No. 18-949

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

REPLY BRIEF

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REPLY

Rarely does the Court confront such a clear and stark conflict in the lower courts on such a frequently recurring constitutional question. The split here couldn't get more entrenched. Every federal court of appeals has weighed in on the First Amendment true-threat standard, as have most state high courts. Pet. 8-13. And these courts are intractably divided. *Id.* Respondent does not dispute this.

The division over First Amendment true-threat doctrine "is dangerous to liberty, as it requires ordinary citizens to decipher 'riddles that even top . . . lawyers struggle to solve.'" Amicus Br. of Cato Institute & Rutherford Institute 7 (quoting *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018)). The confusion has widespread implications because of the increasing number of threat prosecutions brought under a myriad of state and federal statutes. *See* Amicus Br. of National Association of Criminal Defense Lawyers 4-5. Respondent does not dispute this either.

Resolving this conflict is undeniably important, particularly to the artistic community. "This division among the lower courts poses enormous practical problems for artists. An artist's work is often exhibited or performed in multiple venues, so under the current state of affairs, artists who produce works that evoke violent themes are subject to varying degrees of First Amendment protection depending on where their art is viewed." Amicus Br. of Art Scholars 5. Worse, "a number of states have adopted tests that conflict with the tests applied by the federal circuit in which they reside. In practical terms, then, whether the First Amendment protects a particular work of art may depend on whether charges are brought in state court or federal court." *Id.* Simply put, "[i]f one First Amendment doctrine

screams out the loudest for clarification, it may well be true threats." Amicus Br. of Rap Artists, Scholars & Music Industry Representatives 3 (internal quotation marks omitted). Again, Respondent does not contest the importance of the question presented in the petition.

Instead, respondent's principal argument against certiorari is that the court below supposedly "did not . . . adopt a purely subjective true-threat standard" without an objective component. Opp. 13. That reading of the decision below is untenable. The Pennsylvania Supreme Court majority could not have been clearer in expressing its view that "an objective, reasonable-listener standard . . . is *no longer viable*" under this Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003). Pet. App. 19a (emphasis added). As the Harvard Law Review recently put it, "the Pennsylvania Supreme Court read *Black* to mean that 'an objective, reasonable-listener standard . . . is no longer viable'" and thus "failed to contextualize the allegedly threatening speech." Recent Case, *True Threat Doctrine—Pennsylvania Supreme Court Finds Rap Song a True Threat*, 132 Harv. L. Rev. 1558, 1558, 1560 (Mar. 8, 2019). There is no other plausible reading of the state high court's opinion.

Having expressly found that the First Amendment true-threat test has no objective component, the majority below undertook no evaluation—none—of whether a reasonable person would regard petitioner's rap song as a genuine threat in context. Rather, the majority affirmed the conviction of a rap artist based solely on a finding of subjective intent.

That was wrong. Basic First Amendment principles require that the true-threat test consider whether a reasonable person familiar with the con-

text would find the speech objectively threatening. *See* Pet. 17–20; Amicus Br. of Cato Institute & Rutherford Institute 12–15. And here, a reasonable person familiar with the rap genre's basic conventions would know that artists often use violent lyrics as a means of political, social, and artistic commentary—including on police relations. *See* Amicus Br. of Rap Artists, Scholars & Music Industry Representatives 13–19. "[E]ven casual listeners would recognize that Knox and Beasley are paying tribute to the N.W.A. original" version of "F**k tha Police." *Id.* at 16. This Court's review is warranted both to correct the error below and to provide guidance on a question that has long confounded lower courts and continues to do so.

I. The Pennsylvania Supreme Court Eschewed Any Objective Test and Applied a Purely Subjective One

A. Respondent does not dispute that lower courts are intractably divided over whether the First Amendment "true threat" standard is subjective, objective, or both. *See* Pet. 8–14. Nor does respondent contest that this question is recurring and exceptionally important, particularly to artists. *See id.* at 20–26; Amicus Br. of Art Scholars 3–6. Respondent further does not dispute that rap lyrics are particularly susceptible to being mistakenly perceived as subjectively threatening. *See* Pet. 23-24; Amicus Br. of Rap Artists 13–19. And on the merits respondent does not even try to defend a purely subjective true-threat test.

Instead, respondent's principal argument is that the Pennsylvania Supreme Court supposedly did not cast aside the objective inquiry and "adopt a purely subjective true threat standard." Opp. 13. Respondent is demonstrably wrong.

On its face, the decision below makes clear that the state high court jettisoned any objective inquiry and applied a purely subjective true-threat standard. The majority acknowledged that, after this Court's decision in *Black*, some courts "have continued to use an objective, reasonable-person standard" because "an objective standard remains appropriate for judging whether the speech, taken in its full context, embodies a serious expression of an intent to commit unlawful violence." Pet. App. 18a.

But the court below took the polar opposite view. The majority stated, explicitly and unambiguously, that, "[a]s we read *Black*, an objective, reasonable-listener standard . . . is no longer viable." *Id.* at 19a. Those words—"no longer viable"—are clear as day. It's not surprising, then, that the majority undertook no objective analysis whatsoever. One can search the majority's decision high and low for any discussion of whether a reasonable listener would regard petitioner's song as a genuine threat in context. No such discussion appears—not a single word.

The Pennsylvania Supreme Court majority instead focused exclusively on the separate question of petitioner's subjective intent to threaten. It read *Black* to mean that "the First Amendment necessitates an inquiry into the speaker's mental state." *Id.* at 20a. It stated that "the Constitution allows states to criminalize threatening speech which is specifically intended to terrorize or intimidate." *Id.* at 21a-22a. It recounted the trial court's finding that petitioner's song reflected "a subjective intent" to threaten. *Id.* at 22a. And the court below concluded that "these findings, if supported by competent evidence, are sufficient to place the rap song within the true-threat category." *Id*. In analyzing this question, the

majority narrowly focused throughout its opinion on petitioner's "intent." *Id.*; *see id.* at 21a-28a.

Ultimately, the court below "conclude[d] that the trial court's finding as to [petitioner's] intent was supported by competent evidence." *Id.* at 28a. In the majority's view, no more was needed to deem the song a true threat. By contrast, the dissenting judges spent several pages analyzing petitioner's song under an objective standard. *Id.* at 38a-48a.[1]

Legal scholars, artists, criminal defense lawyers, and prominent think tanks have accordingly read the decision below as rejecting an objective standard in favor of a purely subjective one. *See* Amicus Br. of

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[1] Respondent relies on a snippet from the dissenting opinion as "proof" that the majority engaged in an objective analysis. Opp. 16. The dissent stated that "like the Majority, I also would hold that consideration of a speaker's mindset is only part of the analysis, and would adopt a two-pronged approach to evaluating a true threat for constitutional purposes." Pet. App. at 37a. But the majority opinion does not adopt a "two-pronged analysis." In context, the dissent's phrase appears to be expressing agreement that true-threat analysis, even of subjective intent, must include consideration of context when analyzing a speaker's intent. *See id.* In any event, a dissenting opinion's interpretation of a majority opinion is hardly gospel. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 271-72 (2007) (Roberts, C.J., dissenting) ("It cannot have been 'objectively unreasonable' for a state court . . . to have been guided by the *Johnson* majority on this question, rather than by the dissent."). Most telling, the dissent below applied a two-pronged subjective-and-objective test and found the song both subjectively and objectively threatening. If the majority had agreed that the song was objectively threatening, it could have easily said so instead of deciding that the objective analysis was irrelevant under this Court's decision in *Black*. *See* Pet. 23.

Cato Institute & Rutherford Institute 18 (decision below "adopt[s] a purely subjective intent test for whether speech is an unprotected 'true threat'"); Amicus Br. of Art Scholars 5 (decision below gives "no First Amendment protection even if an objectively reasonable person would not perceive the speech as threatening"); Amicus Br. of National Association of Criminal Defense Lawyers 6 (decision below "announced a rule that allows the government to criminalize objectively nonthreatening speech").

If the decision below is allowed to stand, Pennsylvania state courts in future cases will apply a purely subjective true-threat standard, because that is what the Pennsylvania Supreme Court's decision commands. "It allows for a criminal conviction based entirely on the speaker's supposed subjective intent, even if the speech at issue is, in context, objectively non-threatening." Amicus Br. of Cato Institute & Rutherford Institute 14.

In short, the state high court's explicit statement that "an objective, reasonable-listener standard . . . is no longer viable," Pet. App. 19a, disposes of respondent's lone objection to this Court's review. The question presented was plainly passed upon below. *See United States v. Williams*, 504 U.S. 36, 41 (1992).

B. Respondent seeks to distinguish this case from *Elonis v. United States*, 135 S. Ct. 2001 (2015), and *Perez v. Florida*, 137 S. Ct. 853 (2017) (Sotomayor, J.) (concurring in the denial of certiorari), on the ground that those cases specifically involved the level of intent, if any, required to establish a true threat. Opp. 18–24. Such quibbles provide no basis to deny review.

Elonis and *Perez*, like this case, raised the question of what constitutes an unprotected true threat,

an issue that has confounded the lower courts. The petition in *Elonis* asked whether a true-threat requires a showing of subjective intent and not a purely objective inquiry. *See* Petition for Writ of Certiorari at I, *Elonis*, 135 S. Ct. 2001 (No. 13-983). And in *Perez* the lower court instructed the jury that the defendant needed to communicate a threat "to inflict harm or loss on another when viewed and/or heard by an ordinary reasonable person"; the question was the level of subjective intent required. *Perez*, 137 S. Ct. at 854 (Sotomayor, J., concurring in the denial of certiorari)

This case is the flipside of the same coin: whether a true threat requires a showing that the speech at issue is objectively threatening and not a purely subjective inquiry. If it was concerning in *Elonis* and *Perez* that the government could criminalize speech absent a subjective intent to threaten, it is even more troubling to allow the government to criminalize *objectively non-threatening* speech as a true threat based solely on the speaker's supposed subjective intent. *See Perez*, 137 S. Ct. at 855 (Sotomayor, J., concurring in the denial of certiorari) (*Black* and *Watts* "strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.").

II. This Case is an Ideal Vehicle

This case is an excellent vehicle to resolve the question presented. *See* Pet. 22–23; Amicus Br. of Cato Institute & Rutherford Institute 9–10; Amicus Br. of Rap Artists 3–4. There are no jurisdictional barriers to review, and the question presented is outcome determinative and squarely presented. There is no reason to delay any longer this Court's resolu-

tion of the true-threat question at the heart of this case. It is undoubtedly important. The Court should decide it once and for all.

Respondent's suggestion that petitioner's song was objectively threatening and was viewed that way by the officers provides no basis to deny review. For one, as noted, the court below did not find the song objectively threatening. And respondent's description of the officers' response is overstated. Opp. 8. At trial the officers admitted that they had no contact with petitioner after his arrest. Tr. 114, 155. Both officers admitted that they had no reason to ever have discovered the song and likely never would have discovered it had it not been specifically sent to them by another officer. *Id.* Neither officer testified that he thought petitioner would actually engage in violence of any kind against him on the basis of the song. Both officers made it to every scheduled court appearance and testified against petitioner and his co-defendant, without incident. Tr. 115–16, 155. One of the officers testified that he was not aware of "any formal changes" to staffing, policing, or manpower in response to the song. Tr. 109.

Respondent claims that "[a]s a result of the threats contained within the lyrics, Officer Kosko decided to leave the Pittsburgh Police and relocate." Opp. 8. But in fact, the officer testified that he did not leave the force until eight months after learning of the song, stating generally that the song was "one" of the reasons he left the force. Tr. 109. During that same period, this officer had become embroiled in a public controversy after he was involved in a police shooting that left a young African American man permanently paralyzed. *See Ford v. City of Pitts-*

burgh, No. 13-1364, 2017 WL 3393954, at *1–*2 & n.1 (W.D. Pa. Aug. 4, 2017).

Grasping at straws, respondent suggests that "the objective nature of the threat contained in the song was never at issue, as Knox at no time in these proceedings even attempted to argue that his song did not constitute an objective threat." *See* Opp. 16. This is plainly false. After granting review on "the issue of whether the rap video constitutes protected free speech or a true threat punishable by criminal sanction," Pet. App. 10a (quotation marks omitted), the Pennsylvania Supreme Court roundly rejected respondent's contention that the objective nature of the song was not at issue: "[T]he substantive issue of whether the First Amendment prohibits the imposition of criminal liability based on the rap song was raised at trial and in [petitioner's post-trial] statement, and argued to the [intermediate appellate court]." *Id.* at 10a n.4. And again: Petitioner "has not waived his First Amendment claim." *Id.* at 10a n.5.

* * * * *

"Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain." *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011). In a free society, the government "cannot react to that pain by punishing the speaker." *Id.* at 461.

Yet here, Pennsylvania punished the speaker, a young rap artist who created a song of artistic and political expression. The court below should have evaluated whether the song was objectively threatening. It did not, and the case provides an ideal opportunity to resolve an entrenched conflict and provide

guidance to lower courts—and artists—across the land.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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