No. 23-6305

IN THE SUPREME COURT OF THE UNITED STATES

BRENDAN HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review to the jury's finding that petitioner made a "true threat" when he posted on social media a video titled "Kill Your Senators" in which he said, among other things, "If anybody has a gun give me it. I will go there myself and shoot them and kill them."

RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

United States v. Hunt, No. 21-cr-86 (Dec. 10, 2021)

United States Court of Appeals (2d Cir.):

United States v. Hunt, No. 21-3020 (Sept. 20, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 82 F.4th 129. The order of the district court denying petitioner's motion for a judgment of acquittal is reported at 573 F. Supp. 3d 779.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2023. The petition for a writ of certiorari was filed on December 15, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of threatening to assault or murder members of Congress in violation of 18 U.S.C. 115(a)(1)(B) and (b)(4). Judgment 1. The district court sentenced him to 19 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1-14.

1. On January 8, 2021, petitioner posted to his account on the video-sharing platform BitChute a video he titled "Kill Your Senators," giving it the description "Slaughter them all." Pet. C.A. App. A294. In the 88-second video, petitioner spoke directly to the camera and said:

> Hey guys, so we need to go back to the U.S. Capitol when all of the Senators and a lot of the Representatives are back there and this time we have to show up with our guns and we need to slaughter these motherfuckers.
>
> What I'm saying is that our government at this point is basically a handful of traitors, so what you need to do is take up arms, get to DC probably the inauguration -- so called inauguration —- of this uh motherfucking communist Joe Biden. That's probably the best time to do this.
>
> Get your guns show up to DC and literally just spray these motherfuckers. Like, you know, that's the only option. They're gonna come after us. They're gonna kill us. So we have to kill them first. So get your guns. Show up to DC; put some bullets in their fucking heads.
>
> If anybody has a gun, give me it. I will go there myself and shoot them and kill them. We have to take out these Senators and then replace them with actual patriots.

> Basically I would trust anybody over them at this point uh this is a ZOG government um, you know, that that's basically all I have to say. Let's, uh, take up arms against them.

Pet. App. 15. The video was public for approximately 36 hours, and was viewed 502 times. Gov't C.A. App. GA180; Pet. C.A. App. A187-A191.

While the "Kill Your Senators" video was public, numerous other BitChute users commented on it, including several who warned petitioner that he could be arrested for posting it. Pet. C.A. App. A321-A323. One commenter urged petitioner, "seriously, take your video down," both to avoid arrest and because "murder is not a good thing" and would only "make them martyrs." Id. at A323. Another commenter told petitioner it was not smart to "giv[e] them a warning of when you might attack." Id. at A321. Other commenters gave similar advice. See id. at A321-A323; Gov't C.A. App. GA181-GA185. One, for example, told petitioner that he "[s]houldn't alert people to what you might do" and "there are plenty of alternative sites to communicate from if you do it in a smart way." Pet. C.A. App. A321-A322. Petitioner replied to that comment, writing, "Of course you should alert people, fucking idiot. How else should you get the word out? * * * [E]veryone should come to Washington, D.C. on January 20th wearing masks and camo, concealed carry, body armor and just blast them all away while we still have a chance." Id. at A322.

One person who saw the "Kill Your Senators" video reported it the same day to the FBI's National Threat Operations Center, which

immediately identified the video as a threat to life. Pet. C.A. App. A113-A115. The FBI promptly investigated petitioner and arrested him on January 19, 2021. Id. at A188-A194, A234-A235, A374.

2. A federal grand jury returned an indictment charging petitioner with one count of threatening to assault or murder members of Congress in violation of 18 U.S.C. 115(a)(1)(B) and (b)(4), based on the "Kill Your Senators" video and three other declarations made by petitioner. Indictment 1.

a. Before trial, petitioner moved to preclude the government from arguing that any of the other three charged statements violated Section 115(a)(1)(B), contending that those declarations amounted only to incitement and thus as a matter of law could not constitute a "true threat." D. Ct. Doc. 46, at 6-9 (Apr. 7, 2021). But petitioner did not make that argument as to the "Kill Your Senators" video, instead acknowledging that the video contained language that "could be viewed at least semantically to fit within the term 'threat' as that's used in [Section] 115." 4/12/21 Tr. 21; see id. at 20 ("[T]o clarify * * * our position again is that the only thing that is not inciting language is that one BitChute Video, and that the other things are.").

The district court denied the motion. D. Ct. Doc. 66, at 32-33 (Apr. 15, 2021).

b. At trial, the government introduced evidence regarding the "Kill Your Senators" video, the context in which it was posted, and petitioner's motivations, including evidence that petitioner was infuriated by the results of the 2020 presidential election and believed that violence and the threat of violence was needed to forestall the transfer of power. Among other things, the evidence showed that the day after the election, petitioner wrote to his father that President Trump should follow the example of Adolf Hitler, "cancel the transfer of power," and "round up the domestic enemies of our republic." Gov't C.A. App. GA165. And when petitioner's father responded that issues with the election would be resolved through a legal process, petitioner replied that "all these corrupt journos pols and disinfo traitors" would "have to be removed somehow" or else they would "still be in place to sabotage the country even if [President Trump] wins." Ibid.

The evidence also showed that later that month, petitioner wrote in a Facebook post, "biden will NEVER set foot in the white house. we will mow down any commies who try to run a coup on america!" Gov't C.A. App. GA209. In December 2020, Facebook suspended petitioner's account for 30 days for violating the site's "community standards" after he posted multiple comments calling for the deaths of then-Speaker of the House Nancy Pelosi, Senator Charles Schumer, and Representative Alexandria Ocasio-Cortez. Pet. C.A. App. A30-A31; Gov't C.A. App. GA215-GA216; Pet. C.A. App. A432-A433.

The evidence further showed that after the intrusion into the U.S. Capitol on January 6, 2021, delayed but did not prevent the congressional certification of electoral votes, petitioner recorded the "Kill Your Senators" video on his phone, then transferred it to his laptop and uploaded it to BitChute. Pet. C.A. App. A1076. Petitioner first uploaded the video on the night of January 7, 2021, but did not publish it. Id. at A293-A294. The following morning, he re-uploaded the video and edited the post -- for example, changing the description from "Take up arms and shoot them all" to "Go Back to the Capitol On January 20th" to, finally, "Slaughter them all" -- and made the video public. Id. at A294-A296, A1077-A1079.

The evidence additionally demonstrated that petitioner chose BitChute to deliver his threatening message because YouTube had previously restricted his account for posting content that violated YouTube's terms of service. See Gov't C.A. App. GA212 (GX 150K) (petitioner's Facebook post stating that he was "on probation with [YouTube] til Jan[uary]"); id. at GA162-GA164 (GX 30) (petitioner's unpublished video stating that he could get "banned" from YouTube for talking about "who rules the world" and discussing the need to use coded language, such as "kill the juice," when discussing "really banned things"); Pet. C.A. App. A1018 (defendant testifying that "a video like Kill your Senators, I knew that kind of stuff wouldn't fly on YouTube"). Petitioner also had explained in a May 2020 text exchange that he was "getting

more views" by posting his videos on BitChute compared to YouTube. Gov't C.A. App. GA172 (GX 41B).

The government introduced direct evidence of petitioner's intent to use the threat of violence to retaliate against members of Congress for their support of the election result and to prevent further actions by Congress to solidify or support that result. In videos that petitioner posted on January 9, 2021, while the "Kill Your Senators" video was still publicly accessible, he referenced a "Million Militia March" purportedly being planned for January 20, 2021 in which he stated, "let's see what happens when people bring guns. There are only 100 senators, remember. They ride on planes like us, they go to restaurants. They should be really scared of being in public, and we know they are spineless cowards." Gov't C.A. App. GA156. He also stated that "[t]hose 100 Senators should be really afraid about going into public now * * * . Like the way these people here behaved, they should have to walk around with bodyguards ten feet deep." Id. at GA160; see id. at GA153-GA161 (GX 26T, 27T). And in a post on the social media platform Parler, petitioner wrote, "enough with the 'trust the plan' bullshit. lets go, jan 20, bring your guns." Pet. C.A. App. A34-A35 (GX 151A, 151B); id. at A324-A327.

The government also introduced evidence of how viewers of the "Kill Your Senators" video reacted to it, including the contemporaneous comments by other BitChute users as well as the testimony of law enforcement officers and a member of

Representative Ocasio-Cortez's staff. See Pet. C.A. App. A111-A115, A319-A323, A462-A470, A850-A854; Gov't C.A. App. GA181-GA285. The Capitol Police, while focusing their limited resources on preparing for the upcoming inauguration, urged the FBI to investigate individual threat cases. See Pet. C.A. App. A512-A514. And petitioner acknowledges that after the FBI learned of the "Kill Your Senators" video through the anonymous tip, it "immediately began to [surveil] him closely," underscoring that it understood petitioner's threat to be serious. Pet. 9.

c. Petitioner testified in his own defense and denied both that the "Kill Your Senators" video was a threat and that he acted with the intent to influence or retaliate against members of Congress. Petitioner acknowledged that "[a]nybody * * * who looked at some of these things that I was saying could say that it's concerning in ways," but characterized the "Kill Your Senators" video as an unserious, "spur of the moment video, just spewing out some rhetoric" after "having a bunch of beers, smoking a little weed, tak[ing] a few bong rips." Pet. C.A. App. A1006, A1012. He claimed that he "just threw that out there into the ether" by posting the video on BitChute and that it "wasn't really a message I was trying to get out to people." Id. at 1018.

As the district court observed after trial, petitioner's testimony gave the jury ample reason to find him not credible, as it evidently did. D. Ct. Doc. 130, at 31 n.14 (Nov. 18, 2021). Petitioner testified, for example, that he considered himself to

be "on a stage right now" and that he believed he could "convince people of a lot of bullshit." Pet. C.A. App. A1028, A1119. On cross-examination, he also testified that when he texted his cousin in December 2020 "I have nothing further to say to you and if you text me again, I'll stick a knife in your kid," that statement was not a threat but merely "mouthing off, in my opinion." Id. at A1075.

d. The district court instructed the jury that "the First Amendment protects mere advocacy of the use of force or violence," as well as "vehement, scathing, and offensive criticism of public officials, including Members of Congress," but that it does not protect "true threats." Pet. C.A. App. A1409. And the court informed the jury that "[f]or a statement to be a true threat, it must have been made under such circumstances that an ordinary, reasonable person who heard or read the statement, and who is familiar with the context of the statement, would understand it as a serious expression of an intent to inflict bodily injury." Ibid.

The jury returned a verdict of guilt. Pet. App. 6. Using a special verdict form, the jury indicated that it found the "Kill Your Senators" video to be a "true threat to murder," but found that the other three statements alleged to have been threats did not rise to the level of true threats proscribed by Section 115(a)(1)(B). Pet. C.A. App. A1418-A1420.

The district court sentenced petitioner to 19 months of imprisonment, to be followed by three years of supervised release. Judgment at 2-3.

3. Petitioner moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 at the close of the government's case, and again after trial. See D. Ct. Doc. 97 (May 14, 2021). Petitioner did not raise the "constitutional fact" doctrine, under which courts in certain circumstances "conduct[] an independent examination of the evidence" to determine whether it meets a particular constitutional standard, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 509 & n.27 (1984) (citation omitted), in connection with those motions or otherwise argue that the district court should apply a special standard of review. Instead, petitioner invoked the standard of review established by Jackson v. Virginia, 443 U.S. 307 (1979), and argued that "no rational juror" could have found that the "Kill Your Senators" video constituted a true threat. D. Ct. Doc. 97, at 1.

The district court denied the motion, observing that the evidence was sufficient for the jury to find that petitioner made a true threat in the "Kill Your Senators" video. D. Ct. Doc. 130. The court noted, among other things, that petitioner's statements in the "Kill Your Senators" video (1) "repeatedly emphasized his intent to personally engage in violence"; (2) "referenced past violence directed at the officials in question" (the January 6 events); (3) "provided details about the time and place of another

attack"; (4) "specified the intended victims"; and (5) gave "substantial indicia of seriousness." Id. at 29-30.

Directly addressing the First Amendment concerns that petitioner did assert, the district court observed that "[e]ven leaving aside that [petitioner] titled his video, 'Kill Your Senators,' and captioned it, 'Slaughter them all,' his characterization of his statement as 'lofty principles of revolution' rather than the 'planning of a slaughter' is simply misplaced and misleading." D. Ct. Doc. 130, at 55 (citation omitted). The court pointed out that petitioner's argument necessarily assumed that the jury's finding of guilt was a direct violation of its instructions, including "the very instruction that undergirds the First Amendment jurisprudence [petitioner] invokes." Ibid. The court emphasized that, while petitioner was free to include political messages in his video, he was "not free to make certain threats against public officials," and found that his doing the former did not give him First Amendment immunity for also doing the latter. Id. at 56.

4. The court of appeals affirmed. Pet. App. 1-14.

On appeal, petitioner argued that the court of appeals was required to conduct an "initial sorting" analysis to determine whether the "Kill Your Senators" video fell into the category of incitement or a threat -- and that under a five-factor test of his own creation, the court should determine it was the former and not the latter. See Pet. C.A. Br. 43-54. Although petitioner invoked

the constitutional fact doctrine (for the first time) in support of that argument, he did not ask the court of appeals to determine independently whether the evidence established that he had made a "true threat," that is, a statement that a reasonable person would understand as a serious expression of an intent to inflict bodily injury. See id. at 38-59; Pet. C.A. Reply Br. 8-13. Indeed, petitioner stated expressly that he was not asking the court to review that question independently but was instead asking the court only to answer what he called the "antecedent legal question" of "whether the statement was a threat, rather than incitement, in the first place." Pet. C.A. Reply Br. 11; see id. at 11-13 & n.6; C.A. Oral Argument at 11:15-11:25 (stating that "once you've determined that it's a threat, and you've put that in that category, then of course it's a jury question to determine whether a reasonable person could construe it as a serious expression").

The court of appeals rejected as a matter of law petitioner's contention that the "Kill Your Senators" video "cannot constitute a true threat because it 'is incitement protected under the First Amendment . . . rather than a threat.'" Pet. App. 8 (quoting Pet. C.A. Br. at 38). The court observed that petitioner's argument was "predicated on the erroneous assertion that 'when confronted with a particular communication that may be either incitement or a threat . . . a court must first determine the category to which the statement belongs.'" Ibid. (quoting Pet. C.A. Br. at 44). And the court explained that such a "binary

sorting" argument "is both unsupported by the case law and makes little sense: the offense elements the government must prove are determined by the crime actually charged." Ibid.

The court of appeals also declined to apply the constitutional fact doctrine to the jury's finding that petitioner's video qualified as a "true threat." Pet. App. 7-8. The court explained that under this Court's precedent, whether that doctrine applies "hinges on 'the nature of the substantive law at issue.'" Id. at 7 (quoting Bose Corp., 466 U.S. at 501 n.17). And the court reasoned that "Section 115(a)(1)(B) criminalizes threats that a reasonable person familiar with the context would view as genuine," a definition that "requires only 'ordinary principles of logic and common experience' rather than legal judgment" to apply. Ibid. (quoting Bose Corp., 466 U.S. at 501 n.17). The court also reasoned that "unlike those situations in which the doctrine applies," "the true threat question does not require a 'case-by-case [judicial] adjudication . . . [to] give content to . . . otherwise elusive constitutional standards.'" Ibid. (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686 (1989)) (brackets in original). And it observed that the common law does not "'assign[] an especially broad role to the judge' to answer the operative question." Id. at 7-8 (quoting Bose, 466 U.S. at 502) (brackets in original). The court accordingly assessed that the true threat determination "involves no legal principles warranting independent review of the jury's

conclusion," and that courts are "no better equipped" -- indeed, are "arguably less equipped" -- than juries "to answer whether a statement is a true threat." Id. at 8.

Proceeding to evaluate the sufficiency of the evidence at trial, the court of appeals determined that it "provided the jury with an ample basis to find beyond a reasonable doubt that the video contained a true threat." Pet. App. 8. The court observed that petitioner "emphatically stated his own violent intent" "[u]sing the first person" tense; that he "reiterated his seriousness in replies to comments posted to the video and in two follow-up videos"; and that he posted the video two days after January 6, which he referenced, saying "'we need to go back to the U.S. Capitol.'" Ibid. (citation omitted). The court accordingly had "no difficulty concluding" that the jury's verdict was supported by the evidence. Ibid.

ARGUMENT

Petitioner contends (Pet. 14-27) that the court of appeals erred by not extending the constitutional fact doctrine to his motion for an acquittal. That contention lacks merit, and petitioner overstates the extent and significance of any disagreement among lower courts on the application of the constitutional fact doctrine to true-threat cases, as illustrated by his inability to identify any such case in which the standard of review was outcome-determinative. And this case would in any event be an exceptionally poor vehicle in which to address any

disagreement in the courts of appeals because petitioner relies on a novel legal theory that no court has adopted, and petitioner would not be entitled to relief under any approach. No further review is warranted.

1. Petitioner argues that the constitutional fact doctrine requires appellate courts to decide for themselves whether they believe the trial record was sufficient to satisfy the true-threat element of a prosecution under 18 U.S.C. 115, without deference to the findings of a properly instructed jury on that element. Pet. 18-23. That argument lacks merit.[1]

a. As this Court described in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), the constitutional fact doctrine authorizes appellate courts to undertake independent review of the record in certain cases "to correct errors of law,

[1] The government's amicus brief in Counterman v. Colorado, 600 U.S. 66 (2023), noted the availability of constitutional-facts review as a reason for the Court to reject the petitioner's argument that the First Amendment requires proof beyond a reasonable doubt that a defendant in a true threats case subjectively intended or knew that he was making a true threat. See Gov't Amicus Br. at 27-28, Counterman, supra (No. 22-138). The Court's decision in Counterman held that the "First Amendment * * * requires * * * a mental state of recklessness," Counterman, 600 U.S. at 69, finding that such a requirement addressed concerns about chilling legitimate speech, id. at 73-82, without suggesting that constitutional-fact review should also apply. Petitioner's Rule 28(j) letter about Counterman accordingly presented only mens rea issues, see C.A. Doc. 100, at 1-2 (June 28, 2023), which the court of appeals rejected, see Pet. App. 8-9. And in light of the decision in Counterman, and the additional protection that it provides for criminal defendants in true-threats cases, the government does not view application of the constitutional-facts standard to be warranted under the Court's precedents, for the reasons explained in the text.

including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." Id. at 501. Acknowledging that "[w]here the line is drawn varies according to the nature of the substantive law at issue," the Court explained that a "finding of fact in some cases is inseparable from the principles through which it was deduced" -- namely, at the "point" where it "crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule." Id. at 501 n.17; see ibid. ("Regarding certain largely factual questions in some areas of the law, the stakes -- in terms of impact on future cases and future conduct -- are too great to entrust them finally to the judgment of the trier of fact."). And it has since confirmed that application of the approach "turn[s] on the Court's determination that [the relevant ultimate] findings * * * involve legal, as well as factual, elements." Hernandez v. New York, 500 U.S. 352, 367 (1991).

This is not such a case. A statement is a "[t]rue threat," unprotected by the First Amendment, when it "'conveys' to the person on the other end" a "'serious expression[] * * * that a speaker means to commit an act of unlawful violence.'" Counterman v. Colorado, 600 U.S. 66, 74 (2023) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003), and Elonis v. United States, 575 U.S. 723, 733 (2015)). And the jury is the factfinder best positioned

to determine, under a proof-beyond-a-reasonable-doubt standard, that a person on the other end would in context view a particular statement as a true threat. As the decision below recognized, Pet. App. 7-8, the finding is not "legal" in nature, Hernandez, 500 U.S. at 367, but instead simply requires application of "principles of logic and common experience which are ordinarily entrusted to the finder of fact," Bose Corp., 466 U.S. at 501 n.17, which in a criminal case is the jury. Indeed, the jury brings a diversity of experiences and perspectives to the determination that a judge cannot match. See Spaziano v. Florida, 468 U.S. 447, 486–487 (1984) (Stevens, J., concurring in part and dissenting in part) ("Juries * * * reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench.") (footnote omitted).[2] The ordinary standard of review for a criminal jury's finding of facts under Jackson v. Virginia, 443 U.S. 307, 324 (1979), should accordingly apply.

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[2] In particular, none of the "three characteristics" that undergird application of the constitutional fact standard to determinations of the "'actual malice'" of a defendant in a civil defamation case applies here. Bose Corp., 466 U.S. at 501. Petitioner does not show a "common-law heritage" that "assigns an especially broad role to the judge." Id. at 502. The rule's "literal text" is sufficiently clear to enable jury instruction and determination. Id. at 502. And no "evolutionary process of common-law adjudication," ibid., is required -- or useful. Moreover, the balance struck in Counterman addresses concern about "the constitutional values protected by the rule." Ibid.; see Counterman, 600 U.S. at 73-82.

2. Petitioner overstates the extent and significance of any conflict in the court of appeals about whether the constitutional fact doctrine applies to true-threat determinations. And this case would be a poor vehicle for further review of any circuit disagreement.

a. Like the Second Circuit in this case, see Pet. App. 7-8, the Tenth Circuit has declined to extend the constitutional fact doctrine to true-threat cases. See United States v. Wheeler, 776 F.3d 736, 742 (10th Cir. 2015). And seven other courts of appeals have applied Jackson's sufficiency-of-the-evidence standard in evaluating a jury's true-threat determination, albeit without specifically discussing the possible extension of the constitutional fact doctrine to such cases.[3] Courts in two of those circuits, the First and Third, have stated in the context of motions to dismiss an indictment that whether an alleged communication constitutes a true threat is a matter for the jury, except in unusual cases where courts may properly dismiss an indictment as a matter of law upon concluding that no reasonable jury could find a true threat. See United States v. Stock, 728

[3] See United States v. Oliver, 19 F.4th 512, 517 (1st Cir. 2021); United States v. D'Amario, 330 Fed. Appx. 409, 412-413 (3d Cir. 2009); United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983) (per curiam), cert. denied, 467 U.S. 1228 (1984); United States v. Houston, 792 F.3d 663, 669 (6th Cir. 2015); United States v. Parr, 545 F.3d 491, 497 (7th Cir. 2008), cert. denied, 556 U.S. 1181 (2009); United States v. Schiefen, 139 F.3d 638, 639 (8th Cir. 1998) (per curiam); United States v. Castillo, 564 Fed. Appx. 500, 501 (11th Cir.) (per curiam), cert. denied, 574 U.S. 977 (2014).

F.3d 287, 298 (3d Cir. 2013); United States v. Clemens, 738 F.3d 1, 12-14 (1st Cir. 2013).

Petitioner errs in asserting (Pet. 16) that the Fourth Circuit applies the constitutional fact doctrine where, as here, a jury has found a true threat. Petitioner cites (ibid.) United States v. Bly, 510 F.3d 453, 457-458 (4th Cir. 2007), but in that case, the issue was whether the indictment adequately alleged a true threat, not whether a jury verdict at trial could be set aside based on a reviewing court's independent review about whether the defendant had made a true threat. See id. at 456-457. And following Bly, the Fourth Circuit has continued to apply the Jackson standard in published decisions when evaluating whether the evidence at trial was sufficient to support a jury's finding that the government proved a true threat, even while citing Bly for the standard of review on a motion to dismiss the indictment. See United States v. White, 810 F.3d 212, 228 (4th Cir. 2016); United States v. White, 670 F.3d 498, 512 (4th Cir. 2012), abrogated on other grounds by Elonis, 575 U.S. at 726; United States v. Rendelman, 641 F.3d 36, 43 (4th Cir. 2011), cert. denied, 565 U.S. 1246 (2012); see also Stock, 728 F.3d at 298 (Third Circuit citing Fourth Circuit for sufficiency standard);[4] Clemens, 738 F.3d at 13 (same for First Circuit).

[4] The Fourth Circuit also has applied the Jackson standard in two unpublished true-threat decisions, including one Section 115(a)(1)(B) case. See United States v. McDonald, 444 Fed. Appx. 710, 712 (4th Cir. 2011); United States v. Corbett, 374 Fed. Appx.

Finally, while the Ninth Circuit has stated that it would apply the constitutional fact doctrine to a jury verdict in a true-threat case, its description of the applicable standard includes components of Jackson sufficiency review. See United States v. Hanna, 293 F.3d 1080, 1088 (9th Cir. 2002). Specifically, it has described an inquiry under which "[d]eferring to the jury's findings on historical facts, credibility determinations, and elements of statutory liability, [the court] must consider whether the verdict is supported by substantial evidence. * * * If [the court] finds that it is, [the court] then conduct[s] an independent review of the record to determine whether the facts as found by the jury establish the core constitutional fact, in this case, a 'true threat.'" Ibid. (emphasis added; citation omitted).

Especially given that overlap, there is no reason to believe that the Ninth Circuit's outlier approach to evaluating the sufficiency of the evidence supporting a true-threat finding is ever likely to be outcome-dispositive -- and petitioner has not identified a single case in which it was. When petitioner's counsel was asked at oral argument below to name any such case, he identified the Fourth Circuit's decision in United States v. White and the Ninth Circuit's decision in United States v. Bagdasarian, 652 F.3d 1113 (2011). C.A. Oral Argument at 8:50-9:50. But as

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372, 380-381 (4th Cir. 2010). In one unpublished decision, the Fourth Circuit did apply the constitutional fact doctrine in affirming the sufficiency of the evidence supporting a true-threat conviction. See United States v. Vandevere, 849 Fed. Appx. 69, 70 (4th Cir.), cert. denied, 142 S. Ct. 596 (2021).

discussed above, White applied Jackson's sufficiency-of-the-evidence standard, rather than applying the constitutional fact doctrine, in reversing the defendant's conviction on one count. See p. 19, supra. And in Bagdasarian, the Ninth Circuit stated expressly that it "would decide this case the same way under either [independent review] or Jackson." 652 F.3d at 1119 n.17; see id. at 1123 (reversing conviction because "given any reasonable construction of the words in [the defendant's] postings, those statements do not constitute a 'true threat'"). It thus does not illustrate a circumstance where the result under the Ninth Circuit's constitutional-facts approach diverges from the result under Jackson.

Indeed, petitioner appears not to urge this Court to adopt the Ninth Circuit's approach, but instead a novel approach under which a reviewing court would disregard the jury's "true threat" finding and instead reclassify (or "sort") his speech as incitement and then analyze it under Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). But the decision below correctly rejected that approach as legally unsupported and illogical, Pet. App. 8, and petitioner identifies no court of appeals that has adopted it. Petitioner's hypothesis that incitement and true threats are wholly non-overlapping categories rests on the proposition that a court would, or at least should, override the jury's determination that his statement was the latter. But he has not shown that any court would do so.

b. The novelty of petitioner's proposal also undermines his assertion (Pet. 23-27) that this would be an appropriate vehicle to address the question presented. And this case would be a poor vehicle for the further reason that petitioner would not prevail under any approach.

As the court of appeals observed, petitioner, "[u]sing the first person," explicitly and "emphatically stated his own violent intent"; referenced the violence at the U.S. Capitol just two days earlier, saying "we need to go back to the U.S. Capitol"; and "reiterated his seriousness in replies to comments posted to the video," including some that warned petitioner not to give advance warning of what he might do. Pet. App. 8 (citation omitted). By any standard, that was a true threat.

Petitioner's contrary claim effectively asks this Court to credit his own trial testimony about what he was "trying" or "hoping" to do, see Pet. 26-27, a step that a reviewing court would be ill-positioned to do even if the constitutional facts doctrine applied the way he claims. Indeed, the decision below documented the "overwhelming evidence" that petitioner acted with the subjective intent required to be liable for making a true threat. Pet. App. 9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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