No. 25-5072

IN THE SUPREME COURT OF THE UNITED STATES

Khaled Miah— PETITIONER

vs.

United States of America— RESPONDENT

MR. MIAH'S REPLY TO GOVERNMENT'S RESPONSE TO MR. MIAH'S PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

The government attempts to distract this Court from the heart of the question raised in Mr. Miah's Petition: Can an online social media post that at most forewarns of a possible, unspecific, future attack violate 18 U.S.C. § 875(c), if the post does not identify any particular natural person or group of natural persons as a target? It cannot.

Under the Third Circuit's novel approach in *Miah*, a factfinder can consider a virtually unlimited amount of context outside of a statement itself in evaluating whether the speaker has made a threat—even when the statement at issue does not identify any natural person as a target. *See United States v. Miah*, 120 F.4th 99, 108 (3d Cir. 2024). This unbridled approach differs from the Ninth Circuit's more conservative framework, which requires a particular natural person or group of persons to be identified as a target within a statement to qualify as federally prosecutable threat. *See United States v. Havelock*, 664 F.3d 1284 (9th Cir. 2012) (en banc).

In its response brief ("GB"), the government tries to convince this Court otherwise, characterizing *Havelock*, a key case concerning a sister threat statute, as unanalogous to § 875(c) prosecutions, yet ultimately "consistent" with the Third Circuit's approach in analyzing § 875(c) cases. GB 10. But the government's response misses the point: that *Havelock* concerns a prosecution under § 876 does not render its reasoning inapplicable or unpersuasive here. The Ninth Circuit's discussion of fundamental requirements for threat prosecutions, which specifically

includes commentary about and consideration of § 875(c), highlights the Third Circuit's much broader approach toward threat cases, where an innocuous social media post can qualify as a punishable threat even when it doesn't identify a target of the allegedly threatened harm.

Further, the government relies upon *United States v. Stock*, 728 F.3d 287, 301 (3d Cir. 2013) to bolster the Third Circuit's use of context to find that social media posts without an identified target can still qualify as a threat. *See* GB at 6. (*United States v. Stock*, 728 F.3d 287, 301 (3d Cir. 2013)). But that reliance is misplaced because *Stock* never reached the question of how much particularity is necessary to find that a threat has been directed toward an identified person; it only permitted using context to evaluate whether a statement qualified as a threat to harm. And, unlike in Mr. Miah's case, in utilizing context to make that determination, it limited its consideration to the entirety of an online posting—nothing outside of it. *See id*.

Both, the potential for continued escalation of benign social media posts to federally prohibited threats, and the targeting of online political speech, underscore exactly why the question presented here is so exceptionally important: online social media posts – especially by those engaged in political speech – are increasingly prevalent and capable of varying interpretations when extratextual context can be relied upon to deem the speech a threat. Without clearly defined parameters around what context can be used and to what extent, the potential for unwarranted prosecutions increases. This Court's review is necessary to clarify what level of

particularity a statement must have to constitute a statutorily prohibited threat in the age of social media.

ARGUMENT

I. The Third Circuit's decision permits consideration of a virtually unlimited amount of context when evaluating whether an alleged threat targets a particular natural person or group of persons, creating a circuit split when compared to the Ninth Circuit's more conservative approach.

In his Petition for a Writ of Certiorari ("Petition"), Mr. Miah argued that certiorari review is necessary to resolve the circuit split regarding how much particularity is required to constitute a threat under § 875(c). *See* Petition at 8-11. Specifically, Mr. Miah explained that the Ninth Circuit requires a true threat to identify a natural person as a target, *see Havelock*, 664 F.3d at 1286, whereas the Third Circuit finds threats when online speech does not include any identified target. *See Miah*, 120 F.4th at 108.

The government mischaracterizes Mr. Miah's claim as a mere fact-bound challenge to the sufficiency of the indictment. GB at 5-9. But Mr. Miah's claim stretches beyond questioning the sufficiency of the evidence underlying his convictions. Because of the Third Circuit's expansion of the prohibition of 875(c), his Petition actually zooms out away from his own case to view the legal landscape surrounding threat prosecutions as a whole by examining what level of particularity is required to find that a statement constitutes a "threat to injure the person of

another." 18 U.S.C. § 875(c). Through this lens, the differing approach of the Third Circuit compared to the Ninth Circuit becomes apparent.

A. The Third Circuit takes a liberal approach—unsupported by precedent—to utilizing context in finding that a statement constitutes a threat to injure the person of another.

In Mr. Miah's case, the Third Circuit used "the context and totality of circumstances" to fill in the gaps in Mr. Miah's tweets—specifically finding that even tweets that did not "identify a natural person as their target" could still qualify as threats under § 875(c). *Miah*, 120 F.4th at 107. In the absence of any particular natural person named in the tweets, the court selectively looked backward and forward through Mr. Miah's earlier and later tweets, pointed to the indictment's allegations "describing Miah's retaliatory targeting of Agent Edquist's wife, his inclusion of the investigating agents in his [other] tweets, the contents of his devices revealing an 'interest in weapons, his fascination with violence, and his strong animosity toward law enforcement,' and his recurring surveillance of Agent Edquist's residence and the FBI Pittsburgh Field Office." *Id*. Based on the combination of all of these extratextual factors, the court concluded that each of Mr. Miah's charged tweets were directed at natural persons and therefore constituted § 875(c) threats.

In its response, the government cites to *United States v. Stock*, another Third Circuit case, in support of allowing courts to utilize "context and totality of the communication" when determining whether a statement qualifies as a threat under § 875(c). GB 6 (quoting *United States v. Stock*, 728 F.3d 287, 301 (3d Cir. 2013)). In

Mr. Miah's case, the Third Circuit also relied on *Stock* in concluding that extratextual context could be used to determine the target of allegedly threatening social media posts, even when they did not identify a natural-person target. *See Miah*, 120 F.4th at 107. But in *Stock*, the Third Circuit mainly focused on whether the term "threat" in § 875(c) includes a temporal element and concluded that it "encompasses only communications expressing an intent to inflict injury in the present or future." 728 F.3d at 293. Nowhere in *Stock* did the court reach the question presented in Mr. Miah's Petition regarding the level of specificity required for identifying a natural-person target of a threat. Thus, it is ultimately unhelpful on the point at issue here and both the government's and the Third Circuit's reliance on it is misplaced.

Still, *Stock* contains some relevant guidance on the limited bounds of utilizing context generally when evaluating whether online statements qualify as § 875(c) threats. There, Mr. Stock made the following statements in an online Craiglist positing:

> i went home loaded in my truck and spend the past 3 hours looking for this douche with the expressed intent of crushing him in that little piece of shit under cover gray impala hooking up my tow chains and dragging his stupid ass down to creek hills and just drowning him in the falls. but alas i can't fine that bastard anywhere . . . i really wish he would die, just like the rest of these stupid fucking asshole cops. so J.K.P. if you read this i hope you burn in hell. i only wish i could have been the one to send you there.

Id. at 291.

In determining whether certain statements Mr. Stock made in the online posting qualified as threats to injure under § 875(c), the court deemed review of the

entire positing appropriate. *Id.* at 300. Instead of focusing only on the alleged threats in the posting, the court considered the four corners of the posting, taking into account the sentences that came before and after the alleged threats. *Id.* at 300-301. Ultimately, the court concluded that the statements in the context of the entire posting were sufficient to constitute threats, noting that "the court's determination of whether a statement constitutes a threat under § 875(c) is based on the context and totality of the communication." *Id.* at 301. Notably, no other extratextual context entered the analysis; the *Stock* Court focused solely on the posting itself.

Applying *Stock*'s restrained approach to utilizing context to evaluate whether statements constitute § 875(c) threats, the tweets at issue here do not contain a "threat to injure the person of another." 18 U.S.C. § 875(c). The Third Circuit's analysis in Mr. Miah's case therefore deviated from Third Circuit precedent and exemplifies the problems created by allowing extratextual context to push the boundaries of what statements qualify as targeting a natural person.

None of the tweets at issue here state a threat to injure the person of another.

- **The zero hour is approaching.**

This tweet standing alone at most reads as a vague forewarning. Even assuming arguendo that "the zero hour" does in fact reference "the occurrence of a significant event," for whom is it approaching? *United States v. Miah*, 120 F.4th 99, 107-108 (3d Cir. 2024). Everyone who reads the tweet? Everyone connected to Mr. Miah's investigation? Someone else entirely? Problematically, reaching back

into Mr. Miah's previous online statements in the name of gathering "context" and looking forward to online statements he posted after this one at most allows the factfinder to speculate about who any threat to injure *may* have been directed toward. That unbridled approach toward examining "context" allows for too much conjecture and disregards the core requirement that the statement must actually be aimed toward a "person." *Havelock*, 664 F.3d at 1293.

Other context, that was selectively excluded was that Mr. Miah's Twitter accounts were supportive of the 2020 Trump presidential campaign as he engaged in the online political vitriol in between the time then-President Biden was elected, and the Capitol Riot. The zero hour could have related to the change in presidency, to the buildup to January 6th, or something else entirely. Out of all of Mr. Miah's Twitter accounts and months of tweets, the context relied on was one of his prior tweets referencing the September 11th attack, and ignored, for example, a tweet that came after referencing Mr. Miah's love of the U.S. Capitol building.

- **38° 53' 42. 7" N, 77° 1' 33" W**

This tweet states the apparent coordinates of the FBI headquarters in Washington D.C. (an entirely different office, unrelated to the agents investigating Mr. Miah in Pittsburgh). Indisputably, this tweet on its face contains no "threat to injure the person of another." 18 U.S.C. § 875(c). In deciding it warranted a conviction under § 875(c), the Third Circuit treated it as part of a series of social media posts, that taken together with Mr. Miah's personal characteristics and ideology, sufficiently conveyed a threat to injure the person of another. *Miah*, 120 F.4th at 105-106.

But to whom was any assumed threat directed? The Third Circuit affirmed Mr. Miah's conviction on the grounds that the tweet "could be found to constitute a threat to injure agents at that location." *Id.* at 108 (internal citations omitted). Notably, no FBI agents in D.C. interacted with Mr. Miah during the government's investigation into his tweets. Likely, no one at FBI headquarters was even aware of, much less familiar with, Mr. Miah's case. Thus, no one working in the building located at these coordinates would have been "in fear of imminent danger" because of the tweet. *Havelock*, 664 F.3d at 1306.

This is critical because *only* the investigating agents in Pittsburgh had the requisite knowledge of Mr. Miah's devices, social media activity, years-old saved photos of past extremist materials, etc. that was used to admit highly prejudicial Rule 404(b) and 403 evidence at trial. If the coordinates are considered a threat to the FBI agents at the headquarters in D.C., that is both too broad a group to be considered "particular" (as other tweets were considered to be against the agents in Pittsburgh), and the Rule 404(b) and 403 rulings were baseless. This overly broad approach ignores that the statement itself must have the "capacity to threaten any injury or express any intent to cause the victims future harm or fear of future harm." *Id.* at 1306.

- **Remember boys, the more eyes on me, the less on the others. Regardless, yellow tapes will flow.**

Similar to the preceding tweets, this tweet on its face does not include language "threat[ening] to injure the person of another." 18 U.S.C. § 875(c). Yet, based solely on "context," the Third Circuit concluded that it "appears to reference

crime scene tape" which "could reasonably be interpreted as a threat to inflict harm." *Miah*, 120 F.4th at 108. The tweet was addressed to the "boys," which the court concluded were likely FBI "agents named in a prior tweet." *Id*. But it doesn't follow that those "boys" are the target of any hypothetical flowing yellow tapes. Under this logic, once a speaker has expressed animosity toward a specific person or group online, every subsequent social media post could carry a presumption of being aimed toward that person or group. This can't be the intended approach given that the statement within the social media post must itself "identify a target of any threat." *Havelock*, 664 F.3d at 1307.

Threat prosecutions under § 875(c) and related statutes aim to stifle real threats of specific harm toward real specific people. The Third Circuit's approach begs the question: where do the boundaries lie for allowing extratextual context to form the basis for threat prosecution.

B. The government is wrong in concluding that *Havelock*'s approach to threat cases is consistent with the Third Circuit's approach.

In its response, the government attempts to persuade this Court that *Havelock* would've treated the statement at issue there—"I will slay your children"—as a threat under § 875(c), and is thus consistent with the Third Circuit's approach. *See* GB at 10. But the government distorts the Ninth Circuit's commentary by claiming that "the Ninth Circuit in fact recognized in passing" that said statement, even without naming a particular natural-person target, would qualify as a threat to "the person of another." *Id*.

What the Ninth Circuit actually said is:

> Even looking to the contents of the Manifesto, it indicates nothing at all about the identity of any individual 'person' to whom the communication supposedly was addressed. A few of Havelock's statements appeared to be addressed to whoever happened to read them: e.g., 'I will slay your children.' It is impossible to determine (and is highly unlikely) that Havelock, in the quoted phrase, was addressing any particular person whose children he was going to slay.

Havelock, 664 F.3d at 1296.

Immediately following this passage, is a footnote that states: "Of course, a threat to kill any children qualifies as a *threat* made to the person 'of another' than the addressee. § 876(c) (emphasis included). But that threat alone is not enough to satisfy the requirement that the *communication* be addressed to 'any other person' than the sender. *Id*." *Id*. at n.10. The court did *not* conclude that the statement would satisfy § 875(c), only that it satisfied one of two of § 876(c)'s requirements. *See id*. at 1291 ("Section 876(c) not only requires that the mail be 'addressed to any other person,' but that the offending communication contain 'a threat to *injure the person of the addressee or of another*,'" § 876(c) (emphasis added)).

The government contends that Mr. Miah focuses on the "different statutory requirement" of § 876 that necessitates a threatening statement contain an addressee, "which has no analogue in Section 875(c)." GB at 10. But *Havelock* analyzed more than just the addressee component of the statute. The court specifically noted that § 876(c) also requires "'a threat to *injure the person of the addressee or another*.'"—a requirement squarely applicable to the question presented in Mr. Miah's Petition. *Id*. at 1291. In analyzing § 876(c), the court closely considered the language of "related statutes" from Chapter 41, including § 875(c)

and specifically concluded that "§ 875 clearly envisions that 'person' is limited to a natural person." *Id.* at 1292.[1]

So, although the *Havelock* prosecution was under sister threat statute § 876(c), the only meaningful distinction between § 876(c) and § 875(c) is the method of transmitting the threat: § 876(c) prohibits mailing threatening communications, whereas § 875(c) prohibits making threatening statements in interstate communications.

Section 875(c) states that:

> Whoever transmits in interstate or foreign commerce any communication **containing any threat to kidnap any person or any threat to injure the person of another**, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 875(c) (emphasis added).

Section 876(c) states that:

> Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and **containing any threat to kidnap any person or any threat to injure the person of the addressee or of another**, shall be fined under this title or imprisoned not more than five years or both.

18 U.S.C. § 876(c) (emphasis added).

The portion of each statute concerning the intended target of an allegedly threatening statement is essentially identical, requiring that the "threat to injure"

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[1] The Ninth Circuit also specifically noted the connection between § 875 and § 876, in addition to both being part of Chapter 41, that "[a]lthough the predecessors to §§ 875 and 876 were not enacted as part of the same act, Congress explicitly referenced § 876's predecessor, 18 U.S.C. § 338a (1932), when it enacted § 875's predecessor, 18 U.S.C. § 408d (1934)." *Id.*

be directed to "the person of another." *See id*. Thus, the Ninth Circuit's analysis of what level of particularity is sufficient to satisfy § 876(c), when it comes to the intended target, is certainly relevant to the requirements of § 875(c).

Further, in determining what context can be considered in determining if a threat to injure was directed to the person of the addressee or of another, the *Havelock* court considered whether a factfinder can look beyond the instructions for mailing on the outside of the letter and the salutation line of the mailing itself to identify the target of the communication. In other words, the court considered what—outside the statements themselves—could be considered to contextualize the statements. The court determined that "in order to determine whom a threatening communication is 'addressed to,' a court may consult the directions on the outside of the envelope or the packaging, the salutation line, if any, and the contents of the communication. *Id*. at 1296. Thus, the Ninth Circuit limited how much extratextual context can be considered in identifying the target of an alleged threat.

II. Clearly defining the bounds of how context can be used in § 875(c) prosecutions is exceptionally important because of the prevalence and continuing prosecution of online speech.

In his Petition, Mr. Miah explained that this case presents a question of exceptional importance given the ever-increasing expansion of online social media speech. Petition at 19-22. Moreover, he pointed out that recent § 875(c) prosecutions have continued to focus on online speech. Petition at 19-20. Clearly defining what is required to satisfy § 875(c) is therefore critical as threat jurisprudence and online speech converge.

Mr. Miah's case highlights a popular subset of online speech—political and trolling social media posts—and the unique issues this type of speech presents concerning the degree to which context can be used to satisfy the elements of § 875(c). A public social media post, unlike an email or a direct message sent via a social media platform, is available for vast consumption by a large group of public readers (but often viewed by no one) instead of being directed toward a specific recipient or group of recipients. The comparatively more generic nature of a social media post underscores the problem with using context to supply an intended target when no particular person is identified in the post: a social media post that does not identify a target inherently provides less context about the speaker's intent, whereas an email or direct message clearly indicates to whom the speaker directed their speech. In the latter scenario, a court need not look outside the bounds of the speech itself (the actual message) and the circumstances under which it was made (email, direct message, etc.) to determine whether the speech at issue contains a threat to injure the person of another.

Importantly, anonymous political speech online has taken on a mocking, generally hostile nature. Targeting individuals engaged in protected speech by selectively curating the "context" of their speech creates dangerous precedent and allows an unlimited application of threat prohibitions on those whose speech is unpopular, but protected.

Courts need guidance on what, outside the content of a social media post itself, can be evaluated in determining whether the speaker threatened to injure the

person of another. Without more specific parameters, the degree to which context can be used is a slippery slope. As explained in Mr. Miah's Petition, many § 875(c) arrests target purportedly "ideologically motivated individuals," which raises concerns about leeway "for prosecutors to push the statute toward charging people who have articulated more generalized, less specific threat language[.]"[2]

The government ignored this point raised in Mr. Miah's Petition, but this Court should not.

CONCLUSION

Because the Third Circuit's precedential opinion conflicts with the Ninth Circuit's precedent on an issue of exceptional importance, this Court should grant a writ of certiorari.

Respectfully submitted,

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[2] *Id.*