R. Doc. 242, Gov't Ex. 2B.

Senator Quirmbach testified at trial. On the day Senator Quirmbach received the first email, he also received a voicemail from Leveke. Trial Tr. Vol. II, p. 128; Gov't Ex. 3. In the voicemail, Mr. Leveke was yelling and swearing. Trial Tr. Vol. II, p. 128. Senator Quirmbach believed the voicemail showed Mr. Leveke was agitated to an "extreme degree." Trial Tr. Vol. II, p. 135. He had never received an email or voicemail like that. Trial Tr. Vol. II pp. 136–37.

Senator Quirmbach sent the email to the Story County Sheriff's Office and individuals within the legislature. Trial Tr. Vol. II, p. 129. He considered this an "imminent threat." Trial Tr. Vol. II, p. 129.

The next day, Mr. Leveke sent a third email. The email stated:

> Senator Herman:
>
> My demands to the Iowa Legislature are are simple. The law has already been overturned by the district Court, yet the Legislature refuses to pass the bill, that would make the law Constitutional.
>
> I am interpreting the failure to act as an act of agression by The Iowa Legislature, and the Polk County Attorney. Both of these entities knowingly and deliberately are violation the Constitutional Right of Citizens to access Courts.
>
> I demand the bill be passed by both Houses of the legislature, and the Govenor sign it as soon as possible.
>
> Those that seek to violate the Constitution will be held accountable and will answer to me.
>
> Understood?

R. Doc. 242, Gov't Ex. 4.

Debbie Kattenhorn, a senior administrative assistant for the Iowa Legislature, testified. Trial Tr. Vol. II, p. 99. Senator Quirmbach forwarded her the first email he received from Mr. Leveke. Trial Tr. Vol. II, p. 102. Kattenhorn stated that she was scared after reading the email. Trial Tr. Vol. II, p. 105. She sent the email to Iowa State Patrol. Trial Tr. Vol. II, p. 106. Kattenhorn stated her and her boss agreed it was the most concerning email they had seen before. Trial Tr. Vol. II, p. 106. She

was instructed to share the email with the entire legislature, and she did. Trial Tr. Vol. II, p. 106.

Katternhorn testified that she did not interpret Mr. Leveke's statement of being "outgunned" to mean he could not be threatening. Trial Tr. Vol. II, p. 107. She believed his reference to the firearm indicated he believed he could use firearms against those who didn't agree with him. Trial Tr. Vol. II, p. 108.

Kattenhorn received Mr. Leveke's second email from Senator Quirmbach on September 4. Trial Tr. Vol. II, p. 108. Kattenhorn described her response to the email: "Well, I agreed with the first sentence that I felt pretty powerless. It felt a little bit like he was flaunting how he could carry this off, and obviously I was quite scared by the final sentence." Trial Tr. Vol. II, p. 112. Kattenhorn testified she believed Mr. Leveke was displaying a pattern of threats. Trial Tr. Vol. II, p. 113. She also forwarded this email to Iowa State Patrol. Trial Tr. Vol. II, p. 113. Mr. Leveke's picture was attached when she forwarded the email, so it could be posted at the entrance of the legislative building. Trial Tr. Vol. II, p. 114.

Mr. Leveke testified on his own behalf. He explained that his emails to Senator Quirmbach were driven by his frustrations with issues with the sex offender registry. Trial Tr. Vol. II, p. 178. The emails discussed his continued issues with the sex offender registry and Mr. Leveke further explained these issues at trial. Even though Iowa courts had removed him from the sex offender registry, Arizona law enforcement officials were still asserting Mr. Leveke was required to register, which was incorrect.

Trial Tr. Vol. II, p. 178. Arizona law enforcement arrested Mr. Leveke for failure to register as a sex offender. Trial Tr. Vol. II, p. 180. Eventually, his attorney confirmed that Mr. Leveke was not required to register and Mr. Leveke was not formally charged. Trial Tr. Vol. II, p. 180. Still, his mugshot from his arrest was posted online, indicating Mr. Leveke was arrested for failing to register as a sex offender. Trial Tr. Vol. II, pp. 180-81.

At this point, Mr. Leveke wanted to reach out to Senator Quirmbach again, due to the continued issues. Trial Tr. Vol. II, p. 180. He wanted to use strong language to get his point across, but did not want to threaten the legislature, so he researched what statements he could make that would be lawful. Trial Tr. Vol. II, pp. 180-81. He researched U.S. Supreme Court case law, including *Watts v. United States*. Trial Tr. Vol. II, pp. 180–81.

Mr. Leveke testified that his emails were not intended as a threat, but instead meant to express his anger and frustration. Trial Tr. Vol. II, p. 183. Further, he testified that his statements regarding firearms were political hyperbole. Trial Tr. Vol. II, p. 186. Mr. Leveke explained he noted that he was peaceful by discussing being "outgunned." Trial Tr. Vol. II, p. 188. He also explained that "answer to me" was in reference to a potential lawsuit, as he had already challenged the statute before. Trial Tr. Vol. II, p. 200.

Overall, Mr. Leveke explained the purpose of the email was to alert the legislature that they were violating his civil rights, as the law was found

unconstitutional but the legislature still failed to take action. Trial Tr. Vol. II, pp. 193–94. The point of Mr. Leveke's language was to get the attention of the legislators. Trial Tr. Vol. II, pp. 200–01.

C. Mr. Leveke requests a jury instruction that would require the jury to find he had the subjective intent to threaten injury. The court denies the request.

Before trial, the district court provided the parties with the proposed jury instructions. The proposed instruction on the elements of the offense stated:

> The crime of interstate communication of a threat, as charged in Counts 1 and 2 of the Indictment, has three elements, which are:
>
> First, that on or about September 3, 2019, the defendant knowingly sent a communication containing a threat to injure another person;
>
> Second, the communication was sent in interstate commerce; and Third, the defendant sent the communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat.
>
> In determining whether the defendant's communication was sent for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat, you may consider all the circumstances surrounding the making of the communication. For example, you may consider the language, specificity, and frequency of the threat; the context in which the threat was made; the relationship between the defendant and the threat recipient; the recipient's response; any previous threats made by the defendant; and, whether you believe the person making the statement was serious, as distinguished from mere idle or careless talk, exaggeration, or something said in a joking manner.

R. Doc. 214.

Mr. Leveke objected to the proposed jury instructions, asserting the instruction did not ensure compliance with the First Amendment and require any threat

constitute a "true threat." R. Doc. 226. Mr. Leveke argued the government must prove he had the subjective intent to threaten violence. R. Doc. 226. The government resisted, asserting that no definition of threat is necessary. Trial Tr. Vol. I, p. 77; App. 9. The district court rejected the request. Trial Tr. pp. 76-77; App. 8-9; R. Doc. 234. The jury was instructed as initially proposed by the district court. R. Doc. 234; pp. 3–4; App. 13-14.

Further, at the conclusion of trial, the district court *sua sponte* instructed the jury as follows:

> There was some discussion about the First Amendment. You need not concern yourself with the First Amendment. If the Government proves beyond a reasonable doubt that the defendant committed the crimes in Count 1 or 2, then -- that kind of speech is not protected by our First Amendment, so if the Government proves its case, the First Amendment doesn't come into play because it's not protected -- that kind of speech is not protected by the First Amendment. If the Government doesn't prove its case, then you don't have to consider the First Amendment in that situation either.

Trial Tr. p. 220; App. 18.

At the beginning of their closing argument, the government asserted:

> The defendant wants to make this about the First Amendment, but it's not about the First Amendment. It's very clear from the law that the Court gave you, if he sent this threat with knowledge that it was going to be viewed as a threat, if he sent the communication with knowledge that these folks were going to view it as a threat, that's not free speech; that's a law violation, and that's exactly what happened.

Trial Tr. p. 233–34.

The jury convicted Mr. Leveke on both counts. R. Doc. 239. Mr. Leveke filed a motion for judgment of acquittal, which was denied. R. Doc. 244, 250. Mr. Leveke was sentenced to 60 months of imprisonment. R. Doc. 268.

D. Mr. Leveke appeals the jury instruction ruling. The Eighth Circuit holds a subjective intent is not required.

Mr. Leveke appealed, represented by appointed counsel. As relevant to this petition, he asserted that the government failed to present sufficient evidence that the emails were "true threats." He also challenged the jury instruction, asserting that it did not include the true threat requirement. First, Mr. Leveke asserted the First Amendment required the jury find he had the subjective intent to threaten the senator. Alternatively, he noted the instruction failed to even include the objective, reasonable listener requirement, and that the district court affirmatively misstated the law in a *sua sponte* instruction.

The Eighth Circuit Court of Appeals affirmed. *United States v. Leveke*, 38 F.4th 662 (8th Cir. 2022). First, the circuit rejected the sufficiency of the evidence claim. *Id.* at 667-68. The circuit noted that it defined true threat as "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." *Id.* at 668 (internal quotation marks omitted). The court continued: "[o]ur precedent establishes that the speaker does not have to intend to carry out the threat for the speech to fall outside of the First Amendment's protections." *Id.* Under this framework, the circuit determined that

Mr. Leveke's statements were "objectively threatening, and neither ambiguous nor political hyperbole." *Id.*

For similar reasons, the circuit rejected Mr. Leveke's jury instruction challenge. *Id.* at 668-69. The circuit noted that its case law did not require a subjective intent to threaten. *Id.* at 669. Alternatively, the court determined that "[e]ven assuming the district court erred by not making the objective component of § 875(c) clearer in the instructions, any error is harmless because Leveke's statements were objectively threatening, and a rational jury would have found Leveke guilty beyond a reasonable doubt absent the purported error." *Id.* The court also found no error with the district court's *sua sponte* instruction to the jury that it "need not concern itself with the First Amendment," as the remaining instructions were sufficiently accurate. *Id.*

REASONS FOR GRANTING THE WRIT

I. Lower courts are divided on whether the First Amendment requires that an individual have the specific intent to threaten.

Both before and after this Court's decision in *Elonis*, lower courts have disagreed on the intent requirement necessary to satisfy the First Amendment in a threats prosecution. In recent years, this split has become more pronounced, most notably in state courts. This Court should grant the petition for writ of certiorari to address this deep division.

A. Federal circuit courts are in disagreement regarding whether a true threat requires the specific intent to threaten violence.

In the federal context, circuit courts are split on whether the First Amendment requires a speaker have the subjective intent to threaten, or if an objective test – the so-called "reasonable listener" standard—is sufficient.

The Ninth and Tenth Circuits have held that the First Amendment requires the higher *mens rea* of subjective intent to threaten. *United States v. Heineman*, 767 F.3d 970, 982 (10th Cir. 2014) (18 U.S.C. § 875(c)); *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005); *United States v. Bagdasarian*, 652 F.3d 1113, 1122 (9th Cir. 2011).

Nine circuits have disagreed, only requiring an objective test. Three, including the Eighth Circuit, have continued to apply an objective test post-*Elonis*. *United States v. Ivers*, 967 F.3d 709 (8th Cir. 2020); *United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016); *Heller v. Bedford Cent. Sch. Dist.*, 665 F. App'x 49, 51 n.1 (2d Cir. 2016) (summary order).

The remaining six circuits have not explicitly addressed the true threat intent requirement post-*Elonis*, but as the Second Circuit acknowledged, this Court's "holding in *Elonis* does not significantly alter the standard by which we determine whether a threat is a true threat." *United States v. Wright-Darrisaw*, 617 F. App'x 107, 108 (2d Cir. 2015); *see also United States v. Clemens*, 738 F.3d 1, 9-12 (1st Cir. 2013); *United States v. Elonis*, 730 F.3d 321, 329 (3d Cir. 2013), *rev'd and remanded on narrower grounds*, 135 S. Ct. 2001 (2015); *United States v. Martinez*, 736 F.3d 981,

986-88 (11th Cir. 2013), *vacated and remanded for further consideration in light of Elonis*, 135 S. Ct. 2001 (2015); *United States v. Jeffries*, 692 F.3d 473, 479-81 (6th Cir. 2012); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004).

Yet even some circuits that apply the objective standard have questioned whether their position is consistent with First Amendment and *Black*. *United States v. Turner*, 720 F.3d 411, 420 n.4 (2d Cir. 2013); *United States v. Parr*, 545 F.3d 491, 499-500 (7th Cir. 2008) (questioning, but not overruling, the holding of *Stewart*). This illustrates the uncertainty and confusion caused by the failure of this Court to address the true threat question.

B. State courts are in disagreement regarding whether a true threat requires the specific intent to threaten violence.

State courts are even more fractured than federal courts. Some courts hold that the First Amendment demands a subjective intent to threaten injury. *State v. Fair*, 266 A.3d 1049, 1059 (N.J. 2021); *State v. Taylor*, 866 S.E.2d 740 (N.C. 2021); *State v. Boettger*, 450 P.3d 805, 814 (Kan. 2019); *O'Brien v. Borowski*, 961 N.E.2d 547, 557 (Mass. 2012), *abrogated on other grounds by Seney v. Morhy*, 3 N.E.3d 577 (2014); *Sult v. State*, 906 So. 2d 1013, 1022 (Fla. 2005); *State v. Poe*, 88 P.3d 704, 895 (Idaho 2004); *see also Brewington v. State*, 7 N.E.3d 946, 964 (Ind. 2014) (suggesting in dictum that the First Amendment requires the subjective intent to threaten).

Other courts have reached a sort of middle ground, finding that a reckless *mens rea* is sufficient under the First Amendment. Three states have rejected First

Amendment challenges to their threats statutes that only require a reckless *mens rea*. *State v. Mrozinski*, 971 N.W.2d 233 (Minn. 2022); *Interest of: J.J.M.*, 265 A.3d 246, 263 (Pa. 2021); *Major v. State*, 800 S.E.2d 348, 351-52 (Ga. 2017).

Finally, the majority states have held that an objective standard is sufficient for the true threat requirement. *State v. Johnson*, 964 N.W.2d 500, 503 (N.D. 2021); People *in Interest of R.D.*, 464 P.3d 717 (Colo. 2020); *People v. Ashley*, 162 N.E.3d 200, 215-16 (Ill. 2020); *Haughwout v. Tordenti*, 211 A.3d 1, 8-9 (Conn. 2019); *State v. Draskovich*, 904 N.W.2d 759, 762 (S.D. 2017); *State v. Trey M.*, 383 P.3d 474 (Wash. 2016); *State v. Borowski*, 378 P.3d 409, 412 (Alaska Ct. App. 2016); *In re. S.W.*, 45 A.3d 151, 156 & n.14 (D.C. 2012); *People v. Lowery*, 257 P.3d 72, 77-78 (Cal. 2011); *State v. Soboroff*, 798 N.W.2d 1, 2 (Iowa 2011); *Hearn v.* State, 3 So. 3d 722, 739 n.22 (Miss. 2008); *Jones v. State*, 64 S.W.3d 728, 736 (Ark. 2002); *State v. Valdivia*, 24 P.3d 661, 671-72 (Haw. 2001); *State ex rel.* RT, 781 So. 2d 1239, 1245-46 (La. 2001); *State v. Perkins*, 626 N.W.2d 762, 770 (Wis. 2001); *State v. Lance*, 721 P.2d 1258, 1266-67 (Mont. 1986)[3]; *State v. Moyle*, 705 P.2d 740, 750-51 (Or. 1985); *State v. Sibley*, No. 1 CA-CR 17-0768, 2018 WL 2440236 (Ariz. Ct. App. May 31, 2018).

As illustrated above, the split in state courts has also existed for decades. This Court should grant the petition for writ of certiorari to address this deep division in state and federal courts.

[3] *But see State v. Dugan*, 303 P.3d 755, 768 (Mont. 2013) (holding that a statement was not a true threat because it "was not a statement meant to communicate an intent to commit an act of unlawful violence against" another).

II. Mr. Leveke's case is an ideal vehicle to decide this frequently reoccurring and important issue.

The true-threats question arises frequently, with this Court repeatedly denying certiorari on this issue, at times over dissent. *See, e.g., Kansas v. Boettger*, 140 S. Ct. 1956, 1958-59 (2020) (Thomas, J., dissenting); *see also Perez v. Florida*, 137 S. Ct. 853 (2017) (Sotomayor, J., concurring). The question frequently arises in the context of online communications. "In American society, social networking sites and other online forums dominate modern communication." Alison Best, Note, *Elonis v. United States: The need to uphold individual rights to free speech while protecting victims of online true threats*, 75 *Md. L. Rev.* 1127, 1127 (2016). "Because online communications tend to allow individuals to post their thoughts on a widely accessible network, courts have seen a rise in "true threat" litigation over the past decade . . . ." *Id.*

Instead of resolving itself, in recent years, the division has only deepened. In fact, several state supreme courts have trended away from the majority position, and instead held a subjective intent is required. *State v. Fair*, 266 A.3d 1049, 1059 (N.J. 2021); *State v. Taylor*, 866 S.E.2d 740 (N.C. 2021); *State v. Boettger*, 450 P.3d 805, 814 (Kan. 2019).

Mr. Leveke's case is an ideal vehicle to decide this well-established split and provide necessary guidance. Mr. Leveke preserved the issue by requesting a jury instruction with a subjective intent requirement. The district court not only refused to give this instruction, it did not give the bare minimum "reasonable listener"

instruction either. The district court instead told the jurors the First Amendment was irrelevant. Further, the Eighth Circuit made no harmless error finding when rejecting Mr. Leveke's contention that the jury instruction must require the subjective intent to threaten. Mr. Leveke's case presents a clean vehicle to address this issue.

III. The Eighth Circuit's decision is wrong on the merits.

Finally, this Court should grant the petition for writ of certiorari because the Eighth Circuit's decision is inconsistent with this Court's precedent. This Court has jealously guarded the right to free speech. "Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands ... an area of breathing space so that protected speech is not discouraged." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). This demand is especially important in Mr. Leveke's circumstance, when governmental action risks targeting or dissuading "[s]peech concerning public affairs," which is "more than self-expression; it is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452, (2011). In these circumstances, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007).

Because of this commitment to free speech, this Court has narrowly limited the government's ability to restrict speech. "From 1791 to the present, . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

One narrow restriction is the true threats exception, most notably discussed in *Virginia v. Black*, 538 U.S. 343, 359 (2003).

A subjective intent is more consistent with the need to limit the government's ability to intrude on the freedom of speech. Further, as several courts have recognized, a subjective intent requirement is more consistent with *Black*. In *Black*, this Court stated: "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular group of individuals." 583 U.S. at 359. Courts find that interpreting this language to require a subjective intent is a more "natural reading" of the sentence. *Taylor*, 866 S.E.2d at 752 (quoting *Heineman*, 767 F.3d at 980). As the Tenth Circuit explained when analyzing *Black*:

> When the Court says that the speaker must "mean[ ] to communicate a serious expression of an intent," it is requiring more than a purpose to communicate just the threatening words. . . . It is requiring that the speaker want the recipient to believe that the speaker intends to act violently. The point is made again later in the same paragraph when the Court applies the definition to intimidation threats: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."

Heineman, 767 F.3d at 978.

Yet even before *Black*, this Court has already strongly indicated that in the context of true threats a culpable mind requires the prosecution to show subjective intent. *See Rogers v. United States*, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring). An objective requirement would allow for convictions without a guilty

mind, and "charging the defendant with responsibility for the effect of his statements on his listeners ... would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

CONCLUSION

Mr. Leveke respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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