No. 19-1051

IN THE

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner,*

v.

TIMOTHY C. BOETTGER AND RYAN R. JOHNSON,

*Respondents.*

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

## BRIEF IN OPPOSITION


CLAYTON PERKINS
CAPITAL APPELLATE DEFENDER OFFICE
700 S.W. Jackson Street
Suite 900
Topeka, KS 66603
(785) 291-3207

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

JEFFREY T. GREEN *
JACQUELINE G. COOPER
CHIKE B. CROSLIN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

*Counsel for Respondents*

* Counsel of Record


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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?

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued



STATUTES

TABLE OF AUTHORITIES—continued



OTHER AUTHORITIES

## INTRODUCTION

Petitioner repeatedly asserts that "lower courts are divided" and that there is a "split" or "conflict" on the question it has presented, see Pet. 9, 11, but the truth is that only very few courts have even addressed whether a reckless state of mind passes First Amendment muster in criminal threat statutes. No federal circuit court has yet answered the question, so there is no "split" or "conflict" for this Court to resolve at the federal level. At the state level, petitioner at most points to a shallow and recent split—only two states to one. Such a narrow split could resolve itself, which counsels in favor of allowing the issue to percolate to see whether a genuine split develops. Additional percolation might also produce more thorough First Amendment analyses from lower courts. Even if this issue were ripe for review, the Kansas statute is the wrong one to take up the question, given its unique wording and structure. This Court should wait to allow more courts, both federal and state, to weigh in to see whether the split resolves or a wider and more meaningful split develops.

## STATEMENT OF THE CASE

The State of Kansas seeks review of two Kansas Supreme Court decisions that barred the state's punishment of two men's speech. Both were prosecuted by petitioner for violating Kan. Stat. Ann. § 21-5415, a criminal-threat statute that prohibits in relevant part a threat to commit violence communicated "in reckless disregard of the risk of causing . . . [fear] or evacuation, lock down or disruption in regular, ongoing activities . . . ." *Id.*

In both decisions, the Kansas Supreme Court held that the reckless-disregard portion of this statute is

unconstitutionally overbroad. It held that punishing statements made in reckless disregard of the risk of causing fear is contrary to settled precedent requiring higher levels of intentionality to constitute a true threat.

*State* v. *Boettger*: The State prosecuted Timothy Boettger for statements he made to employees of a convenience store he frequented. Mr. Boettger visited the store for coffee three to four times a week—600 to 800 times in four years—and routinely conversed with store clerks Cody Bonham and Neil Iles. Pet. App. 3–4; 5/18/15 & 5/19/15 Boettger Tr. ("Boettger Tr.") 213. He was well acquainted with Mr. Bonham and Mr. Iles, and they were well acquainted with him. In fact, Mr. Boettger attended high school with Mr. Bonham's father, and had previously dated Mr. Bonham's aunt. Pet. App. 4. Mr. Bonham and Mr. Iles were also familiar with Mr. Boettger's way of speaking. As Mr. Iles noted, his speech was "often very tangential, hard to understand" and "he skip[ped] from one subject to another," which made his conversation "difficult to track." Boettger Tr. 184–85. They also knew, for example, that Mr. Boettger had a louder-than-normal voice, which carried, and that he had an "intense" way of expressing himself. *Id*. at 174–75. They knew that he "tend[ed] to get upset," Pet. App. 3, that his conversations were often monologues "of a complaining nature," Boettger Tr. 181, 185, and that they often involved anger "over something that was done wrong to him" or "[to] a family member." *Id.*

On the evening in question, Mr. Boettger's visit to the store began no differently than any other of his hundreds of visits. Mr. Boettger walked inside, bought a cup of coffee, and spent about five minutes talking with Iles near the cash register. Pet. App. 3;

Boettger Tr. 182. He told Mr. Iles that he was upset because he had recently found his daughter's dog in a ditch, dead from a gunshot wound, and the sheriff's department had not investigated the incident. Pet. App. 3. During that conversation, Mr. Iles recalled Mr. Boettger saying "these people don't know who they're f**king with. They might find themselves dead in a ditch somewhere." Boettger Tr. 180–81. Because Mr. Boettger had previously referenced certain unidentified individuals as suspects, *id.* at 180, Mr. Iles understood this statement to refer to "whoever killed the daughter's dog," Pet. App. 3; Boettger Tr. 181. Furthermore, Mr. Iles, long accustomed to Mr. Boettger's fragmented speech and intense conversational demeanor, did not perceive Mr. Boettger to be more upset than usual, and understood his reaction to the incident as a general complaint regarding the sheriff's department's inaction. *Id.* at 3–4; Boettger Tr. 183. After his conversation with Mr. Iles, Mr. Boettger left the store.

Mr. Boettger later returned. When he came in the second time, Mr. Bonham was stocking bananas in the aisle nearest to the entrance, about ten feet from the counter where Mr. Boettger had spoken with Mr. Iles previously and where Mr. Iles remained on duty. Pet. App. 4; Boettger Tr. 170–71, 182. Mr. Boettger approached Mr. Bonham and said, "You're the man I'm looking for." Boettger Tr. 155. He then engaged in a one-sided, four-minute discourse about the killing of his daughter's dog and the sheriff's department's failure to investigate. *Id.* at 155, 162; Pet. App. 4. Mr. Bonham was "intent on listening to [Mr. Boettger]," and generally limited himself to expressions of agreement and sympathy, replying that he would also be upset if his dog had been killed. Boettger Tr. 162–63. He thought Mr. Boettger seemed "unusually in-

tense," Pet. App. 4, and noted that he was shaking as he spoke. *Id*. Mr. Bonham was unable to recall all of what Mr. Boettger said during those four minutes. Boettger Tr. 162. It stood out to him, though, that at some point Mr. Boettger said that "he had some friends up in the Paseo area in Kansas City that don't mess around, and that [Mr. Bonham] was going to end up finding [his] dad in a ditch,"[1] before ending the conversation with "You remember that." Pet. App. 4. Mr. Boettger then left the store. *Id*.

After Mr. Boettger left, Mr. Bonham called his father to tell him about the incident. *Id*. Acting on his father's advice, Mr. Bonham then drafted an email to record the details of the conversation and subsequently reported the incident to authorities. Boettger Tr. 171–72. During trial, Mr. Boettger asserted that Mr. Bonham had misunderstood him—that his reference to a ditch related only to his daughter's dog, not to Mr. Bonham's father—and that he did not mean either Mr. Bonham or his family harm. *Id*. at 210–12.

The State charged Mr. Boettger with one count of intentional criminal threat. After meeting with Mr. Boettger and reading 200 pages of legal documents he had written, Mr. Boettger's attorney became concerned about Mr. Boettger's mental health and competency, and requested a hearing. Pet. App. 38. During this hearing, Mr. Boettger's attorney stated that his client's comments were disorganized, often straying from the subject matter to unrelated issues, a fact which "[made] it impossible to work with him." 9/24/14 Boettger Tr. 13. So pressing was his concern that he even agreed—over Mr. Boettger's objection—to have Mr. Boettger committed to a mental health

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[1] Mr. Bonham's father was a detective in the Douglas County Sheriff's Department. Pet. App. 4.

institution for evaluation. Pet. App. 38. Mr. Boettger was eventually found competent, and the case proceeded to trial. 1/30/15 Boettger Tr. 2–3.

Before trial began, the State amended the charges, replacing the charge of intentional criminal threat with a single count of reckless criminal threat. 1 R. 107 (Amended Information filed in Douglas Cty. Dist. Ct.). The jury instructions mirrored the amended charge, stating that a conviction must rest on a finding that Mr. Boettger threatened to commit violence and communicated the treat with reckless disregard of the risk of causing fear in Mr. Bonham. Pet. App. 5. The jury found Mr. Boettger guilty, and the court of appeals affirmed his conviction and sentence. *Id.*

The Kansas Supreme Court granted review and reversed, holding that the State's reckless-threat provision is unconstitutionally overbroad because it "[could] apply to statements made without the intent to cause fear of violence," thereby "significantly target[ing] protected activity" and failing to provide a means of distinguishing protected from unprotected speech. Pet. App. 34–35. The court reasoned that this Court's definition of "true threats" in *Virginia* v. *Black*, 538 U.S. 343, 359 (2003)—"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 a group of individuals"—garnered a majority of the Court and provided the controlling guidance. Pet. App. 18–19. The court emphasized that this definition's use of the word "means" focuses the inquiry on the speaker's intention, such that a statement can only be a "true threat" where the speaker "actually intend[s] to convey a threat"—that is, intends to "plac[e] the victim in fear of bodily harm or death"—even if not intending to commit violence. *Id.* at 22, 27, 32, 34 (quoting

*Black*, 538 U.S. at 360). The court further found the recklessness portion of Kan. Stat. Ann. § 21-5415(a)(1) "indistinguishable" from the intimidation type of true threat that this Court in *Black* said required specific intent. *Id.* at 27 ("Intimidation *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." (quoting *Black*, 538 U.S. at 360)).

*State* v. *Johnson*: Ryan Johnson faced charges under the same statute for statements he made to his mother. Mr. Johnson and his wife—then in the midst of a partial separation, 7/14/16 Johnson Tr. ("Johnson Tr.") 139—had an argument, and Mr. Johnson's mother called the sheriff's department, Pet. App. 70. At the time, Mr. Johnson was recovering from serious injuries sustained in a car accident, including a broken neck. As part of that recovery, physicians secured Mr. Johnson's neck by a metal halo screwed into his skull, a condition that resulted in significant pain and required a cocktail of medications that caused him to have outbursts of irrational anger—even when in a room by himself. *Id.* at 72; Johnson Tr. 105, 132. Mr. Johnson was no longer present when the responding deputy arrived on the scene, and the deputy limited himself to investigating the scene. Pet. App. 70.

Mr. Johnson returned the next morning, and another incident ensued, prompting another call to the police. Deputies on the scene reported Mr. Johnson's mother saying that he ripped the phone out of the wall, and engaged in an extended vitriolic, expletive-laden harangue. Pet. 5; Pet. App. 70–71. One of the deputies testified that he recorded the conversation with his body camera and later transposed the

statements into a written report. Pet. App. 71. Mr. Johnson's mother testified that officers misunderstood her, however, and the disk containing the video was lost from the case file before trial. Johnson Tr. 83–85; Pet. App. 71, 84–85. She also testified, as did Mr. Johnson's wife, that "the family commonly threatened to kill each other but did not mean it." Pet. App. 71.

Nine months after this incident, *id.* at 87–88, the State decided to charge Mr. Johnson with one count of criminal damage to property (based on alleged damage to a door during the first argument) and one count of criminal threat against his mother, based on his morning-after statements, *id.* at 71. Unlike Mr. Boettger, the State opted to pursue both intentional and reckless-threat theories against Mr. Johnson. *Id.* at 77–78.

At trial, the jury acquitted Mr. Johnson of the criminal damage to property charge but convicted him of criminal threat. The court of appeals affirmed Mr. Johnson's conviction and sentence. The Kansas Supreme Court reversed his conviction, relying on its analysis in the *Boettger* decision to hold the recklessness portion of the statute unconstitutionally overbroad. *Id.* The court also rejected the State's argument that charging Mr. Johnson under the unconstitutional recklessness prong was harmless error because the evidence presented under the intentional threat prong sufficed to support the conviction. *Id.* The court found that neither the record nor the evidence provided a basis for it "to discern whether the jury concluded that the State had proved beyond a reasonable doubt that Mr. Johnson acted intentionally." *Id.* at 80–81 (noting that there was "conflicting evidence at trial, particularly [the mother's] testimo-

ny that the family routinely threatened to kill each other but no one took it literally").

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO DIVISION AMONG LOWER COURTS THAT WARRANTS THIS COURT'S REVIEW

The questioned presented, and this case in particular, satisfy none of the critical factors justifying the exercise of this Court's discretionary jurisdiction.

#### A. No federal circuit has yet addressed the question presented, so this Court's review would be premature.

There is no circuit conflict concerning the question presented: whether the First Amendment prohibits states from criminalizing threats communicated with the mental state of recklessness. In fact, no federal circuit has directly considered or analyzed the mental state of recklessness in this First Amendment context.

Those federal circuits that have addressed similar questions indicate that the Kansas Supreme Court got it right. The Ninth and Tenth Circuits have held that the First Amendment requires that the higher *mens rea* of specific intent to threaten must be proven under federal criminal threat statutes. *United States* v. *Heineman*, 767 F.3d 970, 982 (10th Cir. 2014) (18 U.S.C. § 875(c)); *United States* v. *Bagdasarian,* 652 F.3d 1113, 1122 (9th Cir. 2011) (18 U.S.C. § 879(a)(3)). As petitioner acknowledges, the Kansas Supreme Court "explicitly relied on and agreed with" the reasoning of the Ninth and Tenth Circuits in reaching its conclusion about recklessness. Pet. 15. This accord makes clear that there is no conflict or

disagreement between the Kansas Supreme Court and the Ninth and Tenth Circuits.

Petitioner can only offer a federal circuit conflict on a different question that has since been resolved by this Court; namely, the split that existed prior to this Court's decision in *Elonis* v. *United States*, 135 S. Ct. 2001 (2015). Pet. 12–13. In *Elonis,* this Court rejected the holdings of several circuits that 18 U.S.C. § 875(c), which does not specify a mental state, requires no *mens rea* at all. See *Elonis*, 135 S. Ct. at 2009 (explaining that the Court interprets "criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them").

Petitioner acknowledges, as it must, that these circuits' "interpretation of 18 U.S.C. § 875(c) is no longer valid" after *Elonis*. Pet. 13 n.1. It then suggests that the overruled cases somehow had First Amendment holdings that were "not disturbed" by *Elonis*. *Id.* This suggestion is unsound because many of the pre-*Elonis* decisions that petitioner relies upon are no longer good law, or are not valid precedent on the question of what mental state is constitutionally required under a criminal threat statute. For example, this Court vacated the Eleventh Circuit's decision in *United States* v. *Martinez*, 736 F.3d 981 (11th Cir. 2013). See *Martinez* v. *United States*, 135 S. Ct. 2798 (2015) (mem.); see also *United States* v. *Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2016) (on remand, recognizing that the court's pre-*Elonis* opinion cited by petitioner was "overruled" and vacating Martinez's conviction). And in *Elonis* itself, this Court reversed the Third Circuit's decision that petitioner cites. *United States* v. *Elonis*, 730 F.3d 321 (3d Cir. 2013), *rev'd & remanded*, 135 S. Ct. 2001 (2015). *Porter* v. *Ascension Par. Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) was not a

criminal case and did not involve a criminal threat statute. In *United States* v. *Clemens*, 738 F.3d 1, 9–12 (1st Cir. 2013), the First Circuit merely reviewed the district court's decision on the constitutional issue for plain error.

Other pre-*Elonis* decisions either solely addressed the proper statutory construction of 18 U.S.C. § 875(c), see, *e.g.*, *United States* v. *Sovie*, 122 F.3d 122, 125 (2d Cir. 1997), or merely mentioned the First Amendment in passing, such that the court made no distinct or stand-alone constitutional holding that could be "undisturbed" by *Elonis*. See, *e.g.*, *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *United States* v. *Nicklas*, 713 F.3d 435, 439–40 (8th Cir. 2013). The Seventh Circuit has cast doubt on its holding in *Stewart* in any event, as petitioner acknowledges. Pet. 13 (citing *United States* v. *Parr*, 545 F.3d 491, 499–500 (7th Cir. 2008)).[2]

The only other pre-*Elonis* decision petitioner cites is *United States* v. *Jeffries*, 692 F.3d 473 (6th Cir. 2012), *abrogated by United States* v. *Howard*, 947 F.3d 936 (6th Cir. 2020), which held that subjective intent to threaten *is not* required under 18 U.S.C. § 875(c). Even though *Jefferies* addressed the First Amendment in some detail, its statutory and consti-

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[2] Kansas also cites a Fourth Circuit post-*Elonis* decision, but that case only addressed the proper statutory construction of 18 U.S.C. § 875(c). *United States* v. *White*, 810 F.3d 212, 221 n.3 (4th Cir. 2016) (declining to decide "whether § 875(c) requires a defendant to act with purpose, knowledge, or recklessness" because the jury could not have concluded that the defendant's conduct was "anything but purposeful"). Subsequent Fourth Circuit cases indicate that the court has construed the required mental state under § 875(c) to be "purpose" or "knowledge." *See United States* v. *Davis*, No. 18-4201, 2020 WL 290665, at *4 (4th Cir. Jan. 21, 2020).

tutional analyses were so enmeshed that one cannot discern whether any aspect of this decision's *mens rea* analysis survived *Elonis*. Even if *Jeffries* were somehow still good law, the Sixth Circuit itself has moved away from the State's reasoning. See *United States* v. *Howard*, 947 F.3d 936, 944–47 (6th Cir. 2020) (acknowledging that after *Elonis*, subjective intent to threaten *is* required under 18 U.S.C. § 875(c)).

Finally, none of the pre-*Elonis* decisions addressed the mental state of recklessness. These decisions are at best relevant to the question of whether the First Amendment imports a subjective intent requirement when a pertinent statute lacks one.

### B. No significant split in authority between state courts has emerged that warrants this Court's interruption of the states' continuing and preeminent role in defining their criminal laws.

The states are laboratories in the development of criminal threat statutes, and it is simply too early in that process to halt that experimentation. Only three state courts of last resort have addressed the question of whether a state statute that criminalizes reckless threats violates the First Amendment. Georgia and Connecticut have upheld recklessness provisions in their anti-threat statutes, contrary to the view of the Kansas Supreme Court. See *Major* v. *State*, 800 S.E.2d 348, 351–52 (Ga. 2017) (holding that the "reckless mindset" "fits within the definition of a true threat"); Ga. Code Ann. § 16-11-37(a); *State* v. *Taupier*, 193 A.3d 1, 18–19 (Conn. 2018) (upholding recklessness standard on the ground that *Black* did not adopt a subjective intent requirement), *cert. denied,* 139 S. Ct. 1188 (2019); Conn. Gen. Stat. Ann. § 53a-61aa(a)(3).

However, both *Taupier* and *Major* are thinly reasoned, with only cursory analyses of why recklessness should satisfy the First Amendment. *Taupier* did little more than echo other courts' conclusions that *Black* did not adopt a subjective intent requirement, without any real rationale for why recklessness is sufficient to satisfy the First Amendment. 193 A.3d at 18–19. *Major* only made passing reference to *Black*'s "true threat" definition, following a conclusory statement that recklessness fits within the definition because it "requires a knowing act." 800 S.E.2d at 352. These cursory decisions would provide little aid to this Court, or any other, if this Court chose to address the recklessness issue; any such intervention is simply premature.

Additional state cases that the petitioner cites in an attempt to show wider consideration of the issue are unavailing. Pet. 14. These cases do not implicate the question presented at all because the pertinent state threat statutes do not criminalize reckless threats. For example, the Washington Supreme Court in *State* v. *Trey M* had no occasion to consider recklessness because the state harassment statute at issue requires that the defendant "*knowingly* threaten[s]." 383 P.3d 474, 476, 480 n.5 (Wash. 2016) (en banc) (emphasis added) (declining to abandon the objective, reasonable person standard for "true threat" under a state harassment statute, concluding that the statute requires both subjective and objective mental elements). See also *People* v. *Lowery*, 257 P.3d 72, 76 (Cal. 2011) (considering a statute prohibiting "willfully" threatening violence against a crime witness or victim); *Hearn* v. *State*, 3 So. 3d 722, 739 n.22 (Miss. 2008) (considering a statute prohibiting "attempt to intimidate," in dicta).

Even if the Georgia and Connecticut decisions had thoroughly analyzed the issue, a three-state split is far too narrow and preliminary to merit this Court's intervention, particularly since other states may well weigh in at some point. When this Court in *Elonis* concluded that no federal court had yet addressed "whether recklessness suffices for liability under Section § 875(c)," the Court prudently "declin[ed] to be the first appellate tribunal" to address the issue. 135 S. Ct. at 2013. The Court should similarly decline petitioner's invitation to do the very same thing now. See also *Commonwealth* v. *Knox*, 190 A.3d 1146, 1156 (Pa. 2018), *cert. denied*, 139 S. Ct. 1547 (2019) (collecting some post-*Black* cases and noting an open question exists about whether recklessness is sufficient in a true-threat context).

## II. THE KANSAS SUPREME COURT PROPERLY APPLIED THIS COURT'S PRECEDENT TO SAFEGUARD PROTECTED SPEECH

Petitioner devotes considerable space to arguing the merits, Pet. 16–21, even though merits arguments are largely premature at this juncture. *Ross* v. *Moffitt,* 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgement we are asked to review.").

Even petitioner's merits arguments demonstrate that there is no reasonable analytical dispute that warrants this Court's attention. For example, petitioner claims to be "unaware of any case" in which this Court has required a subjective standard to criminalize pure speech. Pet. 20. Petitioner overlooks *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), where this Court struck down Ohio's criminal syndi-

calism statute because it ran afoul of the principle that:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed* to inciting or producing imminent lawless action and is likely to incite or produce such action.

*Id.* (emphasis added). That is, this Court has already strongly indicated that in the context of true threats a culpable mind requires the prosecution to show subjective intent.

Without a specific intent requirement, a criminal threat statute overbroadly proscribes protected speech. As the Kansas Supreme Court correctly recognized, the Kansas statute could result in conviction for uttering the very speech protected by this Court in *Watts*. Pet. App. 33. A speaker's intent to communicate a protected political idea through a crass threat on the President's life, even if a specific listener understood the intention of the speech, would be criminal if the speaker "was aware of the risk of causing fear but continued anyway." *Id.* Additionally, any person wishing to burn a cross in the Scottish tradition of signaling other tribes or to burn a cross in a reproduction of Sir Wallace Scott's Lady of the Lake would be subject to prosecution by the Kansas statute because the speaker would likely be aware that the act could cause fear in others. See *Black,* 538 U.S. at 352 (protecting cross-burning in these instances); Pet. App. 33. The simple recitation of lyrics from a well-known police protest song to "[t]ak[e] out a cop or two" would become a felony under Kansas law. Pet. App. 33 (discussing N.W.A., F**k tha Police, on Straight Outta Compton (Ruthless/Priority 1989)). Even the lyrics themselves could qualify as a threat,

placing musical artists in criminal jeopardy for their compositions. See Dixie Chicks, *Goodbye Earl* (Monument 2000) ("[G]oodbye, Earl; We need a break, let's go out to the lake, Earl; We'll pack a lunch, and stuff you in the trunk, Earl").

The use of hyperbole, even if it is "vituperative, abusive and inexact," falls safely within the confines of First Amendment protection. *Watts* v. *United States*, 394 U.S. 705, 708 (1969). Effective governance relies on a burgeoning culture that must tolerate—and even invite—expression of "verbal tumult," "discord," and "offensive utterance." *Cohen* v. *California,* 403 U.S. 15, 24–26 (1971). This Court has recognized that "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." *Id.* at 26. The First Amendment properly leaves matters of taste and style of communication to individuals—exaggeration and colorful speech are not the proper realm for government regulation. *Id.* at 25. The Kansas Supreme Court properly safeguarded against the chilling effect on everyday communication that would accompany enforcement of the overbroad language in the State's criminal threat statute.

## III. THE PETITION DOES NOT DEMONSTRATE AN IMPORTANT OR RECURRING ISSUE, AND THE PETITION WOULD NOT BE AN APPROPRIATE VEHICLE FOR ADDRESSING THE QUESTION PRESENTED IN ANY EVENT

### A. The impact of the Kansas Supreme Court's decision is limited.

#### 1. Petitioner overstates the effects of the Kansas Supreme Court decision, both within Kansas and beyond.

Petitioner's assertion that the decision below will have "widespread impact" is unconvincing. See Pet. 21. First, with respect to Petitioner's claim that the ruling "undermine[s] a significant number of prosecutions" within the state, *id.* at 22, petitioner's guesswork is unhelpful. Petitioner admits that it cannot show that the 1800 convictions it cites would actually be 1800 lost convictions if the recklessness option were off the table. Pet. 22 n.2. The database that reported these 1800 convictions, spanning over five years, does not "distinguish between reckless and intentional criminal threats." *Id.* As Mr. Johnson's case shows, prosecutors often charge both in the same indictment. See Pet. App. 69. With no idea of how many reckless-only threat cases actually would be vulnerable in the wake of the Kansas Supreme Court's decision, petitioner's lead-off argument falls flat. It is an argument better made (as it was) to the Kansas Supreme Court itself.

Second, petitioner asserts that "the law in [at least fourteen other states] is now subject to attack" based on the Kansas Supreme Court's ruling. Pet. 23. Petitioner's position is both logically unsound and ultimately incorrect. As a threshold matter, it is telling

that eight of the fourteen other states with recklessness-based threat statutes were not concerned enough by the Kansas Supreme Court's decision to take even the simple step of joining the States' amicus brief. See Virginia *et al.* Amici Br.

More significantly, petitioner is wrong in insisting that "Kansas's law is not unique." Pet. 23. In fact, the wording and structure of the Kansas statute are sufficiently distinct from other states' formulations, and the Model Penal Code ("MPC") formulation, that a decision in this case may very well not reach those statutes at all. Although Kansas's statute is based on the MPC formulation, it is only loosely so, and deviates in at least two significant respects from other statutes that are also patterned on the MPC.

First, Kansas is the only state that requires a defendant merely to place another "in fear," Kan. Stat. Ann. § 21-5415, whereas the MPC and other states that follow it require more extreme "terrorizing" of another. Second, Kansas merely requires that the defendant make a threat to "commit violence," while the MPC and the other statutes require threats to commit actual *crimes of* violence before criminalizing the speech. See Model Penal Code § 211.3 (Am. Law Inst. 1985); Ga. Code Ann. § 16-11-37. In fact, Kansas is the *only* state that criminalizes threats to "commit violence."

These differences are far from semantic. With respect to the first distinction, "fear" merely constitutes "an unpleasant often strong emotion caused by anticipation or awareness of danger." *Fear*, Merriam Webster's Dictionary (2019). In contrast, a terror or "terrorize" standard is categorically more extreme, requiring "a state of *intense or overwhelming* fear." *Terror*, Merriam Webster's Dictionary (2019) (emphasis added).

The second distinction—mere violence versus actual "crimes of violence"—points to a feature of the Kansas statute that makes it much broader than the MPC. Scholars have described the "crime of violence" limitation as necessary to the proper demarcation between protected speech and unprotected speech. See Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1030–31 (2016). Although the First Amendment does not protect speech "integral to criminal conduct," there is no constitutional cornerstone that allows criminalizing all "violent" speech.

Connecticut's criminal threat statute shows why these linguistic choices matter. In Connecticut (unlike Kansas), "[p]hysical" threats that merely invoke "fear" require intent; Connecticut only allows the lower *mens rea* of recklessness for "crime of violence" threats that "terrorize." Conn. Gen. Stat. Ann. § 53a-62. North Dakota similarly criminalizes fear only if specific intent is established, but later in the statute allows speech creating terror to be shown by a reckless disregard standard. N.D. Cent. Code Ann. § 12.1-17-04. The tailored structure of these other state statutes incorporates constitutional safeguards that the Kansas statute lacks. Threats to commit amorphous "violence" that merely engender some level of "fear"—when not anchored by specific intent—are akin to the unconstitutional *prima facie* cross-burning provision at issue in *Black*.

Thus, specific intent is essential when statutory language wades into such murky waters. The Kansas Supreme Court recognized as much, and tailored its holding to the specific language in the Kansas statute. The court expressly found that the statute fell squarely within the category of intimidation provisions that are controlled by *Black*:

> [*Black*'s] analysis applies equally to [§ 21-5415(a)(1)]. The statute draws no distinction based on the means through which fear is caused. The plain meaning of the conduct prohibited . . .—causing fear—is indistinguishable from the intimidation provision at issue in *Black*.

Pet. App. 27. Because the Kansas Supreme Court's analysis turned on the specific language in the Kansas statute, the decision below did not purport to decide whether other types of criminal threat statutes—*i.e.*, ones worded or structured in a way that makes them an obvious proxy for unprotected reprehensible speech—*also* require a finding of specific intent to threaten. See *State* v. *Schaler*, 236 P.3d 858, 865 n.4 (Wash. 2010) (en banc) (stating "the law at issue in *Black* required an even greater mens rea as to the listener's fear." (quoting *Black*, 538 U.S. at 360 ("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." (emphasis added)))).

Third, petitioner continues its campaign to inflate the reach of the decision below by attempting to sweep in seven additional state threat statutes that utilize a "knowingly" *mens rea*. Pet. 24. But those statutes are inapposite. The question presented pertains to recklessness, and the Kansas Supreme Court did not address the higher mental state of knowledge. It is well established that criminal mental states exist on a hierarchy and *mens rea* is a one-way ratchet. This is true in Kansas: "[P]roof that a person acted knowingly, for example, also is proof that a person acted recklessly, a lower degree of culpability. But it does not work in the other direction. Proof of reckless conduct does not also constitute proof that a person acted knowingly." *State* v. *Warnke*, 441 P.3d 1074,

1084 (Kan. Ct. App. 2019) (citing Kan. Stat. Ann. § 21-5202, which classifies culpable mental states "from the highest to the lowest relative degree" and listing intentionally, knowingly, and recklessly in that order). And it is true elsewhere. See, *e.g.*, Model Penal Code § 2.02 cmt. 7 & n.39 (Am. Law Inst. 1985) (explaining the one-way hierarchy of mental states and collecting state statutes); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 56 (2010) (acknowledging that higher culpability associated with purposeful actions will also satisfy *mens rea* requirement for actions taken knowingly).

Finally, petitioner conjectures that "federal statutes may also be implicated" by the decision below, and cites 18 U.S.C. § 875(c). Pet. 24. As noted above, however (supra I.A.) no federal circuit has held that 18 U.S.C. § 875(c) criminalizes reckless threats. The only other federal statutes cited by petitioner criminalize the conveyance of false information, not threats. See Pet. 24–25 (citing 18 U.S.C. § 35(b) and 18 U.S.C. § 32(a)(7)). As a result, it is pure speculation to suggest that these non-threat statutes could somehow be impacted by the decision below.

**2. Petitioner overstates the impact of the decision below on the state's ability to protect its citizens.**

Petitioner and its amici also argue that it is hard for prosecutors to bring threat cases when they must establish specific intent. *Id.* at 25–27; Virginia *et al.* Amici Br. 6–7 (describing specific intent as a "high bar" and a "bind" on prosecutions); Kansas Coalition Against Sexual & Domestic Violence *et al.* Amici Br. 14 (describing proof of specific intent requirement as "'difficult and time-consuming' without generating any coordinate benefits") (quoting *United States* v. *Bradbury*, 111 F. Supp. 3d 918, 923 (N.D. Ind. 2015)).

Although states certainly have an interest in criminalizing true threats, the government's prosecutorial authority is constrained by the Constitution—here, the First Amendment. See *Watts*, 394 U.S. at 707 (noting that even in the face of the overwhelming government interest in keeping the President safe, the First Amendment serves to curtail prosecution of protected speech); see also *Patterson* v. *New York*, 432 U.S. 197, 210 (1977) (observing that "there are . . . constitutional limits beyond which the States may not go" in defining criminal law); *Berger* v. *United States*, 295 U.S. 78, 88 (1935) (noting that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones.").

Putting aside the fact that government prosecutorial interests cannot trump the First Amendment, petitioner and its amici ignore that States have many other tools—constitutional tools—to combat domestic violence and public gun violence. Laws prohibiting assault, battery, illegal possession-of-a-firearm and other gun offenses, stalking, cyberstalking, harassment, and criminal trespass all contribute to this purpose. Kansas's own Protection from Abuse Act, Kan. Stat. Ann. §§ 60-3101 to 3112, provides a comprehensive scheme that defines domestic abuse,[3] provides for criminal contempt orders for noncompliance, Kan. Stat. Ann. § 60-3110, and permits tracking of domestic abusers through a national criminal information center protection order file, Kan. Stat. Ann. § 60-3112. Even the other prong of the

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[3] Notably, the State's definition of abuse requires, in part, an "[*i*]*ntentional*[] placing, by physical threat, another in fear of imminent bodily injury." Kan. Stat. Ann. § 60-3102(2) (emphasis added). The Kansas Supreme Court's decision thus ultimately, though perhaps inadvertently, harmonized criminal-threat law with domestic-abuse law in Kansas.

statute at issue here, § 21-5415(a)(1)—which criminalizes threats when cause a shutdown or evacuation—amply suffices to reach prosecutors' concerns.

Petitioner also asserts that "prohibiting a State from prosecuting a threat to commit a mass-casualty event—whether at a school, sporting event, or public event—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." Pet. 26. But this begs the question. Some speech can be viewed as threatening but also as art, hyperbole, or symbolic protest. When a criminal statute captures both the former and the latter, then a specific intent requirement is necessary to safeguard constitutionally protected speech.[4] Mr. Johnson's case is a perfect example. Petitioner ignores the fact that his family routinely lobbed death-laden hyperbolic threats at each other. Not every harsh word uttered in the confines of a home constitutes or even is a harbinger of domestic violence.

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[4] Petitioner's parade-of-horribles example is misleading. See Pet. 26 n.7. Although it is true that "a Kansas district court judge dismissed pending charges" against a high school student in an alleged school-shooting case and that the student had texted his co-worker that he had intended to carry out the plot, petitioner fails to mention that the boy also texted his co-worker that he "didn't have the guts" to carry it out and he would not do it because he "cared too much" about people. Tim Hrenchir, *Charge 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. Because the student had affirmatively abandoned his plan, the court held that the state could not meet its burden of proof. *Id.*

### B. The petition is not an appropriate vehicle for addressing the question presented.

Even if the petition presents a question that merits this Court's attention, this case is not a good vehicle for addressing it.

As explained above, the Kansas statute is unique and departs from the MPC formulation in ways that broaden the categories of speech it criminalizes. Because the Kansas statute is an outlier, this case is not an ideal vehicle for addressing the question of whether a threatening statement, uttered recklessly, constitutes a general true threat. "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." R. Stern & E. Gressman, *Supreme Court Practice* 119–20 (3d ed. 1962) (statement of Chief Justice Fred M. Vinson).

## CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

CLAYTON PERKINS
CAPITAL APPELLATE
DEFENDER OFFICE
700 S.W. Jackson Street
Suite 900
Topeka, KS 66603
(785) 291-3207

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

JEFFREY T. GREEN *
JACQUELINE G. COOPER
CHIKE B. CROSLIN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

*Counsel for Respondents*

* Counsel of Record

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