No. 18-

IN THE

Supreme Court of the United States

JAMAL KNOX,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

LISA S. BLATT
Counsel of Record
R. STANTON JONES
ANTHONY J. FRANZE
ANDREW T. TUTT
GRAHAM W. WHITE*
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@arnoldporter.com

** Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members.*

QUESTION PRESENTED

Under *Watts v. United States*, 394 U.S. 705 (1969) (per curiam), the First Amendment does not protect "true threats." Federal courts of appeals and state high courts are deeply divided over the legal standard for determining whether a statement is a true threat. A majority of courts have held that the standard is objective and requires a showing that a "reasonable person" would regard the statement as a sincere threat of violence. But other courts have held that the standard is subjective and assess only whether the speaker intended to communicate such a threat. This Court granted certiorari to address this issue in *Elonis v. United States*, 135 S. Ct. 2001 (2015), but did not resolve the split, prompting concern that "the Court has compounded—not clarified—the confusion," *id.* at 2014 (Alito, J., concurring and dissenting).

A divided Pennsylvania Supreme Court below acknowledged this split and joined the short end of it, holding that a statement can constitute a true threat based solely on the speaker's subjective intent. The court thus affirmed petitioner's convictions for terroristic threats and witness intimidation based on a rap song that petitioner, a rap music artist, wrote and recorded. The court below found it irrelevant whether a reasonable person would find the song threatening in context.

The question presented is whether, to establish that a statement is a true threat unprotected by the First Amendment, the government must show that a "reasonable person" would regard the statement as a sincere threat of violence, or whether it is enough to show only the speaker's subjective intent to threaten.

TABLE OF CONTENTS

Page

Question Presented i
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Constitutional Provisions Involved 1
Statement 1
A. Factual Background 3
B. The Prosecution of Knox for the Song 5
C. The Decision Below 6
Reasons for Granting the Petition 8
I. Federal Courts of Appeals and State High Courts Are Intractably Divided Over the First Amendment True-Threat Standard 8
A. A Minority of Courts Apply a Subjective Test 9
B. A Majority of Courts Apply an Objective Test 11
C. In Some States, the State High Court Applies One Test and the Federal Court of Appeals Applies the Other 13
II. The Decision Below Is Wrong 14
A. This Court Has Never Adopted a Purely Subjective True-Threat Standard 15
B. Core First Amendment Principles Foreclose a Purely Subjective True-Threat Standard 17
III. The Issue Is Recurring and Important 20
Conclusion 26

Table of Contents —Continued: Page

Appendices

Appendix A: Opinion of the Pennsylvania Supreme Court (Aug. 21, 2018)..... 1a

Appendix B: Opinion of the Pennsylvania Superior Court (Aug. 2, 2016)..... 59a

Appendix C: Opinion of the Pennsylvania Court of Common Pleas (Aug. 11, 2015)..... 70a

Appendix D: Verdict and Findings of Fact (Nov. 21, 2013)..... 88a

Appendix E: Sentencing Transcript (Mar. 6, 2014)..... 97a

Appendix F: Federal Threat Prosecution Statistics 117a

TABLE OF AUTHORITIES

Cases Page(s)

Austad v. Bd. of Pardons and Paroles,
719 N.W.2d 760 (S.D. 2006) 12

Carrell v. United States,
80 A.3d 163 (D.C. 2013) 12

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 13, 15, 19

Citizen Publ'g Co. v. Miller,
115 P.3d 107 (Ariz. 2005) 12

Commonwealth v. Knox,
No. 1136 WD 2014, 2016 WL 5379299
(Pa. Sup. Ct. Aug. 2, 2016) 5

Elonis v. United States,
135 S. Ct. 2001 (2015) ..... *passim*

Hearn v. State,
3 So. 3d 722 (Miss. 2008) 12

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46 (1988) 18, 19

Jones v. State,
64 S.W.3d 728 (Ark. 2002) 12

Kleindienst v. Mandel,
408 U.S. 753 (1972) 17

Miller v. California,
413 U.S. 15 (1973) 19

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 18

O'Brien v. Borowski,
961 N.E.2d 547 (Mass. 2012) 10

People v. Baer,
973 P.2d 1225 (Colo. 1999) 12

Cases—Continued Page(s)

People v. Lowery,
257 P.3d 72 (Cal. 2011).....12

Perez v. Florida.,
137 S. Ct. 853 (2017) 8

Porter v. Ascension Parish Sch. Bd.,
393 F.3d 608 (5th Cir. 2004) 11

Red Lion Broad. Co. v. FCC,
395 U.S. 367 (1969).....18

State v. Cahill,
80 A.3d 52 (Vt. 2013) 10

State v. *Curtis*,
748 N.W.2d 709 (N.D. 2008).....12

State v. Grayhurst,
852 A.2d 491 (R.I. 2004) 10, 14

State v. Johnston,
127 P.3d 707 (Wash. 2006).....12

State v. Lance,
721 P.2d 1258 (Mont. 1986).....12, 14

State v. Miles,
15 A.3d 596 (Vt. 2011) 10, 14

State v. Moulton,
78 A.3d 55 (Conn. 2013) 12

State v. Moyle,
705 P.2d 740 (Or. 1985).....12, 14

State v. Perkins,
626 N.W.2d 762 (Wis. 2001).....12

State v. Soboroff,
798 N.W.2d 1 (Iowa 2011) 12

State v. Valdivia,
24 P.3d 661 (Haw. 2001).....12, 14

Cases—Continued Page(s)

Terminiello v. City of Chicago,
337 U.S. 1 (1949).....18

United States v. Alvarez,
132 S. Ct. 2537 (2012).....18

United States v. Cassel,
408 F.3d 622 (9th Cir. 2005) 10, 14

United States v. Davila,
461 F.3d 298 (2d Cir. 2006).....11

United States v. Elonis,
730 F.3d 321 (3d Cir. 2013).....12, 14

United States v. Heineman,
767 F.3d 970 (10th Cir. 2014) 10

United States v. Jeffries,
692 F.3d 473 (6th Cir. 2012) 12, 13

United States v. Mabie,
663 F.3d 322 (8th Cir. 2011) 12, 13

United States v. Martinez,
736 F.3d 981 (11th Cir. 2013) 11, 13

United States v. Nishnianidze,
342 F.3d 6 (1st Cir. 2003).....12, 14

United States v. Sovie,
122 F.3d 122 (2d Cir. 2009).....14

United States v. Stewart,
411 F.3d 825 (7th Cir. 2005) 11

United States v. Whiffen,
121 F.3d 18 (1st Cir. 1997).....12

United States v. White,
670 F.3d 498 (4th Cir. 2012) 11, 13

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976).....17

Cases—Continued Page(s)

Virginia v. Black,
538 U.S. 343 (2003).....*passim*
Ward v. Rock Against Racism,
491 U.S. 781 (1989).....15
Watts v. United States,
394 U.S. 705 (1969).....*passim*
Whitney v. California,
274 U.S. 357 (1927).....15

Statutes & Rules

18 Pa. Cons. Stat.
§ 903(c).....5
§ 2706.....5
§ 2706(a)(1).....5
§ 4952(a).....5
§ 4953(a).....5
18 U.S.C.
§ 115.....20
§ 708.....15
§ 871(a).....20
§ 873.....20
§ 875(c).....20, 21
§ 876(c).....20
§ 878.....20
§ 879.....20
§ 1503(a).....20
§ 1951(a).....20
28 U.S.C. § 1257(a).....1
Ala. Code § 13A-10-15 (West 2013).....21
Ark. Code Ann. § 5-13-301 (West 2013).....21

Statutes & Rules—Continued ..... Page(s)
Cal. Penal Code § 140 (West 2014) 21
Conn. Gen. Stat. Ann. § 53a-183 (West 2014) 21
D.C. Code § 22407 (West 2013) 21
Fla. Stat. Ann. § 836.10 (West 2013) 21
Haw. Rev. Stat. § 707-716 (West 2013) 21
Iowa Code Ann. § 712.8 (West 2013) 21
Mich. Comp. Laws Ann. § 750.411i (West 2013) 21
Okla. Stat. Ann. tit. 21, § 1378 (West 2013) 21
Va. Code Ann. § 18.2-60 (West 2013) 21
Va. Code Ann. § 18.2-423 (1996) 16
Wash. Rev. Code Ann. § 9.61.160 (West 2013) 21
Wis. Stat. Ann. § 940.203 (West 2013) 21
S. Ct. R. 10 13

Articles in Law Reviews

First Amendment—Sixth Circuit Holds that Subjective Intent is Not Required by the First Amendment When Prosecuting Criminal Threats—United States v. Jeffries, 126 Harv. L. Rev. 1138 (2013) 9
Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 Harv. J.L. & Pub. Pol'y 283 (2001) 9, 21
Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 Hastings Const. L. Q. 339 (2011) 23

Articles in Law Reviews—Continued Page(s)

Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225 (2006) 2

Other Authorities

500 Greatest Songs of All Time, Rolling Stone (Apr. 7, 2011), https://bit.ly/2ss07sZ 4, 25

Bob Marley and the Wailers, *I Shot the Sheriff* (1973) 25

Johnny Cash, *Folsom Prison Blues* (1953).....25

Kalhan Rosenblatt, *Kathy Griffin Fired by CNN Over Gruesome Photo of Trump*, NBC News (May 31, 2017), https://nbcnews.to/2CmIhfr.....24

Mayhem Mal, Apple Music, https://apple.co/2Rrz4gd 3

Mayhem Mal, Spotify, https://spoti.fi/2FsMWQR.....3

Shapiro et al., Supreme Court Practice (10th ed. 2013) 22

The Beatles, *Run for Your Life* (1965).....25

The Full Lyrics to Eminem's Trump-Bashing Freestyle 'The Storm', CNN (Oct. 11, 2017), https://cnn.it/2Mb0tNF.....25

Touré, *The Marshall Mathers LP*, Rolling Stone (July 6, 2000), https://bit.ly/2RuyCxJ.....24

Transcript of Oral Argument, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983) 24

Will Hermes, *The Marshall Mathers LP*, Entertainment Weekly (June 2, 2000), https://bit.ly/2swE3Nz 24

OPINIONS BELOW

The Pennsylvania Supreme Court's opinion is reported at 190 A.3d 1146. App. 1a-58a. The intermediate appellate court's opinion is unreported and is available at 2016 WL 5379299. App. 59a-69a. The trial court issued an unreported opinion declining to set aside the verdict on First Amendment grounds. App. 70a-87a. A transcript of the trial court's "verdict and findings of fact" is reproduced at App. 88a-96a.

JURISDICTION

The Pennsylvania Supreme Court issued its decision on August 21, 2018. On November 7, 2018, Justice Alito extended the time to file a petition for a writ of certiorari to January 18, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT

This case raises a critically important and frequently recurring First Amendment question that has intractably divided federal courts of appeals and state high courts: whether, to establish that a statement is an unprotected "true threat," the government must show objectively that a "reasonable person" would regard the statement as threatening, or whether it is enough to prove only the speaker's subjective intent to threaten. It is time for this Court to settle this issue once and for all. Adopting the subjective test followed by a minority of courts, the Pennsylvania Supreme Court below affirmed peti-

tioner's threats convictions based on a rap song petitioner wrote and recorded that was posted on Facebook and YouTube. This case provides an opportunity to correct that manifest error and resolve a longstanding conflict in First Amendment jurisprudence.

The First Amendment does not protect "true threats." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). But the question of how to determine whether a statement is an unprotected true threat is the subject of widespread disagreement among federal and state courts. *Watts* held that the First Amendment protects statements that a reasonable person would not regard as threatening. *See id.* at 706-08. Thus, after *Watts*, courts almost uniformly applied an "objective" reasonable-person test for determining whether a statement is a true threat. *See* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1238-40 (2006).

In *Virginia v. Black*, 538 U.S. 343 (2003), this Court stated that "true threats" refer to "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." *Id.* at 359 (citing *Watts*, 394 U.S. at 708) (emphasis added).

Most courts still hold that the true-threat standard requires an objective inquiry into whether a reasonable person would regard the statement as genuinely threatening. But a minority of courts have read *Black* to mean that the standard is purely subjective, and thus the government must show only the speaker's subjective intent to threaten.

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), this Court granted certiorari to address this issue,

but ultimately resolved the case on narrow statutory grounds. *Id.* at 2013. Justices Alito noted that the Court had "compounded—not clarified—the confusion" in the lower courts. *Id.* at 2014 (Alito, J., concurring in part and dissenting in part). Justice Thomas similarly observed that the Court's "failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty." *Id.* at 2018 (Thomas, J., dissenting).

The constitutional question here implicates the validity of countless convictions under myriad federal and state threat statutes. Only this Court can resolve this frequently recurring question, on which every federal court of appeals and most state high courts have weighed in. Allowing the government to convict and incarcerate people for speech that is not objectively threatening is contrary to this Court's precedents and basic First Amendment principles. The present case provides an ideal vehicle to resolve the intractable divide, and to reject a purely subjective test that is both incorrect and unworkable.

A. Factual Background

Petitioner Jamal Knox, a rap music artist who performs under the stage name "Mayhem Mal," has released rap albums and singles that are available on platforms like Spotify and Apple Music. *See Mayhem Mal*, Spotify, https://spoti.fi/2FsMWQR; *Mayhem Mal*, Apple Music, https://apple.co/2Rrz4gd. Consistent with the rap genre, Knox has acknowledged that some of his music is controversial, but has described his lyrics as part of "put[ting] on an image" and an effort to "sell records." App. 106a, 108a; *see also id.* at 11a.

In 2012, Knox and Rashee Beasley, another rap artist whose stage name is "Soldier Beaz," formed a

rap group called "Ghetto Superstar Committee." App. 27a. As a teenager and aspiring rap artist, Knox wrote song lyrics inspired by his personal experiences and influenced by the work of influential rappers and rap songs. *See id.* at 107a, 111a-12a. He would often record dozens of songs to experiment with ideas, themes, and motifs. *Id.* at 111a-12a. Many of those songs were never released publicly, but kept for future use or as failed experiments. *Id.* Occasionally Beasley would upload finished song tracks to Facebook and YouTube. *Id.* at 2a, 9a.

In April 2012, Knox and Beasley were arrested by Pittsburgh police and charged with, among other things, possessing controlled substances and possessing an unlicensed weapon. App. 2a, 62a. Later, the teenagers wrote a song about it. *Id.* They named the song "F**k the Police," App. 2a—an obvious homage to the world-famous rap song "F**k tha Police" by the rap group N.W.A., which *Rolling Stone* hailed as one of the "500 Greatest Songs of All Time." *500 Greatest Songs of All Time*, Rolling Stone (Apr. 7, 2011).

The Pennsylvania Supreme Court reproduced the song's lyrics in its opinion below. *See* App. 3a-6a. But the song's lyrics were never meant to be read as bare text on a page. Rather, the lyrics were meant to be heard, with music, melody, rhythm, and emotion. An audio recording of the song is enclosed. *See* App. Compact Disk.

Consistent with the rap music genre, Knox and Beasley's song contains violent rhetoric about police generally as well as the two Pittsburgh police officers involved in their arrest specifically. App. 3a-4a.

In one verse, Knox raps, in a line that rhymes with "street," that "I'ma jam this rusty knife all in his

guts and chop his feet." App. 4a. He further raps, in a line that rhymes with "me," that one officer's "shift over at three and I'm gonna f**k up where you sleep." *Id.* There was no evidence at trial that either officer actually got off work at three, or that Knox knew where either officer lived. The song further references "bustin' heavy metal," "kill him wit a Glock," "artillery to shake the mother f***kin' streets," and "Jurassic Park." *Id.* at 3a-5a. The song also refers to a friend of Knox and Beasley's who was killed by police and the teenagers' other negative experiences with police "in the hood." *Id.* at 4a.[1]

In November 2012, Beasley uploaded the song to Facebook and YouTube accounts associated with his "Soldier Beaz" rap artist persona. A Pittsburgh police officer who had been monitoring Knox and Beasley's online presence discovered the song three days later. *See* Trial Tr. 180.

B. The Prosecution of Knox for the Song

A few days after Beasley posted the song online, the Commonwealth of Pennsylvania charged Knox and Beasley with two counts of terroristic threats, *see* 18 Pa. Cons. Stat. §§ 2706, 2706(a)(1), two counts of witness intimidation, § 4952(a), two counts of retaliation against a witness, § 4953(a), and one count of conspiracy (with each other) to commit terroristic threats, § 903(c). The charges were based solely on the content of the song.[2]

---

[1] Because Beasley sang the second verse of the song, the Pennsylvania Supreme Court declined to consider the second verse in its analysis of whether Knox's speech was a true threat. App. 23a n.12.

[2] Knox also faced charges in connection with the April 2012 arrest. *See Commonwealth v. Knox*, No. 1136 WD 2014, 2016 WL

At a bench trial in November 2013, Knox argued that the song was protected speech, not a "true threat," and that any conviction based on the song would therefore violate the First Amendment. Trial Tr. 438-39; *see also* App. 94a. The trial judge rejected Knox's argument, holding that the song was unprotected speech tantamount to "shout[ing] fire in a crowded theatre." App. 94a.

On November 21, 2013, the trial court convicted Knox for terroristic threats, witness intimidation, and conspiracy to commit terroristic threats. App. 94a. The court acquitted Knox on the witness retaliation charges. *Id.* at 95a. The court denied Knox's post-sentence motions challenging the validity of the convictions, holding that the evidence was sufficient to show that Knox subjectively intended to threaten the officers. *Id.* at 78a-84a. The court sentenced Knox to 12 to 36 months in prison, plus two years of probation. *Id.* at 72a. Knox served the sentence consecutively to his sentence on the separate charges stemming from the April 2012 arrest. *See* App. 72a. The Pennsylvania intermediate appellate court affirmed. *See* App. 59a-69a.[3]

C. The Decision Below

The Pennsylvania Supreme Court granted review on the question of whether the song "constitutes protected free speech or a true threat punishable by criminal sanction." App. 10a. A divided court affirmed Knox's convictions. *Id.* at 1a-58a.

5379299, at *2 (Pa. Sup. Ct. Aug. 2, 2016). Those charges are not at issue here.

[3] Knox and Beasley were tried together. Beasley received the same verdict. Beasley's convictions are not at issue here.

The majority acknowledged that, since *Virginia* v. *Black*, 538 U.S. 343 (2003), "courts have disagreed" over the standard for establishing whether a statement is a "true threat." App. 18a. Many courts "have continued to use an objective, reasonable-person standard," *id.*, while others have held that, under *Black*, the government need only show the speaker's subjective "intent to intimidate or terrorize," *id.* at 19a. And other courts have suggested a "subjective-objective combination pursuant to which a statement must objectively *be* a threat and subjectively be *intended* as such." *Id.* (citation and internal quotation marks omitted).

The court below adopted the minority subjective-only test. The court thus held that, under *Black*, a statement is an unprotected true threat whenever "the speaker acted with an intent to terrorize or intimidate," even if the statement is not objectively threatening. App. 22a.

Dissenting in part, Justice Wecht, joined by Justice Donohue, criticized the majority for failing to "provide sufficient guidance to the next musician who seeks to express political views and wants to do so to the fullest extent protected by the First Amendment." App. 32a. Like the majority, the dissent recognized that "[f]ollowing *Black*, federal appeals courts have split over" the true-threat standard. *Id.* at 32a-35a (explaining the split).

The dissent would have adopted a "two-pronged approach" to determine whether a statement is a true threat. *Id.* at 37a. "First, [the dissent] would require reviewing courts to conduct an objective analysis to determine whether recipients would consider the statement to be a serious expression of intent to inflict harm, and not merely jest, hyperbole,

or a steam valve." *Id.* "Second, if the first prong is satisfied, [the dissent] would require courts to conduct a subjective analysis to ascertain whether the speaker subjectively intended to intimidate the victim or victims, or intended his expression to be received as a threat to the victim or victims." *Id.* Under this approach, "[f]ailure of the government to satisfy either prong would mean that, under the First Amendment, the statement cannot be penalized or proscribed." *Id.*

The dissent explained that the two-pronged test "balances the relevant interests at stake" by ensuring that true threats can be punished "while, at the same time, shielding otherwise-protected speech from unwarranted governmental proscription." *Id.* In particular, "[t]he first prong . . . allows courts to determine objectively whether a statement is a threat and not political hyperbole, as was the case in *Watts*, or an instance of sophomoric utterances that could not be taken seriously." *Id.* at 38a.

The dissent expressed the view that the song was objectively threatening. *Id.* at 48a. The majority, however, expressed no such view. *See id.* at 1a-28a.

REASONS FOR GRANTING THE PETITION

I. Federal Courts of Appeals and State High Courts Are Intractably Divided Over the First Amendment True-Threat Standard

For all the reasons this Court granted certiorari in *Elonis*, it should do so here. As both the majority and dissent below acknowledged, federal and state courts "have disagreed" over the standard for establishing that a statement is a "true threat" unprotected by the First Amendment. App. 18a; *see also id.* at 32a-35a (dissent likewise noting that courts "have split"). Commentators likewise have recognized the

conflict. *See, e.g.*, *First Amendment—Sixth Circuit Holds that Subjective Intent is Not Required by the First Amendment When Prosecuting Criminal Threats*—United States v. Jeffries, 126 Harv. L. Rev. 1138, 1145 (2013); Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001). Because *Elonis* did not reach the issue, the division remains in place and calls out for this Court's resolution, as Justice Sotomayor explained last Term. *See Perez v. Florida.*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in the denial of certiorari) ("The Court should . . . decide precisely what level of intent suffices under the First Amendment—a question we avoided two Terms ago in *Elonis*.").

Every federal court of appeals has weighed in, as have the vast majority of state high courts. Most courts apply an objective test requiring the government to show that a reasonable person would regard the statement as a sincere threat. A minority of courts apply a subjective test requiring the government to show only the speaker's intent to threaten.

There is even disagreement between state and federal courts *within* many states—including now between the Pennsylvania Supreme Court and the Third Circuit. Thus, the question of whether a person may be convicted on the basis of a purported true threat turns not only on where the speaker lives, but on which prosecutor decides to bring charges. Such a severe split warrants this Court's review.

A. A Minority of Courts Apply a Subjective Test

The Pennsylvania Supreme Court joined a minority of courts in adopting a purely subjective standard to determine whether a statement constitutes a "true threat." App. 21-22a. Under this

standard, a statement is an unprotected true threat whenever "the speaker acted with an intent to terrorize or intimidate," regardless of whether a reasonable person would regard the statement objectively as a serious threat of violence. *Id.* at 22a. The Ninth and Tenth Circuits apply a subjective standard. *See United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014) ("We read *Black* as establishing that a defendant can be constitutionally convicted of making a true threat only if the defendant intended the recipient of the threat to feel threatened."); *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (similar).

Numerous state courts of last resort likewise apply a subjective test. *O'Brien v. Borowski*, 961 N.E.2d 547, 557 (Mass. 2012) ("The intent requirements in the act plainly satisfy the 'true threat' requirement that the speaker subjectively intend to communicate a threat.") (citing *Black*, 538 U.S. at 360); *State v. Grayhurst*, 852 A.2d 491, 515 (R.I. 2004) (holding that a "true threat" requires a showing of the speaker's subjective intent to threaten); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011) ("Without a finding that his statement represented an actual intent to put another in fear of harm or to convey a message of actual intent to harm a third party, the statement cannot reasonably be treated as a threat.").

These courts concluded that this Court's decision in *Black* compels a purely subjective inquiry. The Ninth Circuit found the "clear import" of *Black* was that "only *intentional* threats are criminally punishable consistent with the First Amendment." *Cassel*, 408 F.3d at 631. The Tenth Circuit and state courts in Massachusetts, Rhode Island, and Vermont reached the same conclusion. *See Heineman*, 767 F.3d at 978; *O'Brien*, 961 N.E.2d at 426; *Grayhurst*, 852 A.2d at 515; *State v. Cahill*, 80 A.3d 52, 57 (Vt.

2013). The court below likewise concluded that, "[a]s we read *Black*, an objective, reasonable-listener standard . . . is no longer viable." App. 19a.

B. A Majority of Courts Apply an Objective Test

By contrast, the vast majority of federal and state courts apply an objective, reasonable-person standard to determine whether a statement is an unprotected "true threat." The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits apply an objective standard requiring the government to "show that a reasonable person would perceive the threat as real," at which point "a true threat may be punished and any concern about the risk of unduly chilling protected speech has been answered." *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013); *see also United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006) ("The test is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury."); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) ("Whether the [statement] contains a 'true threat' is an objective inquiry."); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) ("Speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm.").[4] Numerous state courts of last resort similarly apply an objective test.[5]

---

[4] *Accord United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("[W]hile the speaker need only *intend to communicate a statement*, whether the statement amounts to a true threat is determined by the understanding of a *reasonable recipient familiar with the context* that the statement is a 'serious expression of an intent to do harm' to the recipient.") (citation omit-

Courts have explained that the objective standard "protects listeners from statements that are reasonably interpreted as threats" by those who hear them, and that it is often difficult for prosecutors to prove subjective intent. *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997). Courts similarly have noted that other categories of unprotected speech focus on the harm to the listener. "Much like their

---

ted); *United States v. Jeffries*, 692 F.3d 473, 479-80 (6th Cir. 2012) ("The reasonable person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made."), *cert. denied*, 134 S. Ct. 59 (2013); *United States v. Elonis*, 730 F.3d 321, 331 n.7 (3d Cir. 2013) ("[O]ur test asks whether a reasonable speaker would foresee the statement would be understood as a threat."), *rev'd on other grounds by Elonis v. United States*, 135 S. Ct. 2001 (2015); *United States v. Mabie*, 663 F.3d 322, 330-32 (8th Cir. 2011) ("[T]he government need only prove that a reasonable person would have found that Mabie's communications conveyed an intent to cause harm or injury."), *cert. denied*, 133 S. Ct. 107 (2012); *United States v. Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003) ("A defendant may be convicted for making a threat if 'he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made.'") (citation omitted).

[5] *See Citizen Publ'g Co. v. Miller*, 115 P.3d 107, 114 (Ariz. 2005); *Jones v. State*, 64 S.W.3d 728, 736 (Ark. 2002); *People v. Lowery*, 257 P.3d 72, 74 (Cal. 2011); *People v. Baer*, 973 P.2d 1225, 1231 (Colo. 1999); *State v. Moulton*, 78 A.3d 55, 65 (Conn. 2013); *Carrell v. United States*, 80 A.3d 163, 170 (D.C. 2013); *State v. Valdivia*, 24 P.3d 661, 671-72 (Haw. 2001); *State v. Soboroff*, 798 N.W.2d 1, 2 (Iowa 2011); *State ex rel. RT*, 781 So. 2d 1239, 1245-46 & n.9 (La. 2001); *Hearn v. State*, 3 So. 3d 722, 739 (Miss. 2008); *State v. Lance*, 721 P.2d 1258, 1266-67 (Mont. 1986); *State* v. *Curtis*, 748 N.W.2d 709, 712 (N.D. 2008); *State v. Moyle*, 705 P.2d 740, 750-51 (Or. 1985) (en banc); *Austad v. Bd. of Pardons and Paroles*, 719 N.W.2d 760, 766 (S.D. 2006); *State v. Johnston*, 127 P.3d 707, 710 (Wash. 2006); *State v. Perkins*, 626 N.W.2d 762, 770 (Wis. 2001).

cousins libel, obscenity, and fighting words, true threats 'by their very utterance inflict injury' on the recipient." *Jeffries*, 692 F.3d at 480 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); *accord White*, 670 F.3d at 508-09.

These courts have rejected the view that *Black* mandates a purely subjective inquiry. "*Black* was primarily a case about the overbreadth of a specific statute—not whether all threats are determined by a subjective or objective analysis in the abstract." *Martinez*, 736 F.3d at 986-87; *see also Jeffries*, 692 F.3d at 480-81 ("*Black* cannot be read so broadly" as to "demand a subjective inquiry"); *Mabie*, 663 F.3d at 332 ("[T]he *Black* Court did not hold that the speaker's subjective intent to intimidate or threaten is required in order for a communication to constitute a true threat."); *White*, 670 F.3d at 511 (similar).

C. In Some States, the State High Court Applies One Test and the Federal Court of Appeals Applies the Other

As with any circuit conflict, the division here leads to inconsistent results between states—the same speech may be protected in one state and result in conviction and incarceration in another. That is the paradigmatic basis for this Court's review. *See* S. Ct. R. 10. The situation here is even worse. At least nine state high courts have adopted a standard that conflicts with that of the federal circuit in which they sit. For example, the Pennsylvania Supreme Court below adopted a purely subjective test that conflicts with the objective test adopted by the Third Circuit. *Compare* App. 19-20a *with Elonis*, 730 F.3d at 331 n.7. Massachusetts and Rhode Island use a subjective test in conflict with the First Circuit's objective test. *Compare O'Brien*, 961 N.E.2d at 557 (Massa-

chusetts), *and Grayhurst*, 852 A.2d at 515 (Rhode Island), *with Nishnianidze*, 342 F.3d at 16. Vermont uses a subjective test in conflict with the Second Circuit's objective test. *Compare Miles*, 15 A.3d at 599 (Vermont), *with United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 2009). And while California, Hawaii, Montana, Oregon, and Washington use an objective test, the Ninth Circuit's standard is subjective. *Compare Lowery*, 257 P.3d at 74, 78 (California), *Valdivia*, 24 P.3d at 671-72 (Hawaii), *Lance*, 721 P.2d at 1266-67 (Montana), *Moyle*, 705 P.2d at 750-51 (Oregon), *and Johnston*, 127 P.3d at 710 (Washington), *with Cassel*, 408 F.3d at 633.

As a result, the same speech may be protected in one circuit but unprotected in another circuit. The speech may be protected in one state but unprotected in another state. And even *within* a state, the speech may be protected in state court but unprotected in federal court. Whether a speaker faces criminal liability for a "true threat" should not depend on where the person lives, much less which side of the street the courthouse is on.

The conflict here is clear, acknowledged, and warrants immediate review. This Court has already decided that its review of this urgent constitutional issue is needed. *See Elonis*, 135 S. Ct. at 2004. There is no need for any further delay.

II. The Decision Below Is Wrong

A purely subjective true-threat standard allowing convictions based solely on the speaker's subjective intent—without regard to whether the speech was objectively threatening—is irreconcilable with this Court's precedents and fundamentally at odds with core First Amendment principles.

A. This Court Has Never Adopted a Purely Subjective True-Threat Standard

A "hallmark" of the constitutional right to free speech is "to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Black*, 538 U.S. at 358. The First Amendment thus bars the State from proscribing speech, even if "a vast majority of its citizens believes [it] to be false and fraught with evil consequence." *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring). It is well-settled that these principles apply to music, which, "as a form of expression and communication, is protected under the First Amendment." *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

This Court has acknowledged exceptions to the First Amendment's protections "in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.'" *R.A.V.*, 505 U.S. at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1969)). The government may prohibit libel, "fighting words," and speech intended and likely to produce "imminent lawless action." *Black*, 538 U.S. at 359.

The government also may prohibit "true threats." In *Watts*, a Vietnam War protestor was convicted under 18 U.S.C. § 708 for threatening the President at a rally near the Washington Monument. The protestor exclaimed: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. The crowd laughed. This Court reversed the conviction, holding that the statement was not a "true threat" because of the context in which it was made and the reaction of the those present. *Id.* at

708. The analysis focused entirely on the reaction of an objectively reasonable listener. *Watts* made no reference to the speaker's intent. *See id.*

Four decades later, in *Virginia v. Black*, the Court considered the constitutionality of a Virginia statute that criminalized the burning of a cross in public view "with the intent of intimidating any person," 538 U.S. at 347, 348 (quoting Va. Code Ann. § 18.2-423 (1996)). The statute included a presumption that the burning of a cross in public "shall be prima facie evidence of an intent to intimidate." *Id.*

Justice O'Connor authored the Court's lead opinion, which spoke for a majority in some parts and a plurality in others. A majority held that cross burnings with an intent to intimidate are true threats and may be banned. *Id.* at 362-63. The Court explained that 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." *Id.* at 359 (citations omitted; emphasis added). The Court added that "[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." *Id.* at 360 (emphasis added). Ultimately, the plurality concluded that the prima facie evidence provision was unconstitutional because it allowed a conviction "based solely on the fact of cross burning itself," when "a burning cross is not always intended to intimidate." *Id.* at 365.

Contrary to the conclusion of a minority of courts, *Black* did not mandate a purely subjective true-threat standard or eliminate *Watts*'s objective in-

quiry. *Black* is best read as "add[ing] a subjective intent requirement to the prevailing [objective] test for true threats." *Cf. Parr*, 545 F.3d at 500 (stating that it is "unclear" whether *Black* instead "meant to retire to objective 'reasonable person' approach"). *Black* said nothing about overruling or abrogating *Watts* or the many lower court decisions applying an objective standard based on *Watts*. To the contrary, *Black* cited *Watts* as the source of the true-threat doctrine. *Black*, 538 U.S. at 359. Indeed, *Black* stressed that "a prohibition on true threats protects individuals from the fear of violence"—focusing on the listener, not only the speaker. *Id.* at 360 (citation, internal quotation marks, and bracketing omitted). *Watts* and *Black* thus complement each other: A statement is a true threat if it is both objectively threatening and subjectively intended as a threat. The Court in *Black* was concerned with strengthening the First Amendment's protections. It would have been passing strange for the Court to have overturned *Watts* and eliminated a key objective benchmark for determining free-speech protection without saying so.

B. Core First Amendment Principles Foreclose a Purely Subjective True-Threat Standard

1. Basic First Amendment principles confirm that the true-threat standard must include an objective component and cannot turn solely on the speaker's subjective intent to threaten. As an initial matter, the First Amendment exists to protect far more than the rights of speakers. This Court's decisions make clear that the First Amendment likewise protects the rights of listeners to receive information and ideas. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *see also Kleindienst v. Mandel*, 408

U.S. 753, 762-63 (1972) (recognizing "well established" First Amendment right to "receive information and ideas"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (recognizing "the right of the viewers and listeners . . . is paramount"). A baseline requirement that a true threat be objectively threatening ensures that the government cannot censor provocative works of art, satire, and political opinion based solely on their creators' mindset or intentions.

An objective inquiry is also necessary to preserve sufficient "breathing space" for the free exchange of ideas. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). The First Amendment's protections extend beyond measured and well-reasoned speech to cover speech that is crude, impetuous, or negligent. *See Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Yet under a purely subjective standard, the First Amendment allows a conviction based solely on the defendant's idiosyncratic belief that his or her statement was genuinely threatening, when a reasonable person would not perceive any threat.

For these reasons, virtually every exception to the First Amendment's protections includes a baseline requirement that the speech in question be objectively harmful. While the Court has incorporated a subjective element for many of these exceptions to "provide 'breathing room' . . . by reducing an honest speaker's fear that he may accidentally incur liability for speaking," *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring), the objective standard is the constitutionally mandated minimum protection for all speech onto which this Court has layered *additional* protections.

For example, public figures alleging defamation or libel must show that the offensive speech is objectively harmful (i.e., false and damaging), and that the speaker subjectively intended for it to be defamatory or libelous (i.e., actual malice). *See Hustler Magazine*, 485 U.S. at 52. Similarly, prosecution for incitement requires proof the defendant's "advocacy of the use of force" was subjectively "directed to inciting or producing imminent lawless action." *Brandenburg*, 395 U.S. at 447. But the government also must show that the speech is objectively "*likely* to incite or produce such action." *Id.* One can never be guilty of incitement for riling up an empty room.

Other categories of unprotected speech rely on a purely objective standard. To find unprotected obscenity, the trier of fact must determine, under "contemporary community standards," that the speech "appeals to the prurient interest." *Miller v. California*, 413 U.S. 15, 24 (1973). And for so-called "fighting words," the state must show that the speech "by [its] very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

2. The Pennsylvania Supreme Court's purely subjective approach to true threats is a clear outlier, and for good reason. The notion that one could commit a "speech crime" *by uttering an objectively harmless statement with bad intent* is profoundly chilling. Imprisoning a person for a statement that is not only objectively nonthreatening but in fact artistically or socially valuable is fundamentally inconsistent with the First Amendment and would erode the breathing space that safeguards the free exchange of ideas.

Permitting the criminalization of objectively nonthreatening statements made with bad intentions

would chill speech and invite abuse. It would grant law enforcement officials a roving license to arrest and interrogate any person who said nearly anything, no matter how outlandish, because that person might, in their heart of hearts, have meant it as a threat. Individuals who wish to avoid being targeted for coming close to the line accordingly may choose to avoid it altogether by remaining silent.

The First Amendment thus demands that, at a minimum, statements must be objectively threatening before they lose First Amendment protection. The notion that a speaker's mere motive might transform protected speech into unprotected speech is wholly foreign to the First Amendment. The court below thus erred in affirming petitioner's convictions based on a purely subjective true-threat standard.

III. The Issue Is Recurring and Important

A. The standard for determining whether a statement is a true threat unprotected by the First Amendment is undeniably important, and this Court recognized as much by granting certiorari in *Elonis*. The issue implicates the validity of countless threat prosecutions by federal and state authorities each year. There are at least a half-dozen federal threat statutes, including threatening the President, 18 U.S.C. § 871(a), blackmail, § 873, threatening to kidnap or injure any person, § 875(c), mailing threatening communications, § 876(c), threats and extortion against foreign officials, official guests, or internationally protected persons, § 878, and threats against former Presidents and certain other persons, § 879, threats against a grand jury member, § 1503(a), interference with commerce, § 1951(a), influencing, impeding, or retaliating against a federal official by threatening or injuring a family member, § 115. The

United States brings dozens of threat prosecutions annually under § 875(c) alone, resulting in significant terms of incarceration. *See* App. 117a. For example, 26 defendants were convicted under § 875(c) in fiscal year 2016, and those incarcerated faced an average prison term of more than two years. *Id.* The fact that most, if not all, states criminalize threats only compounds the urgency of this Court's review.[6]

Whether a person can be convicted and incarcerated on the basis of speech should not depend on the location of the speaker. But that is precisely the case under the current conflict in the lower courts. "[Under] the current jurisprudence . . . courts are reaching radically different results in relevantly similar cases." Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 Hastings Const. L. Q. 339, 340 (2011). "The Supreme Court's minimal guidance has left each circuit to fashion its own test . . . . There is no justification for regional variations on what speech is punished as a threat." Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J. L. & Pub. Policy 283, 302 (2001). This is an untenable status for a federal constitutional right.

Notably, the issue is recurring in large part because lower courts are in disagreement over the interplay between this Court's decisions in *Black* and

---

[6] *See, e.g.*, Ala. Code § 13A-10-15 (West 2013); Ark. Code Ann. § 5-13-301 (West 2013); Cal. Penal Code § 140 (West 2014); Conn. Gen. Stat. Ann. § 53a-183 (West 2014); D.C. Code § 22-407 (West 2013); Fla. Stat. Ann. § 836.10 (West 2013); Haw. Rev. Stat. § 707-716 (West 2013); Iowa Code Ann. § 712.8 (West 2013); Mich. Comp. Laws Ann. § 750.411i (West 2013); Okla. Stat. Ann. tit. 21, § 1378 (West 2013); Va. Code Ann. § 18.2-60 (West 2013); Wash. Rev. Code Ann. § 9.61.160 (West 2013); Wis. Stat. Ann. § 940.203 (West 2013).

Watts. This Court often accepts review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Shapiro et al., Supreme Court Practice 254 (10th ed. 2013). Only this Court can clarify how the First Amendment operates in this important context.

Vast increases in online communication make the issue more important today than ever before. The Internet has revolutionized self-expression by creating a boundless global sounding board. In so doing, the Internet has created more opportunities for users to transmit communications that an overzealous prosecutor or a particularly sensitive soul might interpret as a threat. Fear of threat prosecutions is far from an idle one. Especially because so much online content is presented as irreverent songs or screeds, it is critically important that online speech remain constitutionally protected unless the speech is objectively threatening. Internet users deserve robust free speech protections. But at the very least, they deserve clarity.

B. This case presents an ideal vehicle to resolve this important and recurring issue. The question here is purely one of constitutional interpretation. The case poses no jurisdictional or procedural obstacles to the Court's resolution of the question. The Pennsylvania Supreme Court clearly and reversibly erred by failing to consider whether a reasonable person would regard petitioner's song as conveying a serious intention to engage in unlawful violence. Nearly every federal circuit has weighed in, as have most state courts of last resort, creating a deep and lasting split. The issue is ripe for review, and nothing would be gained from delaying review further.

The Court's resolution of this issue will also be outcome determinative. No court at any level has concluded that a reasonable person would find that Knox's song conveyed a sincere intent to engage in violence, a finding the First Amendment requires. At a minimum, then, Knox would be entitled to consideration of that question on remand.

The disposition of the case also suggests that a majority of justices on the Pennsylvania Supreme Court would not have found the song objectively threatening. The partial dissent below applied a two-pronged subjective-and-objective test and found the song both subjectively *and* objectively threatening. But the majority did not express agreement with this assessment or conduct any objective analysis of its own, instead resting on the conclusion that the true-threat standard contains no objective component. If the majority had agreed with the dissent that the song was objectively threatening, it could have easily said so instead of deciding that the objective analysis was irrelevant.

This Court could conclude on its own that Knox's song is not objectively threatening. In *Watts*, this Court concluded as a matter of law that the statement at issue was not objectively threatening and therefore was protected by the First Amendment. *See* 394 U.S. 705, 708. The Court could reach the same conclusion here.

C. The outcome of this case is of great concern to the music industry, where artists often reference specific persons and real-world events alongside violent lyrics and themes—often to worldwide critical acclaim. Rap music—which draws on many artistic traditions, including violent language, hyperbole, and basing stories off larger-than-life antagonists—is es-

pecially vulnerable to erroneous and under-protective "true threats" analysis. As Chief Justice Roberts suggested at oral argument in *Elonis*, a reasonable-person inquiry may be needed to avoid "subject[ing] to prosecution the lyrics that a lot of rap artists use." Transcript of Oral Argument at 41, *Elonis v. United States*, 135 S. Ct. 2001 (2015) (No. 13-983).

For example, Grammy Award-winning artist Eminem named a song after his ex-wife Kim Mathers titled "Kim" following a contentious divorce proceeding. The song featured violent lyrics clearly directed at her. In the song, Eminem threatens to "beat the s**t" out of her, throw her "in the trunk" of his car, and kill her. *Eminem - Kim Lyrics*, Metro Lyrics, https://bit.ly/2RKQrrK. The lyrics, while grotesque, were obviously fictitious. The album was nominated for "Album of the Year" at the 2001 Grammy Awards, *Eminem*, Grammy Awards, https://bit.ly/2VVbLdl, and the song itself received critical acclaim, *See* Touré, *The Marshall Mathers LP*, Rolling Stone (July 6, 2000), https://bit.ly/2RuyCxJ; Will Hermes, *The Marshall Mathers LP*, Entertainment Weekly (June 2, 2000), https://bit.ly/2swE3Nz.

The issue is of added salience today, as many artists have directed virulent speech specifically toward the President of the United States. Comedian Kathy Griffin caused widespread outrage after she posted a photo online of herself posing with a "fake decapitated head made to look like" the President. Kalhan Rosenblatt, *Kathy Griffin Fired by CNN Over Gruesome Photo of Trump*, NBC News (May 31, 2017), https://nbcnews.to/2CmIhfr. And rapper Eminem recorded a song for a music awards show in which he exudes anger toward the President and "threatens," among other things, to put a "fork and a dagger in this racist 94-year-old grandpa." *The Full Lyrics to*

Eminem's Trump-Bashing Freestyle 'The Storm', CNN (Oct. 11, 2017), https://cnn.it/2Mb0tNF. The standard adopted by a minority of courts, including the court below, would allow prosecutors to charge, and juries to convict, these artists of terrorist threats without any objective inquiry whatsoever.

Similarly, the song "F***k the Police" by renowned hip-hop group N.W.A.—to which petitioner's song paid homage—contains similarly violent threats toward Los Angeles Police Department Officers: "And when I'm finished, it's going to be a bloodbath/ Of cops, dying in L.A . . . . I'm a sniper with a hell of a scope/ Taking out a cop or two, they can't cope with me." *See N.W.A. - F*** The Police Lyrics*, Metro Lyrics, https://bit.ly/2Fvh0LR. That song did not land the artists in prison; it was included among the 500 greatest songs of all time. *See 500 Greatest Songs of All Time*, Rolling Stone (Apr. 7, 2011), https://bit.ly/2ss07sZ.[7]

Such lyrics are a matter of taste. But the First Amendment tolerates such expression because reasonable listeners understand that violent lyrics in music are not literal. The Court should confirm that fundamental principle, correct the manifest error here, and resolve the conflict in the lower courts.

---

[7] Violent lyrics in music are of course not limited to the rap genre. *See, e.g.*, The Beatles, *Run for Your Life* (1965) (claiming about an unnamed girlfriend: "I'd rather see you dead, little girl, than to be with another man"); Johnny Cash, *Folsom Prison Blues* (1953) ("I shot a man in Reno, just to watch him die."); Bob Marley and the Wailers, *I Shot the Sheriff* (1973) ("I shot the sheriff, but I did not shoot the deputy.").

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
R. STANTON JONES
ANTHONY J. FRANZE
ANDREW T. TUTT
GRAHAM W. WHITE*
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@arnoldporter.com

**Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members.*

Counsel for Petitioner

January 18, 2019