No. _____

In the
Supreme Court of the United States

STATE OF KANSAS,
Petitioner,

v.

TIMOTHY C. BOETTGER AND RYAN R. JOHNSON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment prohibit a State from criminalizing threats to commit violence communicated in reckless disregard of the risk of placing another in fear?

STATEMENT OF RELATED PROCEEDINGS

- *Kansas v. Timothy C. Boettger*, 2014CR262 (Douglas County District Court) (convicted on May 19, 2015, and sentenced on June 16, 2015)
- *Kansas v. Timothy C. Boettger*, No. 16-115387-A (Kansas Court of Appeals) (opinion issued and judgment entered on June 23, 2017)
- *Kansas v. Timothy C. Boettger*, No. 16-115387-AS (Kansas Supreme Court) (opinion issued and judgment entered on October 25, 2019)
- *Kansas v. Ryan Robert Johnson*, 2014CR490I (Montgomery County District Court) (convicted on July 14, 2016, and sentenced on August 18, 2016)
- *Kansas v. Ryan Robert Johnson*, No. 16-116453-A (Kansas Court of Appeals) (opinion issued and judgment entered on December 15, 2017)
- *Kansas v. Ryan Robert Johnson*, No. 16-116453-AS (Kansas Supreme Court) (opinion issued and judgment entered on October 25, 2019)

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

The State of Kansas respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kansas in two cases decided on the same day that "involve identical or closely related [federal] questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

The Kansas Supreme Court's opinion reversing Respondent Timothy C. Boettger's criminal threat conviction is reported at 450 P.3d 805 and reprinted at Pet. App. 1. The Kansas Supreme Court's opinion reversing Respondent Ryan R. Johnson's criminal threat conviction is reported at 450 P.3d 790 and reprinted at Pet. App. 67. The Kansas Supreme Court's opinion in *Boettger* is the lead opinion, and the *Johnson* opinion adopts the *Boettger* opinion's reasoning.

The Kansas Court of Appeals' unpublished decision affirming Boettger's conviction is located at 397 P.3d 1256 (Table) and reprinted at Pet. App. 36. The Kansas Court of Appeals' unpublished decision affirming Johnson's conviction is located at 407 P.3d 675 (Table) and reprinted at Pet. App. 86.

JURISDICTION

The Kansas Supreme Court issued its opinions on October 25, 2019. The State of Kansas received an extension of time to file this Petition for Writ of Certiorari on December 17, 2019, until February 24, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATUTORY PROVISIONS INVOLVED

The relevant portion of Kan. Stat. Ann. § 21-5415, under which both Respondents were convicted, provides:

> (a) A criminal threat is any threat to:
> (1) Commit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such fear or evacuation, lock down or disruption in regular, ongoing activities[.]

Kan. Stat. Ann. § 21-5202 defines reckless as follows:

> (j) A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

STATEMENT OF THE CASE

In two separate cases, *State v. Boettger* and *State v. Johnson*, the Kansas Supreme Court held that the First Amendment precludes imposition of criminal liability for a threat to commit violence uttered with reckless disregard of the risk of placing another in fear. The State of Kansas petitions this Court for a writ of certiorari to the Kansas Supreme Court in both cases because they present the same question. S. Ct. R. 12.4.

1. The State of Kansas prosecuted Respondents Timothy Boettger and Ryan Johnson in separate proceedings for violating Kan. Stat. Ann. § 21-5415. In pertinent part, that provision declares it a crime to communicate a threat to commit violence "in reckless disregard of the risk of causing" fear of violence. *Id.* at 21-5415(a)(1).

a. *State v. Boettger*: Timothy Boettger frequented a convenience store in Lawrence, Kansas, where Cody Bonham worked. Pet. App. 3, 37. One night while Bonham was working, Boettger came to the store to purchase a cup of coffee. Pet. App. 3. Boettger was angry because someone had shot and killed his daughter's dog and the Douglas County Sheriff's office had not investigated the matter. Pet. App. 3. Boettger told another employee that "these people . . . might find themselves dead in a ditch somewhere." Pet. App. 3. Boettger left the store but returned shortly thereafter. Pet. App. 4.

When Boettger returned, he confronted Bonham. Pet. App. 4. Boettger and Bonham were well-acquainted, and Boettger knew that Bonham's father

was a detective with the sheriff's office. Pet. App. 4. Bonham testified that Boettger approached him with clenched fists and visibly shaking, saying, "You're the man I'm looking for." Pet. App. 4. Bonham testified that Boettger then said that "he had some friends up in the Paseo area in Kansas City that don't mess around, and that I was going to end up finding my dad in a ditch." Pet. App. 4. Distraught by Boettger's statement, Bonham reported the incident to law enforcement. Pet. App. 4-5.

The State of Kansas filed charges against Boettger for making a criminal threat in violation of Kan. Stat. Ann. § 21-5415(a)(1). At trial, Boettger admitted that he knew Bonham's father worked for the sheriff's department but denied that he intended to threaten anyone. Pet. App. 5. A jury convicted Boettger of one count of reckless criminal threat. Pet. App. 5.

b. *State v. Johnson*: The Montgomery County, Kansas, Sheriff's office received a request to check on the welfare of Vickie Walker because she was reportedly being abused by her son, Ryan Johnson. Pet. App. 70. Walker told the investigating deputy that Johnson "had been causing problems in her home and she was afraid for her safety." Pet. App. 70. But because Walker's allegations were "pretty nonspecific," the deputy only took a report. Pet. App. 70.

A few nights later, Walker called 911 and asked a deputy to come to her home. Pet. App. 70. By the time the deputy arrived, Johnson was no longer there. Pet. App. 70. Walker told the deputy that she came home and found Johnson and his wife arguing. Pet. App. 70. She stated that Johnson's wife ran into another room

to get away from Johnson and locked the door. Pet. App. 70. Walker reported that Johnson kicked open the door. Pet. App. 70. Upon investigation, the deputy confirmed that the door and frame had been damaged, which he photographed. Pet. App. 70. While the deputy was at Walker's home, Johnson called his mother. Pet. App. 70. During the call, the deputy asked Johnson to return to the home, but Johnson refused. Pet. App. 70.

Johnson eventually returned to Walker's home the next morning, and another incident occurred that led to another 911 call. Pet. App. 70. Two law enforcement officers responded. Pet. App. 70. Walker told them that Johnson had forced his way into her home, ripped the phone out of the wall, and said, "Try to call the sheriff now, bitch." Pet. App. 70. He then told Walker: "Bitch, if I'm going to be on the streets, then you're going to be on the streets because I'm going to burn your shit up. Then I'm going to be back this afternoon and you ain't going to like what I'm bringing for you." Pet. App. 70-71. He then continued his threats: "I hate you, Mom, you fucking bitch. I wish you would die, but don't worry about it because I'm going to help you get there. I'm going to fucking kill your ass. I hate what you do to me." Pet. App. 71.

The State of Kansas charged Johnson with making a criminal threat in violation of Kan. Stat. Ann. § 21-5415(a)(1) for his threats to burn down Walker's house and kill her, and it charged him with criminal damage to property for the damage caused to the door. Pet. App. 71. During trial, both Walker and Johnson's wife downplayed the incidents, testifying that the family commonly threatened to kill each other without

meaning it. Pet. App. 71. Walker also testified that she did not recall what she said to any officer, other than asking the deputies to remove Johnson from the home. Pet. App. 71. She agreed that she would have been truthful to the deputies, but explained that they may have misunderstood her because she was in a highly excited state and still under the effect of morphine from a recent hospital visit. Pet. App. 72.

Johnson denied making any threats and denied breaking the door. Pet. App. 72. The jury acquitted him of criminal damage but convicted him of criminal threat. Pet. App. 73.

2. Boettger and Johnson separately appealed their convictions to the Kansas Court of Appeals. Both argued that *Virginia v. Black*, 538 U.S. 343 (2003), stands for the proposition that to communicate a true threat proscribable under the First Amendment, the person communicating the threat must specifically intend to threaten the victim. Pet. App. 44, 100. As a result, they each posited that the First Amendment precluded criminal liability under Kan. Stat. Ann. § 21-5415 because that statute permits conviction on a lesser mens rea of recklessness. Pet. App. 44, 100.

Separate panels of the Kansas Court of Appeals affirmed both convictions. Pet. App. 36-66, 86-103. In *Boettger*, the Court of Appeals held that *Black* never determined the minimum level of mens rea to communicate a true threat. Pet. App. 44-45. The Court of Appeals further concluded that a recklessness mens rea is sufficient to separate constitutionally protected speech from true threats because it demands that the person conveying the threat be aware that others could

perceive the statement as a threat. Pet. App. 46 (citing *Elonis v. United States*, 135 S. Ct. 2001 (2015) (Alito, J., concurring in part and dissenting in part)). Another panel of the Court of Appeals rejected Johnson's argument by adopting the *Boettger* panel's reasoning. Pet. App. 102.

3. Respondents petitioned for review in the Kansas Supreme Court. That court granted review in both cases and reversed Respondents' convictions. Pet. App. 1-35, 67-85.

a. In *Boettger*, the court first recognized that "true threats" fall beyond the protection of the First Amendment and can be criminally punished. It then declared that the question was "what constitutes a true threat and, more specifically, whether the only way to make a true threat is to actually intend to cause fear." Pet. App. 3. The court noted that this Court has not squarely addressed the question and that lower courts are divided on the issue. Pet. App. 14.

Even so, the Kansas Supreme Court believed that this Court's decision in *Black*, "explains the intent necessary to have a true threat prosecuted without violating the First Amendment's protections." Pet. App. 18. Specifically, the court concluded that "a majority of the *Black* Court determined an intent to intimidate was constitutionally, not just statutorily, required." Pet. App. 27. The court relied heavily on two quotes in *Black* to reach this conclusion. The first was this Court's statement that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular

individual or group of individuals.'" Pet. App. 18-19 (quoting *Black*, 538 U.S. at 359-60). The second was *Black*'s statement 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*." Pet. App. 27 (quoting *Black*, 538 U.S. at 360, and adding emphasis).

Based on its reading of *Black*, the court then struck down as overbroad the portion of Kansas's criminal threat statute allowing for a conviction when the threat of violence is made in reckless disregard for causing fear "because it can apply to statements made without the intent to cause fear of violence." Pet. App. 34. According to the court, "[a]cting with an awareness that words may be seen as a threat leaves open the possibility that one is merely uttering protected political speech, even though aware some might hear a threat." Pet. App. 32.

In reaching this conclusion, the court relied on the Tenth Circuit's opinion in *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014), which "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." Pet. App. 22 (quoting *Heineman*, 767 F.3d at 978). The court also noted the Ninth Circuit embraced the same conclusion. Pet. App. 23-24.

The Kansas Supreme Court recognized that its holding conflicted with decisions of the First, Third, Fourth, Sixth, Eighth, and Eleventh Circuits, as well as decisions of the Connecticut and Georgia Supreme Courts. Pet. App. 20-21, 31-32. But it explained that it disagreed with those courts' reading of *Black*.

b. In *Johnson*, the court relied on its analysis and holding in *Boettger* that Kansas's criminal threat statute violates the First Amendment to the extent it allows a conviction based on reckless disregard. Pet. App. 77. The court next considered whether the error was harmless because the trial court had instructed the jury on both the intentional and reckless alternatives found in Kan. Stat. Ann. § 21-5415. Pet. App. 78-79. A majority of the Kansas Supreme Court held the error was not harmless and reversed Johnson's conviction because the State could not show beyond a reasonable doubt that the jury convicted Johnson of intentional criminal threat. Pet. App. 79-81. Justice Stegall, joined by Justice Biles, dissented only as to whether the error was harmless. Pet. App. 81-85.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons.

First, lower courts are divided on whether a true threat under the First Amendment requires specific intent to threaten violence. The Kansas Supreme Court's holding that specific intent is required conflicts with the decisions of several other state supreme courts and numerous federal circuit courts. On the other side of the split, two federal circuit courts have reached the same conclusion as the Kansas Supreme Court.

Second, the Kansas Supreme Court's decision is wrong. *Black* did not address the question of what level of intent is necessary for a true threat. A recklessness mens rea should suffice for criminal threats to commit violence—just as it suffices in other First Amendment contexts—because it requires the speaker to consciously disregard a substantial and unjustifiable risk. Threats to commit violence inflict fear and disruption on victims regardless of whether the speakers specifically intend to convey a threat.

Third, the question in this case is important and recurring. Kansas's criminal threat statute is based on the Model Penal Code and is similar to statutes in a number of other States. The States' ability to prosecute criminal threats, including ones recklessly made, is crucial to their ability to protect their citizens.

I. Lower Courts Are Divided on What Intent Is Required to Constitute a True Threat.

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), this Court declined to address whether recklessness suffices for liability under the federal threat statute and therefore had no occasion to consider whether a mens rea of recklessness for true threats satisfies the First Amendment. *Id.* at 2012. Since then, state courts of last resort have reached conflicting conclusions on what the First Amendment requires. And in the federal courts, the doctrinal schism on this important constitutional issue persists. This Court should grant certiorari to resolve the constitutional uncertainty.

A. In conflict with the Kansas Supreme Court, numerous other state and federal courts have held that a specific intent to threaten is not required for a threat to be proscribable under the First Amendment.

The Kansas Supreme Court held that only threats made with the specific intent to cause fear constitute true threats. Pet. App. 34. In direct conflict with the Kansas Supreme Court, two state courts of last resort have recently upheld their criminal threat statutes that forbid threats communicated in reckless disregard of causing terror. *State v. Taupier*, 193 A.3d 1, 18-19 (Conn. 2018); *Major v. State*, 800 S.E.2d 348, 350 (Ga. 2017); *see* C.G.S. § 53a-62(a)(2)(B); O.C.G.A. § 16-11-37(a). The issue in these cases was whether this Court's description of a true threat in *Virginia v. Black*, 538 U.S. 343, 359 (2003), adopted a specific-intent-to-threaten standard. Unlike the Kansas Supreme Court, the Georgia and Connecticut Supreme Courts held it did not. *Taupier*, 193 A.3d at 16-19; *Major*, 800 S.E.2d at 352.

In *Major*, the Georgia Supreme Court rejected a First Amendment challenge to its reckless criminal threat statute. That court held that because "recklessness requires a knowing act—i.e., *conscious* disregard of a substantial risk—it fits within the definition of a true threat." 800 S.E.2d at 351-52. The court quoted Justice Alito's separate opinion in *Elonis* for the proposition that "[s]omeone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not

merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway." *Id.* at 352 (quoting *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part)).

The Connecticut Supreme Court also upheld the reckless portion of a Connecticut statute against a First Amendment challenge. That court was "persuaded by the reasoning of the courts that have concluded that *Black* did not adopt a subjective intent standard." *Taupier*, 193 A.3d at 18. The court did not determine whether the First Amendment requires that the defendant subjectively know that the threat would be interpreted as serious because it concluded that even if proof of subjective knowledge is required, the Connecticut statute satisfies that requirement by requiring proof of reckless disregard. *Id.* at 19.

More broadly, numerous state and federal courts have gone even further. They have held that the First Amendment does not require *any* subjective mens rea—much less specific intent, as the Kansas Supreme Court held—with regard to making the victim feel threatened. Instead, these courts have held that the definition of true threat involves a purely objective, reasonable-person standard.

Nine circuit courts of appeals have reached this conclusion. *United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016); *United States v. Clemens*, 738 F.3d 1, 9-12 (1st Cir. 2013); *United States v. Elonis*, 730 F.3d 321, 329 (3d Cir. 2013), rev'd and remanded on narrower grounds, 135 S. Ct. 2001 (2015); *United States v. Martinez*, 736 F.3d 981, 986-88 (11th Cir. 2013), vacated and remanded for further consideration

in light of *Elonis*, 135 S. Ct. 2001 (2015); *United States v. Nicklas*, 713 F.3d 435, 438-40 (8th Cir. 2013); *United States v. Jeffries*, 692 F.3d 473, 479-81 (6th Cir. 2012); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997); *but see United States v. Parr*, 545 F.3d 491, 499-500 (7th Cir. 2008) (questioning, but not overruling, the holding of *Stewart*).[1]

Unlike the Kansas Supreme Court, these circuit courts rejected the argument that the First Amendment requires that a true threat involve a specific intent to threaten. Instead, nearly every one of these circuit courts interpreted *Black*'s statement 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 mean the speaker need only intend to make the communication, not specifically or subjectively intend to threaten. *Clemens*, 738 F.3d at 11-12; *Elonis*, 730 F.3d at 329; *Martinez*, 736 F.3d at 986-88; *Nicklas*, 713 F.3d at 438-40; *Jeffries*, 692 F.3d at 479-81. And they interpreted *Black*'s statement that intimidation "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," to mean

[1] Although these cases' interpretation of 18 U.S.C. § 875(c) is no longer valid after *Elonis*, they also addressed whether the statements in question constituted true threats that were excluded from First Amendment protection. Those constitutional holdings—that specific intent to threaten is not required for a true threat—remain undisturbed. *See White*, 810 F.3d at 221 (explaining that *Elonis* did not alter the court's constitutional holding).

that intimidation is just one "type of true threat," not the only type. *E.g. Jeffries*, 692 F.3d at 480.

At least three other state courts of last resort have likewise held that the First Amendment does not require a finding of subjective intent. The Washington Supreme Court, for example, held that "nothing in *Black* imposes in all cases an 'intent to intimidate' requirement in order to avoid a First Amendment violation." *State v. Trey M.*, 383 P.3d 474, 478, 481 (Wash. 2016) (upholding Wash. Rev. Code Ann. § 9A.46.020(1)(a), which makes it a crime to "knowingly threaten[ ]" someone or their property). So too did the California Supreme Court, which read *Black* to hold that "the category of threats that can be punished by the criminal law without violating the First Amendment *includes but is not limited to* threatening statements made with the specific intent to intimidate." *People v. Lowery*, 257 P.3d 72, 77 (Cal. 2011); *id.* at 81 (Baxter, J., joined by a majority of the court, concurring) ("[*Black*] did not . . . , for the first time, require proof that the speaker subjectively intended the speech be taken as a threat. The relevant intent remains the intent to communicate, not the intent to threaten."). And the Mississippi Supreme Court has held that "[t]he protected status of threatening speech is not based upon the subjective intent of the speaker" but rather on whether an objectively reasonable person would consider the communication a threat. *Hearn v. State*, 3 So. 3d 722, 739, n. 22 (Miss. 2008) (addressing the issue despite the existence of a procedural bar).

All of these state and federal courts have rejected the Kansas Supreme Court's holding that a true threat requires a specific intent to threaten.

B. Two federal circuits have reached the same conclusion as the Kansas Supreme Court.

On the Kansas side of the split, the Ninth and Tenth Circuits have held that specific intent to threaten is required. *United States v. Heineman*, 767 F.3d 970, 982 (10th Cir. 2014); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011). Like the Kansas Supreme Court, these circuits relied heavily—if not exclusively—on the language from *Black* that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" and 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." *Black*, 538 U.S. at 359-60. These circuits interpreted this language to "embrace[ ] not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005); *see also Heineman*, 767 F.3d at 978.

The Kansas Supreme Court explicitly relied on and agreed with these opinions when it held that a true threat requires the specific intent to threaten. Pet. App. 22-23.

* * *

State and federal courts have fully explored the parameters and implications of the true threat doctrine for decades. And they have reached contrary conclusions about what threats the First Amendment prohibits the States from criminalizing. That mature and fully developed conflict warrants this Court's resolution. *See Perez v. Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in 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*."). The First Amendment, "the guardian of our democracy," should apply equally to threats of violence across the Union. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982). Its protections cannot vary based on locality.

II. The Kansas Supreme Court's Decision Is Wrong.

The Kansas Supreme Court incorrectly held that the First Amendment protects threats to commit violence unless the speaker specifically intended to threaten the victim. Rather, recklessness is a sufficiently culpable state of mind that separates wrongful from protected conduct.

A. *Black* did not determine whether a true threat must involve a specific intent to threaten.

The Kansas Supreme Court held that *Black*'s interpretation of the First Amendment required specific intent to threaten before a state may criminalize that conduct. Pet. App. 27, 34. *Black* did not consider, much less resolve, that question. *See Elonis*, 135 S. Ct. at 2027 (Thomas, J., dissenting) ("The Court's fractured opinion in *Black* . . . says little about whether an intent-to-threaten requirement is constitutionally mandated here."). Indeed, the Court "had no occasion to decide" the issue because the Virginia statute expressly required the speaker to possess an intent to intimidate. *Id*.

The Kansas Supreme Court (like the Ninth and Tenth Circuits before it) reads too much into two sentences in *Black*. Neither statement—individually or collectively—bears the constitutional weight ascribed to them.

The first is that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. But as Judge Sutton writing for the Sixth Circuit noted, a speaker "'means to communicate' when she knowingly says the words." *Jeffries*, 692 F.3d at 480. This sentence in *Black* cannot be interpreted as requiring a specific intent to threaten when that issue was not before this Court. And even if this quote was referring to a specific intent to threaten, this Court said only that true threats "encompass" (i.e., include) those statements,

538 U.S. at 359, not that true threats are limited to those statements.

The second of *Black*'s statements is that intimidation "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." 538 U.S. at 360. That sentence is best read as describing *one* "type of true threat," not the *only* type. The Kansas Supreme Court erroneously interpreted *Black* as holding something that it did not address.

B. The First Amendment permits States to proscribe true threats to commit violence communicated in reckless disregard of placing another in fear.

The Constitution does not protect true threats. *Black*, 538 U.S. at 359-60. Such statements have long been recognized as one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 399 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)). This is because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

Requiring a mens rea greater than recklessness is unnecessary to draw the line between unprotected threats to commit violence and protected statements such as "political hyperbole," *see, e.g.*, *Watts v. United*

States, 394 U.S. 705, 708 (1969); *Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987). Instead, the context of the statements differentiates the two. *See, e.g.*, *Rankin*, 483 U.S. at 386 (citing *Connick v. Myers*, 461 U.S. 138 (1983)); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (threats of social ostracism to join a boycott were protected speech); *Watts*, 394 U.S. at 708 (defendant's impassioned statement at public rally was protected political hyperbole). Here, the contexts were nothing close to political hyperbole but rather threats to kill communicated directly to individuals. That is not protected speech; it is a crime.

Requiring the speaker to have a heightened mens rea runs counter to this Court's teachings over the past century that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Indeed, this well-accepted principle is implicated here. Kan. Stat. Ann. § 21-5415 not only criminalizes threats made in reckless disregard of causing fear, but also threats made in reckless disregard of causing "evacuation, lock down or disruption in regular, ongoing activities," such as theater-going.

Recklessness is a culpable mental state. It requires the speaker to "consciously disregard[] a substantial and unjustifiable risk." Kan. Stat. Ann. § 21-5202(j); ALI, Model Penal Code § 2.02(2)(c) (1962). One "who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he

delivers them anyway." *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part). A recklessness standard is therefore sufficient to impose criminal liability.

In other First Amendment contexts, this Court has recognized that recklessness is a sufficient mens rea to render speech proscribable. In *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), for example, this Court determined that "false statements made with reckless disregard of the truth[ ] do not enjoy constitutional protection" in criminal libel. The same is true in civil libel. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). And the same goes for criminally punishing reckless possession of visual depictions of child pornography, which this Court found does not offend the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 115 n.9 (1990). In fact, Kansas is unaware of any case in which this Court has held that recklessness is an *insufficient* mens rea to separate constitutionally protected speech from that which is proscribable. The same should be true for criminal threats.

Governments have good reason to proscribe reckless threats. It matters not to the victim of a threat whether law enforcement can ultimately prove the speaker intended to cause fear; the voluntarily made threat causes immediate harm, fear, and disruption to the victim without regard to the speaker's subjective intent. For decades, this Court and lower courts have recognized that "the government has the right, if not the duty, to 'protect[ ] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will

occur,' all of which places the menacing words and symbols 'outside the First Amendment.'" *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (Sutton, J.) (quoting *R.A.V.*, 505 U.S. at 388, and citing *Chaplinsky*); accord *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part) ("A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation.").

Moreover, States have a long history of prosecuting reckless criminal threats regardless of the speaker's subjective intent. *See* Merits Brief of the United States, *Elonis v. United States*, No. 13-983, 2014 WL 4895283 at *43-44 (S. Ct.) (describing how, "[s]ince the Eighteenth Century, legislatures and courts have proscribed and punished threats without requiring proof of a subjective intent to threaten."). As Justice Thomas noted in *Elonis*, "[a]lthough the Federal Government apparently did not get into the business of regulating threats until 1917, the States have been doing so since the late 18th and early 19th centuries." *Elonis*, 135 S. Ct. at 2024 (Thomas, J., dissenting). Kansas has criminalized some form of unlawful threats since its territorial days. Statutes of the Territory of Kansas, 1855, Ch. 49, § 29 (attempt to rob by threatening letter). And the statute at issue in this case was adapted from the Model Penal Code in 1969. 1969 Kan. Sess. Law 180; *State v. Gunzelman*, 502 P.2d 705, 708 (Kan. 1972).

III. The Question Presented Is Important and Recurring.

This Court should also grant certiorari because of the widespread impact this ruling will have in Kansas

and beyond. Not only does the ruling undermine a significant number of prosecutions that protect some of the most vulnerable victims in Kansas, but its rationale implicates state and federal statutes across the country that likewise rely on something less than a specific intent to threaten for criminal threat prosecutions. The ruling also undermines the right and duty that governments have to protect their citizens from the modern-day equivalents of shouting fire in a crowded theater.

A. The Kansas Supreme Court's holding, if correct, would have serious implications in Kansas and beyond.

The effect of the Kansas Supreme Court's decision is not academic. Since 2015, Kansas has obtained more than 1,800 convictions for criminal threat.[2] An additional 34 convictions were obtained for aggravated criminal threat, which requires an evacuation, lockdown, or disruption of a public place. Kan. Stat. Ann. § 21-5415(b).

Nor is the opinion's rationale necessarily limited to Kansas. The court's ruling implicates laws throughout the country that were enacted to protect victims from the pernicious fear and disruption caused by threats of violence.

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[2] This data was compiled by the Kansas Sentencing Commission on November 22, 2019, from its 2015-2019 Kansas Sentencing Commission Felony Journal Entry Databases. The database is unable to distinguish between reckless and intentional criminal threats.

Kansas's law is not unique. Kan. Stat. Ann. § 21-5415 is based on the Model Penal Code. *Gunzelman*, 502 P.2d at 708. Even today, Kansas's law still largely mirrors the Model Penal Code, which permits prosecution of a terroristic threat made in reckless disregard of the terror it causes:

> A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

Model Penal Code § 211.3 (Am. Law Ins. 2018). Following the Model Penal Code's example, at least fourteen other States have enacted statutes that criminalize reckless threats.[3] The law in each of these jurisdictions is now subject to attack based on the Kansas Supreme Court's interpretation of the First Amendment.

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[3] Alaska Stat. Ann. § 11.56.810(a)(1)(A) (terroristic threatening); Ariz. Rev. Stat. Ann. § 13-1202(A)(2) (threatening or intimidating); Conn. Gen. Stat. Ann. § 53a-62(a)(2)(B) (second degree threatening); Del. Code Ann. tit. 11, § 621(a)(2)(c) (terroristic threatening); Ga. Code Ann. § 16-11-37(b)(2)(D) (terroristic threat); Haw. Rev. Stat. Ann. § 707-715(2) (terroristic threatening); Minn. Stat. Ann. § 609.713 (threats of violence); Mo. Ann. Stat. § 574.120 (second degree making a terrorist threat); Neb. Rev. Stat. Ann. § 28-311.01(1)(c) (terroristic threats); N.H. Rev. Stat. Ann. § 631:4(I)(e), (f) (criminal threatening); N.J. Stat. Ann. § 2C:12-3(a) (terroristic threats); N.D. Cent. Code Ann. § 12.1-17-04 (terrorizing); 18 Pa. Cons. Stat. § 2706(3) (terroristic threats); Wyo. Stat. Ann. § 6-2-505(a) (terroristic threat).

The effect of the Kansas Supreme Court's reasoning extends beyond these statutes that use recklessness as a baseline mens rea. At least seven other States have statutes that criminalize threats made "knowingly."[4] Because the Kansas Supreme Court held that the First Amendment requires a specific intent to threaten, those statutes would also be in jeopardy under its reasoning.

Federal statutes may also be implicated. For example, 18 U.S.C. § 875(c), which this Court in *Elonis* held can be violated "with knowledge that the communication will be viewed as a threat," 135 S. Ct. at 2012, falls short of requiring an intentional threat. The effect would be even broader if 18 U.S.C. § 875(c) also criminalizes reckless threats, a question this Court has left unresolved.[5] Other federal statutes that require less

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[4] Colo. Rev. Stat. Ann. § 18-3-206 (menacing); Colo. Rev. Stat. Ann. § 18-3-602(1)(a) (stalking); Me. Rev. Stat. tit. 17-A, § 209(1) (criminal threatening); Md. Code Ann., Crim. Law § 3-1001(b) (threats of crimes of violence); Tex. Penal Code Ann. § 22.01(a)(2) (assault); Vt. Stat. Ann. tit. 13, § 1702(a)(1)-(2) (criminal threatening); Va. Code Ann. § 18.2-60(A)(1) (threats); Wash. Rev. Code Ann. § 9A.46.020(1)(a) (harassment).

[5] "[P]ost-*Elonis*, the majority of federal courts confronting this question have taken their cue from the Supreme Court and have declined to reach it." *Carrell v. United States*, 165 A.3d 314, 324 (D.C. 2017); *see United States v. Kirsch*, 903 F.3d 213, 233 (2d Cir. 2018) (noting the issue before skipping to the question of whether any perceived error was prejudicial); *United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016) (stating that the intent requirement in 18 U.S.C. § 875(c) could be met if the Government showed "the defendant transmitted the communication 'for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat,' or, perhaps, with reckless disregard for the likelihood that the communication will be viewed as a threat.").

than a specific intent now come into question as well. *See* 18 U.S.C. § 35(b) (prohibiting communicating false information with "reckless disregard" for the safety of human life); 18 U.S.C. § 32(a)(7) (prohibiting the willful communication of information that endangers the safety of an aircraft in flight and that is known to be false and may reasonably be believed under the circumstances).

B. The ability to prosecute reckless criminal threats is crucial to the government's ability to protect its citizens.

Regardless of whether the speaker specifically intends to cause fear or acts in reckless disregard of that risk, threats to commit violence cause fear and disruption for the victims. This harm does not turn on the speaker's subjective intent but rather on the content and context of the communication.

Criminalizing threats is particularly important when it comes to protecting victims of domestic violence. Indeed, "[t]hreats of violence and intimidation are among the most favored weapons of domestic abusers . . . " 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part). So common are threats in domestic violence that they are deemed part of the cycle of violence. *E.g.* Cycle of Domestic Violence, Women & Children First, https://www.wcfarkansas.org/cycle-of-domestic-violence (last visited December 9, 2019).[6] Ryan Johnson's treatment of his mother exemplifies this reality: he instilled fear in his mother

[6] The prosecution of reckless threats to commit violence also can prevent subsequent physical abuse. The earlier in the cycle States can intervene to hold perpetrators accountable, the more effectively States can protect victims from physical harm.

causing her to repeatedly call law enforcement to halt his threatening conduct.

And domestic violence is not the only arena where these threats arise. The Kansas Supreme Court's decision also restricts the State's ability to combat threats of gun violence in public places. Courts have described threats of gun violence and mass shootings "as the twenty-first century equivalent to the shout of fire in a crowded theater once envisioned by Justice Oliver Wendell Holmes, Jr." *Haughwout v. Tordenti*, 211 A.3d 1, 3 (Conn. 2019). But prohibiting a State from prosecuting a threat to commit a mass-casualty event—whether at a school, sporting event, or public gathering—is not required by the First Amendment because there is no constitutional right to threaten violence that would harm the health and safety of innocent victims.[7] This presents an unnecessary risk to the safety of those the State is empowered to protect. *E.g. Interest of J.J.M.*, 219 A.3d 174, 184 (Pa. Super. 2019) (holding that a reckless mens rea is sufficient to

[7] This scenario is not hyperbole. Shortly after the Kansas Supreme Court issued its opinions in *Boettger* and *Johnson*, a Kansas district court judge dismissed pending charges against a local high school student who admitted to police that "he sought to get the attention of three friends by telling them he was going to shoot up a school." Tim Hrenchir, *Charges Dismissed Against Man Accused of Threatening School*, Topeka Capital-Journal (Nov. 26, 2019), https://www.cjonline.com/news/20191126/charge-dismissed-against-man-accused-of-threatening-school. He even sent a text message to a co-worker "indicating he had intended to carry out 'the school shooting plot' at 10:30 a.m. that day" but later decided not to. *Id.* The judge concluded that prosecutors could not meet their burden of proof to show the student specifically intended to place others in fear or to cause evacuation, lockdown or disruption. *Id.*

constitute a true threat "in the context of the special circumstances attendant with threats made in a school setting").

* * *

The First Amendment provides a robust defense of our right to engage in all forms of exchanging ideas and beliefs. But it is not an impenetrable shield that places all harmful speech and its consequences beyond accountability. Specifically, the First Amendment does not prevent governments from punishing threats to commit violence when communicated in reckless disregard of the substantial and unjustified risk that those who hear or read such threats will be placed in fear of being harmed. Instead, governments have the right—if not the duty—to protect the health and well-being of their citizens. The Kansas Supreme Court's decision preventing governments from performing that mission, which deepens an entrenched conflict among the courts, warrants this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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