No. _____

In The
Supreme Court of the United States

EDWARD TAUPIER,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court
Of The State Of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this petition are as follows:

The first question presented is: Whether in a prosecution for speech under the "true threats" doctrine an objective standard of mere recklessness is sufficient to meet the scienter requirement.

The second question presented is: Whether in a prosecution for speech under the "true threats" doctrine speech acts unknown to the person threatened shed any light on the state of mind of the party uttering the alleged threat.

PARTIES TO THE PROCEEDING

The petitioner is an adult resident of the State of Connecticut. At the time of this filing, he is incarcerated in the State of Connecticut and is in the custody and care of the Connecticut Department of Corrections.

The respondent is the State of Connecticut, acting through the Office of the Chief State's Attorney.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Taupier respectfully petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court.

OPINIONS BELOW

The decision of the Connecticut Supreme Court is reprinted in the Appendix (App.) at 1-60. The underlying decision of the Superior Court of the State of Connecticut is reprinted at App. 61.

JURISDICTION

The Connecticut Supreme Court issued its decision on September 11, 2018. App. 1. Jurisdiction of this Court is evoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides: "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."

Connecticut General Statutes § 53a-3(13): "A person acts 'recklessly' with respect to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . . ."

Connecticut General Statutes § 53a-61aa(a): "A person is guilty of threatening in the first degree when such person . . . (3) commits threatening in the second degree as provided in Section 53a-62, and in commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a pistol, revolver, shotgun, rifle, machine gun or other firearm."

Connecticut General Statutes § 53a-62(a): "A person is guilty of threatening in the second degree when . . . (3) such person threatens to commit [any] crime of violence in reckless disregard of the risk of causing . . . terror. . . ."

Connecticut General Statutes § 53a-182(a)(2): "A person is guilty of disorderly conduct when, with the intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (2) by offensive or disorderly conduct, annoys or interferes with another person."

Connecticut General Statutes § 53a-181(a)(3): "A person is guilty of breach of the peace in the second degree when, recklessly creating a risk of causing inconvenience, annoyance or alarm, such person threatens to commit any crime against another person."

INTRODUCTION

The First Amendment guarantee of freedom of speech is not absolute. "True threats," like "fighting words," may be proscribed. Drawing the line distinguishing protected and proscribed speech has historically involved the courts in making legal judgments about states of mind. Is the test one of the declarant's subjective intentions? Or is the test one of the objectively reasonable likelihood that a declarant's words might cause alarm? As recently as 2015, in *Elonis v. United States*, 575 U.S. ___, 135 S.Ct. 2001 (2015), this Court signaled a willingness to resolve the issue, however, the issue only arose at oral argument, was not briefed, and was not supported by an appellate court record. As a result, this Court declined to consider the issue.

The Connecticut Supreme Court's ruling in *State v. Taupier*, 330 Conn. 149 (2018), provides this Court such an opportunity: the issue was briefed and argued, and the appellate record is ample. The case also provides this Court with an opportunity to resolve a split in federal Circuit Court authority on the mental state

required to prove a "true threat." What's more, the Connecticut Supreme Court's ruling requires review as it so fundamentally misconstrues the relationship of subjective and objective states of mind as to foretell even more confusion about what is, and is not, protected speech.

Mr. Taupier was a self-styled aggrieved family-court litigant when he sent a private e-mail to six acquaintances who shared an interest in reform of the Connecticut family courts. The e-mail was a hyperbolic expression of vitriol, essentially boasting about how easy it would be to shoot a Connecticut family court judge poised to make critical custody rulings in his case. His expression of rage was the functional equivalent of the burning of a cross at a Ku Klux Klan rally—an ugly spectacle, to be sure, but designed to inflame the passions of others already committed to the same objectives. The recipients of the e-mail did not immediately take steps to alert anyone as to the "threat" posed by the e-mail; one recipient chastised Mr. Taupier for the tone and content of the e-mail.

A week after sending the e-mail, one recipient brought the e-mail to the attention of a lawyer after seeing a television news report involving Mr. Taupier's children. At that moment, she feared he might, in fact, make good on the hyperbole in his e-mail. The lawyer to whom she gave the e-mail brought the e-mail to marshals employed by the State of Connecticut Judicial Branch. The state police were also notified. A week after the communication was sent privately to his

friends, the judge received a copy from a state police officer. She was alarmed.

At a court trial, the state prosecuted Mr. Taupier for threatening and related offenses, relying on a theory that he had recklessly engaged in conduct that would cause a reasonable person to fear. Under Connecticut law, a person engages in reckless conduct when he is "aware of and consciously disregards a substantial and unjustifiable risk" of harm, and then causes the harm and that the risk constitutes a "gross deviation" from the standard of conduct a "reasonable person" would observe. The trial court expressly relied on Judge Alito's concurring opinion in *Elonis*, an opinion *not* joined by a majority of this Court, and concluded that recklessness was sufficient to satisfy the mens rea in a threatening prosecution challenged on First Amendment grounds. Mr. Taupier raised a First Amendment challenge at trial and, after his conviction, on appeal. The trial court effectively transformed the mens rea requirement in a "true threats" case into satisfaction of a negligence standard.

The Connecticut Supreme Court affirmed, siding with those Circuits that have held that the First Amendment does not require proof of subjective intent to threaten. But the Connecticut court went further than any of the Circuits have gone, concluding that even if subjective knowledge were required, it could be satisfied on a showing of recklessness because the defendant knew of a substantial and unjustifiable risk that his speech would cause harm. The Connecticut court ignored that portion of the state statute on

recklessness requiring that an unjustifiable risk be a "gross deviation" from what a "reasonable person" would do. It did so because its awkward melding of subjective and objective standards is unworkable as a matter of simple logic and law. This confusing effort to wed subjective and objective standards charts new legal ground, and will only add further confusion to an area of law on which there is already disagreement.

This Court noted in *Elonis* that having liability turn on whether a "reasonable person" regards a communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to mere negligence. The use of a negligence standard to distinguish mere hyperbole from proscribed speech would transform both "true threats" and "fighting words" cases into little more than applied tutorials in etiquette, with fact-finders supplying their judgment of what is appropriate independent of a speaker's intentions. Such a standard reduces culpability to negligence and deprives the First Amendment of its bite.

The Connecticut Supreme Court adopted far more than an objective standard to determine whether Mr. Taupier's speech was more than mere hyperbole, and herein lies its danger. The Connecticut Court sat as an omniscient reviewer, considering communications and conduct that took place long before and long after the e-mail that served as the basis of Mr. Taupier's prosecution were uttered. It did so under the guise of considering whether an "objectively reasonable" person would regard the communication at issue as a threat.

Untethering an evaluation of an utterance from the subjective intention of the utterer cannot help but yield such a result, and cannot help but do damage to core First Amendment values.

STATEMENT OF THE CASE

A. Factual Background

Shortly before midnight on August 22, 2014, the petitioner sent the following e-mail privately to six friends who shared a mutual interest in reform of Connecticut's family courts. App. 5. The e-mail commented on a family-court judge, Connecticut Superior Court Judge Elizabeth Bozzuto, whom he perceived to be biased against him in a pending matrimonial case pending in the Connecticut courts:

> Facts: JUST an FYI:
>
> [1] [I'm] still married to that POS . . . we own our children, there is no decision . . . its 50/50 or whatever we decide. The court is dog shit and has no right to shit they don't have a rule on.
>
> [2] They can steal my kids from cold dead bleeding cordite filled fists . . . as my [sixty] round [magazine] falls to the floor and [I'm] dying as I change out to the next [thirty rounds]. . . .
>
> [3] [B]ozzuto lives in [W]atertown with her boys and [n]anny . . . there [are] 245 [yards]

> between her master bedroom and a cemetery that provides cover and concealment.
>
> [4] They could try and put me in jail but that would start the ringing of a bell that can be undone. . . .
>
> [5] Someone wants to take my kids better have an [F-35 fighter jet] and smart bombs . . . other wise they will be found and adjusted . . . they should seek shelter on the ISS ([international] space station). . . .
>
> [6] BTW a [.308 caliber rifle] at 250 [yards] with a double pane drops [one-half inch] per foot beyond the glass and loses [7 percent] of [foot pounds] of force [at] 250 [yards]—nonarmor piercing ball ammunition. . . .
>
> [7] Mike may be right . . . unless you sleep with level [three] body armor or live on the ISS you should be careful of actions.
>
> [8] Fathers do not cause cavities, this is complete bullshit.
>
> [9] Photos of children are not illegal. . . .
>
> [10] Fucking [n]annies is not against the law, especially when there is no fucking going on, just ask [Bo]zzuto . . . she is the ultimate [n]anny fucker.

App. 6, fn.7. The petitioner did not send the e-mail to Judge Bozzuto; indeed, the judge did not learn of the e-mail for seven days, when one of the original recipients sent a copy of it to an acquaintance of hers who was a lawyer. The lawyer then informed the State of

Connecticut Judicial Branch; the state police were also notified. The state police then informed the judge. App. 9.[1] The e-mail was never posted in a public place, such as Facebook. Despite the use of other e-mails as evidence at trial, this is the only e-mail to serve as the basis for criminal charges, and it was the only e-mail seen by Judge Bozzuto. App. 10, fn.9.

The petitioner was arrested and charged with threatening in the first degree in violation of Connecticut General Statutes § 53a-61aa(a)(3:)[2] two counts of disorderly conduct in violation of Connecticut General Statutes § 53a-182(a)(2);[3] and, one count of breach of

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[1] Although the Connecticut Supreme Court states that one recipient immediately "communicated her concern" about the e-mail to several others, the record is barren about to whom those communications were made. App. 8.

[2] "A person is guilty of threatening in the first degree when such person . . . (3) commits threatening in the second degree as provided in Section 53a-62, and in commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a pistol, revolver, shotgun, rifle, machine gun or other firearm." (This is the version of the statute that existed at the time of the offense; it has since been amended.)

Connecticut General Statutes § 53a-62(a), on which this count depended, reads as follows: "A person is guilty of threatening in the second degree when . . . (3) such person threatens to commit [any] crime of violence in reckless disregard of the risk of causing . . . terror. . . ."

[3] Connecticut General Statutes § 53a-182(a)(2) reads as follows: "A person is guilty of disorderly conduct when, with the intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (2) by offensive or disorderly conduct, annoys or interferes with another person."

peace in violation of Connecticut General Statutes § 53a-181(a)(3).[4] App. 3. Each prosecution depended on a scienter of recklessness, which is defined in Connecticut General Statutes § 53a-3(13) as follows: "A person acts 'recklessly' with respect to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . . ." App. 12, fn.11.[5]

Judge Bozzuto was the alleged victim as to all counts but for one of the counts of disorderly conduct; the second count of disorderly conduct named the recipient who passed the e-mail along to a lawyer as the alleged victim. All of the charges were supported by a reckless mental state.

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[4] Connecticut General Statutes § 53a-181(a)(3) reads as follows: "A person is guilty of breach of the peace in the second degree when, recklessly creating a risk of causing inconvenience, annoyance or alarm, such person threatens to commit any crime against another person."

[5] Because the recklessness element was common to each count, the Connecticut Court analyzed it but once, in the context of Connecticut General Statutes § 53a-61aa(a). Accordingly, the Supreme Court confined its analysis of recklessness to the charge of threatening in the first degree, recognizing that its decision on that issue as to that count would be dispositive on all other counts. App. 3, fn.6.

After a court trial, the petitioner was found guilty of the crimes charged. The Supreme Court affirmed, and the petitioner now files a petition for certiorari.

B. Procedural Background

After a lengthy court trial, but before the trial court rendered a verdict in the form of a written decision, this Court decided *Elonis v. United States*, 575 U.S. ___, 135 S.Ct. 2001 (2015). As noted by the Connecticut Supreme Court, "[r]elying on Justice Alito's concurring opinion in *Elonis* . . . the trial court concluded that the state was constitutionally required to prove that the defendant acted recklessly, that is, that the defendant subjectively knew that there was a substantial and unjustifiable risk that his threatening speech would terrorize the target of the threat, and that he acted in conscious disregard of that risk." App. 12.

However, in *Elonis*, this Court, on grounds of parsimony, elected against deciding whether, in the face of a First Amendment challenge, recklessness was a sufficient scienter for liability under 18 U.S.C. 875(c),[6] a

[6] 18 U.S.C. 875(c) reads: "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." The issue in *Elonis* was whether the District Court erred in refusing to grant the defendant's request to charge on this statute requiring specific intent to threaten. This Court remanded the case for further proceedings; the Third Circuit affirmed on grounds that rendered moot consideration of the issue Mr. Taupier raises in this petition.

statute criminalizing reckless threats in interstate commerce. "No Court of appeals has addressed that question," this Court noted, electing to follow the "usual practice of awaiting a decision below." *Elonis*, at 2013. This Court remanded *Elonis* to the Third Circuit for further proceedings, and the Circuit affirmed on grounds that did not address the question of whether mere recklessness was a sufficiently culpable mental state to support a prosecution based on a "true threat." Certiorari was thereafter denied.

In the instant case, the petitioner was convicted of all counts at the trial level, and the Connecticut Supreme Court affirmed, in a lengthy written decision. The decision, although not arising under 18 U.S.C. 875(c), presents this Court with an opportunity to resolve the issue left undecided by a majority in *Elonis*. To wit: Whether in a prosecution for speech under the "true threat" doctrine an objective standard of mere recklessness is sufficient to meet the scienter requirement?

REASONS FOR GRANTING THE PETITION

I. Certiorari Is Warranted Because The Law Is Unclear About Whether A "True Threats" Prosecution Requires The Government To Prove That A Declarant Have A Subjective Intent To Intimidate A Victim

A. *Virginia v. Black*, 538 U.S. 343 (2003) Appears To Require That A "True Threats" Prosecution Be Supported By Specific Intent To Cause Fear

The line distinguishing a true threat from protected speech requires, among other things, an evaluation of a speaker's intent.

"'True 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 individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). "Intimidation in the constitutionally proscribable sense of the word is a 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." *Id.*, at 360. Thus, in *Black*, cross-burning with the intent to intimidate a person is prohibited, while cross-burning as a matter of expressive speech is not. "The act of burning a cross may mean that a person is engaged in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech." *Id.*, at 365. Mere hyperbole is not prohibited, *Watts v. United States*, 394

U.S. 705, 708 (1969) (hyperbole not necessarily a "true threat"); neither is mere abstract advocacy of the use of force of violence proscribed, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (advocacy of the use of force of violence proscribed when imminent and likely to cause harm).

B. The Connecticut Supreme Court Held That Mere Recklessness Could Support A "True Threats" Prosecution, So Long As A "Reasonable Person" Would Interpret The Speech As A Threat, Effectively Eliminating *Black*'s Distinction Between Protected Expressive Speech And Proscribed Speech

The Connecticut Supreme Court held that a "true threat" prosecution could be supported by mere recklessness, adopting an objective standard. "We are persuaded by the reasoning of the courts that have concluded that *Black* did not adopt a subjective intent standard. Indeed, nothing in *Black* itself suggests that the court intended to overrule the preexisting consensus among the federal courts of appeals that threatening speech may be punishable under the First Amendment when a reasonable person would interpret the speech as a serious threat." App. 27.[7]

[7] Lest there be any doubt that the Connecticut decision eliminates the requirement of intent to threaten, the Court notes, albeit in a footnote: "Whether the defendant actually intended to harm Judge Bozzuto or, instead, the statements in his e-mail were, as he claims, mere hyperbolic bluster, has no bearing on our

The Connecticut Court's decision would effectively eliminate the distinction this Court was careful to draw in *Black* between permissible and impermissible cross-burning. It goes without saying that cross-burning will always be offensive, in whatever context, to some members of the community. A person burning a cross at a political rally will be guilty—***every time***—of engaging in expressive activity carrying with it a substantial and justifiable risk of alarming another so long as someone, whether known or known to the burner, claims he or she feels threatened.

C. The Federal Circuits Are Split On Whether Specific Intent Or Recklessness Is Necessary To Support A "True Threats" Prosecution

The federal Circuits are split on whether a "true threat" requires subjective intention to threaten the victim, a fact that has not gone unnoticed among scholars. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001) (noting that the "Supreme Court's minimal guidance has

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analysis. The question before us is whether the defendant knew that there was a substantial and unjustifiable risk that the recipients of the e-mail would *interpret it* as a serious threat." App. 48, fn.24 (emphasis in the original). On this rendering of the true threats, Charles Evers, a NAACP organizer warning community members about what would happen to them if they did not honor a boycott of white-owned business, should have been convicted for uttering "[i]f we catch any of you going in any of those racist stores, we're gonna break your damn neck." *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 902 (1982).

left each circuit to fashion its own test," and courts have applied either a subjective or objective intent standard); Jing Xun Quek, Elonis v. United States: *The Next Twelve Years*, 31 Berkeley Tech. L.J. 1109 (2016) (noting a "sharp divide" among lower courts considering the mens rea requirement in true threats prosecutions); Georgette Geha, *Think Twice Before Posting Online: Criminalizing Threats Under 18 U.S.C. § 875(c) After* Elonis, 50 J. Marshall L. Rev. 167 (2016) (urging adoption of a specific intent standard).

The Ninth Circuit has concluded such a subjective intent is required to prove that an utterance is a "true threat." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (under *Black*, "true threats" require "not only . . . that the communication be intentional, but also the requirement that the speaker intend for his language to threaten the victim"). See also *United States v. Twine*, 853 F.2d 676, 681 (9th Cir. 1988). The Seventh and Tenth Circuits have signaled in dicta a similar requirement of subjective intent to threaten the victim. *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (the objective test "no longer tenable" after *Black*), cert. denied, 556 U.S. 1181 (2009); *United States v. Bagdasarian*, 652 F.3d 1113-1118 (9th Cir. 2011) (*Black* requires specific intent); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (subjective test supported by *Black*, but issue not reached on procedural grounds), cert. denied, 547 U.S. 1097; *United States v. Heineman*, 767 F.3d 970, 980 (10th Cir.

2014) (speech unprotected if the speaker intended to instill fear in the recipient).[8]

Five Circuits, the Third, Fourth, Sixth, Eighth, and Eleventh Circuits, have concluded an objective standard is sufficient. *United States v. Martinez*, 736 F.3d 981, 986 (11th Cir. 2013), vacated on other grounds, 135 S.Ct. 2798 (2015); *United States v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011); *United States v. Niklas*, 713 F.3d 435, 440 (8th Cir. 2013); *United States v. Jeffries*, 692 F.3d 473, 479-481 (6th Cir. 2013), cert. denied, 571 U.S. 817 (2013); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012); and, *United States v. Elonis*, 730 F.3d 321, 329-330 (3d Cir. 2013), rev'd on other grounds, 135 S.Ct. 2001 (2015).[9]

The *Jeffries* case, a case decided in 2013, before this Court issued its 2015 opinion in *Elonis*, bears an uncanny similarity to the instant case, arising, as it does, from a litigant's disaffection with a family court judge. The decision is also cited with approval in the Eighth Circuit's decision in *Niklas*, 713 F.3d at 439,

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[8] The state of Indiana also requires subjective intent to intimidate under the true threats doctrine. *Brewington v. State*, 7 N.E.3d 946, 964 (Ind. 2014).

[9] Four states have sided in favor of an objective standard. *People v. Stanley*, 170 P.3d 782,788 (Colo.App.2007), cert. denied, Colorado Supreme Court, Colo. LEXIS 1088 (November 19, 2007), cert. denied, 512 U.S. 1297 (2008); *People v. Diomedes*, 2014 IL App (2d) 121080, 382 Ill.Dec. 712, 13 N.E.3d 125, 137 (Ill.App.2014), appeal denied, 396 Ill.Dec. 180, 39 N.E.3d 1006 (Ill. 2015); *State v. Draskovich*, 2007 SD 76, N.W.2d 759, 762 (S.D. 2017); *State v. Schaler*, 169 Wash.2d 274, 283, 236 P.3d 858 (2010).

and in the Sixth Circuit's decision in *Martinez*, 736 F.3d at 986.

Jeffries disavowed a reading of *Black* requiring that a threat be supported by subjective intent. "*Black* does not work [a] sea change [in the law]. . . . The case merely applies—it does not innovate—the principle that 'what is a threat must be distinguished from what is constitutionally protected speech.' *Watts*, 394 U.S. at 707. It says nothing about imposing a subjective standard on other threat-producing statutes;. . . . The problem in *Black* thus did not turn on subjective versus objective standards for construing threats. It turned on overbreadth—that the statute lacked any standard at all." *Jeffries*, 692 F.3d at 479-480; *Martinez*, 736 F.3d at 986; *Nicklas*, 713 F.3d at 439. Insofar as *Jeffries* is concerned, the subjective intention of a person uttering a statement, and whether the target of the statement ever even saw the statement, are both irrelevant. A "true threat," under *Jeffries* and those Circuits adopting this standard, can be supported by an objective standard of recklessness; a showing of subjective intent is not necessary. Under *Jeffries* an utterance is a "true threat" if the speaker intended to utter the words, and if a reasonable person would be intimidated by the words, even if he never heard them. The *Jeffries* rule results in the paradoxical rule that Judge Bozzuto was threatened even if she didn't know it, a result hard to square with common sense or ordinary use of the English language.

Of course, one problem with the Circuits relying on an objective standard is that they assume that the

Third Circuit's decision in *Elonis* is, in effect, the last word on the topic. Thus, in *Martinez*, the Court cites the Third Circuit's *Elonis* decision as a favorable precedent in the column of those Circuits adopting the objective standard. "*Black* does not clearly overturn the objective test the majority of Circuits applied to Section 875(c)." *Martinez*, 736 F.3d 986; citing *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013).

This Court, on review of *Elonis*, flagged the issue of whether recklessness was sufficient to support a conviction for uttering a true threat, but declined to decide it, in substantial part because the issue had not been adequately briefed.

> There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat. See Tr. of Oral Arg. 25, 56.[10] In

[10] The issue arose during oral argument as follows:

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

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

[I]t's important that you have inquiry into why the speaker's intent was to avoid chilling the speech. Because, you know,

> response to a question at oral argument, counsel for Elonis stated that a finding of recklessness would not be sufficient. See *id.*, at 8-9. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it. See *Department of Treasury, IRS v. FLRA*, 494 U.S. 922, 933 (1990) (this Court is "poorly situated" to address an argument the Court of Appeals did not consider, the parties did not brief, and counsel addressed in "only the most cursory fashion at oral argument"). Given our disposition, it is not necessary to consider any First Amendment issues."

Elonis, 135 S.Ct. 2012.

Far from endorsing the Third Circuit's view of recklessness, this Court signaled a keen interest in determining whether recklessness can pass constitutional muster. This Court's reluctance to decide the issue places the Connecticut Court's reliance on

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basically, under the government standard, any sort of speech that uses, you know, forceful language or violent rhetoric could potentially be at risk. Like somebody who at—in Ferguson, Missouri the night of the riots tweets a photo of law enforcement over the motto, the old Jeffersonian motto, 'The tree of liberty must be refreshed . . . with the blood of . . . tyrants. I mean, would I—would a reasonable person foresee that that would be viewed as a threat by the police officers. Again, I wouldn't want to, you know, bet a felony conviction against it."

Tr. of Oral Arg., pp. 9, 26-27, *Elonis v. United States*, 13-983, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-983_hejm.pdf.

Justice Alito's lone concurrence precarious and uncertain constitutional moorings.

Despite the interest shown by this Court in the question in *Elonis*, upon remand, the Third Circuit affirmed, holding that the District Court's error in failing to charge the jury on the matter of intent was harmless error. *United States v. Elonis*, 841 F.3d 589 (3d Cir. 2016). *Elonis* did not raise the issue in its second petition for certiorari, which was denied in 2017. *Elonis v. United States*, 12-1231 (2017).

D. A Recklessness Standard Anchored In The Expectations Of A "Reasonable Person" Transforms The Mens Rea Requirement Into Negligence, A Standard Applicable In Civil Cases, But One Inappropriate In "True Threats" Cases

As this Court noted in *Elonis*, ordinary negligence, while sufficient to establish civil liability, is not typically sufficient to support a criminal conviction. "Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error." *Elonis*, at 135 S.Ct. 2012.

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing."

> *Staples*, 511 U.S., at 606-607 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (citing *Morissette v. United States*, 342 U.S. 246 (1952). See 1 C. Torcia, Wharton's Criminal Law § 27, pp. 171-172 (15th ed. 1993); *Cochran v. United States*, 157 U.S. 286, 294 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind"). Under these principles, 'what [Elonis] thinks' does matter.

Elonis, 135 S.Ct. at 2011.

In Mr. Taupier's case, an utterance was found to be a "true threat" because, in part, he disregarded the risk that "a reasonable person" would find the speech threatening. This is precisely the sort of move this Court viewed with suspicion in *Cochran*, requiring that a defendant have "an evil intent actually existing in his mind" before he could be criminally liable. *Cochran*, 157 U.S. at 294.

The danger of such a low-threshold for criminal liability is that core political speech will be criminalized

so long as there is a fact-finder prepared to regard the speech as offensive to "reasonable person." This standard yields no way to draw the principled distinction *Black* requires, between protected political speech and proscribable speech. Only a subjective intent requirement can carry such a load.

E. The Connecticut Supreme Court's Ruling Confuses Intentional And Reckless Mental States In A Manner That Will Further Confound Courts Evaluating True Threats

The Connecticut Court relied, in effect, on little more than a linguistic trick to sidestep the issue that interested this Court in *Elonis*. So long as a declarant intends to utter words that some listener could reasonably interpret as a threat, the declarant utters a "true threat." This strained melding of subjective and objective standards clarifies nothing, and will simply add another layer of confusion to an area of law already confounding enough to the federal Circuit Courts and Courts of final jurisdiction in the states.

The Connecticut trial court concluded proof of mere recklessness satisfied the "true threat" doctrine. The Connecticut Supreme Court affirmed the trial court's decision, adopting the concurring opinion of Justice Alito in holding that recklessness was sufficient to support a prosecution for a "true threat." The Connecticut Court did so in a roundabout way, conflating intent and recklessness: it held that a threatening

prosecution can be supported by being aware of and disregarding a substantial and unjustifiable risk of harm attendant to an utterance. Paradoxically, it did so by concluding that this classic statement of an objective standard itself satisfies a subjective standard. "Even if we were to assume that proof of subjective knowledge is constitutionally required, [the statute] satisfied that requirement because it requires the state to prove the elements of recklessness . . . the state must show that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk" of harm. App. 28. Nowhere in the Connecticut decision is there any discussion, much less an analysis, of how this attempt to transform recklessness into a subjective standard squares with the definition of "risk" in Connecticut's statute defining the state of mind, C.G.S. 53a-3(13): "The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . . ."

Ignoring the objective standard obscures the practical, and, from a First Amendment perspective, the dangerous practical import of the Court's ruling—it conflates the subjective and objective standards. The objective standard will lurk within the subjective standard much like a secret warrior hidden in a Trojan horse. Who will decide what a reasonable person would perceive? The Court doesn't say; indeed, it can't say because its decision strains to produce consensus where no consensus exists by trying to eliminate a core distinction in the law regarding mental states—there is a

division among the Courts on whether a subjective ***or*** an objective standard is applicable in evaluating "true threats." In the final analysis, the Connecticut Court merely states that this new hybrid standard is satisfied, without explaining how it was satisfied in this case, or how it can be satisfied in any case at all. This Court can, and should, reject this strange gift delivered by the Connecticut Court. It is difficult to reconcile this ruling with the current split in the Circuits; it appears to be a bold, and, indeed, startling amalgam of mental states.[11]

The Connecticut Supreme Court places itself on the side of those federal Circuit Courts holding that proof of subjective intent to intimidate the recipient is not required. "We are persuaded by the reasoning of the courts that have concluded that *Black* did not adopt a subjective intent standard. App. 23. See *State*

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[11] Speculation was substituted for analysis when the Court concluded that "the evidence 'fully support[ed] the reasonable inference that the defendant knew that his e-mail would be seen as a serious expression of his intentions, and was aware of and consciously disregarded the substantial and unjustifiable risk that, as a result, it would be disclosed to others and cause terror to Judge Bozzuto." App. 14. The secret warrior emerging from the Trojan horse is at work: What evidence was there to support the inference that this private e-mail would ever be seen by the judge? The objective standard is at work, eliminating even the requirement that the "victim" even see the message at the heart of the prosecution, so long as a "reasonable person" would be frightened, scienter is satisfied.

Mr. Taupier sent his e-mail in a private forum to like-minded friends; what inference supports the belief that he knew it would ever reach the judge. Is every expression of frustration at a water cooler now fair game for a "true threats" prosecution?

v. Krijger, 313 Conn. 434, 451-452 fn.10 (2014). See *United States v. Martinez*, 736 F.3d 981, 987 (11th Cir. 2013), vacated on other grounds, 135 S.Ct. 2798 (2015); *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), cert. denied, 571 U.S. 817 (2013). App. 24, fn.17. The Connecticut Court declares its allegiance to the policy goal of protecting folks from the trauma of receiving alarming speech, regardless of the speaker's intentions. "[T]he purpose underlying the true threats doctrine . . . [is] protecting the targets of threats from the fear of violence,. . . . " App. 27, citing *People v. Stanley*, 170 P.3d 782, 789 (Colo. App. 2007), quoting *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003). App. 26-27.

That allegiance is misapplied, especially in this case, where the record must be teased with the fine-toothed comb to create an inference that Mr. Taupier had any reason to believe that his e-mail would even find its way to Judge Bozzuto, much less threaten her. What's more, there is a split in the federal circuits on what subjective intent must be found to support a "true threat" prosecution. The better rule, given the importance of speech, and this Court's jurisprudence in the context of "true threats" and "fighting words" is to require specific, or subjective, intent to cause harm to a foreseeable victim. Any other standard invites censorship of hyperbole, emotive speech and other utterances that offend the perhaps too tender sensibilities of a majority of listeners.

II. The Connecticut Court Erred In Holding That Contextual Factors Of Which The Victim Was Unaware Shed Any Light On Whether The Speech At Issue Was A "True Threat" Or Merely Hyperbole; This Court Should Make Clear That Contextual Factors In "True Threats" Cases Are Limited To What Is Known To An Alleged Victim

Black recognized that "contextual factors" are necessary in evaluating whether a speech act is a "true threat." In declaring unconstitutional a statute making the mere act of burning a cross prima facie evidence of intent to intimidate, the Court noted: "The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." *Black*, 538 U.S. at 367. The petitioner contends that an objective standard runs the risk of casting to wide a net in gathering what may, or may not, be evidence of a "contextual factor."

The Connecticut Supreme Court ruling adopts an omniscient point of view in evaluating the speech act in question, viewing an isolated utterance through the lens of events weeks before and after the speech to divine the utterance's meaning. The Connecticut court did this all the while acknowledging that its interpretation of the speech was based on factors of which there is no evidence the victim was even aware. Reliance on whether Mr. Taupier owned guns, a fact apparently unknown to the parties who actually received the communication, is misplaced; there is no indication when,

if ever, the alleged target of the utterance ever learned he possessed weapons. As the Connecticut Court noted in its decision, guns were not seized from Mr. Taupier's home until one week after he sent the e-mail. App. 13.

In an e-mail sent to the petitioner the day after receiving the e-mail eventually shown to Judge Bozzuto, one of his friends, Michael Nowacki, a fellow family court activist with his own unique history in the Connecticut courts,[12] replied in a private e-mail: "Ted, [t]here are disturbing comments made in this [e-mail]. You will be well served to NOT send such communications to anyone." App. 7. The petitioner responded to Mr. Nowacki and one other recipient with more vitriol. There is no evidence that Judge Bozzuto ever saw this e-mail, or that she even became aware of it.[13]

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[12] See *State v. Nowacki*, 155 Conn. App. 758 (2015).

[13] The footnote is produced verbatim, as reported in *Taupier*, footnote 8, App. 7:

> Hi Mike . . . the thoughts that the courts want to take my civil rights away is equally disturbing. I did not have the children, to have them abused by an illegal court system.
>
> My civil rights and those of my children and family have always be protected by my breath and hands.
>
> I know where she lives and I know what I need to bring about change. . . .
>
> These evil court assholes and self appointed devils will only bring about an escalation that will impact their personal lives and families.
>
> When they figure out they are not protected from bad things and their families are taken from them in the same way they took yours then the system will change.

This past week in [Ferguson, Missouri] there was a lot of hurt caused by an illegal act, if it were my son, shot, there would be an old testament response.

[Second] Amendment rights are around to keep the police state from violating my [family's] rights.

If they—the courts . . . need sheeeple they will have to look elsewhere. If they feel it's disturbing that I will fiercely protect my family with all my life . . . they would be correct, I will gladly accept my death and theirs protecting my civil rights under my uniform code of justice.

They do not want me to escalate . . . and they know I will gladly. . . .

I've seen years of fighting go [unnoticed], people are still suffering. . . . Judges still fucking sheeple over. Time to change the game.

I don't make threats, I present facts and arguments. The argument today is what has all the energy that has expended done to really effect change, the bottom line is—insanity is defined as doing the [same thing] over and over and expecting a different outcome . . . we should all be done . . . and change the game to get results . . . that's what Thomas Jefferson wrote about constantly.

Don't be disturbed . . . be happy there are new minds taking up a fight to change a system.

Here is my daily prayer:

I will never quit. I persevere and thrive on adversity.

My [n]ation and [f]amily expects me to be physically harder and mentally stronger than my enemies.

If knocked down, I will get back up, every time.

I will draw on every remaining ounce of strength to protect my [family and] teammates and to accomplish our mission.

I am never out of the fight. . . .

Among the other factors the trial court considered in its efforts to determine whether the isolated e-mail eventually given to Judge Bozzuto was a "true threat" were firearms seized from Mr. Taupier's home one week after the offensive e-mail was sent. The Connecticut Supreme Court conceded this was error, but was harmless. App. 40. A jurisprudence rooted in an objective standard, and untethered to the state of mind of the declarant, invites such error every time it is invoked.

It is difficult to fathom how the petitioner's private hyperbole could be considered a threat against Judge Bozzuto. As *Black* noted, "[i]ntimidation 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." *Black*, 538 U.S. at 360. The petitioner here sent a private e-mail to a group of friends sharing a common antipathy to Connecticut's family courts. Nothing in the record supports an inference that the communication was intended to place Judge Bozzuto "in fear of bodily harm or death." Indeed, it took a week for the e-mail to be brought to the attention of anyone outside the circle of friends, and then the e-mail only found its way to the judge after passing through the hands of a lawyer, then judicial marshals, then the state police—the petitioner would need to have the powers of a seer to foresee that the e-mail would find the victim at all.

Mr. Taupier's private ruminations among friends falls on the protected side of the line drawn by *Black*'s

rejection of a prima facie showing of intent to intimidate based on the mere fact of burning a cross. "It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross-burning done with the purpose of threatening or intimidating a victim." *Id*., at 366. Mr. Taupier's words were no doubt intended to spur anger and resentment; they were not uttered for the purpose of threatening or intimidating the judge. Anger and resentment are protected consequences of expressive speech; intimidating a victim is not. Or, as *Black* noted, "[i]t does not treat the cross burning directed at a individual differently from the cross burning directed at a group of like-minded believers." *Id*.

The contrast between the facts in the instant case and the facts in *Jeffries* are striking. While both share the declarants' animosity toward family court judges, the communications in Mr. Taupier's case were private, whereas the *Jeffries* comments were posted on Facebook and shared on other social media. What's more, the *Jeffries* comments went beyond abstract ruminations about the possibility of violence; they posed a direct threat to the judge. All that was lacking in *Jeffries* was an envelope addressed and delivered to the judge containing the threatening note.

The *Jeffries* court noted the alarm that certain of the words Jeffries posted publicly would cause to the judge who was the target of those words. *Jeffries*, 692 F.3d. at 477. Those words are in boldface, italicized type here.

I've had enough of this abuse from you.

It has been goin' on for 13 years

I have been to war and killed a man.

I don't care if I go to jail for 2,000 years,

'Cause this is my daughter we're talkin' about,

And when I come to court this better be the last time

I'm not kidding at all, I'm making this video public.

'Cause if I have to kill a judge or a lawyer or a woman I don't care.

'Cause this is my daughter we're talking about.

I'm getting tired of abuse and the parent alienation.

You know its abuse.

I love you; daughters are the beautiful things in my life,.

It keeps me going and keeps me alive every day.

Take my child and I'll take your life,

I'm not kidding, judge, you better listen to me.

I killed a man downrange in war,

I have nothing against you, but I'm tellin' you this better be the last court date.

Because I'm gettin' tired of missin' out on my daughter's love.

(And that's the name of the song by the way "Daughter's Love.")

And I'm getting tired of you sickos

Thinking it's the right thing for the children.

You think it's the best interest of the child,

But look at my daughter from her mother's abuse.

She's mentally and physically abused her,

And I'm getting tired of this bull.

So I promise you, judge, I will kill a man.

This time better be the last time I end up in court

'Cause, damn, this world is getting tired.

When you don't have your daughter to love on or have a big hug

'Cause she's so mentally abused and psychologically gone.

She can't even hold her own dad

Because her mom has abused [her] by parent alienation [].

And this s__ needs to stop because you're gonna lose your job.

And I guarantee you, if you don't stop, I'll kill you.

'Cause I am gonna make a point either way you look at it somebody's gotta pay,

And I'm telling you right now live on the Internet.

So put me in jail and make a big scene.

Everybody else needs to know the truth.

'Cause this s__'s been going on for 13 years and now my daughter's screwed up

'Cause the judge and the lawyers need money.

They don't really care about the best interest of the child.

SO I'm gonna f__ somebody up, and I'm going back to war in my head.

So July the 14th is the last time I'm goin' to court.

Believe that. Believe that, or I'll come after you after court. Believe that.

I love my daughter.

Nobody's going take her away from me.

'Cause I got four years left to make her into an adult.

I got four years left until she's eighteen.

So stop this s__ because I'm getting tired of you,

And I don't care if everybody sees this Internet site

Because it is the truth and it's war.

Stop abusing the children and let 'em see their dads,

'Cause I love you, Allison.

I really do love you. I want to hold you and hug you, and I want the abuse to stop.

That's why I started Traumatized Foundation.org. Traumatized Foundation.org.

Because of children being left behind, being abused by judges, the courts.

They're being abused by lawyers.

The best interest ain't of the child anymore.

The judges and the lawyers are abusing 'em.

Let's get them out of office. Vote 'em out of office.

If fathers don't have rights or women don't have their rights or equal visitation,

Get their ass out of office.

'cause you don't deserve to be a judge and you don't deserve to live.

You don't deserve to live in my book.

And you're gonna get some crazy guy like me after your ass.

And I hope I encourage other dads to go out there and put bombs in their goddamn cars. Blow 'em up. Because it's children we're, children we're talkin' about.

> I care about her. And I'm willing to go to prison, But somebody's gonna listen to me,
>
> Because this is a new war.
>
> This ain't Iraq or Afghanistan. This is goddamn America. This is my goddamn daughter,
>
> There, I cussed, Don't tell me I can't f__in' cuss.
>
> Stupid f_in' [Guitar crashes over in the background] ***BOOM!***
>
> ***There went your f_in' car, I can shoot you. I can kill you, I can f_ you. Be my friend, Do something right. Serve my daughter.***
>
> yeah, look at that, that's the evil. You better keep me on God's side
>
> ***Do the right thing July 14th,***

Jeffries, 692 F.3d at 475.

Mr. Jeffries's public rant is a true threat in ways that Mr. Taupier's is not. Mr. Jeffries went to a quintessential public forum, social media, to make a particular threat of violence targeted toward a judge about to make a decision in a case at a particular date and time. The message was directed to the judge, even if not mailed directly to him. Its message was clear, rule in my favor, or else, regardless of the consequences to the declarant.

This speech comes far closer to *Black*'s definition of a true threat when considering the contextual factors in which the speech is situated—it was public,

specific, directed toward the target, related to specific events about to take place and, standing alone, conveyed a message chilling in content. Those factors distinguish Mr. Jeffries threat from Mr. Taupier's rant.

Significantly, "[t]rue threats encompass those statements the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders,. . . ." *Black*, 538 U.S. at 359.

The same cannot be said of Mr. Taupier's private rant.

First, there is no indication that the speech was ever intended to be broadcast beyond a circle of friends. Nothing in the speech distinguishes it from hyperbolic chest-thumping. Second, standing alone, and not filtered through the prism of other e-mails, or acts distant in time from the declaration, Mr. Taupier's declaration is comparably tame. Is he much different than Mr. Watts, who promised to kill LBJ if he were drafted? Is he distinguishable from the NAACP organizer who "threatened" to break the necks of those who dared cross an NAACP picket line?

The methodology the Connecticut court adopted to interpret Mr. Taupier's speech transforms an objective standard of recklessness into the omnipotent standard of the judicial censor, and therein lies its danger.

Indeed, therein lies the danger of the recklessness standard no matter how applied. An utterance detached from the intentions of the declarant is in effect a free-floating variable into which listeners are free to import meaning. Certainly the intention of the speaker needs to be evaluated by a standard more exacting than the impact of the speaker's words on a hypothetical listener.

Only a test focusing on the subjective intentions of the speaker affords ample First Amendment protection to unpopular speech. As in any criminal prosecution, this is not a guarantee that the inept or ineffective defendant will be excused his criminal intent merely because he fails to accomplish his objective. The law of attempt would govern speech acts as effectively as it governs physical activity. Anchoring true threats in subject intent to cause harm provides ample protection to potential victims without elevating the judiciary into censors policing the outer boundaries of acceptable speech. Intent is a workable standard. Recklessness, as demonstrated by the Connecticut Supreme Court, is not.

The petitioner realizes this second issue comes perilously close to asking this Court to adopt a prophylactic rule on materiality and relevancy of evidence in true threats prosecutions. But that is not his objective. The true threat doctrine deprives certain speech acts of First Amendment protection. Those Circuits and state courts siding in favor of an objective standard will be encouraged to find threats where none were intended. They will do so by looking to other acts and

utterances perhaps equally unknown to the alleged victim. This slippery slope will yield the functional equivalent of a national speech code in which fact-finders, whether they be judges or juries, inject their tastes into the reasonable person standard to the detriment of freedom of speech. Connecticut's omniscient standard is but the most extreme, and frightening, example of what can go wrong, horribly wrong, if this Court does not act. Even if an objective standard is to remain the law, this Court needs to make clear that the contextual factors that matter must be tethered to the speech at issue.

CONCLUSION

"No Court of Appeals has even addressed" the questions of whether recklessness is a sufficient mental state for prosecution of a "true threat." *Elonis*, 135 S.Ct. at 2013. The Connecticut Supreme Court has addressed the issue, and found recklessness sufficient. This Court can and should decide the issue.

For all of the reasons stated above, the petitioner respectfully requests that this Court grant his writ of certiorari.

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