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Supreme Court of New Jersey

DOCKET NO. 086617

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal as of Right Pursuant to Rule 2:2-1(a)(1) from a Final Judgment of the Superior Court of New Jersey, Appellate Division.
v.	:	
CALVIN FAIR,	:	Sat Below: Hon. Clarkson S. Fisher, Jr., P.J.A.D., Hon. Heidi Willis Currier, J.A.D., and Hon. Patrick DeAlmeida, J.A.D.
Defendant-Respondent.	:	

BRIEF AND APPENDIX ON BEHALF OF THE
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PRELIMINARY STATEMENT

For centuries, New Jersey has maintained statutes that prohibit individuals from making violent threats, consistent with our constitutional tradition. The current version of New Jersey's "terroristic threats" law, N.J.S.A. 2C:12-3(a), bars a person from "threaten[ing] to commit any crime of violence … in reckless disregard of the risk of causing … terror or inconvenience." That includes an objective component and a subjective mens rea. The statement must objectively threaten violence—a speaker cannot be liable just because a hearer is unusually sensitive. And a speaker must have the requisite level of subjective culpability, recklessness, which requires that he "consciously disregard[ed] a substantial and unjustifiable risk" that the statement would cause terror in a way that reflected "a gross deviation from the standard of conduct that a reasonable person would observe." N.J.S.A. 2C:2-2(b)(3).

The Appellate Division announced below that this statute violates the First Amendment, but its outlier decision is wrong. The First Amendment authorizes States to adopt statutes that bar individuals from making violent threats and that impose civil or criminal sanctions when they do. And it allows States to do so even if the speaker did not harbor the specific purpose of causing fear. Rather, as 25 state high courts and federal courts of appeal have reasoned, a "true threat" can be prohibited when a statement objectively threatens violence, regardless of

subjective intent. For good reason: The interests behind the true-threats rule go beyond protecting individuals "from the possibility that the threatened violence will occur," but instead focuses on allowing States to "protect[] individuals from the fear of violence" and "from the disruption that fear engenders." And a threat causes fear and disruption based on the communication's content, not hidden intent. Students who hear that one classmate put them on a "hit list," individuals who get threats from their intimate partners, and judges who learn a local litigant expressed a desire to shoot them will experience fear and disruption, regardless of what subjective intent happened to be in the speaker's mind.

There is a second problem with the Appellate Division's outlier decision: even assuming that a subjective mens rea is required, recklessness would suffice. A mens rea of recklessness only allows for liability in the face of an objectively violent threat made with conscious disregard of a substantial, unjustifiable risk of provoking terror. As another four state high courts and U.S. courts of appeal have found, that is enough. Recklessness is a common criminal mens rea, even for crimes causing extreme harm or carrying serious penalties. And courts have seldom required knowing or purposeful conduct for other unprotected categories of speech. This Court therefore need not decide whether an objective analysis alone is enough to establish a true threat, or whether a subjective intent of recklessness is needed, because both are present in this statute. All it must hold

to find the facial validity of N.J.S.A. 2C:12-3(a) is that the Appellate Division's purpose requirement imposed below lacks support.

The remaining tools of constitutional interpretation likewise foreclose the Appellate Division's insistence on purpose and instead confirm the validity of a statute that prohibits objective true threats (and, moreover, one that pairs an objective test with recklessness). For one, not only do objectively violent threats fall within an established constitutional exception, but there is also no other First Amendment interest that N.J.S.A. 2C:12-3(a) inhibits: the prohibited threats do not advance the marketplace of ideas or contribute to debate on public matters. For another, extensive historical and modern state and national practice confirm that this terroristic-threats statute is within the constitutional mainstream. Laws at the Founding, including in this State, prohibited violent threats without any subjective intent, and in modern times, 16 other States and the Model Penal Code alike prohibit terroristic threats based only on recklessness. Last, the Appellate Division's view finds no support in either federal or state precedent.

True threats receive no protection from either the U.S. or the New Jersey Constitutions, given the fear and disruption they cause. New Jersey's terroristic-threats law easily passes the test of facial validity under both.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

The Attorney General relies on the Statement of Procedural History and Statement of Facts in the State's brief, adding only the following.

On March 1, 2022, defendant filed a motion to dismiss the State's notice of appeal as of right. Dm1 to 9.[1] The State opposed, and on November 7, 2022, the Court issued an order denying that motion. AGa1. The Court ordered that the State's appeal shall proceed as an appeal as of right according to Rule 2:2-1(a), and that further proceedings would follow a preemptory schedule. AGa1. Under that schedule, any entity wishing to appear as amicus curiae must "serve and file its motion for leave to appear, and its proposed amicus curiae brief, by December 22, 2022." AGa1. The parties may then "serve and file answers to any motions for leave to appear, together with responses to the proposed amicus curiae briefs on the merits, on or before January 11, 2023." AGa1.

[1] The Attorney General adopts the transcript and record citations used by the parties and adds "AGa" to refer to the Attorney General's appendix and "Ds" to refer to the Defendant's Supreme Court brief.

LEGAL ARGUMENT

POINT I

THE NEW JERSEY TERRORISTIC THREATS LAW IS CONSISTENT WITH THE FIRST AMENDMENT.

Like other threats laws adapted from the Model Penal Code, New Jersey's terroristic-threats law, N.J.S.A. 2C:12-3(a), bars a person from "threaten[ing] to commit any crime of violence … in reckless disregard of the risk of causing … terror or inconvenience." That includes an objective component and a subjective mens rea. The statement must objectively threaten violence—a speaker cannot be liable just because the hearer is unusually sensitive. And a speaker must have the requisite level of subjective culpability, recklessness, which requires the jury find that he "consciously disregard[ed] a substantial and unjustifiable risk" that the statement would cause terror in a way that reflected "a gross deviation from the standard of conduct that a reasonable person would observe." N.J.S.A. 2C:2-2(b)(3); see also Model Penal Code & Commentaries § 2.02 (Am. Law. Inst. 1985) (MPC) ("General Requirements of Culpability").

The question this case presents is whether the First Amendment forecloses terroristic-threats statutes except if the threat was made with the specific intent (that is, the purpose) of causing terror. In contrast to the Appellate Division, the vast majority of state supreme courts and federal circuits to consider this First Amendment question have rejected analogous challenges, and have instead held

that laws like N.J.S.A. 2C:12-3(a) fit comfortably within the First Amendment's established exception for true threats. The overwhelming majority of courts—at least 25 state high courts and federal courts of appeal—have concluded that a "true threat" can be constitutionally proscribed where it objectively threatens violence, and that the "true threat" exception does not require any specific intent beyond the general intent to communicate those words.[2] Another four state high courts either hold or assume that some further specific mens rea is required, but hold that recklessness suffices.[3] In any of these courts, New Jersey's terroristic-

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[2] See United States v. Nishnianidze, 342 F.3d 6, 15 (1st Cir. 2003); Heller v. Bedford Cent. Sch. Dist., 665 F. App'x 49, 51 n.1 (2d Cir. 2016) (AGa2 to 5); United States v. Elonis, 730 F.3d 321, 332 (3d Cir. 2013); United States v. White, 810 F.3d 212, 220 (4th Cir. 2016); Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004); United States v. Jeffries, 692 F.3d 473, 480-81 (6th Cir. 2012); United States v. Stewart, 411 F.3d 825, 828 (7th Cir. 2005); United States v. Ivers, 967 F.3d 709, 718, 720-21 (8th Cir. 2020); United States v. Martinez, 736 F.3d 981, 986 (11th Cir. 2013); Citizen Publ'g Co. v. Miller, 115 P.3d 107, 114-15 (Ariz. 2005); Jones v. State, 64 S.W.3d 728, 736 (Ark. 2002); People v. Lowery, 257 P.3d 72, 74 (Cal. 2011); People In Interest of R.D., 464 P.3d 717, 721-22 (Colo. 2020) (en banc); In re S.W., 45 A.3d 151, 156-57 (D.C. 2012); State v. Valdivia, 24 P.3d 661, 671-72 (Haw. 2001); State v. Soboroff, 798 N.W.2d 1, 2, 8-9 (Iowa 2011); In Interest of R.T., 781 So. 2d 1239, 1246 (La. 2001); Hearn v. State, 3 So. 3d 722, 739 n.22 (Miss. 2008); State v. Lance, 721 P.2d 1258, 1266-67 (Mont. 1986); State v. Johnson, 964 N.W.2d 500, 503 (N.D. 2021); State v. Moyle, 705 P.2d 740, 749-51 (Or. 1985); Austad v. Bd. of Pardons & Paroles, 719 N.W.2d 760, 766 (S.D. 2006); State v. Blanchard, 256 A.3d 567, 574-76 (Vt. 2021); State v. Trey M., 383 P.3d 474, 478 (Wash. 2016) (en banc); State v. Perkins, 626 N.W.2d 762, 770 (Wis. 2001).

[3] State v. Taupier, 193 A.3d 1, 18-19 (Conn. 2018); Major v. State, 800 S.E.2d 348, 350 (Ga. 2017); State v. Mrozinski, 971 N.W.2d 233, 245 (Minn. 2022); In Interest of J.J.M., 265 A.3d 246, 270 (Pa. 2021).

threats statute is plainly constitutional, and even goes beyond what most hold the First Amendment requires. Only five high courts and federal circuits have held that the speaker's "subjective intent to threaten is the pivotal feature" under the First Amendment—that is, have required a mens rea of purpose.[4] In short, a lopsided 29-5 divide would endorse the validity of New Jersey's law.[5]

Constitutional law is of course more than a counting exercise, but all the traditional interpretive tools support the overwhelming majority's position. The Appellate Division's conclusion that a threat cannot be prohibited under the First Amendment unless the government can prove the speaker's subjective purpose to cause fear is inconsistent with the contours and purposes of the "true threats" exception and produces senseless results. It does not serve any First Amendment values. It contradicts widespread national practice today, as well as an extensive historical tradition in New Jersey and across the Nation. And it finds no support

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[4] United States v. Bachmeier, 8 F.4th 1059, 1064 (9th Cir. 2021); United States v. Heineman, 767 F.3d 970, 975 (10th Cir. 2014); State v. Boettger, 450 P.3d 805, 817-18 (Kan. 2019); O'Brien v. Borowski, 961 N.E.2d 547, 557 (Mass. 2012); State v. Taylor, 866 S.E.2d 740, 753-55 (N.C. 2021).

[5] The U.S. Supreme Court has not yet stepped in to resolve this well-recognized disagreement. See Elonis v. United States, 575 U.S. 723, 740 (2015); Kansas v. Boettger, 140 S. Ct. 1956, 1959 (2020) (Thomas, J., dissenting from denial of cert.); Perez v. Florida, 580 U.S. 1187, 1187-90 (2017) (Sotomayor, J., concurring in denial of cert.). The question is the subject of a pending petition for certiorari. See Counterman v. Colorado (No. 22-138) (filed Aug. 9, 2022).

in precedent. That is all this Court must hold to resolve the issue: it need not decide whether an objective threat suffices or a subjective intent of recklessness is required, because N.J.S.A. 2C:12-3(a) requires both.

A. The Appellate Division's purpose requirement is inconsistent with the contours and purposes of the "true threats" exception.

The Appellate Division's insistence that the government prove the speaker had a specific intent to cause terror finds no support in the First Amendment's "true threats" exception. There is no dispute that the First Amendment (just like Article I, Paragraph 6) allows States to prohibit "true threats," among other types of historically unprotected speech. See, e.g., Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam); State v. Burkert, 231 N.J. 257, 281 (2017). These threats are thus one of the established forms of speech that fall "outside the First Amendment," R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992), with other such examples including child pornography, New York v. Ferber, 458 U.S. 747, 763-64 (1982); fraud, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); obscenity, Roth v. United States, 354 U.S. 476, 492 (1957); defamation, Beauharnais v. Illinois, 343 U.S. 250, 254-55 (1952); speech that is integral to criminal conduct, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); and fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). Each can "be regulated because of their constitutionally proscribable content." R.A.V., 505 U.S. at 383.

i. The Proper Analysis Turns On The Objective Nature Of The Threat, Not The Subjective Intent Of The Speaker.

The precise contours and purpose of the "true threats" exception make clear that a true threat turns on the objective nature of the communication, in the context that communication was made, and not on the speaker's personal intent. Importantly, the true threats exception exists for reasons that go beyond actually protecting people "from the possibility that the threatened violence will occur"; instead, the true threats rule also exists to allow the government to adopt laws that "protect[] individuals from the fear of violence" and "from the disruption that fear engenders." Virginia v. Black, 538 U.S. 343, 360 (2003) (emphasis added); see also, e.g., R.A.V., 505 U.S. at 388; J.J.M., 265 A.3d at 254. But those interests—the profound fear that individuals experience from a threat, and the harmful impacts of that fear—rise or fall with the content of the communication, and not whether the speaker specifically intended the statements to be taken that way. See, e.g., Elonis, 575 U.S. at 733 ("[A]n anonymous letter that says 'I'm going to kill you' is 'an expression of an intention to inflict loss or harm' regardless of the author's intent."). And because the communications themselves are "of such slight social value" to justify that fear and disruption, they merit no First Amendment protection—having nothing to do with a speaker's subjective intent. R.A.V., 505 U.S. at 383 (quoting Chaplinsky, 315 U.S. at 572).

Case after case has thus recognized that the contours and purpose of the "true threats" exception are appropriately served by an objective analysis of the threat, in the context it was made. Cf. N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 593 (2020) ("The polestar of constitutional construction is always the intent and purpose of the particular provision."). As one court appropriately put the point, once the government establishes the objectively threatening nature of the communication—i.e., "that a reasonable person would perceive the threat as real"—"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[.]'" Jeffries, 692 F.3d at 478 (first alteration in original) (quoting R.A.V., 505 U.S. at 388); see ibid. (adding "any concern about the risk of unduly chilling protected speech has been answered" by requiring the government to show an objective threat). Or, as the Minnesota Supreme Court said simply, "[w]hether the person making the communication to commit a violent act specifically intends to threaten the victim, a violent statement can still elicit fear and cause harm; it can still cause a person to feel intimidated." Mrozinski, 971 N.W.2d at 244; see Taupier, 193 A.3d at 15 (Connecticut Supreme Court making same point).

The practical realities confirm that objective true threats generate fear and disruption—regardless of any subjective purpose to do so. In Taupier, for

example, a litigant indicated his desire to shoot a local trial judge and her children from a nearby cemetery using a long-range rifle. See 193 A.3d at 9-11. Needless to say, the judge did not call that litigant to inquire about his subjective state of mind—that is, whether he wanted the judge to be afraid, or was blowing off steam. Rather, the threat alone prompted the state police to watch the judge's house, an evening escort from the marshals, and conversations with the children's school. Id. at 11. That is precisely the sort of "fear" and "disruption" the true-threat doctrine addresses. See id. at 19 (holding "first amendment does not require the state to prove that the defendant had the specific intent to terrorize [the judge] before he could be punished for his threatening speech"); see also R.D., 464 P.3d at 731 ("[A] single online post can trigger the diversion of significant law enforcement resources.").

Nor does the criminal context stand alone. While this is a criminal case, the panel below made its ruling as a matter of First Amendment law, State v. Fair, 469 N.J. Super. 538, 554 (App. Div. 2021), and the "true threats" analysis does not vary according to the type of adjudication. See, e.g., Haughwout v. Tordenti, 211 A.3d 1, 9 (Conn. 2019) (noting, in context of university student's civil suit challenging his expulsion for threats of gun violence, that "[b]ecause the true-threats doctrine has equal applicability in civil and criminal cases, case law from both contexts informs our inquiry"). And it would disserve the core

constitutional interests—mitigating fear and resultant disruption—to preclude the State from taking civil or administrative action in response to objectively threatening statements. In particular, as a range of States have noted, a specific-intent requirement is especially troubling in two contexts that often involve civil interventions: protecting schoolchildren and protecting intimate partners from violence. See Brief Amici Curiae of Virginia, et al. at 3-10, Kansas v. Boettger, 140 S. Ct. 1956 (2020) (No. 19-1051), 2020 WL 1479883, at 7-10 (AGa13 to AGa20).

With regard to school violence, the U.S. Supreme Court's school-speech cases consistently arise in the context of civil litigation regarding school policy and discipline—not criminal law. See, e.g., Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy, 141 S. Ct. 2038, 2043 (2021). A true threat of school violence can cause extraordinary fear and disruption regardless of subjective intent. See, e.g., R.D., 464 P.3d at 730-31 (recounting how threats made on Columbine's 20th anniversary forced "hundreds of schools across the state closed in response"); Trey M., 383 P.3d at 477 (describing fear expressed by three minor victims after learning they were on a student's "hit list"). And yet under the decision below, a teenager who talks about their "hit list" may not be subject to suspension if the school cannot sufficiently establish the student's specific intent to cause fear. See State in Interest of J.F., No. A-5543-12 (App. Div. July 9, 2014) (affirming

conviction under reckless-disregard prong despite the fact "[t]here was no testimony that [the student] threatened to harm anyone to whom he spoke or that he asked them to tell others, including the five students on his list, about the threats") (AGa29).

Domestic violence is likewise "a serious problem in New Jersey," State v. Bryant, 227 N.J. 60, 73 (2016), and victims often seek refuge in civil remedies, including restraining orders. The First Amendment, of course, applies in those proceedings too. See R.D., 464 P.3d at 731 ("'Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace.'" (citation omitted)). There is no basis in the interests animating the First Amendment and the true-threats exception to immunize from government intervention—civil or criminal—objectively threatening statements made by an enraged spouse simply because the spouse subjectively sees the statements as a way of dealing with "pain." Cf. Elonis, 575 U.S. at 727. See generally Brief of Amici Curiae Nat'l Network to End Domestic Violence, et al., Elonis v. United States, 575 U.S. 723 (2015) (No. 13-983), 2014 WL 5013749 (AGa34 to AGa97).

Defendant also suggests that the Appellate Division's First Amendment rule is needed to promote racial equity, Ds39-42, but that argument falls short in at least two respects. First, it is not clear why incorporating a subjective

element would serve an interest in combatting racial inequities, and there is good reason to doubt that it would serve that goal any better than an objective test. See Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990 (1988) (acknowledging "subconscious stereotypes and prejudices" can infect subjective evaluations). Second, and importantly, defendant ignores that his rule would deny all victims—including members of historically marginalized groups—effective vindication where another person has engaged in threatening speech, however objectively threatening, absent a showing of purpose. See generally Brief Amicus Curiae of Anti-Defamation League, Elonis v. United States, 575 U.S. 723 (2015) (No. 13-983), 2014 WL 4978892 (AGa98 to AGa121). That would have significant harmful impacts on law enforcement and civil efforts to protect such groups.

Finally, not only does the objective-threats analysis advance the interests the "true threats" doctrine serves, but the objective test fits with one of the most enduring through-lines in First Amendment jurisprudence: liability for speech should seldom, if ever, hinge on the thoughts inside someone's head rather than their external conduct. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 251-52 (2002). Thus, while differences in motives can justify different sentences, see Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993), the First Amendment abhors the "bizarre result" of liability turning on "the speaker's intent," such

that "identical" content is "protected speech for one speaker, while leading to criminal penalties for another." Fed. Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J.); see id. at 492-93 (Scalia, J., concurring in part and concurring in judgment) (also rejecting intent-based test).

If the panel's decision stands, however, then the State's ability to seek accountability for two objectively identical threats—each causing identical "fear of violence" and accompanying "disruption," R.A.V., 505 U.S. at 388—would diverge if one of the speakers intended the statement to be taken as a threat while the other intended to "blow off steam" despite knowing a listener would almost certainly see the statement as a threat. Cf. Davis v. Gilchrist Cty. Sheriff's Off., 280 So. 3d 524, 529 (Fla. Dist. Ct. App. 2019) (evaluating risk-protection order to remove firearm from sheriff's deputy who made threatening statements). The First Amendment does not mandate such a "bizarre result" here—which would divorce the doctrine from the fear and disruption it protects against.

ii. Even If the First Amendment Requires Some Level of Subjective Culpability, Recklessness Is Sufficient.

Although the First Amendment, properly construed, exclusively requires an objective-threat analysis, this Court need not definitively conclude as much to reverse the decision below. That is because, as noted, New Jersey's statute requires subjective culpability on top of an objectively violent threat. See supra Point I, at p.5. And recklessness—that is, "consciously disregard[ing] a substantial and unjustifiable risk …. of such a nature and degree that," under the totality of the circumstances, "its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe," N.J.S.A. 2C:2-2(b)(3)—is a common criminal mens rea. At the very least, this additional criterion confirms that the Appellate Division's purpose requirement is misguided. See Taupier, 193 A.3d at 19 (indicating an objective-threats analysis alone comports with the First Amendment while adding that, "[e]ven if we were to assume that proof of subjective knowledge is constitutionally required," recklessness suffices).

As an initial matter, there is nothing anomalous about having criminal liability (let alone civil liability, see supra Point I.A.i., at pp. 11-14) turn on recklessness. Indeed, the MPC—"the basis for many provisions in the Criminal Code," State v. Lee, 96 N.J. 156, 163 (1984)—recommends that whenever an offense is "silent as to culpability," the default minimum culpability required

should be recklessness. MPC § 2.02, cmt. 5, at 244; see also Voisine v. United States, 579 U.S. 686, 695 (2016) (noting this default rule). And many crimes—including crimes causing extreme harm and carrying serious penalties—can be accomplished with a mens rea of recklessness. See, e.g., N.J.S.A. 2C:11-4 (manslaughter); N.J.S.A. 2C:11-5 (vehicular homicide); N.J.S.A. 2C:12-1 (assault); N.J.S.A. 2C:40-3 (hazing); N.J.S.A. 2C:24-7.1 (endangerment); N.J.S.A. 2C:21-4.3 (health care claims fraud); N.J.S.A. 2C:17-1 (arson). That should be no surprise: "The harm such conduct causes is the result of a deliberate decision to endanger another." Voisine, 579 U.S. at 694. True threats are the same: the threats "by their very utterance inflict injury," Jeffries, 692 F.3d at 480 (quoting Chaplinsky, 315 U.S. at 572), and making such threats recklessly "requires a knowing act"—that is, a "conscious disregard of a substantial risk," Major, 800 S.E.2d at 352.

Nor does that reality change simply because the defendant is alleging his First Amendment rights are being violated. To the contrary, the U.S. Supreme Court has seldom required either knowing or purposeful—or even necessarily reckless—conduct "under the First Amendment for historically unprotected categories of speech." Elonis, 575 U.S. at 766 (Thomas, J., dissenting). Fighting words can be banned based on their purely objective content. See Cohen v. California, 403 U.S. 15, 20 (1971). Purely private defamation can be

held accountable based on mere negligence. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 770, 775 (1986). Possession of child pornography can be punished based on recklessness, Osborne v. Ohio, 495 U.S. 103, 112 n.9, 115 (1990), as can defamation of a public official on a matter of public concern, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). There is no reason for violent threats to enjoy a special carveout. See J.J.M., 265 A.3d at 266 ("[W]e are unaware of a single case in which the Court has held that recklessness is an insufficient mens rea to separate constitutionally protected speech from that which is proscribable.").[6]

These other areas of permissible State regulation, consistent with the First Amendment, make clear that the terroristic-threats statute's reckless-disregard provision provides sufficient room for "the free exchange of ideas," United States v. Williams, 553 U.S. 285, 292 (2008), untrammeled by fear of prosecution or liability. See Mrozinski, 971 N.W.2d at 245 ("If in the context of other First Amendment categories, a reckless standard 'provides adequate breathing space' for protected speech, requiring proof of recklessness in the context of true threats similarly provides sufficient protection of speech."). In

[6] Nor is this point unique to the First Amendment. The Second Amendment, to take one obvious example, would not prevent holding someone accountable for the reckless discharge of a firearm. Cf. Richard v. Andrew, No. 15-63, 2015 WL 9855880, at *2 n.2 (D. Mont. Nov. 10, 2015) (rejecting theory that a negligent-homicide conviction "violates the Second Amendment") (AGa126).

short, the "strong medicine" of facial invalidation is not appropriate here. See Virginia v. Hicks, 539 U.S. 113, 124 (2003).

B. The Appellate Division's purpose requirement does not advance any other First Amendment values.

Nor, for that matter, does protecting objectively violent threats advance other First Amendment interests. Undisputedly, both the U.S. Constitution and our Constitution reflect a "profound … commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." N.Y. Times Co., 376 U.S. at 270; see, e.g., Warren Hosp. v. Does (1-10), 430 N.J. Super. 225, 230 (App. Div. 2013). But there is nothing about a message announcing to one's classmates that one may "make Columbine look childish," Major, 800 S.E.2d at 350, or discussing a "hit list," Trey M., 383 P.3d at 477, that advances uninhibited, robust, and wide-open debate; if anything, it does the opposite. See Mrozinski, 971 N.W.2d at 244 ("Indeed, protecting this type of speech has a corrosive effect on society because it allows bullies who espouse violence to intimidate others, potentially stifling public discourse.").

In fact, the reason that threats—along with other "historic and traditional categories long familiar to the bar," United States v. Stevens, 559 U.S. 460, 468 (2010) (citation omitted)—have always been understood to fall outside standard First Amendment protection is because they 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." R.A.V., 505 U.S. at 383 (citation omitted). Nothing about recognizing the core societal interest in protecting people from the harms of true threats diminishes society's or a State's commitment to protecting "vehement, caustic," or odious statements of "grievance and protest" regarding "public officials" or "public issues." See N.Y. Times Co., 376 U.S. at 270-71. The two are distinct.

Indeed, the objective and the subjective aspects of N.J.S.A. 2C:12-3(a) do independent work to "winnow[] out protected speech" from culpable conduct. Jeffries, 692 F.3d at 480. The objective test—requiring that a reasonable person would understand the words communicated to, in context, objectively threaten violence—"avoids the risk that an otherwise innocuous statement might become a threat if directed at an unusually sensitive listener." United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997). Critically, "instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made." Jeffries, 692 F.3d at 480; see also Watts, 394 U.S. at 708 (looking to "context," phrasing, and listener reactions to conclude anti-war statement was "political hyperbole" rather than a threat against President Johnson). A vituperative statement made at a rally or a violent lyric in a song would, in context, suggest something entirely different about whether a threat is objectively being made. See, e.g., J.J.M., 265 A.3d at 273 (rejecting subjective-intent requirement but finding

statement was not an objective true threat). Indeed, the Appellate Division has already provided valuable guidance on the importance of a robust and nuanced objective analysis in this and other related contexts. See State v. Carroll, 456 N.J. Super. 520, 538-39 (App. Div. 2018). That analysis protects all of the speech the First Amendment protects—even loathsome speech—for political or entertainment or other social value.

And the Legislature's decision to extend N.J.S.A. 2C:12-3(a) only to cases in which the speaker acts recklessly provides even more certainty that the statute will not cross the line and inadvertently prohibit any speech that has social value. After all, both a properly nuanced and contextual analysis of whether speech is an objectively violent threat, Carroll, 456 N.J. Super. at 538-39, and the law's requirement that the culpability rise to the level of "conscious[] disregard[]" of "a substantial and unjustifiable risk," amounting to "a gross deviation" from ordinary behavior, N.J.S.A. 2C:2-2(b)(3), ensure that even the most "vehement, caustic, and sometimes unpleasantly sharp" statements are protected, New York Times Co., 376 U.S. at 270, while ensuring New Jerseyans can be free from true threats. See J.J.M., 265 A.3d at 270 (holding "recklessness—which, to reiterate, entails a conscious disregard by the speaker of a substantial and unjustifiable risk that his speech will have a threatening or terrorizing effect—is a culpable mental state more analogous to intentional conduct than carelessness," and that

the interests behind the true-threats doctrine "place reckless threats outside the First Amendment" (cleaned up)).

C. The Appellate Division's purpose requirement is inconsistent with both widespread national practice and historical practice.

Widespread national practice today, building on an extensive historical tradition in both New Jersey and across the Nation, further refutes the Appellate Division's insistence on a specific purpose to cause terror.

As a threshold matter, practice can play an important role in constitutional interpretation. Sometimes, that practice is historical in nature: "'[l]ong settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" Chiafalo v. Washington, 140 S. Ct. 2316, 2326 (2020) (citation omitted); see also Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 85-86 (2010) (considering the "relevant historical materials" in federal constitutional interpretation, including around the Founding). Other times, the widespread practice can develop in more modern times but nevertheless provide evidence of how the Nation understands a constitutional provision. See NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (relying heavily on "'practice of the government'" to "inform" Court's "determination of 'what the law is'" (first quoting McCulloch v. Maryland, 4 Wheat. 316, 401 (1819); then quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)); see id. at 524-25 (collecting cases that have "continually confirmed

[James] Madison's view" that courts "put significant weight upon historical practice" in constitutional interpretation). Both "[l]ong settled and established practice" offer a powerful basis to reject any novel and divergent understandings of the Constitution's commands. The Pocket Veto Case, 279 U.S. 655, 689 (1929).

The historical materials are particularly powerful in confirming that the objective-threat standard is consistent with the First Amendment—and that true threats need no specific purpose to cause fear. To "[b]egin at the beginning," Chiafalo, 140 S. Ct. at 2326, shortly after the Founding, "[m]ore than a dozen States and Territories" passed threats laws that essentially replicated an English threats law requiring only "general intent"—that is, knowledge of the offense's actus reus. Boettger, 140 S. Ct. at 1957 (Thomas, J., dissenting from denial of cert.) (collecting early state statutes). New Jersey was one of these States, having passed a law in 1796 making it a crime to "knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, … threatening to maim, wound, kill or murder any person, or to burn his or her [property] …." Ibid. (alteration in original) (quoting 1796 N.J. Laws § 57, p.108); see also J.J.M., 265 A.3d at 267-68 (noting similar Pennsylvania statute enacted in 1860). "The founding and Reconstruction generations," having been familiar with the underlying English decisions, would

have understood such state laws to only "require a mental state of general intent"—that is, an intent to make the objectively threatening communication, not a specific intent regarding the fear it would cause—just as the U.S. Supreme Court contemporaneously recognized that the adoption of an English statute carried with it a "silent[] incorporat[ion]" of that statute's "known and settled construction." Boettger, 140 S. Ct. at 1957 (Thomas, J., dissenting from denial of cert.) (quoting Pennock v. Dialogue, 27 U.S. 1, 18 (1829)); accord J.J.M., 265 A.3d at 267-68.

States, including New Jersey, also continued regulating threats even after incorporating free-speech protections into their Constitutions. See N.J. Const. of 1844, art. I, § 5; Lucius Q.C. Elmer, Digest of the Laws of New Jersey ¶65, at 204 (4th ed. 1868) (AGa129); Revised Statutes of the State of New Jersey ¶32, at 133-34 (1874) (AGa131 to AGa132); 2 Compiled Statutes of New Jersey ¶39, at 1758 (1910) (AGa134); Elonis, 575 U.S. at 760-61 (Thomas, J., dissenting) (collecting analogous provisions from across States). If such statutes violated the freedom of speech as the States understood it, "one would expect these States not to have such laws," or one would at least "expect state courts to hold such laws unconstitutional," but many States did have such laws, and apparently none of their courts struck them down. Boettger, 140 S. Ct. at 1958 (Thomas, J., dissenting from denial of cert.); see also State v. McCabe, 37 S.W.

123, 126 (Mo. 1896) (observing that "statutes against letters which threaten extortion by means of libel …. do not infringe the constitutional right of any law-abiding citizen," "have been the common subjects of legislation both in England and the states of this Union," and "have never been supposed to be obnoxious to freedom of speech, as understood in our free institutions"). The conclusion follows that settled understandings support the constitutionality of provisions like the terroristic-threats statute's reckless-disregard provision. See J.J.M., 265 A.3d at 268 ("This relevant history fortifies our determination that the First Amendment has limited application to general anti-threat statutes, including those requiring only a mental state of recklessness.")

That historical practice persists to the present: The Appellate Division's conclusion that the First Amendment allows the State to address true threats only if the speaker specifically intends to cause fear is inconsistent with "established practice" all across the country. For one—as noted above, see supra Point I, at p.6 note 2—a wide range of States do not require any subjective test, and that allows for civil and administrative actions to respond to threats without a showing of particular specific intent. But even more strikingly, the holding below is also inconsistent with laws across the country that are a carbon copy to New Jersey's terroristic-threats statute, N.J.S.A. 2C:12-3(a).

New Jersey's terroristic-threats statute is in all relevant parts a verbatim

reproduction of the MPC. See MPC § 211.3 ("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."). New Jersey's decision to adopt Section 211.3 of the MPC is especially relevant because 15 other States likewise modeled their own threats laws on that provision. See Alaska Stat. § 11.56.810(a)(1)(A); Ariz. Rev. Stat. Ann. § 13-1202(A)(2); Conn. Gen. Stat. § 53a-62(a)(2)(B); Del. Code Ann. tit. 11, § 621(a)(2)(c); Ga. Code Ann. § 16-11-37(b)(2)(D); Haw. Rev. Stat. § 707-715(1); Kan. Stat. Ann. § 21-5415(a)(1), invalidated by Boettger, 450 P.3d at 818; Minn. Stat. § 609.713; Mo. Rev. Stat. § 574.120; Neb. Rev. Stat. § 28-311.01(1)(c); N.H. Rev. Stat. Ann. § 631:4(1)(e), (f); N.D. Cent. Code Ann. § 12.1-17-04; 18 Pa. Cons. Stat. § 2706(a)(3); Wisc. Stat. Ann. § 947.019(1)(e); Wyo. Stat. Ann. § 6-2-505(a). That 16 States incorporated such a provision—on top of all the contexts that require no specific-intent showing at all—provides strong evidence of a broad national view that the First Amendment is no barrier. But if even a subjective-recklessness requirement violates the First Amendment, then all 16 statutes are unconstitutional.[7]

[7] Nor would the consequences stop there: if the First Amendment requires

The Appellate Division's decision is inconsistent not only with the wealth of case law, but with established national practice. And that national practice is particularly instructive in light of the overwhelming historical evidence from which it sprung up. That tradition turns entirely on the objective nature of the threatening communication, and where an intent is additionally incorporated, it is usually recklessness—precisely the components of New Jersey's law.

D. The Appellate Division's purpose requirement finds no support in U.S. Supreme Court precedent.

The Appellate Division grappled with almost none of the analysis above. The Appellate Division did not seriously address the contours of the true-threats exception, or any of the purposes that underlie it. The panel did not address the practical challenges that flow from its rule, or its application to civil matters. It did not discuss whether its purpose requirement was needed to protect other First Amendment values. And it did not grapple with the widespread national practice of adopting similar statutes, or these laws' extraordinary historical pedigree. To the contrary, the Appellate Division largely seemed to believe that U.S. Supreme

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purpose, the laws in an additional eight States that require a knowing mens rea would be likewise invalid. See Colo. Rev. Stat. Ann. § 18-3-206; Colo. Rev. Stat. Ann. § 18-3-602(1)(a); Me. Rev. Stat. tit. 17-A, § 209(1); Md. Code Ann., Crim. Law § 3-1001(b); Tex. Penal Code Ann. § 22.01(a)(2); Vt. Stat. Ann. tit. 13, § 1702(a)(1)-(2); Va. Code Ann. § 18.2-60(A)(1); Wash. Rev. Code Ann. § 9A.46.020(1)(a); W. Va. Code Ann. § 61-6-24(b). Laws that exist in half the country would fall in one fell swoop.

Court precedent—especially Virginia v. Black, 538 U.S. 343 (2003)—required imposing a purpose element on N.J.S.A. 2C:12-3(a). See Fair, 469 N.J. Super. at 554 (finding itself "bound by Virginia v. Black" and concluding "that Black strongly suggests the 'reckless disregard' element in N.J.S.A. 2C:12-3(a) is unconstitutional[]"). But the panel misread the relevant precedents, which instead support the State.

In fact, the objective test flows directly from First Amendment case law. To begin with, the canonical U.S. Supreme Court case, Watts, engaged in a self-evidently objective approach. There, the Court reversed the conviction of an 18-year-old who, speaking about the draft at a rally, reportedly told a group: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. In doing so, the Court expressly put to the side a disagreement among the judges in the appellate court about willful intent under the relevant statute. Id. at 707-08. Instead, focusing on the "context" of the remark, and its conditional phrasing as well as the fact that the listeners reacted with laughter, the Court held there was no plausible way that the remark "could be interpreted" as anything other than a hyperbolic political statement. Ibid. The Court engaged in an objective analysis and declined to delve into the speaker's psyche. It thus comes as no surprise that, for three decades, an objective threats analysis "was universally acknowledged by federal courts as the proper constitutional standard

for identifying punishable true threats under the first amendment." Taupier, 193 A.3d at 15; accord Jeffries, 692 F.3d at 479 (citing pre-2003 cases); J.J.M., 265 A.3d at 255 (agreeing that after "Watts, a number of courts, including this one, focused on contextual circumstances when evaluating whether a speaker's words constituted a true threat, utilizing an objective listener standard"); see also Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (noting this unanimity contemporaneously).

The Supreme Court's 2003 decision in Virginia v. Black did not "work the sea change" that the Appellate Division supposed. Jeffries, 692 F.3d at 479. The fractured series of opinions in Black concerned a Virginia statute banning cross burning "with the intent of intimidating any person or group of persons." 538 U.S. at 348. Although the Court held that Virginia's precise language had a particular constitutional defect—it instructed courts to treat cross burning as prima facie evidence of an intent to intimidate—the Court held that generally speaking, Virginia could permissibly ban cross burning carried out with intent to intimidate. Id. at 347-48. To explain why, the Court emphasized that the true-threats doctrine would justify such a statute, and in briefly explaining some of the contours of that doctrine, wrote a paragraph that has since provoked the lopsided split discussed above. Specifically, it wrote:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of

> unlawful violence to a particular individual or group of individuals. [Citing Watts and R.A.V.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." [Citing R.A.V.] 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….
>
> [Black, 538 U.S. at 359-60 (second alteration in original).]

Defendants began arguing that this paragraph required imposing a specific intent requirement on any threats statute, and while the overwhelming majority of both state and federal courts have disagreed, a few read it that way. See generally Taupier, 193 A.3d at 15-18 (describing how a minority of courts broke with the "general consensus" after Black).

But there are two obvious problems with reading the brief discussion in Black to work this dramatic change in First Amendment law. Initially, the Court itself does not believe that it has ever resolved this question—to the contrary, it acknowledges that the question remains open. See, e.g., Elonis, 575 U.S. at 740 ("Given our disposition, it is not necessary to consider any First Amendment issues."). And several justices have agreed in individual writings. Id. at 742-43 (Alito, J., concurring in part and dissenting in part) (chiding majority for not resolving question); Boettger, 140 S. Ct. at 1956, 1959 (Thomas, J., dissenting from denial of cert.); Perez, 580 U.S. at 1187-90 (Sotomayor, J., concurring in

denial of cert.). That a few courts have read Black to answer a question that the Supreme Court's own members believe remains open is, rather, proof of a rule that the Court has made clear: "the language of an opinion is not always to be parsed as though [it] were . . . [the] language of a statute." Brown v. Davenport, 142 S. Ct. 1510, 1528 (2022) (second alteration in original) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979)). It is hard to believe the 2003 Black decision can be dispositive given Elonis and these separate writings.

In any event, even parsing Black's key paragraph reveals that the relevant language is a red herring. When the majority wrote that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359 (emphasis added), it meant exactly that: there are different types of true threats, and that broader category encompasses statements made with intent to intimidate—the very type of intent that Virginia's statute required. See id. at 348, 363; see also, e.g., Mrozinski, 971 N.W.2d at 243 (noting this sentence "does not clarify what minimal mental state is required for speech to be a true threat"); Jeffries, 692 F.3d at 480 (same). So too as to its 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."

538 U.S. at 360 (emphasis added). Once again, the Court meant what it said: there are different types of true treats, and intimidation—the type that was referred to in the Virginia statute—is one of them. See Mrozinski, 971 N.W.2d at 243 (making this point); Jeffries, 692 F.3d at 480 (same).[8]

The Court further noted that "[t]he speaker need not actually intend to carry out the threat," and that, instead, true threats are proscribable because doing so "'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" 538 U.S. at 359-60 (second alteration in original) (quoting R.A.V., 505 U.S. at 388). As already explained, anchoring the true-threats doctrine in these interests is inconsistent with requiring a defendant to have specifically intended to communicate a threat, because fear and disruption turn on the objective nature of the communication rather than the speaker's private intent. See supra Point I.A.i. It would be passing strange for Black to have required subjective purpose only to

[8] It also made sense, given the slate on which Black wrote, to emphasize that banning cross burning with intent to intimidate proscribes only a particularly egregious type of threat rather than disfavoring a subset of political views. The latter, in the Court's view, had been fatal to a municipal ordinance banning cross burning that the Court had struck down eleven years prior—a precedent that loomed large in Black. See R.A.V., 505 U.S. at 388-93.

immediately, in the adjoining sentence, lay out justifications which contradict that requirement. See, e.g., Mrozinski, 971 N.W.2d at 244.[9]

* * *

Because a proper understanding of the First Amendment does not bar a State from prohibiting objectively violent threats, there is no realistic risk of New Jersey's terroristic-threats statute covering protected speech, let alone any "substantial amount of protected speech, judged in relation to the statute's plainly legitimate sweep." Hicks, 539 U.S. at 118-19. And even were some sort of further intent required, recklessness would be more than sufficient. The vast majority of courts uphold statutes like New Jersey's terroristic-threats law in light of the principles described above, and Black does not stand in the way. In short, the law is facially constitutional for these independent reasons.

[9] Although some courts try to support a purpose requirement by cobbling together lines from other opinions in Black, see Boettger, 450 P.3d at 811-15, that is an especially poor way to divine an answer that the Court and its members have expressly disclaimed giving, see supra Point I.D, at pp. 30-31. When Justice O'Connor wrote that Virginia's law did not "distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim," Black, 538 U.S. at 366, she was not holding this kind of intent is required; she was distinguishing this case from the language of the ordinance in R.A.V., which had been invalidated a decade earlier in light of its lack of viewpoint neutrality. See 505 U.S. at 385, 391. Bluntly, "Black did not resolve this issue," even by trying to pull together sentences from separate writings. Mrozinski, 971 N.W.2d at 243.

POINT II

THE THREATS PROVISION IS ALSO CONSTITUTIONAL UNDER ARTICLE I, PARAGRAPH SIX.

The same analysis establishing that the reckless-disregard provision in N.J.S.A. 2C:12-3(a) is facially constitutional under the First Amendment applies equally well to the New Jersey Constitution. While the Appellate Division did not reach this question, deeming it not to have been raised, see Fair, 469 N.J. Super. at 554 n.7, no independent state-constitutional grounds exist to justify invalidating the "balance struck by the Legislature," Lesniak v. Budzash, 133 N.J. 1, 17 (1993), of the competing needs of ensuring free expression and protecting New Jerseyans from being victimized by violent threats. Instead, an objective analysis into the threat suffices to uphold the statute, and even were a subjective mens rea required, the New Jersey Constitution would not be offended by a recklessness element.

Article I, Paragraph Six of our Constitution "guarantees individuals a broad, affirmative right to free speech." Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492 (2012). And it is thus "well-settled" that our Constitution "may provide greater protections than" the Federal Constitution. State v. Stever, 107 N.J. 543, 556-57 (1987). "However, it is equally settled that such enhanced protections should be extended only when justified by '[s]ound

policy reasons.'" Id. at 557 (alteration in original) (quoting State v. Hunt, 91 N.J. 338, 345 (1982)). Divergent interpretations of parallel constitutional provisions should be avoided unless warranted by our State's "constitutional history, legal traditions, strong public policy and special state concerns." State v. Williams, 93 N.J. 39, 57-58 (1983); see Hunt, 91 N.J. at 345 ("Divergent interpretations are unsatisfactory … particularly where the historical roots and purposes of the federal and state provisions are the same). In this case, none exist.

The analysis in Point I makes clear that objective threats of violence do not warrant enhanced protection under the First Amendment, especially if made with recklessness towards the fear and disruption they would cause, and neither history nor policy supports such a divergence on state constitutional grounds. Rather, as already noted, New Jersey has long imposed liability for threats without proof of specific intent—a practice it continued long after the freedom of speech was enshrined in our State Constitution. See supra Point I.C., at pp. 23-25. Even more importantly, public policy—as illustrated by the relevant First Amendment principles—would support using even an objective standard alone to distinguish true threats from protected speech, see supra Point I.A.i. The State Constitution, no more than the First Amendment, has little interest in a "bizarre result" where two defendants who each made identical, objectively

violent threats would see their liability hinge on the government's proof regarding the intent in their mind. See supra Point I.A.i. And regardless, should this Court disagree, New Jersey's law strikes a careful balance by requiring subjective culpability in the form of recklessness. See supra Point I.A.ii. In any event, no sound policy basis supports granting constitutional immunity to individuals who make objectively violent threats, and a contrary result would do substantial harm across civil and criminal contexts to the State's interest in keeping children, intimate partners, and all other New Jerseyans safe from violent threats.

Defendant's resort to State v. Burkert, 231 N.J. 257 (2017), and State v. Pomianek, 221 N.J. 66 (2015), is unavailing. See Ds58-62. Neither Burkert nor Pomianek evaluated specific intent, let alone held that it was constitutionally required. In Burkert, the challenged statute, N.J.S.A. 2C:33-4(c), required proof that an accused had acted "with purpose to alarm or seriously annoy [a] person." 231 N.J. at 263 (alteration in original) (emphasis added) (quoting N.J.S.A. 2C:33-4(c)). This Court thus had no need—and did not—construe the challenged statute to require proof that an accused acted with specific intent, given that the Legislature had already imposed that requirement. Rather, that case turned on the proper reading of "alarm or seriously annoy"—terms that raised vagueness questions that are in no way implicated here. Id. at 278-85.

Nor does Pomianek get defendant further. There, this Court considered the validity of a subsection of the bias-crime law, N.J.S.A. 2C:16-1(a)(3), that rendered a person guilty of "bias intimidation if the victim 'reasonably believed' that the defendant committed the offense on account of the victim's race" or other protected characteristic. 221 N.J. at 69 (quoting N.J.S.A. 2C:16-1(a)(3)). As a threshold matter, this Court applied a due-process analysis under the U.S. Constitution, not a free-speech analysis under the New Jersey Constitution. See id. at 84-91. But even assuming it sheds light on the latter, the statute could hardly differ more. That statute criminalized intimidation made with a specific type of mental state: bias against a protected characteristic. See id. at 69. And what made that law vague in contravention of the Fourteenth Amendment's Due Process Clause was that by "focusing on the victim's perception and not the defendant's intent, the statute does not give a defendant sufficient guidance or notice on how to conform to the law." Id. at 70 (emphasis added).

It is true, of course, that intent was important to the Court's analysis in Pomianek, but for a different reason: the whole point of the challenged statutory provision was to distinguish innocent (non-biased) intimidation from unlawful (bias) intimidation. See, e.g., id. at 82, 87. And because subsection (a)(3) allowed liability to turn wholly on what the victim "reasonably believed" was the defendant's motivation, it offered no safety valve for a wholly innocent state

of mind. Id. at 82. After all, a bigoted person who "harass[ed] a neighbor for no reason other than that the neighbor [wa]s playing music too loudly in the evening" could be convicted of bias under the statute "if the neighbor reasonably believe[d], under the circumstances," that the harasser had acted based on his independent "racial, religious, or nativist sentiments." Id. at 87.

Had the statute simply sought to criminalize harassment, of course, that inquiry would have been irrelevant in the first place—whether the defendant acted based on racial, religious, or nativist sentiments would have shed no light on whether they engaged in objectively harassing behavior, see ibid., much the same way that a defendant who sells drugs within 1000 feet of a school can be convicted regardless of whether he does so because he harbors ill-will toward children or simply finds the location most convenient, see id. at 87-88. In such cases, a defendant "can readily inform himself of a fact and, armed with that knowledge, take measures to avoid criminal liability." Id. at 88. But if liability for whether one intimidated another based on bias turns on a victim's "personal experiences, cultural or religious upbringing and heritage," id. at 89, a defendant has no such opportunity. Due process requires more. Ibid.

This case presents a wholly distinct issue—and not just because, unlike Pomianek, it turns on the First Amendment. See id. at 91 (declining to "address whether N.J.S.A. 2C:16-1(a)(3) is also violative of the First Amendment"). For

one, liability under the terroristic-threats statute does not hinge on whether the defendant's conduct is driven by racism, music, or any other motive. Compare Pomaniek, 221 N.J. at 87-88, with N.J.S.A. 2C:12-3(a). Because of that, liability cannot hinge on the victim's perceptions of the defendant's motives, subject to the victim's own life experiences. Thus, as Pomianek itself makes clear, the terroristic-threats statute falls into the category of laws in which a defendant can "inform himself" and "take measures to avoid criminal liability," id. at 88: individuals have the ability to avoid making objectively violent threats.

Further, there is a second protection in this statute: our Legislature has required a mens rea of at least recklessness, which renders this a far cry from Pomianek. The additional "breathing space" that the reckless element provides, Mrozinski, 971 N.W.2d at 245 (citation omitted), even though it is not compelled by the First Amendment, gives all defendants an ample opportunity to ensure that they stay on the right side of the law. In short, as in myriad other contexts, defendants must simply refrain from "consciously disregard[ing] a substantial and unjustifiable risk" that amounts to a "a gross deviation from" a reasonable standard of conduct under the circumstances. N.J.S.A. 2C:2-2(b)(3). That reasonable legislative directive is a far cry from a statute that makes one's liability for bias intimidation turn on the listener's life experience and resultant

perception of prejudice. Compare Pomianek, 221 N.J. at 69-70, with N.J.S.A. 2C:2-2(b)(3), and N.J.S.A. 2C:12-3(a). Nothing in this Court's precedents justifies deviating from the sound result provided by the First Amendment analysis, should this Court even reach the issue.

CONCLUSION

This Court should reverse and uphold the constitutionality of the reckless-disregard prong of the terroristic-threats statute.

Respectfully submitted,

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DATED: December 22, 2022

SUPREME COURT OF NEW JERSEY
M-194 September Term 2022
086617

State of New Jersey,
Plaintiff-Respondent,
v.
Calvin Fair,
Defendant-Movant.

ORDER

It is ORDERED that the motion to dismiss the notice of appeal as of right is denied; and it is further

ORDERED that the State of New Jersey's appeal shall proceed pursuant to Rule 2:2-1(a)(1); and it is further

ORDERED that further proceedings on appeal shall be conducted in accordance with an expedited, peremptory schedule, and should any entity wish to appear as amicus curiae, such entity shall serve and file its motion for leave to appear, and its proposed amicus curiae brief, by December 22, 2022. The parties may serve and file answers to any motions for leave to appear, together with responses to the proposed amicus curiae brief on the merits, on or before January 11, 2023. No further submissions shall be accepted without leave of Court.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 1st day of November, 2022.

Heather J. Baker
CLERK OF THE SUPREME COURT

665 Fed.Appx. 49
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals, Second Circuit.

Adam B. HELLER, Plaintiff–Appellant,
v.
BEDFORD CENTRAL SCHOOL DISTRICT; Dr. Jere Hochman; Town of Pound Ridge; David Ryan; Westchester Medical Center; Susan Kemker, M.D., Defendants–Appellees, Alexander Lerman, M.D., Defendant.

16–242
|
November 4, 2016

Synopsis

Background: Former teacher at public high school brought § 1983 action against town, town's police chief, school district, district's superintendent, and psychiatric hospital, alleging that after anonymous telephone call alerting authorities to potential instability in teacher's mental health, he was arrested and was involuntarily committed to hospital, his tenured employment was terminated, and his firearms were confiscated. The United States District Court for the Southern District of New York, Katherine B. Forrest, J., 144 F.Supp.3d 596, granted defendants' motions to dismiss. Teacher appealed.

Holdings: The Court of Appeals held that:

teacher failed to state plausible claim for First Amendment retaliation;

teacher's gun purchases did not constitute expressive conduct protected by the First Amendment;

probable cause supported arrest and subsequent hospital detention of teacher; and

teacher failed to state plausible claim for violation of due process.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

***50** Appeal from a judgment of the United States District Court for the Southern District of New York (Forrest, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Attorneys and Law Firms

For Appellant: Michael H. Sussman, Sussman & Watkins, Goshen, New York.

For Appellees Town of Pound Ridge and David Ryan: Steven C. Stern, Sokoloff Stern LLP, Carle Place, New York.

For Appellees Bedford Central School District and Dr. Jere Hochman: Richard G. Kass, Bond, Schoeneck & King, PLLC, New York, New York.

PRESENT: DENNIS JACOBS, DEBRA A. LIVINGSTON, Circuit Judges, JED S. RAKOFF, * District Judge.

SUMMARY ORDER

Adam B. Heller appeals from the judgment of the United States District Court for the Southern District of New York (Forrest, J.) dismissing under Rule 12(b)(6) his various § 1983 claims. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review. We affirm on the grounds that Heller's communications presented a substantial risk of disruption that, as a matter of law, justified the school district's actions; that there was ***51** probable cause for Heller's arrest and detention; that his brief commitment to a mental institution did not shock the conscience such that it violated substantive

due process; and that his Second Amendment challenge is baseless given that commitment.

Heller is a former public school teacher. In December 2012 and January 2013, he purchased two firearms, received a third from a friend, and was shopping for a fourth. At the same time, he had a month-long online conversation with Georgia O'Connor via the online game Words with Friends. During the course of that conversation, Heller told O'Connor that he believed aliens controlled the government; that the Sandy Hook school shooting (which had recently happened) was fake; and that he "want[s] to kill people." The FBI received an anonymous tip about Heller in January and began monitoring his online communications. They coordinated with the local police department, which stopped Heller on January 18 as he drove home from a gun store.

The police induced Heller to go to a local hospital where he was psychiatrically committed and later released. The school district at which he worked then brought disciplinary charges stating that Heller should be dismissed from his teaching job because he failed to cooperate with an investigation into his mental health and because he was incompetent to work as a teacher due to mental illness. After an eight-day hearing, a hearing officer sustained all charges against Heller and praised the Pound Ridge police department, the Bedford Central School District, and the Westchester Medical Center for their roles.

Heller sued the school district, the school superintendent, the town of Pound Ridge, Pound Ridge's chief of police, the medical center, and several of the psychiatrists who examined him. He now appeals from dismissal of his § 1983 claims which alleged: 1) retaliation based on views he expressed in his online chat with O'Connor; 2) unlawful search and detention; 3) violation of substantive due process rights; and 4) violation of his right to bear arms.

Heller's online conversations and the record of his dismissal hearing are both integral to and incorporated by reference in his complaint. Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007). All parties cite these records extensively and none object to their consideration on appeal.

The District Court properly dismissed Heller's retaliation claims. At the start, Heller's statements, assuming arguendo that they relate to a matter of public concern, were of such a character that "the disruption they cause[d]" or threatened was "great enough to warrant the school's action against him." Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York, 336 F.3d 185, 198 (2d Cir. 2003). Indeed, although we need not reach the question whether these statements constitute a "true threat," their threatening quality is highly relevant to the Pickering balance. See Melzer, 336 F.3d at 198 (referencing the balancing test outlined in Pickering v. Bd. of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)). [1]

In his online chats with O'Connor, Heller said that he was "stewing in anger ... ***52** and want[s] to kill people ... because the people who are behind [government weather control] are evil." O'Connor asked "what people do you think deserve to die for the sins of an evil government," and Heller responded, "oh I don't know. but I could probably do some research and hand you a list ... #1. Someone should just shoot down one of the planes." O'Connor said, "you are scaring me," and asked him to "just promise me you arent going to kill anybody." Heller responded "yea I promise." O'Connor brought up the "list" in a subsequent conversation, and Heller said, "there are a lot of people in this country who have done seriously evill things to the masses. one day, someone is going to make a list and go about the task of removing them from power. That will be in the middle of a civil war in America."

Context is crucial to identification of a true threat. Turner, 720 F.3d at 420. The context here bespeaks danger.

- Heller was delusional. He believed that the military controlled the weather and had deliberately caused Hurricane Sandy, the Haitian earthquake, and the Fukushima nuclear disaster.
- He believed that space aliens controlled the government, that the government was capable of mind control, and that he was working on "deprogramming himself" from that government mind control.
- He was a public school teacher who came into contact with 125-150 students each semester.
- He believed that the Sandy Hook elementary school killing of 26 people had been faked; he appeared to have researched the shooting; and he made his threatening statements within a few weeks of it.
- He seemed to be angry, depressed, and generally emotionally "worked up."
- And—with no prior history of interest in guns or gun ownership—he purchased two guns, received a third

from a friend, and considered purchasing a fourth, all in a brief period.

Although we need not decide whether Heller's statements constituted a true threat to determine whether the Pickering balance has been satisfied, as a matter of law, the record is clear that "an ordinary, reasonable recipient who is familiar with the context of the communication" could well have viewed Heller's communications as "a threat of injury." Turner, 720 F.3d at 420. O'Connor herself seems to have interpreted them as legitimate threats. United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) ("In making this determination, proof of the effect of the alleged threat upon the addressee is highly relevant.").

Heller argues that his statements were "off-the-cuff political hyperbole written in the context of friendly social media banter," and that he ended the conversation with "humor." However, his statements appear to be in earnest, and O'Connor so interpreted them. He identified airplanes as targets and said that people in government deserved to die; and his conduct raised prudent concern about the risk of a school shooting. See Turner, 720 F.3d at 424 (rejecting the argument that "only communications that facially threaten unequivocal, unconditional, immediate, and specific injury" are "true threats"). In such circumstances, the school's concern about the safety of its students and the potential for "severe ... disruption" to its functioning justified its actions. See Melzer, 336 F.3d at 198, 199 (stating that such factors "may outweigh a public employee's rights").

Heller has also failed to plausibly allege that the defendants were motivated by a desire to retaliate against Heller for his views. A review of the record confirms ***53** that the defendants were interested in Heller's communications only insofar as they raised the prospect of a shooting spree at the high school. The school district did not immediately bring charges after it learned of Heller's speech. Instead, school officials worked with law enforcement to monitor the situation at the high school. Next, the district ordered an independent psychological evaluation of Heller. Only after the evaluation process was complete did the district bring charges against Heller. Moreover, the charges were not based on his speech but rather (a) his unwillingness to cooperate with the evaluation and (b) the possibility that he might be mentally unfit to teach. As the claim of retaliation is not plausible on its face, it must be dismissed. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Heller's other First Amendment claim is that he intended his gun purchases as a symbolic invocation of his Second Amendment rights so that his possession constituted expressive conduct protected by the First Amendment. Heller does not allege that anyone other than the gun store employees knew of his purchases. Without more, a gun store employee would understand Heller's purchase as a routine retail transaction. And since there was no likelihood that the supposed message "would be understood by those who viewed it," he has not sustained his burden of demonstrating more than a "plausible contention" that his purchase was expressive. Church of Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 205 (2d Cir. 2004); see also Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003) ("Typically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it.").

Heller's Fourth Amendment claim is defeated by probable cause. He argues that his arrest on January 18 and his subsequent hospital detention—both based on his mental health—were unlawful. Pursuant to New York's Mental Hygiene law, the police may take into custody individuals who both appear mentally ill and pose a substantial risk of physical harm to others. N.Y. Mental Hyg. Law §§ 9.41, 9.01. Probable cause to make such an arrest means a substantial chance or probability that those requirements are satisfied, based on the information that the police had at the time. Illinois v. Gates, 462 U.S. 213, 245 n.13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Kerman v. City of New York, 261 F.3d 229, 235 (2d Cir. 2001).

At the time of the arrest, the police department had access to Heller's communications with O'Connor, along with an anonymous tip from a friend of Heller's and information about Heller's gun purchases. Heller's delusional communications established at least a substantial chance that he was mentally ill and posed a risk of physical harm to others. Since there was probable cause for both the initial arrest and the detention, the Fourth Amendment claims were properly dismissed.

Heller claims his substantive due process rights were violated by his involuntary commitment. But substantive due process rights are only implicated when commitment decisions reflect a level of care *substantially* below the standards of the medical community. Bolmer v. Oliveira, 594 F.3d 134, 142 (2d Cir. 2010). That is a level considerably worse than malpractice; a level so dismissive of the patient's rights to care and freedom that it shocks the conscience. Cty. of Sacramento v. Lewis,

523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Heller has not plausibly alleged that the standards used to commit him shock the conscience, and his claim was therefore properly dismissed.

Heller's Second Amendment claim is that his involuntary commitment to a mental ***54** institution made it illegal under federal law for him to purchase guns. 18 U.S.C.A. § 922(g)(4). Restrictions on the purchase of guns by the mentally ill are presumptively lawful. D.C. v. Heller, 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."); see also New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 269 n.107 (2d Cir. 2015). Heller's Second Amendment claim was properly dismissed because the restriction on gun purchases by individuals committed to a mental institution is presumptively lawful, and because Heller has not stated a plausible claim that he was improperly committed.

For the foregoing reasons, and finding no merit in Heller's other arguments, we hereby **AFFIRM** the judgment of the district court.

All Citations

665 Fed.Appx. 49, 340 Ed. Law Rep. 58, 2016 IER Cases 368,798

Footnotes

* The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

1 The test for whether a communication is a true threat is objective, and the determination is a question of law. United States v. Francis, 164 F.3d 120, 123 at n.4 (2d Cir. 1999); United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013). The inquiry is "whether an ordinary, reasonable recipient who is familiar with the context of the communication would interpret it as a threat of injury." Id. (quoting United States v. Davila, 461 F.3d 298, 305 (2d Cir. 2006)). A statement can be a true threat even if the speaker has no intention of carrying it out. Id.

End of Document

No. 19-1051

In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER,

v.

TIMOTHY C. BOETTGER AND RYAN R. JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF AMICI CURIAE OF VIRGINIA, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAIʻI, INDIANA, LOUISIANA, MINNESOTA, NEBRASKA, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, AND WISCONSIN IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

States have "regulat[ed] threats . . . since the late 18th and early 19th centuries." *Elonis* v. *United States*, 135 S. Ct. 2001, 2024 (2015) (Thomas, J., dissenting). Their ability to do so, this Court has explained, reflects a balance between the free-speech protections enshrined in the First Amendment and society's compelling interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992).

According to the Supreme Court of Kansas, the First Amendment forbids a prosecution for even the most violent, upsetting, and disruptive of threats unless the State can establish beyond a reasonable doubt that the speaker *specifically intended* to instill fear or generate panic. Pet. App. 27. But nothing in this Court's precedents requires such a rule and adopting it would be profoundly unwise. Amici States thus support this Court's intervention to preserve their authority to prosecute criminal threats and protect their citizens.

SUMMARY OF ARGUMENT

In *Elonis* v. *United States*, 135 S. Ct. 2001 (2015), this Court specifically declined to address whether a *mens rea* of recklessness could suffice to establish a criminal threat. Lacking this Court's guidance on the

[1] The parties' counsel of record received timely notice of the intent to file this brief.

issue, the Supreme Court of Kansas held here that the First Amendment entirely forecloses States' ability to prosecute threats made in reckless disregard of placing another in fear. According to the court below, States may prosecute only those threats made with the specific intent of instilling fear.

That understanding of the First Amendment is wrong. It also would jeopardize States' efforts to ensure school safety and combat domestic violence in an era when threats are often communicated over the Internet and proof of perpetrators' specific intent becomes even more difficult to come by. But that is not all. Indeed, a constitutionally mandated specific-intent requirement would invalidate scores of state laws, covering all manner of threats. Amici States urge this Court to grant the petition for a writ of certiorari and clarify that the federal Constitution does not so hobble States' authority to protect their citizens.

ARGUMENT

As petitioner explains (at 10–16), the Supreme Court of Kansas's decision deepens a split on a straightforward constitutional question of great practical import: Does the First Amendment prohibit criminalization of threats made with reckless disregard of the possibility of placing another in fear?

The Supreme Court of Kansas concluded that this Court has already answered that question, relying on an unduly expansive reading of this Court's opinion in *Virginia* v. *Black*, 538 U.S. 343 (2003). See Pet. App. 15–27. But "the Court's fractured opinion in *Black* . . .

sa[id] little about whether an intent-to-threaten requirement is constitutionally mandated." *Elonis* v. *United States*, 135 S. Ct. 2001, 2027 (2015) (Thomas, J., dissenting). And if the Court had already resolved whether a recklessness standard satisfies the First Amendment in 2003 in *Black*, it is difficult to understand why the Court specifically reserved that very question 12 years later in *Elonis*. *Id.* at 2012.

In truth, this Court has yet to decide "precisely what level of intent suffices under the First Amendment" to permit prosecution. *Perez* v. *Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in the denial of certiorari). But it should do so here and it should do so now.

I. The discretion to prosecute reckless threats is vital to States' ability to protect their citizens

Two examples highlight the dangers of the Supreme Court of Kansas's holding and the urgency of the need for this Court's review: school safety and domestic violence. In those contexts (and others), the Internet and social media have complicated efforts to prevent and redress threats of violence.

1. a. "[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis." *LaVine* v. *Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001). Horrific examples of school shootings are all too familiar, devastating communities across the Nation and victimizing everyone from university students in Blacksburg, Virginia, to

first-graders in Newtown, Connecticut, to high-schoolers in Parkland, Florida.[2]

In the wake of past tragedies, Virginia and other States have made crucial progress in identifying and responding to threats of school violence.[3] But the problem remains grave—Virginia public schools reported a total of 5,586 threat cases during the 2014-15 school year alone[4]—and school officials are often forced to make difficult decisions based on imperfect

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[2] See Christine Hauser and Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. Times (Apr. 16, 2007), https://www.nytimes.com/2007/04/16/us/16cnd-shooting.html; James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. Times (Dec. 14, 2012), https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html; Audra Burch and Patricia Mazzei, *Death Toll Is at 17 and Could Rise in Florida School Shooting*, N.Y. Times (Feb. 14, 2018), https://www.nytimes.com/2018/02/14/us/parkland-school-shooting.html.

[3] See, *e.g.*, Dewey Cornell & Jennifer Maeng, *Statewide Implementation of Threat Assessment in Virginia K-12 Schools*, Contemp. School Psychol. 22, 116–24 (2018), https://doi.org/10.1007/s40688-017-0146-x (noting that in 2013 Virginia became the first State to mandate the use of threat assessments in its K-12 schools).

[4] Dewey Cornell et al., *Threat Assessment in Virginia Schools: Technical Report of the Threat Assessment Survey for 2014-2015*, at 4–5, Curry School of Educ., U. Va. (2016); see also Mike Connors, *School Threats Are Becoming More Common. And Their Impact Can Be Lasting.*, Va. Pilot (Jan. 13 2019), https://www.pilotonline.com/news/crime/article_8348fdb8-14f6-11e9-af5b-030e37773f74.html (in one three-month period, local police in Virginia Beach investigated 20 school threats, double the total from the previous year).

information.[5] This is all the more so because research suggests that those who make online threats are more likely to make preparations to execute on those threats than those who make their threats in person.[6]

Given that reality, "[s]chool administrators must be vigilant and take seriously any statements by students resembling threats of violence, as well as harassment and intimidation posted online and made away from campus." *Bell* v. *Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (en banc) (internal citation omitted). And that need for vigilance, in turn, "increases the importance of clarifying the school's authority to react to potential threats *before* violence erupts." *Id.* (emphasis added); accord *Wynar* v. *Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013) (noting the "daunting task" that "school administrators face" in "keeping their students safe without impinging on their constitutional rights").

b. The Supreme Court of Kansas's approach would jeopardize efforts to respond to threats of violence at schools. Under a specific "intent-to-threaten

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[5] Mike Carter-Conneen, *Authorities Investigating Social Media Shooting Threat at 2 Virginia Middle Schools*, WJLA/ABC7 (Feb. 18, 2018), https://wjla.com/news/local/social-media-threat-to-2-va-middle-schools-under-investigation-officials-say (describing social media post threatening shootings at local middle schools and noting that "[e]ven if the threat is a hoax, the timing of such a threat—just days after the shooting that left 17 dead at a high school in Florida—is upsetting to many parents").

[6] See Desmond Patton et al., *Social media as a vector for youth violence: A review of the literature*, 35 Computers in Hum. Behav. 548–53 (2014).

requirement," *Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting), neither knowledge nor recklessness suffices. So long as there is any reasonable doubt that a person did not make the statement specifically *because* it will be perceived as a threat, a conviction would be constitutionally barred. As a result, States would be unable to prosecute a defendant who "consciously disregard[ed] a substantial and unjustifiable risk" that his words would instill fear in another, Model Penal Code § 2.02(c) (Am. Law Inst. 2018), or one who threatened harm fully "aware that it [was] *practically certain* that his" words would instill fear, *id.* § 2.02(b) (emphasis added).

Such a high bar would have real consequences in the context of school safety. For example, imagine a student who calls his school to threaten a mass shooting—but only because he hopes to cancel class and avoid an exam scheduled for that day. Despite the terror and chaos that threat undoubtedly would unleash on the school community, such a person would (at most) be guilty of acting with knowledge—and thus enjoy categorical immunity under the Supreme Court of Kansas's interpretation of the First Amendment. See Pet. App. 27 (holding that "an intent to intimidate was constitutionally . . . required"). And even if the requisite intent actually existed, prosecutors would often be hard-pressed to prove that intent in the context of threats made online—threats that state officials cannot afford to ignore. See *supra* note 6.[7] As petitioner

[7] Indeed, one would expect any criminal defendant to argue he or she did not specifically intend to make a threat.

notes, the bind this rule places on prosecutions is not limited to hypotheticals: A Kansas state court has *already* dismissed a school-threat prosecution because prosecutors could not meet their burden of showing a specific intent. See Pet. 26 & n.7.

Beyond inhibiting criminal prosecutions of school threats, a specific intent-to-intimidate rule would cast doubt on school officials' ability to impose non-criminal discipline as well. See *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). Such a result would ignore the reality that, because of "the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence." *Morse* v. *Frederick*, 551 U.S. 393, 425 (2007) (Alito, J., concurring). Nothing in this Court's precedents supports that paradoxical outcome, and this Court should clarify that the First Amendment does not so hinder States' efforts to protect their schools and the students they teach.

2. A specific intent-to-threaten requirement would likewise hinder States' ability to combat domestic violence, particularly in the Internet age.

a. "Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace." *Elonis*, 135 S. Ct. at 2017 (Alito,

J., concurring in part and dissenting in part).[8] In addition, such threats often serve as a reliable predictor of physical violence,[9] making prompt and effective responses to threats of domestic violence a central component in any effort to prevent future physical abuse.[10] And it is not just those issuing threats who may make good on their contents, because online threats create the *added* danger that a third party will be incited to action.[11]

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[8] Accord Brief for the Nat'l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 4, *Elonis* v. *United States*, 135 S. Ct. 2001 (2015) (No. 13-983) (noting that abusers are turning "more and more often [to] social media" to deliver threats of violence, which are "a key part of the in-person abuse to which the victims have been subjected").

[9] Joanne Belknap et al., *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Pol'y 373, 378 (2012) ("Indeed, threats of violence by former partners who are currently stalking are an even better predictor of future violence than the prior violence used by these ex-partners."); see also Katie Zezima et al., *Domestic Slayings: Brutal and Foreseeable*, Wash. Post (Dec. 9, 2018), https://www.washingtonpost.com/graphics/2018/investigations/domestic-violence-murders/ ("Unlike other types of homicide, domestic slayings often involve killers who leave a long trail of warning signs or signal their intent, in some cases threatening to kill their victims.").

[10] See Zezima et al., *supra* note 9 (describing intimate-partner homicide in which the victim reported "threatening text messages" from her partner to the police, but—according to the victim's mother—those "threats didn't rise to the level of a crime," the partner remained at large, and he eventually made good on his threats by murdering her).

[11] See Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 Mo. L. Rev. 125, 132 (2007).

The specter of physical violence is only one aspect of the problem. "[T]rue threats 'by their very utterance inflict injury' on the recipient." *United States* v. *Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012) (Sutton, J.) (quoting *United States* v. *Chaplinsky*, 315 U.S. 568, 572 (1942)). And "[a] threat may cause serious emotional stress for the person threatened and those who care about that person," regardless of whether actual violence follows. *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

b. The interpretation of the First Amendment adopted by the court below would pose serious challenges for prosecuting threats of domestic violence. Allowing prosecution for threats of domestic violence goes to the very reason this Court has blessed the prosecution of "true threats" in the first place: the ability of States to "protect[ ] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 at 388. Yet, in this case, the court below did not deny that the recipient of one of the threats "was genuinely fearful when she called for law enforcement assistance" but held that respondent's conviction could not stand because a jury may have "believed that [the defendant] did not intend [his] threats to be taken literally." Pet. App. 81.

Even where a threat is not carried out, the ability to terrify remains. It is no solace to a battered partner that an abuser did not intend for a threat to instill terror, even though the abuser was "practically certain" that those words would do just that. Model Penal Code

§ 2.02(b) (defining knowing conduct). Nor does the "fear of violence," or the "disruption that fear engenders," *R.A.V.*, 505 at 388, lessen where the abuser, aware of the "substantial and unjustifiable risk" that threatening words will instill fear, "consciously disregards" that risk, Model Penal Code § 2.02(c) (defining recklessness). This is particularly so given the formidable showing required to prove criminal recklessness: "The risk" that the threat will provoke fear in another "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves *a gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.* (emphasis added).

To be sure, there are difficult distinctions to be made between speech that is merely vulgar and speech that rises to the level of a criminal threat. And States may decide to strike that balance by requiring a showing of an intent to instill fear in another in some or even all cases.[12] But, contrary to the holding of the Supreme Court of Kansas, see Pet. App. 27, the First Amendment does not *require* that all States strike exactly that balance. And foreclosing prosecutions based on threats made knowingly or recklessly risks crippling States' ability to combat domestic violence in an age when the prevalence of threats made over the Internet makes proving intent more difficult than ever.

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[12] Indeed, dozens of States appear to have done just that. See *infra* notes 13 & 14 (identifying the 24 States that permit a criminal-threat conviction based on a lesser *mens rea*).

II. The Supreme Court of Kansas's reasoning would require invalidating criminal statutes in nearly half of the States

The impact of a constitutionally based, specific intent-to-threaten requirement would extend far beyond school threats and domestic violence. Under the Supreme Court of Kansas's reasoning, the First Amendment would invalidate whole swaths of the criminal codes of the various States. These include the laws of 16 States with a criminal provision that—like the Kansas statute at issue here—tracks the Model Penal Code and criminalizes threats made in reckless disregard of their potential to instill fear. See Model Penal Code § 211.3 (Am. Law Ins. 2018) ("A person is guilty of a felony in the third degree if he threatens to commit any crime of violence . . . in reckless disregard of the risk of causing such terror or inconvenience.").[13] Also at risk are the laws of eight more States—including Virginia—that criminalize threats made "knowingly,"

[13] See also 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); Kan. Stat. Ann § 21-5415; Minn. Stat. Ann. § 609.713 (threats of violence); Mo. Rev. Ann. Stat. § 574.120 (second degree making a terrorist threat); N.D. Cent. Code Ann. § 12.1-17-04 (terrorizing); N.H. Rev. Stat. Ann. § 631:4(I)(e), (f) (criminal threatening); N.J. Stat. Ann. § 2C:12-3(a) (terroristic threats); Neb. Rev. Stat. Ann. § 28-311.01(1)(c) (terroristic threats); 18 Pa. Cons. Stat. § 2706(a)(3) (terroristic threats); Wisc. Stat. Ann. § 947.019(1)(e) (terroristic threats); Wyo. Stat. Ann. § 6-2-505(a) (terroristic threats).

because such a *mens rea* permits conviction even in the absence of a specific intent to threaten. See Va. Code Ann. § 18.2-60(A)(1) ("Any person who knowingly communicates . . . a threat to kill or do bodily injury to a person, regarding that person or any member of his family, and the threat places such person in reasonable apprehension of death or bodily injury to himself or his family member, is guilty of a Class 6 felony.").[14]

All told, fully 24 States would find themselves potentially unable to pursue the kinds of prosecutions they currently deem necessary to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.[15] Neither the First Amendment nor this Court's precedents support such a result. See Pet. 16–21. Accordingly, Amici States urge this Court to grant certiorari and clarify that States may prosecute threats

[14] See also Colo. Rev. Stat. Ann. § 18-3-206 (menacing); Colo. Rev. Stat. Ann. § 18-3-602(1)(a) (stalking); Md. Code Ann., Crim. Law § 3-1001(b) (threats of crimes of violence); Me. Rev. Stat. tit. 17-A, § 209(1) (criminal threatening); Tex. Penal Code Ann. § 22.01(a)(2) (assault); Vt. Stat. Ann. tit. 13, § 1702(a)(1)-(2) (criminal threatening); W. Va. Code Ann. § 61-6-24(b) (threats of terrorist acts); Wash. Rev. Code Ann. § 9A.46.020(1)(a) (harassment).

[15] Although this case involves the scope of the "true threat" doctrine, a defendant may attempt to use this same intent-to-threaten requirement to render constitutionally suspect other criminal statutes that implicate speech-related conduct. Such statutes include state and federal laws criminalizing online solicitation or sexual exploitation of minors based on a *mens rea* short of specific intent. See, *e.g.*, Va. Code Ann. § 18.2-374.3; 18 U.S.C. § 2251.

made either knowingly or in reckless disregard of the potential to instill fear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Superior Court of New Jersey,
Appellate Division.

STATE in the Interest of J.F.

A-5543-12T1
|
Argued May 7, 2014.
|
Decided July 9, 2014.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket Nos. FJ–15–0867–13 and FJ–15–1087–13.

Attorneys and Law Firms

Barry J. Serebnick argued the cause for appellant J.F. (Shamy, Shipers & Lonski, P.C., attorneys; Mr. Serebnick, on the brief).

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Before Judges WAUGH and NUGENT.

Opinion

PER CURIAM.

***1** J.F. (Jeff), [1] a minor, appeals the Family Part's June 12, 2013 order adjudicating him delinquent based on five counts arising out of conduct that would constitute the third-degree crime of making terroristic threats, *N.J.S.A.* 2C:12–3(a), if committed by an adult, as well as one count arising out of conduct that would constitute a petty disorderly persons offense under *N.J.S.A.* 2C:33–2(a), if committed by an adult. We affirm.

I.

We discern the following facts and procedural history from the record on appeal. [2]

On December 17, 2012, Jeff was charged, under docket number FJ–15–796–13N, with one count of terroristic threats for making generalized threats against faculty, staff, and students at Point Pleasant High School. Additional charges were added as a result of further investigation. On January 14, 2013, Jeff was charged, under docket number FJ–15–867–13N, with five counts of terroristic threats against five specific students. On March 6, Jeff was charged, under docket number FJ–15–1087–13N, with one count of conduct that, if committed by an adult, would constitute the third-degree crime of making a false public alarm, *N.J.S.A.* 2C:33–3(a), and one count of petty disorderly conduct by making threats. Jeff was tried over three consecutive days in April 2013.

S.S. (Sam) [3] testified that, in early December 2012, Jeff, C.C. (Carla), and he were talking together at the Point Pleasant recreation center. According to Sam, he and Jeff, who had dated his sister, were friends. Sam testified that Jeff talked about a "hit list that he had," and "that he would want to shoot up the people that are preventing him from returning to school [, after his recent release from juvenile detention,] and that it was students, staff, and basically just the school." According to Sam, on a prior occasion, Jeff had "mentioned that he would be able to obtain a [nine millimeter] gun for fifty bucks" from someone he met in a juvenile rehabilitation facility.

Sam originally believed Jeff was "spouting off." He testified that Jeff was upset because he had recently broken up with Sam's sister. Sam was not immediately fearful for himself or his family because Jeff "had mentioned that me and the people I love, my family members, were not on the list."

Sam became worried after he heard about the shooting at Sandy Hook Elementary School in Connecticut. [4] Sam stated: "[b]ut as the shooting ... had occurred, ... it started to sink more in that maybe he could go through with these things and that he is not all right in the head and he could actually do this." As a result, Sam told his mother about his conversation with Jeff, and then spoke to the police. However, by that time, the police were already investigating threats made by Jeff to others.

Carla, age fifteen at the time of trial, described the conversation she had with Jeff and Sam at the recreation center in early December. Jeff was angry because of his recent breakup with Sam's sister M.S. (Macy). According to Carla, Jeff was "angry with the people that [Macy] was like doing

stuff with, and he like wanted to get revenge." She clarified that he used the word "payback" rather than revenge.

***2** Carla also testified about seeing Jeff at a park following the conversation at the recreation center. According to Carla, Jeff told her he was on Vicodin at the time. He was still angry about his breakup with Macy. Carla testified that she believed he was capable of hurting the guys with whom Macy had a relationship.

Carla further testified about a Facebook interchange with Jeff that took place a few days after Jeff left the detention facility on December 3, but before the conversation at the recreation center. According to Carla, Jeff told her on Facebook that "he wanted to kill himself" because his relationship with Macy had ended. She believed that he was serious, but was not sure if he was capable of hurting himself.

T.H. (Travis), who was sixteen at the time of trial, testified concerning a separate conversation he had with Jeff in early December, probably the week of December 10. Travis described his interaction with Jeff as follows:

> I was waiting for my mom to come and pick me up outside of school when I saw [Jeff], and I came up to him and I was talking to him about how he's been doing. And he just said he's been in and out of programs and stuff. So I asked ... him what was going on and he's like, "I have a problem," about if he violates probation, that he goes back to juvie until he's eighteen. And then he said he didn't like that. So he said he was gonna kill himself. So I told him that he doesn't need to do that, there's no reason to do that. And then he said ... he was gonna go and shoot up the school[,] and he pointed to the school.

Travis further testified that he was fearful for his own safety and the safety of others at the time of their conversation.

A.T. (Anne), who was fourteen at the time of trial, testified that she talked with Jeff at some point in December. According to Anne, she, V.H. (Valerie), who was sixteen years old, and Jeff were at her house. By that time, according to Valerie's testimony, there were rumors at the school about Jeff and a hit list, so they asked him about it. Anne testified that "he was talking about how he didn't actually have one written but he has one, and he told us like a few people that were on the list." Anne testified that he mentioned the names of at least four people on the hit list: B.M. (Beth), a second student named C.C. (Cori), V.E. (Vander), and M.M. (Max). Jeff told Anne and Valerie that he chose those people because "they just like did stuff to him, so it was like payback for whatever they did, or he just didn't like them." According to Anne, Jeff told them "[t]hat if he had a gun, he would kill them."

Anne testified that, at the time Jeff told her about the list, she was not afraid for herself or initially for the safety of the people on the hit list. She added that she was worried for the safety of those individuals and "[k]ind of" afraid for her own safety at the time of trial. Anne did not at first believe Jeff was capable of carrying out the threats, but at the time of her testimony she "kind of" believed he was. Anne did not tell anyone about what Jeff told her that day, but subsequently spoke to the police during their investigation.

***3** Valerie testified about the discussion at Anne's house, which she described as follows:

> [T]he topic about like shooting people got brought up and ... we just kept talking about it. And [Jeff] was saying that he could buy a gun from his friend and named like a couple people on this list that he apparently had, and that he was gonna walk into the school, shoot up all those people that were on the list.

She specifically recalled Jeff mentioning five people on the hit list: Beth, Max, Cori, Vander, and E.C. (Earl).

Valerie testified that she was not worried for her own safety "because I had like a really good bond with him and I felt safe, but I was worried for like the other people." She added that she did not "really think he would actually like go through with it," but that "part of me did think he could, like it was possible." Valerie did not think to warn people when Jeff made the statements to her "because like I didn't think it was gonna be this serious. I didn't really think it through."

According to Valerie, after hanging out at Anne's house, she and Anne went to Logan's [5] house and told him what Jeff had said about his hit list. Valerie also told two other students [6] about Jeff's comments. She told them: "He's stupid. He's not gonna do it."

Macy, who was fourteen at the time of trial, testified that she dated Jeff for approximately one-and-one-half years. She ended the relationship in early December. Macy testified that, prior to their breakup, Jeff had made threats such as "[i]f anyone like came near me, he said that he would stab them." She also testified that Jeff told her "he wanted to like hurt his parents" and that he "wanted to ... put a pillow over their faces" while they were asleep. Macy did not believe Jeff would actually hurt his parents, because he "makes threats a lot." Macy was not fearful for herself, but she felt that Jeff might be capable of physically hurting someone at the time of their breakup.

Cori, who was fifteen at the time of trial, testified that she learned from her mother, during the first week of January 2013, that "there was a hit out on me." She was afraid to go to school at that time and was still afraid at the time of trial. Cori testified she knew Jeff, but was not friends with him. She thought she was on Jeff's hit list because she is friends with Macy and had told Macy that she should not date Jeff.

Beth, age fifteen at the time of trial, testified that she learned from her father in late December or early January that she was included on a hit list, which made her "very scared." She testified that she knew Jeff, but did not have any reason to know why she would be included on his hit list.

M.D. (Mabel), who was sixteen at the time of trial, testified that she saw Jeff at the juvenile detention center on March 13, 2013. He asked her "to find out who snitched on him and to look at his police report" because "he was going to beat the shit out of whoever snitched on him if he got out." According to Mabel, Jeff told her "he was going to beat the shit out of him," referring to Travis. Mabel testified that Jeff was not joking, that she was worried for Travis, and that at the time of trial she was worried for herself.

***4** Jacquelyne Moore, a vice principal at the high school, testified that, on December 13, the school received an email from a parent regarding "a student with an apparent hit list." She told Edward Kenney, another vice principal, about the email and the "need to find out who that is and move forward from there." She and Kenney identified Travis as a student who might have more information about the hit list. They also identified Jeff as the individual who may have created the hit list.

Kenney testified that, after Moore told him about the email, he spoke with Travis and another student and "realized that I had a potentially serious problem or issue." He immediately notified the high school principal, "Central Office," and the police. He testified that he "was concerned about the safety and the security of all of our students."

Vincent Smith, the superintendent of schools, testified that, in response to the information concerning a student threatening to shoot up the school, all but two entry points at the school were closed. Before the police arrived, they searched the school to determine whether Jeff was present. The police arrived and posted officers at the high school and the other schools in the district.

One of the police officers involved in the investigation testified that the police were contacted by the school on December 13. He also testified that he notified all five victims about Jeff's threats. On cross-examination, he stated that he had brought Jeff into the police station a few days after his release, probably December 5, to ask him about reports that he wanted to hurt himself. Jeff denied that he had any such intention. The police officer testified that he did not question Jeff about hurting others at that time.

After the State rested, Jeff moved for a judgment of acquittal on all charges. The trial judge ruled that, "giving the State the benefit of all the reasonable inferences, a reasonable jury could not find beyond a reasonable doubt a false public alarm under the circumstances of this case." Consequently, he granted Jeff's motion to dismiss that charge. He denied the motion as to the remaining charges.

Jeff presented testimony from his substance abuse counselor. The counselor described the outpatient program attended by Jeff for four days during the week of December 10, following one day of intake the week before. Jeff was taken in for questioning by the police while at the program on December 13. The witness testified that there was nothing about Jeff's conduct while at the program to indicate suicidal or homicidal ideations.

On April 12, after hearing closing arguments, the trial judge delivered an oral decision. He outlined the principles of law that guide judicial decision making in terms similar to

those applicable to a jury. He then made findings of fact and outlined the legal principles applicable to the offenses charged.

The trial judge adjudicated Jeff delinquent on five counts of conduct amounting to terroristic threats and one count of conduct amounting to disorderly conduct. He "essentially mold[ed] the verdict" regarding the general count of terroristic threats because it "[arose] out of the same circumstances" as the five specific counts. For that reason, the judge dismissed the general count. He then merged the disorderly persons offense into the terroristic threats offenses.

***5** On June 12, the judge committed Jeff to the custody of the Juvenile Justice Commission for two years, with eight months of aftercare. He gave Jeff 177 days of credit for time served. This appeal followed.

II.

Jeff raises the following points on appeal:

> *POINT I:* THE STATE FAILED TO ESTABLISH THE JUVENILE'S GUILT OF THE TERRORISTIC THREATS BEYOND A REASONABLE DOUBT.
>
> *POINT II:* THE COURT ABUSED ITS DISCRETION BY ADMITTING INTO EVIDENCE, OTHER CRIMES AND OTHER ACTS EVIDENCE, CONTRARY TO *N.J.R.E.* 404(B).
>
> *POINT III:* THE STATE FAILED TO ESTABLISH ALL OF THE ELEMENTS OF DISORDERLY CONDUCT BEYOND A REASONABLE DOUBT.

We address each of Jeff's arguments in order.

A.

Our review of a judge's verdict in a non-jury case is limited. The standard is not whether the verdict was against the weight of the evidence, but rather "whether there is sufficient credible evidence in the record to support the judge's determination." *In re R.V.,* 280 *N.J.Super.* 118, 121, 654 A.2d 999 (App.Div.1995). Our task is to " 'determine whether the findings made could reasonably have been reached on sufficient credible evidence *present in the record* .' " *In re B.C.L.,* 82 *N.J.* 362, 379, 413 A.2d 335 (1980) (quoting *State v. Johnson,* 42 *N.J.* 146, 162, 199 A.2d 809 (1964)). A reviewing court should not independently assess the facts, *State v. Locurto,* 157 *N.J.* 463, 471, 724 A.2d 234 (1999), but instead assess whether the findings of fact by the trial judge " 'are so wholly insupportable as to result in a denial of justice,' " *B.C.L., supra,* 82 *N.J.* at 380, 413 A.2d 335 (quoting *Rova Farms Resort, Inc. v. Investor Ins. Co. of Am.,* 65 *N.J.* 474, 483–84, 323 A.2d 495 (1974)).

Moreover, we are obliged to "give deference to those findings of the trial judge which are substantially influenced by [the] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." *Locurto, supra,* 157 *N.J.* at 471, 724 A.2d 234 (quoting *Johnson, supra,* 42 *N.J.* at 161, 199 A.2d 809). "[T]he factual findings of the trial court are binding on appeal when supported by adequate, substantial, credible evidence." *In re W.M.,* 364 *N.J.Super.* 155, 165, 834 A.2d 1053 (App.Div.2003). " '[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.' " *Rova Farms, supra,* 65 *N.J.* at 484, 323 A.2d 495 (quoting *Fagliarone v. Twp. of N. Bergen,* 78 *N.J.Super.* 154, 155, 188 A.2d 43 (App.Div.), *certif. denied,* 40 *N.J.* 221, 191 A.2d 61 (1963)).

N.J.S.A. 2C:12–3(a) provides as follows:

> A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the 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.

***6** The statute requires proof of two elements beyond a reasonable doubt: "(1) [that defendant] threatened to commit a crime of violence; and (2) [that] he intended to terrorize the victim, or acted in reckless disregard of the risk of doing so." *State v. Tindell,* 417 *N.J.Super.* 530, 553 (App.Div.2011) (citing *State v. Conklin,* 394 *N.J.Super.* 408, 410–11, 927 A.2d 142 (App.Div.2007)).

The threat need not actually be "communicated directly to the victim to be actionable." *Cesare v. Cesare,* 154 *N.J.* 394, 403, 713 A.2d 390 (1998). And, "[t]he personal reaction of the alleged victim ... is not the measure of proof of a terroristic threat." *State v. Dispoto,* 189 *N.J.* 108, 123, 913 A.2d 791 (2007) (citing *Cesare, supra,* 154 *N.J.* at 403, 713 A.2d 390). Instead, "[t]he communication must be of such a character that a reasonable person would have believed the threat." *Tindell, supra,* 417 *N.J.Super.* at 553 (citing *Dispoto, supra,* 189 *N.J.* at 121, 913 A.2d 791). Nevertheless, "[a]lthough we agree that, under an objective standard, courts should not consider the victim's actual fear, courts must still consider a [victim]'s individual circumstances and background in determining whether a reasonable person *in that situation* would have believed the defendant's threat." *Cesare, supra,* 154 *N.J.* at 403, 713 A.2d 390 (emphasis added) (citing *State v. Milano,* 167 *N.J.Super.* 318, 323, 400 A.2d 854 (Law Div.1979), *aff'd,* 172 *N.J.Super.* 361, 412 A.2d 129 (App.Div.), *certif. denied,* 84 *N.J.* 421, 420 A.2d 333 (1980)).

The first element requires a showing that Jeff threatened to commit a crime of violence. *N.J.S.A.* 2C:12–3(a). Sam testified that Jeff told him about a hit list and that he wanted to "shoot up the people that are preventing him from returning to school." Travis testified that Jeff told him that he was going to "shoot up the school" and pointed at their school while making the statement. According to Anne, she asked Jeff about the hit list and he listed four names on the list: Beth, Cori, Vander, and Max. He told her that "if he had a gun, he would kill them." Valerie testified that she was present for the same conversation as Anne and that Jeff mentioned the hit list and that five people were on it: Beth, Max, Cori, Vander, and Earl. Valerie recounted that Jeff stated "he was gonna [sic] walk into the school, [and] shoot up all those people that were on the list."

The trial judge found the first element satisfied:

> The Court is satisfied that the testimony of these witnesses satisfied that the State has proven beyond a reasonable doubt that the defendant threatened to commit a crime of violence, specifically violence by way of shooting or killing and reference to a hit list. And, therefore, the first element of the terroristic threat has been established to this Court's satisfaction beyond a reasonable doubt.

The judge found each of the testifying witnesses to be credible. Their testimony supported a finding that Jeff threatened to shoot people at the school in general, including the named individuals. That would have been either a form of criminal homicide, *N.J.S.A.* 2C:11–2, or a form of assault, *N.J.S.A.* 2C:12–1, depending on whether the shots were fatal. Because there was a sufficient factual basis for the judge's finding that Jeff threatened to commit a crime of violence, the first element of the offense was established. *B.C.L., supra,* 82 *N.J.* at 379, 413 A.2d 335.

***7** The second element requires a showing that the threat was intended either to "terrorize the victim, or [the defendant] acted in reckless disregard of the risk of doing so." *Tindell, supra,* 417 *N.J.Super.* at 553 (citing *Conklin, supra,* 394 *N.J.Super.* at 410–11, 927 A.2d 142). The trial judge made alternative findings beyond a reasonable doubt. He first found "beyond a reasonable doubt that [Jeff] made those statements purposely to terrorize." He then found, also beyond a reasonable doubt, that Jeff made them recklessly.

" 'A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result.' " *State v. Hoffman,* 149 *N.J.* 564, 577, 695 A.2d 236 (1997) (quoting *N.J.S.A.* 2C:2–2(b)(1)). Purpose may be inferred from the evidence, and "[c]ommon sense and experience may inform that determination." *Ibid.* (citing *State v. Richards,* 155 *N.J.Super.* 106, 118, 382 A.2d 407 (App.Div.), *certif. denied,* 77 *N.J.* 478, 391 A.2d 493 (1978)). The parties did not advocate for a specific meaning of the term "terror ." If given its ordinary meaning, the term is defined as an "[i]ntense, overwhelming fear." *Webster's II New College Dictionary* 1167 (3d ed.2005). To "terrorize" means to "fill or overwhelm with terror." *Ibid.*

We question whether there was substantial credible evidence in the record to support the trial judge's finding that Jeff acted with a purposeful intent to terrorize another. *B.C.L., supra,* 82 *N.J.* at 379, 413 A.2d 335. There was no testimony that he threatened to harm anyone to whom he spoke or that he asked them to tell others, including the five students on his list, about the threats. For that reason, we have chosen to confine our analysis to the judge's alternate finding that Jeff

acted "in reckless disregard of the risk of causing such terror or inconvenience." *N.J.S.A.* 2C:12–3(a).

In *State v. Williams,* 190 *N.J.* 114, 123–24, 919 A.2d 90 (2007), the Supreme Court explored the nature of criminal recklessness:

> The element of criminal recklessness differs from knowing culpability, *N.J.S.A.* 2C:2–2(b)(2), in that the latter requires a greater degree of certainty that a particular result will occur. *See State v. Simon,* 161 *N.J.* 416, 464, 737 A.2d 1 (1999) ("Recklessness can generally be distinguished from purposely and knowingly based on the degree of certainty involved. Purposely and knowingly states of mind involve near certainty, while recklessness involves an awareness of a risk that is of a probability rather than certainty."); *State v. Rose,* 112 *N.J.* 454, 562, 548 A.2d 1058 (1988) (recognizing same). Nevertheless, even when recklessness is the *mens rea* element of the crime charged, a defendant's knowledge or awareness is material to the determination of culpability. *State v. Sewell,* 127 *N.J.* 133, 148–49, 603 A.2d 21 (1992) (noting that "recklessness resembles knowledge in that both involve a state of awareness"). As the 1971 Commentary to the Code explains,
>
> ***8** [a]s the Code uses the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk that is of probability rather than certainty; the matter is contingent from the actor's point of view. Whether the risk relates to the nature of the actor's conduct or to the existence of the requisite attendant circumstances or to the result that may ensue is immaterial; the concept is the same.
>
> [II *The New Jersey Penal Code: Final Report of the New Jersey Criminal Law Revision Commission,* commentary to § 2C:2–2, at 41–42 (1971).]
>
> Accordingly, when the State alleges criminal recklessness, it must demonstrate through legally competent proofs that defendant had knowledge or awareness of, and then consciously disregarded, "a substantial and unjustifiable risk." *N.J.S.A.* 2C:2–2(b)(3).
>
> [(Alteration in original).]

Recklessness is specifically defined by the criminal code:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.
>
> [*N.J.S.A.* 2C:2–2(b)(3).]

In making his alternate ruling, the trial judge found that

> in his heat of anger and upset[, Jeff] acted recklessly and consciously [dis]regarded a substantial and [un]justifiable risk that the result would occur from the conduct. Words are powerful weapons, and mindful that we're dealing with young people today, given the circumstances and events of the world around them, it certainly is reckless to refer to going into a school, a hit list, and killing people. And I do find that those statements were made and they were made ... beyond a reasonable doubt recklessly and it reached the point where there would be specific individuals named on the hit list. [7]

Based upon our review of the record and giving the required deference to the trial judge's factual findings, we conclude that there was sufficient credible evidence in the record to support a finding of guilt on the basis of criminally reckless conduct. *B.C.L., supra,* 82 *N.J.* at 379, 413 A.2d 335. Jeff discussed his hit list or talked about shooting students and others at the school with five people during at least three separate conversations. He asserted his ability to obtain a gun and named five people on the list. There was no evidence that Jeff told any of them not to communicate his threats further.

In fact, at the time Anne and Valerie asked about the list, Jeff was aware that rumors about the threats were circulating among the students. He repeated the threats rather than disavowing them or asserting that they were not serious. By making the threats to so many people, and by continuing

to make the threats once he knew that word of them had spread at school, Jeff exhibited a conscious disregard for the "substantial and unjustifiable risk" that the victims would learn about the threats and be in fear from them. *N.J.S.A.* 2C:2–2(b)(3).

***9** There was also sufficient credible evidence in the record to support the finding that the threats were credible from an objective point of view, including that of a high school student. Travis testified that he was fearful for his own safety and that of others at the time Jeff told him he was going to "shoot up the school." Valerie testified that she was not fearful for herself because of her strong relationship with Jeff, but she was "worried for [ ] the other people" and for the kids on the list because "some of them are close friends." Cori and Beth, two of the victims, testified that they were each worried as to their safety when they learned they were included on the hit list.

Jeff argues that he could not have acted recklessly because the discussions with his friends occurred just before the Sandy Hook shooting, an event that he argues then shifted the opinions of some witnesses from a point where they believed he was blowing off steam to a point where they were more concerned about his statements.

Jeff's argument ignores the fact that the Sandy Hook shooting took place on December 14, which was one day after the concerned parent had notified the school of the threats. That notification caused the school to inform the police and also to take steps to secure the school building. The school and police were already investigating the threats when the Sandy Hook shooting occurred. In fact, Jeff was taken in for questioning on December 13, and was undergoing a psychological evaluation on the day the Sandy Hook shooting occurred. The argument also ignores the fact that (1) Travis and Valerie were concerned about the threats when Jeff made them and (2) that the school was sufficiently concerned to take security precautions, all prior to the Sandy Hook shooting.

Although there was evidence from which the judge might have found that Jeff was merely letting off steam, as Jeff now argues, there was significant evidence from which the judge could and did find otherwise. The judge heard and saw the witnesses testify and "had the feel of the case" from doing so. We defer to his findings as to credibility and the weight of the evidence. As a result, we are satisfied that the judge's finding of guilt beyond a reasonable doubt based on conduct "in reckless disregard of the risk of causing such terror or inconvenience" finds sufficient support in the record to warrant affirmance.

B.

Jeff argues that the trial judge erred in admitting four pieces of testimony concerning other crimes or wrongs that should have been excluded pursuant to *N.J.R.E.* 404(b). The testimony at issue is (1) Macy's testimony that Jeff told her he wanted to harm or kill his parents, (2) Macy's testimony that Jeff hit a brick wall at the time of their breakup, (3) Carla's testimony that Jeff told her he was "on Vicodin," and (4) Mabel's testimony about Jeff's threat to beat up anyone who reported him to the police, which Jeff apparently believed included Travis.

***10** "Trial judges are entrusted with broad discretion in making evidence rulings." *State v. Muhammad,* 359 *N.J.Super.* 361, 388, 820 A.2d 70 (App.Div.), *certif. denied,* 178 *N.J.* 36, 834 A.2d 408 (2003). "A reviewing court should overrule a trial court's evidentiary ruling only where a clear error of judgment is established." *State v. Loftin,* 146 *N.J.* 295, 357, 680 A.2d 677 (1996) (citation and internal quotation marks omitted).

N.J.R.E. 404(b) generally precludes the admission of evidence pertaining to other crimes or wrongs, except to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue of dispute." In *State v. Cofield,* 127 *N.J.* 328, 338, 605 A.2d 230 (1992), the Supreme Court articulated a four-factor test to govern the admissibility of such evidence for those permitted purposes. The *Cofield* test requires that:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [*Williams, supra,* 190 *N.J.* at 122, 919 A.2d 90 (citing *Cofield, supra,* 127 *N.J.* at 338, 605 A.2d 230).]

In *Williams,* however, the Court observed that the second *Cofield* factor "is not one that can be found in the language of *Evidence Rule* 404(b). *Cofield's* second prong, therefore, need not receive universal application in *Rule* 404(b) disputes." *Id.* at 131, 605 A.2d 230.

We find no error with respect to Mabel's testimony. Our courts have repeatedly held that threats against a potential prosecution witness can be admitted into evidence under *N.J.R.E.* 404(b), or its predecessor, because they manifest consciousness of guilt. *See, e.g., State v. Yough,* 208 *N.J.* 385, 402 n. 9 (2011); *State v. Hill,* 47 *N.J.* 490, 500–01, 221 A.2d 725 (1966); *State v. Goodman,* 415 *N.J.Super.* 210, 232 (App.Div.2010), *certif. denied,* 205 *N.J.* 78 (2011); *State v. Buhl,* 269 *N.J.Super.* 344, 364–65, 635 A.2d 562 (App.Div.), *certif. denied,* 135 *N.J.* 468, 640 A.2d 850 (1994); *State v. Pierro,* 253 *N.J.Super.* 280, 285–87, 601 A.2d 757 (App.Div.), *certif. denied,* 127 *N.J.* 564, 606 A.2d 374 (1992).

With respect to the testimony concerning (1) Jeff's statements to Macy that he wanted to harm his parents, (2) Jeff's having hit the brick wall when he broke up with Macy, and (3) his statement to Carla that he was "on Vicodin," even if there was error, we see no basis to conclude, taking them singly or together, that they raise "a reasonable doubt as to whether the error led [the judge] to a result [he] otherwise might not have reached." *State v. Macon,* 57 *N.J.* 325, 336, 273 A.2d 1 (1971). Although the judge mentioned Jeff's desire to harm his parents in passing during his oral decision, we conclude that it was in no way central to his decision. Consequently, none of the potential trial errors warrant reversal of the judge's adjudication of delinquency.

C.

***11** Finally, we turn briefly to Jeff's contention that the State failed to prove its case with respect to the petty disorderly conduct offense.

Jeff was charged with conduct that, if committed by an adult, would violate *N.J.S.A.* 2C:33–2(a), which provides:

> a. Improper behavior. A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he
>
> (1) Engages in fighting or threatening, or in violent or tumultuous behavior; or
>
> (2) Creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor.

The statute defines "public" as "affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are ... schools." *N.J.S.A.* 2C:33–2(b).

Although we agree that it would have been helpful had the judge made specific findings of fact with respect to the language of that statute, it is clear that the conduct found by the judge constituted conduct prohibited by *N.J.S.A.* 2C:33–2(a)(1).[8] By engaging in the threatening behavior found by the trial judge, Jeff recklessly created a risk of public inconvenience, annoyance, or alarm. We have upheld the judge's finding that Jeff's conduct satisfied the similar recklessness standard of *N.J.S.A.* 2C:12–3(a), and the testimony of the police officer and school officials, as well as the students, more than supported the element of public inconvenience, annoyance, or alarm.

Affirmed.

All Citations

Not Reported in A.3d, 2014 WL 3346469

Footnotes

1 We use fictitious names throughout this opinion for persons who were juveniles at the time of the underlying events.

2 The events on which the charges against Jeff are based took place between December 2, 2012, when Jeff was released from a juvenile detention facility, through December 13, when the police began their investigation. The witnesses were not sure of the exact dates on which certain events took place.

3 Sam was an adult at the time of trial, but a juvenile at the time of the underlying events.

4 The Sandy Hook shooting took place on December 14, 2012.

5 This individual was not identified by last name at trial.

6 Those students were not fully identified at trial and were not among those mentioned by Jeff.

7 We have edited the language in the transcript to reflect what we have concluded, from the context, were the words actually intended by the judge.

8 There was no factual basis for an adjudication under *N.J.S.A.* 2C:33–2(a)(2).

No. 13-983

IN THE

Supreme Court of the United States

ANTHONY D. ELONIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE, ET AL. IN SUPPORT OF RESPONDENT

[Additional *Amici* Listed On Inside Cover]

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INTEREST OF *AMICI CURIAE* [1]

Amici include numerous non-profit organizations devoted to remedying domestic violence through legal, legislative, and policy initiatives, as well as organizations providing advocacy and legal and counseling services to survivors of domestic violence. *Amici* collectively have hundreds of years of experience working with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence. *Amici* also represent clients that are threatened and stalked through the use of technology, including social media.

Amici are deeply concerned that interpreting Section 875(c) to require proof of a subjective intent to threaten will make it more difficult to protect victims of abuse from threats of violence made by their current and former intimate partners, who increasingly use easily accessible but sophisticated technology to track their victims and to threaten them wherever they are, even after they manage to escape their abusers, and from the crippling fear and disruption such threats cause. For these reasons *Amici* are submitting this brief in support of Respondent.

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[1] No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. The identities and interests of the individual *Amici* are described in the Appendix to this brief.

SUMMARY OF ARGUMENT

This case is not about political speech. It is not about ideological, religious, or social speech. It is not even about distasteful or offensive speech. This case is just about threatening speech—words that threaten violence.

Threats of violence are hallmarks of intimate partner violence, and are used by perpetrators to gain and maintain power over their victims. Advances in technology give perpetrators of intimate partner violence an ever-increasing array of tools to threaten their victims, and to continue to threaten them even after they manage to escape their abusive partners. Advances in technology also provide perpetrators with ever-more sophisticated tools to track their victims' movements, making their threats that much more potent and credible.

Threats of violence have never enjoyed First Amendment protection, and for good reason: threats cause fear and they force victims to change their lives, sometimes quite drastically. This is particularly true in the context of intimate partner violence. As this Court has long recognized, the government has a compelling interest in protecting people from such harm.

The harm caused by threats of violence does not depend on the subjective intent of the person making the threats; it depends on the content of the threats and on the context in which they are delivered. Just as a cry of "fire" in a crowded theater will cause the same panic whether the speaker intended only a prank or actually intended to cause fear, so too with threats of violence. An objectively threatening message will predictably cause fear and disruption

regardless of whether the speaker actually intended to threaten, or intended only to harass or annoy, or simply had no regard for how its recipient might react.

A standard that requires proof of the speaker's subjective intent—what he "really" intended in his heart of hearts—for conviction of threatening another person would fail to protect victims of intimate partner violence and stalking from the real and predictable harm caused by the threats of violence they face daily.

The objective, reasonable person standard strikes the appropriate balance: it protects victims from threats of violence, and from the fear and disruption such threats cause, while at the same time ensuring that First Amendment boundaries are not transgressed. By focusing the inquiry on whether a reasonable person would understand a given statement as expressing a serious intention to injure another person, the objective standard reaches only true threats, not idle or careless talk, exaggeration, or statements made in jest. It reaches only speech that a reasonable person would, in light of the speech's content and the context in which it was delivered, regard as conveying a threat to injure or kill. As such, it protects victims of intimate partner violence and stalking from the fear and disruption caused by objectively threatening speech, without chilling, much less criminalizing any protected speech.

ARGUMENT

I. TECHNOLOGY HAS GIVEN PERPETRATORS OF DOMESTIC VIOLENCE EVER MORE SOPHISTICATED AND POTENT TOOLS TO THREATEN THEIR VICTIMS.

A. Women Across the United States Are Being Threatened By Perpetrators Who Misuse Social Media and Other Online Technologies; the Consequences are Deeply Damaging.

In every jurisdiction across the country, *Amici* have seen the victims they represent suffer the devastating psychological and economic effects of threats of violence, which their abusers deliver more and more often via social media. These threats are not artistic expression. They are not performance art or fantasy violence. They are a key part of the in-person abuse to which the victims have been subjected, sometimes for years, and from which they have tried desperately to escape. And they have very real and very damaging consequences on the victims' daily lives. Their stories are chilling. Here are just a few:

- In Arizona, one victim moved 9 times in an 18 month period, changed phone numbers and providers multiple times, changed employers 4 times, and moved 2,000 miles away from her abuser after he repeatedly threatened her on social networking sites including Facebook and Twitter, created pages and profiles using pseudonyms designed to harass and intimidate her, and created false Facebook profiles of her

loved ones in a further effort to control her and place her in fear.[2]

- In Illinois, another victim felt terrorized and fearful after her abuser posted publicly on Facebook pictures of her, her house, and their children from a distance with captions such as, "You think you can hide from me?" and thinly veiled death threats that soon he would have custody of the children because their mother would be "*no more*." Her abuser also created fake accounts with her name and friended her friends and family using these fake profiles.[3]
- In Pennsylvania, a woman described being unable to sleep and eat and feeling extremely frightened and anxious upon seeing her abuser's Facebook page where he publicly announced that he planned to hogtie her, put her in a trunk, pull out her teeth one by one, then pull off her finger and toe nails, and chop her into pieces, but keep her alive long enough to feel all the hurt and pain.[4]
- Elsewhere in Pennsylvania, another woman described feeling harassed, terrorized, and threatened by her abuser after he publicly posted a series of threats

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[2] Statement provided by *Amicus* Arizona Coalition Against Domestic Violence on September 19, 2014.

[3] Statement provided by *Amicus* Illinois Coalition Against Domestic Violence on September 19, 2014.

[4] Statement provided by the Law Offices of Women in Need, Pennsylvania, on September 19, 2014.

against her on Tumblr and Facebook, including the following statement after she obtained a protective order against him: *"You stupid fucking cunt you will never get away with this, I don't care if I have to wait years, I will always remember what you did to me—no one fucks me over and gets away with it. EVER. And you will NOT be the first."*[5]

- In Colorado, one victim described checking her ex's Facebook page daily to see where he was, what he was doing, and what he was posting after he threatened her and used the site to post a fairly large reward to anyone who told him where she was staying. When he posted his intentions to fly to her state, she told the police and an officer followed him from the airport to her residence where he was arrested for violation of the protection order and later, for cyberstalking.[6]
- In New York, after experiencing continued threats on her Facebook page from her ex-boyfriend and his family, one women described being hyper-vigilant and fearful, particularly after her abuser tagged her baby's picture on Facebook and made threatening statements.[7]

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[5] Statement provided by A Woman's Place Legal Assistance Program, Pennsylvania, on September 22, 2014.

[6] Statement provided by *Amicus* Colorado Coalition Against Domestic Violence on September 19, 2014.

[7] Statement provided by the NYC Housing and Veterans Initiatives, New York, on September 23, 2014.

- In Guam, victims reported feeling afraid, anxious, scared, and humiliated by threatening Facebook posts made by their abusers, and several victims recently moved to domestic violence shelters because of that fear.[8]

These victims, and thousands more like them, have experienced real-life terror caused by increasingly graphic and public posts to Facebook and other social media sites—terror that is exacerbated precisely because abusers now harness the power of technology, "enabling them to reach their victims' everyday lives"[9] at the click of a mouse or the touch of a screen.

B. Threats of Violence Have Always Been an Integral Part of Domestic Violence, and Often Precede Physical Violence.

Domestic violence is an epidemic that claims 7 million new victims every year across all age, race, and socioeconomic groups.[10] At its core, "domestic violence is about gaining control of another person."[11] It is an

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[8] Summaries of recent cases involving social media threats against their clients provided by *Amicus* Guam Coalition Against Sexual Assault & Family Violence on September 18, 2014.

[9] Cynthia Fraser, et al., *The New Age of Stalking: Technical Implications for Stalking*, Juv. & Fam. Ct. 61, no. 4 (Fall 2010), at 1.

[10] *Location Privacy Protection Act of 2014: Hearing on S. 2171 Before the Subcomm. on Privacy, Technology, and the Law of the S. Comm. on the Judiciary*, 113th Cong. (June 4, 2014) (herein, *"Location Privacy Protection Act of 2014 Hearing"*) (testimony of Cindy Southworth, Vice President of Development and Innovation, National Network to End Domestic Violence).

[11] Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552, 569 (2007); *see* Evan Stark, *Coercive Control: How Men*

"ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's [or man's] life, including sexuality; material necessities; relations with families, children, and friends; and work."[12] The reality of domestic violence may include such conduct as verbal threats directed at the victim herself or at her family, children and friends; stalking behaviors, including cyberstalking, which involves the use of the Internet or other electronic means to stalk or harass an individual; excessive monitoring of a woman's movements and activities, repeated accusations of infidelity, and various actions aimed at controlling with whom she has contact.[13]

Entrap Women in Personal Life 5 (2007) (hereinafter, "Stark, *Coercive Control*") (articulating "coercive control" theory of domestic violence, which frames "woman battering . . . as a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control").

[12] Evan Stark, *Re-Representing Woman Battering: From Battered Woman's Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 986 (1995); *see also Domestic Violence*, U.S. Dep't of Justice, Office on Violence Against Women, http://www.ovw.usdoj.gov/domviolence.htm (last visited Oct. 1, 2014) (hereinafter, "USDOJ Office on Violence Against Women") (defining "domestic violence" as "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner").

[13] *See* Anne L. Ganley, *Understanding Domestic Violence*, in *Improving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* 14, 18-24 (2d ed. 1996), *available at* http://www.futureswithoutviolence.org/userfiles/file/HealthCare/improving_healthcare_manual_1.pdf (last visited Oct. 1, 2014); *see also* Michele C. Black et al., Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 37 (Nov. 2011) (measuring broad

Threats and stalking behaviors are not just terrifying in themselves; they are also frightening because they are reliable predictors of physical violence. The incidence of threats is strongly correlated with the likelihood of physical violence.[14] Indeed, direct threats of violence lead to significant physical violence for more than half of victims.[15] Researchers have also found that "leakage"—a perpetrator's communications with third parties expressing an intent to harm the victim—is a leading indicator of escalation from threats to physical violence.[16, 17]

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range of conduct in national survey on prevalence of intimate partner violence).

[14] Lorraine Sheridan & Karl Roberts, *Key Questions to Consider in Stalking Cases*, Behav. Sci. Law 29:255-270 (2011) (finding that threats of physical assault are a reliable and statistically significant predictor of serious domestic violence, "specific written or verbal threats . . . should be taken particularly seriously"); Kris Mohandie et al., *The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*, J. Forensic Sci., Jan. 2006, Vol. 51, No. 1 (stating that threats of physical violence are strong indicators of forthcoming physical violence); Mary P. Brewster, *Stalking by Former Intimates: Verbal Threats and Other Predictors of Physical Violence*, Violence and Victims, Vol. 15, No. 1 (2000) ("[W]hen verbal threats occurred, the likelihood of violence occurring significantly increased." and "Threats of violence were significantly correlated with actual physical violence in every model.").

[15] *See* Brewster, *supra* note 14.

[16] Mario J. Scalora, *Electronic Threats and Harassment* (2014) in International Handbook of Threat Assessment, Chapter 13 (J. Reid Meloy & Jens Hoffman, eds.) (2014).

[17] In fact, one in three women will be assaulted by an intimate partner in her lifetime—that is over 50 million women alive in the United States today. *See* Brewster, *supra* note 14. One in 12 women will be stalked by an intimate partner in her lifetime. *See*

It is not surprising, then, that nearly half of intimate partner stalking victims report that their worst fear is "not knowing what would happen next"—a crippling terror that damages a victim's ability to sleep, eat, and work, let alone thrive.[18] These women change jobs, uproot themselves, avoid contact with family and friends who know their abusers, and

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TK Logan & Robert Walker, *Toward a Deeper Understanding of the Harms Caused by Partner Stalking*, Violence and Victims, Vol. 25, No. 4 (2010). Among stalking victims, about 63% will face direct threats from their stalker and almost 30% will suffer some form of physical violence. *See* Sheridan & Roberts, *supra* note 14 at 29:255-270 (29.3% of stalking victims are physically assaulted, and of those assaulted, 29.6% required hospital or emergency room treatment for their resulting injuries); Karl Roberts, *Women's Experience of Violence During Stalking by Former Romantic Partners: Factors Predictive of Stalking Violence*, Violence Against Women, Vol. 11, No. 89 (2005). Women stalked by former husbands are at an even higher risk: 81% risk have been physically assaulted and 31% have been sexually assaulted. *See* Patricia Tjaden and Nancy Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, U.S. Department of Justice, National Institute of Justice and Centers for Disease Control and Prevention (Apr. 1998), *available at* https://www.ncjrs.gov/pdffiles/169592.pdf (last visited Oct. 1, 2014). And 76% of all women killed by intimate partners had been previously stalked by that partner. *See* Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 Tex. J. Women & L. 131 (2011). Some reports suggest that this number could be as high as 90 percent. *See, e.g.,* Beth Bjerregaard, *An Empirical Study of Stalking Victimization*, Violence and Victims, Vol. 15, No. 4 (2000).

[18] Katrina Baum et al., *Stalking Victimization in the United States*, Bureau of Justice Statistics Special Report, National Crime Victimization Survey (Jan. 2009); *see also* Shannan Catalano, *Stalking Victims in the United States–Revised*, Bureau of Justice Statistics Special Report, National Crime Victimization Survey (Sept. 2012) (updating 2009 report).

isolate themselves in response to the invasive and threatening actions of their abusers. They also suffer from high global stress scores, which measure the degree to which a person appraises situations in her life as stressful, high rates of post-traumatic stress disorder, continuing fear of ongoing harassment, physical injury, and public humiliation,[19] and high rates of anxiety and depression.[20]

The impact is not only psychological and emotional, but also economic. More than half of victims reported losing at least one week of work and about 130,000 reported being fired or asked to leave their positions because stalking had affected their work.[21] From the perspective of the national economy, the lost productivity is enormous; from the perspective of the individual victim who is desperately trying to escape her abuser, the lost financial stability is crippling.

C. Current Technologies Give Abusers Sophisticated Tools to Threaten Violence in Ever More Potent and Far-Reaching Ways.

The Internet has given stalkers and abusers "more tools and a wider audience, which makes it more

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[19] This includes incidents where the abuser creates mock public social media profiles of the victim and posts inappropriate or lewd comments or pictures, typically sexual in nature, and poses as the victim on social media, disrupting the victim's communications and relationships with family and friends and further isolating the victim.

[20] *See* Logan & Walker, *supra* note 17.

[21] *Location Privacy Protection Act of 2014 Hearing*, *supra* note 10 (testimony of Cindy Southworth, Vice President of Development and Innovation, National Network to End Domestic Violence).

dangerous for victims."[22] In particular, these perpetrators are increasingly posting to social media with descriptions of what they intend to do to their victims and disclosures of personal, damaging, or humiliating information or pictures of them.[23]

This is not a surprising development. A new generation is growing up on digital communication. Facebook boasts 1.3 billion users;[24] Gmail, one of the web's most popular e-mail services, has over 425 million active users;[25] and the number of active mobile phones may exceed the world's population by the end of 2014.[26] Young women ages 18-24 are experiencing electronic stalking through e-mail, text messaging, and social media at levels well beyond any other

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[22] Fraser, *supra* note 9.

[23] *Id.* *See also* King-Ries, *supra* note 17 ("An entire generation is normalizing 'boundarylessness' and incorporating technology use into their relationships. . . . Additionally, a greater use of technology in engaging in intimate relationships means greater risk of being cyberstalked as adults.").

[24] Facebook, Inc., Quarterly Report (Form 10-Q), at 21 (July 24, 2014).

[25] Dante D'Orazio, *Gmail Now Has 425 Million Total Users*, The Verge, June 28, 2012, *available at* http://www.theverge.com/2012/6/28/3123643/gmail-425-million-total-users (last visited Oct. 1, 2014).

[26] *World to Have More Cell Phone Accounts Than People by 2014*, Silicon India, Jan. 2, 2013, *available at* http://www.siliconindia.com/magazine_articles/World_to_have_more_cell_phone_accounts_than_people_by_2014-DASD767476836.html (last visited Oct. 1, 2014). *See also* International Telecommunication Union, The World in 2014: ICT Facts and Figures (May 5, 2014), *available at* http://www.itu.int/en/ITUD/Statistics/Documents/facts/ICTFactsFigures2014-e.pdf.

demographic group.[27] The exponential growth of technology and its impact on the way we communicate will only increase the incidence of "high-tech" stalking as more digitally-native generations mature.[28]

Social media have become a dominant feature of the new technological landscape. Social networks are a way to stay in touch and share life's moments with others. Facebook, for instance, allows its users to connect, communicate, and share media with one another. Facebook users can become "friends" with other users, a relationship that grants additional access to each other's profiles, photos, and postings. When posting a message, link, video, or photo to Facebook, a user has the option to limit who can see the post by only sharing it with friends or a select group of friends, but the Facebook default is to share that post with all 1.3 billion active users. Logging on to Facebook brings the user to her News Feed, a constantly-updating collection of stories chronicling friends' activities, such as pictures of their vacation, thoughts on the most recent political scandal, or a map showing where some friends had dinner last night.

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[27] *Location Privacy Protection Act of 2014 Hearing, supra* note 10 (testimony of Bea Hanson, Principal Deputy Director, Office on Violence Against Women, Department of Justice). Youth violence is also increasingly occurring on social media with about 20% of youth in 2010 reportedly experiencing cyberbullying. *See, e.g.*, Desmond Upton Patton et al., *Social Medial as a Vector for Youth Violence: A Review of the Literature*, 35 Computers in Hum. Behav. 548-553 (2014). Patton et al. also note that adolescents who made online threats of school massacres were more likely to have made preparations to carry out those acts than adolescents who made in-person threats.

[28] *Location Privacy Protection Act of 2014 Hearing, supra* note 10 (testimony of Bea Hanson, Principal Deputy Director, Office on Violence Against Women, Department of Justice).

Facebook posts that are not directly sent to a victim will often find their target. If a friend of the victim comments on the abuser's post, that comment (and, thus, the post) is likely to show up on the victim's News Feed. A victim, then, could see her abuser's posts not just directly but also through a mutual friend's comments or activity.[29] And, if the post is public, a victim can access it, as can her friends, coworkers and family, and any other Facebook user.

In a survey of victim service agencies conducted by NNEDV in 2012, almost ninety percent of the 759 agencies reported that victims had been intimidated or threatened via technology.[30] Threatening text messages were used more than half of the time, Facebook and social media were used at least one-third of the time, and e-mail was used a quarter of the time.[31] The immediacy of new communication

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[29] Facebook Help Center, Sharing, *available at* https://www.facebook.com/help/www/418076994900119 (last visited September 29, 2014).

[30] Fifty-five of the fifty-six states and several U.S. territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands) participated in the survey. The agencies surveyed included Dual Domestic Violence/Sexual Assault Programs: 350 (46%), Domestic Violence Programs: 328 (43%), Sexual Assault Programs: 27 (4%), Programs that help victims of all crimes, including DV/SA/ Trafficking/Stalking: 22 (3%), and Other (including government, LE, attorney, prosecutor offices, housing): 32 (4%). "Technology Abuse in Intimate Partner Violence," NNEDV Survey (2012), a*vailable at* http://techsafety.org/blog/2014/4/29/new-survey-technology-abuse-experiences-of-survivors-and-victim-services (last visited Oct. 1, 2014).

[31] *Id*. These percentages add up to more than 100% because many victims were threatened via multiple forms of technology. Half of the agencies also reported that victims requested assistance with safety on social media, almost seventy percent reported that perpetrators had posted pictures of the victim

methods has reduced the cost and effort required for abusers to escalate their actions from internal thoughts to verbal threats and physical assaults. Emotional impulses that in the past were often tempered by distance and time can now immediately be turned into easily-communicated threats.

Contemporary technology also makes stalking easier. Once, stalking required an almost obsessive effort from perpetrators to call, drive by, follow, and track their victims incessantly. Today, there are a variety of applications that allow stalkers to track their victims' movements.[32] Increasingly, perpetrators are turning to mobile applications and social media sites to infiltrate every aspect of their victims' lives.

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online or on social media without consent, and almost three quarters reported abusers had created mock social media profiles impersonating the victim, or had accessed the victim's social media account or e-mail. *Id.*

[32] *Location Privacy Protection Act of 2014 Hearing, supra* note 10 (opening statement of Chairman Franken) (describing mobile applications designed for spying on spouses, including FlexiSPY and quoting its marketing materials: "FlexiSPY gives you total control of your partner's phone without them knowing it . . . See exactly where they are, or were, at any given date and time."); Fraser, *supra* note 9. *See also* Department of Justice, *Pakistani Man Indicted for Selling 'StealthGenie' Spyware App*, *available at* http://www.justice.gov/opa/pr/pakistani-man-indicted-selling-stealthgenie-spyware-app (last visited Oct. 2, 2014) (describing "StealthGenie" mobile application that allows users to spy on and to track their intimate partners without their partners' knowledge or consent); Craig Timberg and Matt Zapotosky, *Maker of StealthGenie, an app used for spying, is indicted in Virginia*, The Washington Post, Sept. 29, 2014, *available at* http://www.washingtonpost.com/business/technology/make-of-app-used-for-spying-indicted-in-virginia/2014/09/29/816b45b8-4805-11e4-a046-120a8a855cca_story.html (last visited Oct. 2, 2014) (same).

With a few taps, an abuser can listen in on all calls, read all text messages, track location in real-time, and even remotely activate the mobile device's camera—all from the couch, the office, or while waiting for the morning train. Using this information, abusers are tailoring their threats to include specific details to signal they know where their victims are and what they are doing at all times, and even arriving at their victims' locations unannounced. These types of advanced threats instill in victims a deep and abiding fear of what their abusers will do next and prevent them from living normal, healthy lives.[33]

II. REQUIRING PROOF OF SUBJECTIVE INTENT WILL UNDERMINE THE CENTRAL PURPOSE OF PROHIBITING THREATS OF VIOLENCE.

It is well settled that the government may proscribe true threats of violence without regard to whether the speaker actually intends to carry them out. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003). This is because threats of violence are, in themselves, harmful—they cause fear and all its attendant damaging and disruptive psychological, emotional, and physical effects. And, as this Court reaffirmed in *Black*, the government has a compelling interest in protecting people from such fear and disruption, and not just from the possibility that the threatened violence will occur. *Id.* at 360 (citing *R.A.V. v. City of St. Paul*, 505 U.S., 377, 388 (1992)).

For the same reason—because threats of violence cause fear and disruption regardless of the speaker's actual motivation in making them—proof of subjective intent should not be required for conviction of

[33] Fraser, *supra* note 9.

threatening under Section 875(c). Particularly with respect to intimate partner violence and stalking, proscribing only those statements in which the speaker subjectively intended to convey a threat will be "dangerously underinclusive" with respect to the principal rationale of protecting individuals from the harm caused by threats of violence, and will undermine the central purpose of prohibiting threats in the first instance. *United States v. Mabie*, 663 F.3d 322, 333 (8th Cir. 2011) (quoting *New York v. Cain*, 418 F. Supp. 2d 457, 479 (S.D.N.Y. 2006)); *cf. United States v. White*, 2010 U.S. Dist. LEXIS 9603, at *27 (W.D. Va. Feb. 4, 2010) ("If the prohibition on true threats is meant to protect listeners from the 'fear of violence' and the corresponding 'disruption that fear engenders,' then the subjective intent of the speaker cannot be of paramount importance.") (quoting *Black*, 538 U.S. at 360), *aff'd*, 670 F.3d 498 (4th Cir. 2012).

A. The Harm Caused By Threats of Violence Depends on Their Content And The Context In Which They are Made, Not On The Speaker's Subjective Intent.

Like fighting words, true threats of violence are words that "by their very utterance inflict injury." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). They do so simply by virtue of their threatening character, *i.e.*, because the expressions *convey* an intention to cause bodily harm or death, thereby naturally creating in their recipients a sense of fear and disturbing their sense of security. *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991) ("The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the gravamen of the offense.").

The fear and disruption caused by threats of violence do not derive from the speaker's private motivation—whether he actually *intended* to convey a threat, or intended just to have a bit of fun or to vent his frustration. A statement that a reasonable person would interpret as a threat to hurt or to kill causes fear and disruption regardless of the speaker's motivation. *Cf. United States v. Castagana*, 604 F.3d 1160, 1164 (9th Cir. 2010) ("Even if a perpetrator does not intend that his false information be believed as indicative of terrorist activity, the false information will nevertheless drain substantial resources and cause mental anguish when it is objectively credible."). This is just a function of the way language works. "[W]ords or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published," *United States v. Prochaska*, 222 F.2d 1, 2 (7th Cir. 1955), and not from the speaker's personal reasons for using them in the way that he did.

Of course, this is not to say that the speaker's intent is divorced from his audience's interpretation of what he meant to convey, for "it will usually be the case that a person intends the ordinary meaning and natural consequences of the words he uses." Frederick Schauer, *Intentions, Conventions, and The First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 220. Were it otherwise, communication would be very difficult, if not impossible. But a speaker's private reasons for expressing himself in the way that he did—whether he really meant to convey a threat or instead had other undisclosed reasons for making the statement in question—are never directly accessible to his audience. They can only be inferred from the content of his words and the context in which

he uttered them, interpreted in light of his audience's shared understandings and expectations of what particular words mean when they are used in a particular way, in a particular context.

Contextual factors affecting how particular words are likely to be understood, and whether a reasonable person would interpret them as threatening include the identity of the speaker and that of his listener(s), the nature of the relationship between them, and where and how the communication is made. Statements made in the context of a relationship marked by a history of abuse, for example, are inevitably interpreted in light of that history and against the backdrop of an ever-present awareness of the correlation between threats of violence and the likelihood the threats will one day be carried out.[34]

Take, for example, Petitioner's threats against his estranged wife. One of the statements that formed the basis for his conviction of threatening his wife read in relevant part:

> Fold up your PFA [protection-from-abuse order]
> and put it in your pocket
> is it thick enough to stop a bullet?

Pet. Br. at 12. The objectively threatening character of this statement derives in large part from the historical context in which it was made: only days before Petitioner posted the statement, a state court awarded his wife a protection-from-abuse order in part

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[34] See note 14, *supra*. And, indeed, victims are often the best assessors of the risk that the threats of violence they face will be carried out. *See* Sheridan & Roberts, *supra* note 14.

because of other threatening statements Petitioner had posted to the same Facebook page (as well as other abuse his wife reported). J.A. 148-51. Whatever Petitioner says were his private reasons for making the statement, it scared his wife. J.A. 156 ("It made me extremely afraid for my life. I mean I got the protection order to protect myself and my children and he was still making the threats for everyone to see . . ."). Her fear was reasonable. In light of the parties' history and more recent events, Petitioner's statement is one that a reasonable person would regard as conveying an intent to injure or kill.

Similarly, the objectively threatening character of Petitioner's statements describing the best place from which to fire a mortar launcher at his wife's house derives at least in part from Petitioner's inclusion of a diagram accurately depicting the house in which his wife was living since she had left him a few months earlier and the surrounding area. J.A. 153-54.

Under the circumstances, these statements reasonably caused Petitioner's wife to fear for her life. J.A. 153 (testifying that she felt like she was being stalked and that she was afraid for her and her children's lives). That Petitioner later claimed he intended only to vent his frustration is of no moment. The harm was done—and predictably so—when he posted the objectively threatening statements online. The government should be permitted to prevent such harm, and to punish those who inflict it.

B. To Prevent the Real Harm Caused by Threats of Violence, the Focus of the Inquiry Must be on the Objectively Threatening Character of the Message.

The recipient of a threatening message does not—and indeed cannot—know the private motivations the speaker had for sending it. She can only react to the message based on its objective character. If it is objectively threatening, she will predictably fear for her life and will likely take various precautions in order to protect herself. The harm is created by the threat itself.

Because threats of violence cause real harm regardless of the speaker's private intentions, the focus of the inquiry must be on whether, taking all the relevant facts and circumstances into account, the statement is objectively threatening—that is, whether, in light of the statement's content and the context in which it was transmitted, a reasonable person would have foreseen that his audience would regard it as threatening.

The objective, reasonable person standard is fitted to the task of protecting people from the harms caused by threats of violence—the fear of violence, the disruption it engenders, and the risk that the threatened violence will occur. *Black*, 538 U.S. at 360. It allows the government to prosecute abusers and stalkers who make objectively threatening statements that genuinely and reasonably cause fear and all the disruption such fear engenders, without also having the difficult task of proving beyond a reasonable doubt that the perpetrators made the statements with the specific intent to threaten and not, as they often later claim, for some other purpose—*e.g.*, to vent their frustration, to make a joke, to express themselves

artistically, or to harass and annoy, but not to threaten.

Requiring the government to prove beyond a reasonable doubt that the speaker subjectively intended to convey a threat (and did not have some other private purpose) is not adequate to the task of protecting people from the harms threats of violence cause. Such a rule would leave too many victims of threats without any meaningful protection. It would also effectively decriminalize conduct that predictably and reasonably creates a genuine fear of violence with all its attendant psychological, emotional, economic, and social disruptions.

Of course, even under the objective, reasonable person test, the government must still prove the objectively threatening character of the statement beyond a reasonable doubt. In order to qualify as threats under the objective test, statements have to be serious expressions of an intention to inflict bodily harm on another. *See*, *e.g.*, *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013) (a threat is a statement foreseeably interpreted as "a serious expression of an intention to inflict bodily harm."); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) (a threat is a statement a reasonable person would take "as a serious expression of an intention to inflict bodily harm"), *cert. denied*, 134 S. Ct. 59 (2013); *United States v. White*, 670 F.3d 498, 509 (4th Cir. 2012) (defining "threat" in light of this Court's discussion in *Black* as a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"); *United States v. Martinez*, 736 F.3d 981, 983 (11th Cir. 2013) (a threat is a statement that "would be construed by a reasonable person as a serious expression of an intent to inflict

bodily harm or death."); *Mabie*, 663 F.3d at 330 (a threat is a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another") (internal quotation marks omitted); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) (a threat is a statement foreseeably interpreted "as a serious expression of an intention to inflict bodily harm upon or to take the life of another individual.") (internal quotation marks and brackets omitted).

Under this definition, two important criteria must be met. First, the expression must be serious. Jokes do not count. Neither does political hyperbole. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).[35]

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[35] *Watts* involved statements made against the President in the context of a political rally against a war—the kind of speech implicating our "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Even though the case dealt with core political speech, the *Watts* Court did not require proof of subjective intent to threaten as an element of the offense. Indeed, it made no reference to the defendant's subjective intent at all. Instead, the Court focused on the meaning of the words used in the context in which they were delivered, concluding that, under the circumstances, Watts's statement could only be characterized as political hyperbole: "Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id.*

Second, the serious expression in question must convey an intention to inflict injury to another.[36] Unlike the political hyperbole at issue in *Watts*, serious expressions of an intention to inflict injury do not implicate that most "profound national commitment" to "'uninhibited, robust, and wide-open' debate" on public issues at the heart of the First Amendment. 394 U.S. at 708.

Proscribing threats of violence against private persons under the objective test does not raise the specter of illegitimate government interference with the deliberative process at the foundation of our democracy, nor does it implicate any of the other concerns animating the Court's First Amendment jurisprudence. We are far from the political arena here. The speech at issue in this case involves no social or political criticism; it constitutes no expression of shared ideology or of social solidarity, or of a commitment to any social cause or group. And the language at issue here is proscribable not because it is "vituperative" or "caustic" or "sharp," (*Watts*, 394 U.S. at 708)—indeed, it may be none of those things—but because it threatens violence and scares people where

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[36] Relying on Judge Sutton's dubitante opinion in *United States v. Jeffries*, Petitioner argues that proof of subjective intent is required as a matter of statutory construction because the term "threat" at the heart of Section 875(c) has always meant "an expression of an intention to injury," and such expression, in turn, connotes a subjective intent to threaten. Pet. Br. at 23 (citing *Jeffries*, 692 F.3d at 483 (Sutton, J., concurring dubitante)). Not so. A speaker's expressions are not the same thing as, and should not be confused with, his private motivations for speaking. If a person's intentions were always the same as (or at least always reliably reflected in) their expressions, it would not be possible to lie.

they live, where they work, and where they sleep, and it does so objectively and predictably.

CONCLUSION

For the foregoing reasons, this Court should hold that proof of subjective intent to threaten is not required for conviction of threatening. Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

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APPENDIX

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of Respondent:

The **National Network to End Domestic Violence (NNEDV)** is a non-profit membership and advocacy organization dedicated to ending domestic violence through legal, legislative, and policy initiatives. The leading voice for domestic violence victims and their advocates, NNEDV comprises a network of 56 state and territorial coalitions against domestic violence representing over 2,000 local organizations that provide shelter, advocacy, and counseling and legal services to victims and survivors of domestic violence and their families.

Working with federal, state, and local policy makers and domestic violence advocates throughout the nation, NNEDV helps identify and promote policies and best practices to advance victim safety. NNEDV was instrumental in promoting Congressional enactment and eventual implementation of the Violence Against Women Act of 1994 and subsequent reauthorizations. NNEDV's broad expertise in the nature and dynamics of domestic violence and its impact on victims, as well as its work on the Safety Net technology project, which focuses on the intersection of technology and intimate partner abuse and stalking and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform its position on the criminal use of technology as a means of perpetrating domestic violence, sexual assault, and stalking.

NNEDV is deeply concerned that interpreting Section § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse from threats of violence by their current and former intimate partners—who often use easily accessible but sophisticated technology to track their victims and threaten them from afar—and from the crippling fear and disruption such threats cause.

The **Arizona Coalition to End Sexual and Domestic Violence (ACESDV)** was formed in 1980 as the Arizona Coalition Against Domestic Violence to unite concerned citizens and professionals to increase public awareness about the issue of domestic violence, enhance the safety of and services for victims of domestic violence, and reduce the incidents of domestic violence in Arizona families. In 2013, the organization expanded its focus and now also addresses the issue of sexual violence in our communities, state and world. Our mission is to lead, to advocate, to educate, to collaborate, to prevent and end sexual and domestic violence in Arizona.

ACESDV is based in Arizona and has significant, statewide presence. We are a non-governmental, non-profit membership organization that works with more than 170 formal members and allies to carry out our mission and objectives. Our objectives are to:

- promote quality services for victims that focus on safety and self-determination;
- advocate and educate on behalf of survivors, their children, and their advocates;

- facilitate partnerships among victim advocates, allied organizations, and state agencies;
- mobilize a statewide voice on sexual and/or domestic violence;
- connect local, state and national work; and
- engage in prevention and social change efforts that challenge the social, economic and political conditions that sustain a culture of violence in which domestic and sexual violence is condoned.

ACESDV is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **California Partnership to End Domestic Violence (the Partnership)** is the federally recognized State Domestic Violence Coalition for California. Like other Domestic Violence Coalitions throughout the U.S. States and territories, the Partnership is rooted in the battered women's movement and the values that define this movement, including working toward social justice, self-determination and ending the oppression of all persons. The Partnership has a 30-year history of providing statewide leadership, and has successfully passed over 100 pieces of legislation to ensure safety and justice for domestic violence survivors and their children. We believe that by sharing expertise,

advocates and legislators can end domestic violence. Every day we inspire, inform and connect all of those concerned with this issue, because together we're stronger.

The Partnership's mission and work is focused on protecting the safety of domestic violence victims and their children and holding batterers accountable. Protection orders are important tools intended to protect survivors physically and emotionally. Violations committed over social media threaten survivor safety and should be seriously considered. By requiring proof of subjective intent to threaten, there is an incentive for abusers to use technology, including social media to further victimize survivors. As technology and social media becomes more prevalent and pervasive in our daily lives, it is imperative that our judicial system continues to provide safety for victims by upholding protection orders.

The **Colorado Coalition Against Domestic Violence (CCADV)** is a non-profit statewide membership organization whose mission is to inspire Colorado to end domestic violence. CCADV was established in 1978 by twelve domestic violence service providers in order to offer a strong statewide voice for survivors of domestic violence, their families, and advocates and currently represents over 60 domestic violence shelters and programs, allied organizations and individuals. Through training, technical assistance and public policy advocacy, CCADV provides comprehensive supports that enhance member's ability to effectively assist diverse survivors of domestic violence (over 25,000 individuals each year).

CCADV recognizes the critical role that the criminal justice system plays in holding domestic violence

offenders accountable and increasing victim safety. CCADV's Public Policy Program has a long history of advocating for and supporting laws and policies that affect survivors of domestic violence, their dependents, and domestic violence offenders.

CCADV shares NNEDV's concerns regarding the Petitioner's interpretation of 18 USC § 875(c). The statements made by the Petitioner were undoubtedly viewed by the victim as a credible threat on her life. Distinctions made between the seriousness and response accorded a threat being made through social media or any other online platform and other forms of communication are arbitrary. Fundamental to their intent, protection orders must hold restrained parties accountable for threats made against protected parties' life and safety. It is imperative that the integrity of provisions to not threaten or harass within protection orders be upheld regardless of the method of communication used lest victims lose faith in these vital legal tools and courts give license to domestic abusers to continue terrorizing their victims.

The **Delaware Coalition Against Domestic Violence** is a statewide, non-profit organization of domestic violence (DV) programs, allied organizations and individuals working to eliminate DV through public education, training, prevention and advocacy efforts. DCADV works with criminal justice, health care, business and social service systems and communities throughout Delaware to improve services for victims of DV.

The Delaware Coalition also partners with local, state and national organizations on a variety of initiatives designed to foster a broad and comprehensive understanding of the impact of domestic violence on individuals, communities and

societies. These initiatives range include supporting vital federal legislation such as the Violence Against Women Act, engaging in primary prevention efforts using a public health approach and joining in a national collaborative designed to foster use of a trauma informed approach in systems and services.

DCADV is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Georgia Coalition Against Domestic Violence (GCADV)** is a not-for-profit organization incorporated in the state of Georgia representing 52 local-level domestic violence shelters and non-residential programs throughout the state. Tracing our roots back to 1980, GCADV brings together member agencies, allied organizations and supportive individuals who are committed to ending domestic violence. Guided by the voices of survivors, we work to create social change by addressing the root causes of this violence. GCADV leads advocacy efforts for responsive public policy and fosters quality, comprehensive prevention and intervention services throughout the state. As a part of its public policy and systems advocacy efforts, GCADV works with law enforcement, advocates and prosecutors to ensure that victims can call upon our criminal justice system when they are threatened and or stalked by abusers. Interpreting 18 USC § 875(c) in the manner suggested

by Petitioner would expose victims to unending threats without any criminal justice recourse.

The **Guam Coalition Against Sexual Assault & Family Violence (GCASAFV)** is a non-profit organization comprised of member agencies representing public/private service providers, community partners, and other government allies. GCASAFV focuses on addressing sexual assault and family violence on Guam at a community level; providing education, outreach and training; identifying and addressing gaps in services to victims of sexual assault and family violence; and assisting in building the capacity of community organizations and networks to meet Guam's sexual assault and family violence needs.

GCASAFV is deeply concerned that abusers will be given license to threaten victims, without recourse, if the subjective test is adopted rather than the appropriate objective standard which requires the prosecution to only provide and prove all available and credible evidence including the content of Petitioner's communications and the context in which those communications were transmitted. To adopt Petitioner's argument would embolden abusers and yank jurisprudential protections from under victims' very feet.

The **Hawaii State Coalition Against Domestic Violence (HSCADV)** is a not-for-profit organization and a statewide partnership of domestic violence programs and shelters, incorporated in the state of Hawaii in 1980. HSCADV is comprised of the director of spouse abuse shelters and psycho-educational counseling programs for victims and perpetrators of spouse abuse on each of the islands, as well as the Victim Witness Assistance Division of the Honolulu

Prosecutor's Office, Legal Aid Society, Hawaii Immigrant Justice Center, and the Domestic Violence Action Center. HSCADV is troubled that the lives of victims of domestic violence will forever be at the crippling mercy of abusers' threats if the Court adopts Petitioner's interpretation of 18 USC § 875(c).

The **Illinois Coalition Against Domestic Violence (ICADV)** is a membership organization consisting of 53 domestic violence programs throughout the state of Illinois. The ICADV provides technical assistance, training, and advocacy to and on behalf of our programs and the victims they serve. The general purpose of the Illinois Coalition Against Domestic Violence is: to eliminate violence against women and their children; to promote the eradication of domestic violence across the state of Illinois; to ensure the safety of survivors, their access to services, and their freedom of choice; to hold abusers accountable for the violence they perpetrate; and to encourage the development of victim-sensitive laws, policies and procedures across all systems that impact survivors of domestic violence.

ICADV is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Indiana Coalition Against Domestic Violence, Inc. (ICADV)** is a non-profit organization incorporated in 1980 (www.icadvinc.org) to end domestic violence. The Indiana Coalition Against

Domestic Violence is a statewide alliance of domestic violence and sexual assault programs law enforcement, prosecutors, criminal justice agencies, faith-based organizations, and concerned individuals. We provide technical assistance, resources and training to those who serve victims of domestic violence and sexual assault; and advocate for social and systems change through public policy, public awareness, and prevention.

The ICADV specifically provides training and technical assistance to Indiana shelters, advocates and criminal justice providers around the identification, documentation and intervention of technology-facilitated intimate partner violence. Our work focuses on understanding the different ways in which technology, specifically social media and other forms of electronic communication, is used to stalk, harass, and further control survivors of intimate partner violence. This work is done in partnership with the National Network to End Domestic Violence's Safety Net project which focuses on the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform its position on the criminal use of technology as a means of perpetrating domestic violence and other state coalitions.

ICADV is concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

Jane Doe Inc. (JDI), the Massachusetts Coalition Against Sexual Assault and Domestic Violence, is a statewide organization of fifty-seven programs that provide direct services to victims and survivors of sexual and domestic violence. Guided by the voices of survivors, JDI brings together organizations and people committed to ending domestic violence and sexual assault, creating social change by addressing the root causes of this violence, and promoting justice, safety and healing for survivors. JDI advocates for responsible public policy, promotes collaboration, raises public awareness, and supports its member organizations to provide comprehensive prevention and intervention services.

JDI is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a statewide non-profit organization aimed at eliminating and preventing sexual and domestic violence. KCSDV's membership is the 29 sexual and domestic violence programs serving survivors of domestic violence and sexual assault across the state. For the last 30 years, KCSDV has been Kansas's leading voice on sexual and domestic violence. We enhance response and prevention efforts through training, public policy advocacy, public awareness programs, and support to professionals and local crisis centers.

KCSDV is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, the internet or other electronic or social media platforms to threaten, taunt, isolate, frighten, and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Maine Coalition to End Domestic Violence (MCEDV)** is a non-profit membership and advocacy organization dedicated to ending domestic violence through prevention, training and policy initiatives. The leading voice for domestic violence victims and their advocates in Maine, MCEDV has eight domestic violence resource centers that provide shelter, advocacy, and counseling and legal services to adults, children and communities impacted by domestic violence and abuse.

MCEDV helps identify and promote policies and best practices to advance victim safety and to hold abusers accountable for their actions. MCEDV has been instrumental in establishing a homicide and serious assault reduction program state wide in Maine, including risk assessment and enhanced safety planning teams in each county. MCEDV also took part in early cyber abuse trainings with the Safety Net Project, resulting in our providing training on Abuse in the Digital Age statewide for advocates, law enforcement and prosecutors over the past four years. This focus on the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform our position on the criminal use of technology as a means of perpetrating domestic

violence. Our Law Court has recently considered the issue of threats via digital media in the issuance of a protection order, (*Clark v. McLane*), finding that the issuance of the protection order was appropriate in that case. MCEDV coordinated the preparation of amicus briefs on behalf of the victim and in doing so became even more aware both the increasing prevalence of cyber-threats in our state, as well as the negative impact of cyber-threats on victims' lives.

MCEDV echoes NNEDV's concern that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Missouri Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in Missouri in 1980. As a membership organization of 125 programs providing domestic and sexual violence services, MCADSV serves as the statewide advocacy, education and communications network to advance the prevention of violence against women and to address the needs of those victimized by the violence. MCADSV is recognized for its successes during the past 30 years in advocacy work with state, local and national policy makers to identify and promote policies and best practices to address victim lethality, advance victim safety and establish best practices for victimless and evidence-based prosecution of domestic violence offences. MCADSV's current CEO worked with advocates and Congress members to draft the original

Violence Against Women Act of 1994 and continues to participate in national policy leadership for the implementation of all subsequent reauthorizations of the Act.

Therefore, MCADSV, on behalf of domestic violence victims in Missouri and all of the Missouri advocates and programs who serve them, is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will encourage abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Montana Coalition Against Domestic and Sexual Violence (MCADSV)** is a not-for-profit organization incorporated in the state of Montana in 1986 (www.mcadsv.com). MCADSV is a statewide coalition of individuals and organizations working together to end domestic and sexual violence through advocacy, public education, public policy, and program development. Our mission is to support and facilitate networking among our member organizations while advocating for social change in Montana. MCADSV represents a majority of the state's domestic and sexual violence service providers and is the primary statewide organization providing training and technical assistance to these programs. MCADSV is deeply concerned that the Petitioner's reading of 18 USC § 875(c) will permit abusers to threaten and stalk victims with impunity.

The **Nevada Network Against Domestic Violence (NNADV)**, a nonprofit organization founded in 1980 and incorporated in the State of

Nevada, serves as the professional association for the state's thirteen member domestic violence organizations and as the primary representative of battered women and their children in the public policy arena. NNADV members share the goal of ending domestic violence through community education, public policy development, and services for victims.

NNADV's broad expertise in the nature and dynamics of domestic violence and its impact on victims, as well as its recent work on the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform its position on the criminal use of technology as a means of perpetrating domestic violence.

NNADV shares the concern that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will encourage abusers to use technology, including social media, to continue to control and threaten their victims. It will decrease a victim's options to respond to electronic abuse.

The **New Hampshire Coalition Against Domestic and Sexual Violence (NHCADSV)** is a not-for-profit organization committed to creating safe and just communities through advocacy, prevention and empowerment of anyone affected by sexual violence, domestic violence and stalking in New Hampshire. This mission is accomplished by the Coalition, which includes 14 independent community-based member programs, a board of directors, and a central staff working together to influence public policy on the local, state and national levels; ensure that quality services are provided to victims; promote

the accountability of societal systems and communities for their response to sexual violence, domestic violence and stalking; and prevent violence and abuse before they occur. In 2013, NHCADSV member programs provided services to over 15,000 victims. NHCADSV has an interest in this case because it is critically important to our work to ensure that abusers are prohibited from using the Internet or other electronic or social media platforms as a means to perpetuate the abuse of their victims, and it is crucial that when this abuse occurs, victims have recourse and protection in the justice system.

The **New Jersey Coalition for Battered Women (NJCBW)** is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include 29 domestic violence programs in New Jersey, including the 23 lead domestic violence agencies. NJCBW advocates for victims of domestic violence with state level governmental and private agencies, the state legislature, judiciary and governor to support legislation and policies that will increase safety and options for victims of domestic violence.

NJCBW has expertise in providing information, resources, technical assistance and training to domestic violence programs, the public, and organizations involved with New Jersey's response to domestic violence. NJCBW advocates locally and statewide on a variety of policy matters, including legislation, to improve New Jersey's response to domestic violence and has previously served as amicus curiae on a number of cases before the New Jersey Supreme Court.

NJCBW shares the concern of the National Network to End Domestic Violence that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten will make it more difficult to protect victims of abuse and prosecute abusers. Such a requirement will not be effective in deterring abusers from using technology, including social media, to continue their abuse intimidation and abuse.

The **New Mexico Coalition Against Domestic Violence (NMCADV)** is a 501c3 organization that provides training, technical assistance, information, education, referrals and other support to domestic violence programs and stakeholders across New Mexico. We serve as the collective voice for victims of domestic violence and participate actively in systems change efforts statewide. The NMCADV proudly joins this *amicus* brief because requiring proof of a subjective intent to threaten will make it more difficult to protect victims of domestic violence and prosecute their abusers. With the skyrocketing rates of domestic violence we see across this country the last thing we need is a requirement which will embolden abusers to use technology to threaten and intimidate without recourse.

The **New York State Coalition Against Domestic Violence (NYSCADV)** is a not-for-profit organization incorporated in the State of New York in 1978 (www.nyscadv.org). NYSCADV works to create and support the social change necessary to prevent and confront all forms of domestic violence. As a statewide network of over 100 local domestic violence member programs, NYSCADV achieves our mission through activism, training, prevention, technical assistance, legislative development, advocacy, and leadership development.

Working with policy makers, coalitions, and domestic violence advocates across both New York State and the nation, NYSCADV monitors and provides input, guidance and leadership in policy and legislative matters affecting victims of domestic violence and their children. NYSCADV educates, trains, and advises members and other advocates on legislative and policy changes and processes, and encourages our members to communicate with their legislators. NYSCADV also provides input regarding various agency policies related to survivors and domestic violence programs.

Domestic violence offenders routinely use threats, both direct and indirect, as part of their pattern power and control over their partners. These threats have contextual meaning that cause victim's alarm and fear. NYSCADV is concerned that requiring proof of a subjective intent to threaten will allow abusers to remain unchecked in their pattern of abuse. And, in the context of this case, abusers will be incentivized to use technology, such as social media, to perpetrate this abuse with impunity.

The **Ohio Domestic Violence Network (ODVN)**, a not-for-profit membership organization incorporated in the state of Ohio and is comprised of 72 domestic violence programs and various other allied professionals representing batterers' intervention programs and other legal and social service agencies that provide services and advocacy to victims and perpetrators of domestic violence. The member agencies represent all regions of the state, including rural and urban areas. ODVN advances the principle that all people have the right to an oppression and violence free life; fosters changes in our economic, social and political system and brings leadership, expertise and

best practices to community programs. ODVN seeks individual, legislative and social change, produces and shares information, and educates the public and other agencies about domestic violence and resource options. As Ohio's largest and most comprehensive resource on domestic violence, ODVN represents the interests of and works arm in arm with domestic violence agencies and victims throughout Ohio. ODVN is a member of the National Network to End Domestic Violence.

ODVN's has considerable expertise in the dynamics of domestic violence and its impact on victims. This expertise includes an understanding of the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims. In our work on behalf of domestic violence survivors ODVN has provided training to advocates and provided resources to survivors on the potential criminal use of technology as a means of perpetrating domestic violence.

ODVN is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Pennsylvania Coalition Against Domestic Violence (PCADV)**, is a private non-profit organization working at the state and national levels to eliminate domestic violence, secure justice for all victims, enhance safety for families and communities, and create lasting systems and social change. The first domestic violence coalition in the nation, PCADV was

established in 1976 when a handful of grassroots women's groups in the state joined together to lobby for legal protections and to develop a network of services for victims of domestic violence. The Coalition has grown to a membership of 60 organizations across Pennsylvania providing shelters, hotlines, counseling programs, safe home networks, legal and medical advocacy projects, and transitional housing for victims of abuse and their children. Over the past three decades, these programs have offered safety and refuge to close to 2 million victims and their children from every corner of the commonwealth.

PCADV and its member programs view domestic violence perpetrators' use of social media including Facebook to stalk, harass and threaten acts of violence against their victims with apprehension and alarm. Interpreting 18 U.S.C. § 875(c) in a way that requires proof of a subjective intent to threaten, as proposed by the Petitioner, will only further empower abusers to employ their threatening and abusive tactics via Internet mediums and claim exercise of their freedom of speech. Meanwhile the victims live in fear and wait for the moment that the perpetrator will carry out his or her threats. Moreover, law enforcement's efforts to protect victims and communities from harm will be hampered if they must determine whether the subjective intent of a perpetrator is to indeed harm the persons or school children that their words indicate they want to injure.

The **Rhode Island Coalition Against Domestic Violence (RICADV)** is a non-profit membership and advocacy organization dedicated to ending domestic. We work to achieve this mission by providing leadership on the issue of domestic violence and supporting our member agencies. Together, our member agencies

provide services to over 10,000 victims of domestic abuse each year, and respond to over 15,000 calls for help and referrals.

RICADV is dedicated to helping identify and promote policies and best practices to advance victim safety. RICADV has been involved in promoting Congressional enactment and eventual implementation of the Violence Against Women Act of 1994 and subsequent reauthorizations. We have worked for 35 years to strengthen the laws in Rhode Island to protect victims of domestic violence and hold batterers accountable, and have seen firsthand the impact that new technologies have had on victims. Too often, victims are terrorized and threatened by their abusers using new technologies, and it is imperative that there be some means of legal recourse for them.

RICADV is incredibly concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will provide additional encouragement to abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a non-profit membership and advocacy organization dedicated to ending domestic violence through legal, legislative, and policy initiatives. The leading voice for domestic violence victims and their advocates in South Carolina, SCCADVASA comprises a network of 23 local non-profit organizations that provide shelter, advocacy, hospital

accompaniment and counseling and legal services to survivors of domestic and sexual violence.

Working with federal, state and local policy makers and domestic and sexual violence advocates throughout the state, SCCADVASA helps identify and promote policies and best practices to advance victim safety. SCCADVASA's broad expertise in the nature and dynamics of domestic and sexual violence and their impact on victims, as well as our trainings for advocates statewide about NNEDV's Safety Net project, which focuses on the intersection of technology and intimate partner abuse and how technology impacts the safety, privacy, accessibility, and civil rights of victims, inform its position on the criminal use of technology as a means of perpetrating domestic and sexual violence.

SCCADVASA is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **Vermont Network Against Domestic and Sexual Violence** is a feminist organization committed to eradicating domestic and sexual violence through advocacy, empowerment and social change. The Vermont Network is a coalition of 14 Member domestic violence and sexual violence Programs located throughout Vermont, and a statewide office located in Montpelier.

VNADV is very concerned that if 18 USC § 875(c) is interpreted to require proof of a subjective intent to threaten, as Petitioner proposes, it will be so very difficult for victims to prove that it will embolden abusers and imperil victims across the country. Allowing this behavior from abusers to continue will also encourage the abuse and send the message that society finds this acceptable and indeed it makes it more likely that these abusers will go even further.

The **Virginia Sexual and Domestic Violence Action Alliance (VSDVAA)** is a not-for-profit organization incorporated in Virginia in 1981 (www.vsdvalliance.org) to create a Virginia free from sexual and domestic violence. We are Virginia's leading voice on sexual and domestic violence. Over the past 30 years, we built an extensive network of agencies and individuals to speak in a unified voice on issues related to sexual and domestic violence. Our membership includes advocates at local accredited domestic and sexual violence service agencies, survivors, attorneys, law enforcement officers, health professionals and community members.

Through our public policy work we strive to strengthen state laws that promote safety for victims and hold offenders accountable. We operate the statewide Virginia Family Violence and Sexual Assault Hotline, which answers thousands of calls each month and offers resources, support and safety planning to people in crisis, family and friends and allied professionals. And we are engaged in a variety of prevention initiatives to reduce risk factors and promote healthy communities and relationships-with the ultimate goal of reducing the incidence and prevalence of both sexual and domestic violence.

The Action Alliance is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as proposed by the Petitioner, will embolden abusers to use technology, such as social media, to continue to threaten, intimidate, and frighten victims-making it more difficult for victims to take action against abusive behavior and protect their safety.

Every day, technology becomes a larger part of all our lives—bringing both benefits and challenges. The same is true for victims of sexual violence, domestic violence, and stalking. While technology has created new ways for victims to reach out for support, it has also created new means for perpetrators of these crimes to threaten and inflict fear in their victims. It is critical that we protect a victims' ability to seek safety and justice through the law—even as we make advances in technology—so that we can continue to hold perpetrators of abuse accountable for their actions regardless of any means, no matter how new, they use to threaten, intimidate, control, or inflict fear in victims.

The **Washington State Coalition Against Domestic Violence (WSCADV)**, is a non-profit statewide membership organization comprised of over 70 organizations and individuals across Washington State committed to ending domestic violence across Washington State. The core commitment of WSCADV is to support domestic violence survivors and emergency shelter and advocacy programs by advocating for laws and public policies that promote safety, justice and autonomy for victims and their children. WSCADV is particularly concerned that if 18 USC § 875(c) is interpreted to require proof that a defendant specifically intended to threaten a victim,

perpetrators that use technology and social media to further their abuse will be able to stalk, abuse, and control their victims with impunity.

The **West Virginia Coalition Against Domestic Violence (WVCADV)** is a not-for-profit organization incorporated in the state of West Virginia (www.wvcadv.org). Founded in 1981, WVCADV's mission, along with the ultimate vision of social justice, is to work to end violence against women through partnerships, advocacy and direct services. The West Virginia Coalition Against Domestic Violence plays an instrumental role in advocating for laws and policies that affect battered women and their children, such as the Violence Against Women Acts of 1994, 2000, and 2005. WVCADV recognizes the critical importance that domestic violence statutes play in the struggle to end domestic violence.

WVCADV is troubled by the interpretation of 18 USC § 875(c) requiring proof of a subjective intent to threaten. Such a requirement will embolden abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

The **End Domestic Abuse WI: the Wisconsin Coalition Against Domestic Violence, Inc. (END ABUSE)** is a non-profit membership and advocacy organization dedicated to ending domestic violence through legal, legislative, and policy initiatives. The leading voice for domestic violence victims and their advocates in Wisconsin, END ABUSE serves the 73 primary purpose domestic violence programs through training and technical assistance.

END ABUSE is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

Through a collective voice, the **Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA)** is committed to provide leadership, education, and systems advocacy to advance social change and end violence. The WCADVSA is a non-profit organization representing the 24 domestic violence and sexual assault advocacy programs in Wyoming. As the leading voice for domestic violence victims and their advocates in Wyoming, the WCADVSA's work includes the following programs: AmeriCorps; Civil Legal Services an Access to Justice; Economic Justice; Organizational an Leadership Development; Primary Prevention; Public Policy; Silent Witness Initiative; Training and Technical Assistance; and Transitional Housing.

The WCADVSA has been an active member of the National Network to End Domestic Violence since the organization's inception. The WCADVSA, along with our sister coalitions, have worked alongside NNEDV for the 1994 enactment and implementation of the Violence Against women Act and subsequent reauthorizations.

The misuse of technology and intimate partner abuse greatly impacts the safety, privacy, accessibility, and civil rights of victims. For example, James Jebidiah Stipe, a former boyfriend of a

Wyoming woman used Craigslist to arrange for a violent rape of her in 2009. (http://articles.latimes.com/2010/jan/11/nation/la-na-rape-craigslist11-2010jan11) Mr. Stipe was sentenced to 60 years in prison.

The WCADVSA is deeply concerned that interpreting 18 USC § 875(c) to require proof of a subjective intent to threaten, as Petitioner proposes, will make it more difficult to protect victims of abuse and to prosecute abusers. Such a requirement will incentivize abusers to use technology, including social media, to taunt, isolate, frighten, threaten and intimidate their victims, forcing them to live a life of crippling fear without recourse to law.

No. 13-983

IN THE

Supreme Court of the United States

ANTHONY D. ELONIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

The Anti-Defamation League (ADL)[1] was founded in 1913 to combat anti-Semitism and other forms of

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the prepara-

discrimination, to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment for all. Today, ADL is one of the world's leading civil and human rights organizations, combating all types of prejudice and working to eradicate hate both online and offline. ADL has long played a leading role in raising awareness about hate on the Internet and working with major industry providers to address the challenge it poses. In September 2014, ADL released Best Practices for Responding to CyberHate, an initiative establishing guideposts for the Internet community to help prevent the spread of hate online.[2] This initiative was embraced by Facebook, Google/YouTube, Microsoft, Twitter, and Yahoo, reflecting the industry's concern about the growing problem of online hate speech, including anti-Semitism, anti-Muslim bigotry, racism, homophobia, misogyny, xenophobia, and other forms of online hate.

ADL is also a leader in developing anti-cyberbullying training, curriculum, and resources for youth, educators, youth providers, and adult family members. After authoring a model cyberbullying prevention statute, ADL created CyberALLY, a cyberbullying prevention program for middle and high school students, and Internet Guidelines for Families to help keep adolescents safe online.

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tion and submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

[2] The Best Practices are available at http://www.adl.org/cyberhatebestpractices.

As a civil rights advocacy organization, ADL is committed to the preservation of democratic freedoms and the constitutional rights that gird them, including the rights to freedom of speech and freedom of expression. ADL's mission and work make it keenly aware of the importance of effectively distinguishing between speech protected by the First Amendment and unlawful true threats. By properly allowing a fact finder to consider the entire context of a case, an objective inquiry achieves this goal.

SUMMARY OF ARGUMENT

Using a reasonable-person, objective inquiry to determine whether threats are "true threats" remains faithful to the purpose of the true threat exception to the First Amendment – protecting individuals from fear of violence and the disruption caused by such fear, while at the same time avoiding unnecessarily chilling speech. The plain language of the statute at issue, 18 U.S.C. § 875(c), makes unlawful "*any* threat to injure the person of another." (emphasis added.) Because the jury in this case found that petitioner's Facebook posts conveyed an objective intent to harm his wife, local law enforcement, elementary school children, and an FBI agent, his conduct plainly fell within the scope of "any threat."

The First Amendment does not change that analysis. This Court long has recognized that the State may punish "true threats," including a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," even when the speaker does not actually intend to carry out the threat. *Virginia v. Black*, 538

U.S. 343, 360 (2003). True threats fall outside the protections of the First Amendment because a prohibition on such speech "protects individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Id.* (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 388 (1992)).

An objective intent inquiry more effectively distinguishes true threats from constitutionally protected speech. As noted, fear of violence and the resulting societal disruption distinguish true threats from protected speech. *Id.* Thus, a test that accurately and effectively identifies true threats should focus on whether the speech at issue creates such fear and disruption. An objective test has this proper focus. It allows a fact finder to consider the full circumstances, such as the impact on the audience and historical context, and to weigh all the evidence, including information about the speaker's state of mind. With all this in mind, a fact finder then determines if the speech at issue has reasonably created the fear and disruption that separates true threats from protected speech. By contrast, improperly focusing on subjective intent treats a subset of disruptive speech – that which lacks proof of subjective intent – as protected speech. Accordingly, by not focusing solely on a speaker's state of mind, an objective inquiry more effectively separates protected speech from true threats.

An objective inquiry does not unnecessarily chill speech. By proscribing speech that instills fear in a target and causes societal disruption, rather than focusing on a hard-to-discern state of mind, an

objective test creates a more predictable standard. This predictability reduces any potential chilling effect. In addition, there is no liability under an objective inquiry for unforeseeable or unreasonable audience reactions.

This Court has never found that the First Amendment requires proof of subjective intent for true threat liability. True threats made with subjective intent are only one "type" of true threat. *Black*, 538 U.S. at 360. A government may choose, as it has in the past, to proscribe only this type of true threat. *See id.*; *Watts v. U.S.*, 394 U.S. 705, 706 (1969). The statute at issue here, however, prohibits "any threat," not just those accompanied by proof of subjective intent. 18 U.S.C. § 875(c). Accordingly, requiring proof of subjective intent would unnecessarily limit the plain language of the statute.

Because an objective test effectively distinguishes between unlawful true threats and protected speech, this Court should affirm.

ARGUMENT

I. TRUE THREATS FALL OUTSIDE FIRST AMENDMENT PROTECTIONS.

Free speech is a cornerstone of American democracy. Our nation's "profound national commitment" to "uninhibited, robust, and wideopen" debate recognizes that public discourse may well be "vehement, caustic [or] unpleasant[]" and yet still be protected by the First Amendment. *Watts*, 394 U.S. at 708. The expression of unpopular ideas or viewpoints is at the heart of our democracy and is rightfully protected by the First Amendment.

First Amendment protections, however, are not absolute. Certain categories of speech 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," and thus fall outside the protections of the First Amendment. *City of St. Paul,* 505 U.S. at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). The government, consistent with the Constitution, may regulate the following categories of speech and expression:

> advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called "fighting words"; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent.

United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (internal citations omitted). "True threats" are on this list; and as this Court has explained, they may be proscribed in order to protect "from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur." *Black,* 538 U.S. at 344; *Watts*, 394 U.S. at 707-08.

True threats are not simply extreme or unpopular opinions. Nor are they directionless or open-ended. They are targeted. They identify a specific individual or group. They intimidate others and prevent them from thinking, acting, and speaking freely. *Black*, 538 U.S. at 359-60; *Watts*, 394 U.S. at 707. By

doing so, true threats instill fear, disrupt society, and absorb law enforcement resources. In order to prevent this fear and societal disruption, a government may prohibit all true threats, not just those made with proof of subjective intent.

II. IT IS MORE DIFFICULT TO DISCERN A SPEAKER'S TRUE INTENT THROUGH NEW MEDIA.

New mediums of communication, such as those at issue here, have changed the way people interact. Today, the world lives both online and offline. While these worlds differ, they are fundamentally interconnected and together make up the full sphere of modern social and public interaction. Indeed, in the Internet age, it is nearly impossible to avoid online communications. From business communications to schoolwork, dating, and friendships, interaction through new media is as much a part of everyday life as face-to-face interaction. Today, it is virtually impossible to function fully "off the grid."

The nature of online interactions – in which people often connect without face-to-face contact, sometimes with fewer than 140 character messages, or with photos that disappear in seconds – is changing the way people communicate information. In this context, discerning a speaker's subjective intent is particularly difficult. New media communications often lack the contextual clues and associated nonverbal communication inherent in face-to-face interaction. For example, body language and facial expressions cannot typically be judged online. Tone is often hard to decipher. There may be no clear distinction between an angry epithet and a lyric rapped to a beat, which a listener would clearly hear

in a face-to-face interaction. Because new media communications are often drafted in private, there are frequently no third-party witnesses to the contemporaneous context of a message. It is, therefore, often more difficult with new media for the audience to distinguish whether a message has been purposefully drafted to intimidate, crafted as an artistic expression, or written in jest.

In addition to opening new lines of communication, new media has also lowered many of the traditional barriers to intimidation and other true threats. With new media, an individual can threaten and harass from the comfort of home. Because it is easier to act outside of the public's view, there is less pressure to comport with traditional social norms that may have previously curtailed truly threatening behavior. *See, e.g.,* L. B. Lidsky, *Incendiary Speech and Social Media*, 44 Tex. Tech. L. Rev. 147, 149 (2011) (noting that "the actual or practical anonymity" of social media communications "fosters a sense of disinhibition in those contemplating violence"). Further, connecting with those that share hateful perspectives has become far easier in the Internet age. *See, e.g.*, A. H. Foxman & C. Wolf, *Viral Hate: Containing Its Spread on the Internet*, 14 (2013) ("Don Black, former grand dragon of the Ku Klux Klan, noted that, 'as far as recruiting, [the Internet has] been the biggest breakthrough I've seen in the 30 years I've been involved in [white nationalism].'"). This leads to validation of hate and empowerment of tendencies to intimidate or act on violent thoughts. *See id.* at 29-30; *see also* Lidsky, *Incendiary Speech and Social Media*, *supra*, at 149 (noting that interactions through subcommunities on social media "may

serve to foster group violence or to 'normalize' individual violence"). Online supporters often encourage or enable would-be harassers to intimidate and threaten. *See, e.g.*, Lidsky, *Incendiary Speech and Social Media*, *supra*, at 157.

New media communications have lower cost, greater reach and specificity, and can be more persistent and pervasive. An attacker can make contact with a specific target, virtually anywhere, without ever having to know his or her physical location. An attacker has no need to track a victim, travel any distance, or expend effort ensuring that the intimidation reaches its intended target. With new media communications, the message instantly finds its target, regardless of time, distance, or location. And with social media, such as Facebook, an individual can threaten a target privately, or in full view of his or her peers. In these ways, the Internet has lowered the barriers to issuing a true threat.

And yet, in many ways, these new social media interactions mirror traditional social interactions. With new media, one can choose to interact with the public at large such as with a tweet on Twitter, much as in a town square or a shopping mall; with a reduced audience on a Facebook wall, such as at a private party; or with an exclusive audience through a personal message, such as in a private conversation. Unlike older forms of media, such as television broadcasting, new media can be as widely broadcast or as directly targeted as a user wishes.

Thus, true threats via new media, as much as those made face-to-face, can induce fear in a target, divert societal resources in the form of law enforcement

time and effort, and put targets in jeopardy of actual physical injury. *See, e.g.*, S. K. Schneider, *et al.*, *Cyberbullying, School Bullying, and Psychological Distress: A Regional Census of High School Students*, 102 Am. J. Public Health 171, 175 (2012) (finding that "victims of cyberbullying alone reported more distress than did school bullying victims alone"); *see also* D. K. Citron, *Intermediaries and Hate Speech: Fostering Digital Citizenship for our Information Age*, 91 B.U. L. Rev. 1435, 1448-50 (2011) (discussing examples of the disruptive effect of threatening behavior through new media); D.K. Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 69-81 (2009) (same). Indeed, because threats through new media communications can be virtually omnipresent, they are often more damaging than those made through traditional mediums. Cyberbullying, for example, can become so pervasive that it can lead to psychological damages and self harm. *See, e.g.*, S. K. Schneider, *et al.*, *Cyberbulling, School Bullying, and Psychological Distress*, *supra*, at 175 (finding that "there is a robust relationship between cyberbullying victimization and all forms of psychological distress along the continuum from depression to suicide attempts"); *see also* C. Hay *et al.*, *Bully Victimization and Adolescent Self-Harm: Testing Hypothesis from General Strain Theory*, 39 J. Youth & Adolescence 5, 446 (2010); S. Hinduja *et al.*, *Bullying, Cyberbullying, and Suicide*, 14 Archives of Suicide Research 3, 206 (2010). It is this kind of targeted fear and disruption that the true threat exception was created to prevent.

Because of these ever-changing methods of communication, evolving social norms, difficulties dis-

cerning a speaker's intent, and profound impacts on a target, it is crucial to fully consider all context when evaluating threatening speech though new media. Only by doing so can speech that causes fear and disruption be properly separated from protected speech.

III. AN OBJECTIVE INQUIRY MORE EFFECTIVELY DISTINGUISHES TRUE THREATS FROM PROTECTED SPEECH, WITHOUT UNNECESSARILY CHILLING SPEECH.

The First Amendment does not require this Court to read subjective intent into the statute at issue here. To the contrary, an objective inquiry fulfills the purpose of the true threat exception by effectively distinguishing speech that causes fear and disruption from protected speech, is true to the plain language of the statute, and aligns with this Court's precedents.

A. Neither The Statute Nor This Court's Precedent Require Proof Of The Defendant's Subjective Intent To Threaten.

Congress elected not to include a subjective intent requirement in 18 U.S.C. § 875(c). This Court should refrain from reading one into the statute. The statute states:

> 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) (emphases added). Unlike the statutes at issue in *Watts* and *Black*, the plain language of Section 875(c) does not require proof of subjective intent. *See Watts*, 394 U.S. at 706 (prohibiting, inter alia, "knowingly and willfully" threatening the President); *Black*, 538 U.S. at 348 (prohibiting cross burning "with the intent of intimidating any person or group of persons"). Here, the statute merely requires transmission of "any threat."

This Court has never held that the First Amendment requires proof of subjective intent for true threat liability. In *Black*, this Court resolved a different question of intent raised by the statute. Unlike the statute at issue in this case, the statute in *Black* explicitly required proof of subjective intent and provided that "any" cross burning was "prima facie evidence of intent to intimidate." 538 U.S. at 348. This Court viewed and discussed the circumstances of that case through the lens of the statutorily required intent. It had no need to address whether the First Amendment separately required proof of subjective intent because the statute set the necessary level of intent.

Further, this Court noted that true threats made with subjective intent were only a "type" of true threat. *See Black*, 538 U.S. at 360 ("a *type* of true threat" is one made "with the intent of placing the victim in fear of bodily harm or death" and "'[t]rue threats' *encompass* those statements where the speaker means to communicate" a threat) (emphases added). This Court did not find that this was the only type of true threat, nor all that true threats "encompass." Indeed, this Court reaffirmed that the entire class of true threats are proscribable. *Id.* at

361-62. Thus, in order to fully protect from the fear and disruption that true threats create, the government may prohibit all "types" of true threats, not just those accompanied by proof of subjective intent. The statute at issue in this case does just that, proscribing "any threat." 18 U.S.C. § 875(c). While "any threat" certainly includes true threats made with subjective intent, the plain meaning is not limited to this type of true threat. Thus, requiring proof of subjective intent would stray from the plain language of the statute.

B. An Objective Inquiry Draws A Clear Distinction Between Protected Speech And True Threats And Allows A Fact Finder To Fully Consider All The Circumstances.

Distinguishing between true threats and protected speech requires a highly factual, case-by-case determination. *Watts*, 394 U.S. at 707-08; *Black*, 538 U.S. at 364-67. In *Black*, this Court found that prejudging evidence would "ignore[ ] all of the contextual factors" related to the alleged threat and therefore "blur[ ] the line" between protected speech and true threats. *Id.* at 365, 367 (faulting statute at issue for deeming a cross burning as always being prima facie evidence of intent to threaten). *Black* explained that placing special evidentiary weight on one piece of evidence, in every case, would result in not properly considering all the circumstances. *Id.* at 367. There, the Court considered the full context, including the history of cross burning and related violence, the location of the land where the cross was burned, the likely audience, and whether the accused had permission to enter the land.

In *Watts*, the accused threatened the President but this Court examined the context and concluded that it was not a "true threat." *Watts*, 394 U.S. at 708. This Court considered the location and timing of the speech, the audience's reaction, the speaker's tone and demeanor, the words used, and the location of the target. In *Watts*, the threat was not communicated to the target. The President was elsewhere and was highly unlikely to ever hear the potentially threatening speech, and consequently, highly unlikely to be placed in fear. Taking all this together, the Court found that the speaker's actions were not a true threat. *Id.* at 708. Thus, when evaluating a true threat, this Court has repeatedly emphasized the importance of fully considering all the circumstances, such as audience reaction and historical context, and warned against prejudging the evidence. *Id.*; *Black*, 383 U.S. at 367, 365.

An objective inquiry aligns with this precedent and accurately separates targeted speech that causes fear and disruption from protected speech. Fear of physical harm and the resulting societal disruption separate true threats from protected speech, not a speaker's state of mind. An objective inquiry is flexible and focuses on these actual, objective differences. An objective inquiry allows the fact finder to consider the speaker's intent as part of the totality of the evidence. But it does not require the fact finder to consider evidence about the defendant's state of mind to the exclusion of other evidence about context, history, and impact on the target. Accordingly, an objective inquiry views every case within its own context and clearly prohibits targeted speech that causes fear and disruption.

By contrast, a subjective inquiry would allow a subset of threatening speech – that which lacks proof of subjective intent – to avoid liability, despite instilling fear in a target and disrupting society. By not focusing solely on a speaker's state of mind, an objective inquiry identifies all disruptive speech, thereby better separating protected speech from true threats.

An objective inquiry is particularly appropriate in the context of new media communications. As noted, new media communications often lack non-verbal indicia of intent and are frequently drafted in private, leaving the target (and later the finder of fact) very little record beyond the written communication itself. There is no face-to-face interaction to discern tone, volume, facial expression, body language, or other traditional indicia of intent. Thus, individuals have the perfect opportunity to craft messages that engender fear in a specific target and force law enforcement to divert resources to prevent physical harm, but make it difficult to interpret a speaker's state of mind. Forcing a fact finder to determine a speaker's state of mind in this manner requires a great amount of speculation and inference, "blur[ring] the line" between true threats and free speech. *Black*, 538 U.S. at 365.

By creating an accurate test to distinguish protected speech from that which causes targeted fear and disruption, the objective standard does not criminalize speech that should rightly be protected. True threats are undeserving of First Amendment protections because of the significant tolls they take on the target and society at large. *Watts*, 394 U.S. at 707-08; *Black*, 538 U.S. at 359-60. When a reasonable

person targeted by a true threat becomes afraid for his or her physical safety and engages law enforcement for protection, the costs are the same regardless of whether the speaker's intent is provable in a court of law. Under the objective standard, the finder of fact must effectively determine whether a reasonable person in the defendant's position knew or should have known that his or her actions would engender fear in the target. This does not subject defendants to the whims of an "eggshell" victim or punish speech that a reasonable person could not foresee would instill fear. Rather, it proscribes only that speech that the speaker should have known would exact the interpersonal and societal tolls that the true threats exception was intended to address.

The objective standard clearly distinguishes between protected speech and true threats, taking into account the impact on the target and society at large. In so doing, it effectively fulfills the purpose of the true threat exception by deterring the targeted fear and societal disruption that true threats create.

CONCLUSION

For the foregoing reasons, and for those in Respondent's brief, the Third Circuit's judgment should be affirmed.

Respectfully submitted,

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Cyril K. RICHARD, Petitioner,
v.
Boyd ANDREW, et al., Respondents.

Cause No. CV 15–63–M–DLC–JCL
|
Signed November 10, 2015

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FINDINGS AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

Jeremiah C. Lynch, United States Magistrate Judge

***1** This case comes before the Court on Petitioner Cyril K. Richard's application for writ of habeas corpus under 28 U.S.C. § 2254. Richard is a state prisoner proceeding pro se.

On June 30, 2015, the Court ordered Respondents ("the State") to file certain documents from the record of proceedings in the state courts. Order (Doc. 5) at 2–3 ¶¶ 2–5. The State complied on July 24, 2015.

I. Preliminary Review

The petition is subject to preliminary review. *See* Rule 4, Rules Governing Section 2254 Cases in the United States District Courts ("§ 2254 Rules"). If, on the face of the petition and any attached exhibits, it is not clear whether the petitioner is entitled to relief, the judge "must order the respondent to file an answer, motion, or other response ... or to take other action." As noted, the Court directed the State to file certain documents from the record of the proceedings in state court.

A petitioner is "expected to state facts that point to a real possibility of constitutional error." Rule 4, § 2254 Rules, advisory committee's note (1976) (quotation marks omitted) (quoting *Aubut v. Maine,* 431 F.2d 688, 689 (1st Cir.1970)); *see also Calderon v. United States Dist. Court,* 98 F.3d 1102, 1109 (9th Cir.1996) (Schroeder, C.J., concurring). "[I]t is the duty of the court to ... eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee Note (1976), Rule 4, § 2254 Rules.

Considering the claims in Richard's federal petition in light of the state court record, it is clear that he is not entitled to relief. There is no need to obtain an Answer or motion from the State.

II. Background

Richard was originally charged with one count of deliberate homicide, a violation of Mont.Code Ann. § 45–5–102(1)(a) (2007), and one count of tampering with evidence, a violation of Mont.Code Ann. § 45–7–207(1)(a), in connection with the death of Michael Meadows. Information (Doc. 7–3) at 1–2. Pursuant to a plea agreement, *see* Plea Agreement (Doc. 7–5), Richard pled guilty to an Amended Information charging him with one count of negligent homicide, a violation of Mont.Code Ann. § 45–5–104, and two counts of tampering with evidence. *See* Am. Information (Doc. 7–4) at 1–2; Minutes (Doc. 7–6). Richard also waived the right to appeal and the right to sentence review, and the right to pursue postconviction relief, including claims of ineffective assistance of counsel. *See* Plea Agreement (Doc. 705) at 8. On June 16, 2010, Richard was sentenced to a total of 40 years in prison, with 20 of those years suspended. Written judgment was entered on June 24, 2010. Judgment (Doc. 7–9) at 2. Richard did not appeal. Richard's conviction became final on August 23, 2010. *Gonzalez v. Thaler,* —— U.S. ——, 132 S.Ct. 641, 653–54 (2012).

On August 16, 2011, Richard filed a petition for postconviction relief in the trial court. He alleged that he could not be required to register as a violent offender, despite agreeing to do so in the plea agreement. The trial court denied relief, and Richard appealed. On October 30, 2012, the Montana Supreme Court affirmed the denial of relief. Order at 5 ¶ 11, *Richard v. State,* No. DA 12–0213 (Mont. Oct. 30, 2012). A timely petition for rehearing was denied on December 18, 2012. Order at 1, *Richard,* No. DA 12–0213 (Mont. Dec. 18, 2012).

***2** On March 19, 2015, Richard filed a petition for writ of habeas corpus in the Montana Supreme Court. He asserted that he acted in self-defense and therefore is actually innocent of negligent or any other homicide; that he should, under principles of double jeopardy, have been convicted of only one count of tampering with evidence; the trial court erred in denying his motion to suppress; and that his sentence is cruel and unusual. *See* State Habeas Pet. (Doc. 1–1) at 5–9, *Richard v. Berkebile*, No. OP 15–0172 (Mont. Mar. 19, 2015).[1] On March 31, 2015, the Montana Supreme Court dismissed his habeas petition on procedural grounds because the writ of habeas corpus is not available under Montana law to challenge the validity of a criminal judgment. *See* Order at 2, *Richard*, No. OP 15–0172 (Mont. Mar. 31, 2015); Mont.Code Ann. § 46–22–101(2).

Richard filed his federal petition for writ of habeas corpus on May 25, 2015. Pet. (Doc. 1) at 8; Pet'r Decl. ¶ C; *Houston v. Lack,* 487 U.S. 266, 270–71 (1988) (establishing prison mailbox rule).

III. Claims and Analysis

Richard attached his state habeas petition to his federal petition. Although his first two claims are the same in each petition, it is not clear whether he intends to allege, in federal court, the third and fourth claims that are alleged in his state petition. In an abundance of caution, the Court will assume that is what he meant to do.

All of Richard's claims are untimely by about two and a half years. They are also procedurally defaulted, because Richard never presented them in a legally cognizable form in the courts of the State of Montana. Notwithstanding these obvious procedural defects, it is clear that Richard's claims lack merit. It is more efficient to address them on that basis. *See, e.g., Herbst v. Cook,* 260 F.3d 1039, 1043–44 (9th Cir.2001); *Boyd v. Thompson,* 147 F.3d 1124, 1128 (9th Cir.1998).

Richard's claims are reorganized here, but all are addressed.

A. Actual Innocence

Richard alleges that he is actually innocent of homicide because he acted in self-defense. Pet. at 14 ¶ 13B.[2] But "[f]ederal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle,* 463 U.S. 880, 887 (1983). "Once a defendant has been afforded a fair trial[3] and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins,* 506 U.S. 390, 399 (1993). Assuming a State may not hold in custody a person who demonstrates he is innocent of the crime of conviction, *id.* at 400–02, because Richard was convicted, he now has the burden of proving that *no* rational juror could find he did *not* act in self-defense.[4] At trial, Richard would have had to prove, by a preponderance of the evidence, that he used "force likely to cause death or serious bodily harm" in the "reasonabl[e] belie[f] that the force [was] necessary to prevent imminent death or serious bodily harm" to himself. Mont.Code Ann. § 45–3–102, –115 (2007). All available evidence, including any that might be ruled inadmissible, must be considered. *Schlup v. Delo,* 513 U.S. 298, 328 (1995).

***3** Richard's ability to prove his affirmative defense would have been gravely undermined by other available testimony and evidence. Richard told police that he broke his right arm when Meadows pushed him into a rocking chair, causing him to fall to the ground. *See* Paul Aff. in Supp. of Information (Doc. 7–2) ("Paul Aff.") at 4; *see also* Richard Aff. at 4 (Doc. 1–1 at 23); Emergency Room Report at 1–2 (Doc. 1–1 at 17–18). Richard also said that he wrested the pocketknife away from Meadows, who nonetheless charged at him again, unarmed. Richard then stabbed Meadows. He passed out for a period of time, then, when he regained consciousness, he panicked, loaded Meadows' body into his car, stopped briefly for gas and cigarettes, drove to a location west of Missoula, and dumped Meadows' body in the Clark Fork River. Richard Aff. at 4–6; Paul Aff. at 4–5, 6, 7. But a surveillance camera at the gas station where Richard stopped for gas and cigarettes showed him using his right arm to pump gas and make payment while, according to Richard, Meadows lay dead in the car. The clerk also recalled that Richard had fresh blood on his forehead and hands. *See* Paul Aff. at 5–6. As for Richard's undeniably broken arm, a neighbor heard a man scream, as if in great pain, at 5:00 a.m., and again, but more faintly, sometime later. *Id.* at 6–7. This was the time when Richard, according to his own account, was attempting to clean up the significant quantity of blood that spilled from Meadows' body as Richard conveyed it to his car.

If the State had introduced Richard's statement to police, the surveillance footage, the clerk's testimony, and the neighbor's testimony, it is unlikely that *all* reasonable jurors would agree Richard probably acted in self-defense. Some might; but others might consider the State's testimony and evidence, along with Richard's failure to call 911 and his attempt to

conceal Meadows' death, as evidence that he did not act in self-defense and/or did not truly or reasonably fear death or serious injury at Meadows' hands.

Richard adduces no new evidence. Only he and Meadows were present at the altercation. Meadows cannot testify, and Richard's incentive to testify favorably to himself is clear and obvious enough that any reasonable juror might disbelieve what he says. Therefore, Richard has no realistic prospect of proving, by a preponderance of the evidence, that *no* reasonable juror would find him guilty beyond reasonable doubt. His first claim for relief should be denied.

B. Double Jeopardy

Richard asserts that he was guilty of only one count of tampering with evidence because his evidence-tampering was one continuous course of conduct. Pet. at 4 ¶ 13A; *see also, e.g., Blockburger v. United States,* 284 U.S. 299, 304 (1932); *State ex rel. Booth v. Twenty–First Jud. Dist. Court,* 972 P.2d 325, 328–31 ¶¶ 11–25 (Mont.1998); Mont.Code Ann. §§ 46–1–202(23).

But Richard charge-bargained. In the Amended Information, the State added a second charge of tampering with evidence, dropped the charge of deliberate homicide, and added a charge of negligent homicide. Plea Agreement (Doc. 7–5) at 1–2. The maximum penalty for deliberate homicide was death, or life in prison, or ten to 100 years. Mont.Code Ann. § 45–5–102(2) (2007). The maximum penalty for evidence tampering was ten years. *Id.* § –7–207(2). Under the original Information, therefore, the maximum possible sentence Richard faced was death, life in prison plus ten years, or 110 years. Under the Amended Information, the maximum possible sentence Richard faced was 40 years.

"When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson,* 411 U.S. 258, 267 (1973). By agreeing to plead guilty to the Amended Information, Richard waived his protection against double jeopardy. In exchange, he received a 100% guarantee he would not be sentenced to more than 40 years in prison; and, in fact, although he received a 40–year sentence, 20 of those years were suspended. There is no reason to believe Richard could have obtained the benefits of the plea agreement without waiving whatever double jeopardy protection he would have had against a second charge of evidence tampering. Richard's second claim for relief should be denied.

C. Motion to Suppress

***4** Richard claims the trial court erred in denying his motion to suppress the statements he made to police officers after his release from the hospital, when he was "highly intoxicated, heavily medicated ... sever[e]ly injured, suffered from PTSD, [was] sleep deprived and had no lawyer present." State Habeas Pet. (Doc. 1–1) at 7. For his relief, he asks that his "statements to detectives be suppressed from the court records and be inadmiss[i]ble in any court proceedings." *Id.*

Again, because Richard "solemnly admitted in open court that he is in fact guilty of the offense with which he is charged," he waived "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Henderson,* 411 U.S. at 267. Richard specifically and "expressly" waived his right to appeal, Plea Agreement (Doc. 7–5) at 8, including, but not limited to, his right to appeal the trial court's denial of his motion to suppress. And again, there is no reason to believe Richard could have obtained the benefit of the plea agreement without waiving his right to appeal the denial of his motion to suppress.

This claim should be denied.

D. Cruel and Unusual Punishment

Finally, Richard avers that his sentence of 40 years, with 20 suspended, is cruel and unusual in light of other States' imposition of significantly lesser terms for involuntary manslaughter. He points to California and the United States, jurisdictions that he avers impose penalties of two to five years for involuntary manslaughter. Richard concludes:

> Considering petitioner's case contains extensive mitigating factors present, in addition to substantial verifiable claims of self-defense and the justifiable use of force, the sentence imposed is clearly excessive. Factoring these profound mitigating circumstances, the sentence [is] disproportionate, and "a gross miscarriage of justice." ...
>
> Therefore, petitioner asks that the Court grant the following relief: That the petitioner's sentence be corrected, by reducing it to a more reasonable proportionate term.

State Habeas Pet. (Doc. 1–1) at 8–9.

This claim is misguided. First, federal habeas courts do not reconsider or re-weigh the factors that contribute to state prisoners' sentences.

Second, Richard's sentence for negligent homicide is 20 years, not 40. Judgment (Doc 7–9) at 2; Mont.Code Ann. § 45–5–104(2). Half his total 40–year term was suspended, and his parole eligibility was not restricted. *Cf. Solem v. Helm,* 463 U.S. 277, 300–03 (1983). A Montana prisoner may apply for parole after he serves one-fourth of his prison term. *See* Mont.Code Ann. § 46–23–201(3). As a result, Richard will be eligible for parole after he serves five years, representing two and a half years on the negligent homicide charge.

Third, although this claim involves the sentence, it remains significant that Richard bargained for the negligent homicide charge. While negligent homicide in Montana might be comparable to involuntary manslaughter in California, cross-jurisdictional comparisons of available penalties are complicated. States define offenses differently. For instance, a California prosecutor could have charged Richard with involuntary manslaughter, but Richard might also have been charged with second-degree murder, *see, e.g., People v. McNally,* 187 Cal.Rptr.3d 391, 394, 396 (Cal.Ct.App. May 21, 2015), which carries a penalty of 25 years to life, Cal.Penal Code § 190(b). In other states, too, Richard might have been charged with offenses involving criminal negligence and entailing penalties similar to Montana's 20–year maximum for negligent homicide. *See, e.g.,* Fla.Rev.Stat. §§ 782.07(1), 775.082(3)(d)) (15 years for killing by culpable negligence); S.D. Codified Laws §§ 22–6–1(3), –16–15(3) (life for unintentional killing with weapon); Tex. Penal Code Ann. § 12.33(a) 5.19.04(b) (20 years for manslaughter); Wash. Rev.Code §§ 9A.20.021(1)(b), –.32.060(1)(a) (life for reckless killing), -.070 (10 years for criminally negligent killing); Wyo. Stat. Ann. §§ 6–2–105(b), –109(a)(ii) (20 years for voluntary and involuntary manslaughter, or 30 years if victim was pregnant).

***5** Fourth, also related to the charge-bargaining point, Richard agreed that he would recommend the statutory maximum sentence of 20 years for negligent homicide and 10 years on each witness tampering charge, with all terms to run concurrently and all time suspended, for a total sentence of 20 years suspended. *See* Plea Agreement (Doc. 7–5) at 2. His Eighth Amendment claim was, in effect, also waived by his plea agreement. There is no reason to think he could have obtained the benefit of the plea bargain without subjecting himself to 40 years in prison with no suspended time, as the State recommended, *id.,* but did not obtain.

This claim should be denied.

IV. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Proceedings. A COA should issue as to those claims on which the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell,* 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)).

Richard never fairly presented to the state courts any of the claims in his federal petition, and the federal petition itself was filed about two and a half years after the limitations period expired. More fundamentally, however, Richard's claims for relief overlook the most important fact about his case: there was a real prospect a jury would convict him of deliberate homicide. Richard reached a favorable plea agreement with the State; the agreement substituted negligent homicide and an additional evidence-tampering charge for the deliberate homicide charge, reducing Richard's sentencing exposure from life or 120 years to just 40 years. To obtain the considerable benefit of this bargain, Richard waived his potential double jeopardy objection to the second evidence-tampering charge, his right to appeal the trial court's denial of his motion to suppress, and any argument he might otherwise have had that a 20–year sentence for negligent homicide is cruel and unusual. Although Richard now claims he is actually innocent because he acted in self-defense, he offered the self-defense explanation immediately upon his arrest. His account was contradicted in significant respects. He was not particularly likely to prevail on self-defense at trial, and at this point, it is highly unlikely that *all* reasonable jurors would agree he probably acted in self-defense.

Reasonable jurists would not find that Richard's claims have merit. There is no reason to encourage further proceedings. A COA should be denied.

Based on the foregoing, the Court enters the following:

ORDER

1. Richard's petition (Docs.1, 1–1) should be DENIED on the merits.

2. The Clerk of Court should be directed to enter by separate document a judgment in favor of Respondents and against Petitioner.

3. A certificate of appealability should be DENIED.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Richard may object to this Findings and Recommendation within 14 days.[5] 28 U.S.C. § 636(b)(1). Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

***6** *Richard must immediately notify the Court of any change in his mailing address by filing a "Notice of Change of Address."* Failure to do so may result in dismissal of his case without notice to him.

All Citations

Not Reported in Fed. Supp., 2015 WL 9855880

Footnotes

1 This petition and other documents filed in or by the Montana Supreme Court are available on the court's website, http://supremecourtdocket.mt.gov (accessed Nov. 5, 2015). Page five is missing from Richard's postconviction petition as posted on the website, but it is included with his federal petition.

2 Richard claims his conviction violates the Second Amendment, which protects Richard's right to "keep and bear Arms," U./S. Const. amend. II, presumably including a pocketknife. *See, e.g., District of Columbia v. Heller,* 554 U.S. 570, 581–82 (2008) (defining "Arms" as " 'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another' ") (quoting Timothy Cunningham, 1 *A New and Complete Law Dictionary* (1771)). While it is clear the Second Amendment does not license anyone "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller,* 554 U.S. at 626, it is not clear exactly what is and is not prohibited. For instance, while a municipality may not implement a "ban on handgun possession in the home" or a "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense," *id.* at 636, it will still be the case that "some measures regulating handguns" will be constitutionally acceptable.

Richard might, therefore, raise a federal question as to whether Montana's law on justified use of force runs afoul of the Second Amendment. Without suggesting that any such argument would have merit, it is enough to point out that he does not raise that question. Instead, he claims he "acted within" Montana's laws authorizing use of force. *See* Pet. at 5 ¶ 13B(i). This is a claim of actual innocence, not a claim alleging a Second Amendment violation.

3 Richard's other claims for relief allege, in one way or another, he did not receive a fair trial. They must be dealt with on their own merits. In this claim, Richard asserts that he is entitled to federal habeas relief because he is innocent.

4 The *Herrera* Court did not expressly decide what the burden of proof should be, but one year later, in *Schlup v. Delo,* 513 U.S. 298 (1995), the Court held that a *Herrera* claim would have to meet a higher standard than a *Schlup* claim. *Schlup* required the petitioner to show, by a preponderance of the evidence, that no reasonable juror would convict him in light of the new evidence as well as all the other evidence relevant to the case. *See Schlup,* 513 U.S. at 316, 32728. Therefore, it appears the *Herrera* standard requires a petitioner to show clear and convincing evidence that no reasonable juror would convict him. Richard is not entitled to relief under either standard.

5 As this deadline allows a party to act within 14 days after the Findings and Recommendation is "served," Fed.R.Civ.P. 6(d) applies, and three days are added after the time would otherwise expire.

End of Document

DIGEST

OF THE

LAWS OF NEW JERSEY.

BY LUCIUS Q. C. ELMER.

FOURTH EDITION,

CONTAINING ALL THE LAWS OF GENERAL APPLICATION, NOW IN FORCE,

FROM 1709 TO 1868 INCLUSIVE,

WITH THE RULES AND DECISIONS OF THE COURTS.

BY JOHN T. NIXON.

Published by Authority of the Legislature.

NEWARK, N. J.:
MARTIN R. DENNIS & CO.
1868.

man, woman, or child from this state into another state or country, or shall spirit, persuade, or entice any child within the age of fourteen years, to leave his or her father, mother, or guardian, or other person or persons intrusted with the care of such child, and the same child shall secrete and conceal, then the person so offending in any of the premises, and his or her procurers, shall be judged to be guilty of a high misdemeanor, and, on conviction, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labor, not exceeding five years, or both.

63. If any person, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intent to kill, maim, or disfigure, shall cut out and disable the tongue, put out an eye, cut off or slit a lip, cut off, slit, or destroy the nose, or cut off or disable any limb or member of another, wilfully and on purpose, every person so offending shall, on conviction, be deemed guilty of a misdemeanor, and be punished by imprisonment at hard labor not exceeding seven years, or by a fine not exceeding one thousand dollars, or both.

64. If any person shall, by word, message, letter, or any other way, challenge another to fight a duel, with a rapier or small-sword, back-sword, pistol, or other dangerous weapon, or shall accept a challenge, although no duel be fought, or knowingly be the bearer of such challenge, or shall any way abet, prompt, encourage, persuade, seduce, or cause any person to fight a duel, or to challenge another to fight such duel, every person so offending shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding five hundred dollars, or imprisonment at hard labor, not exceeding two years, or both: *And further*, if any person shall engage in, and fight a duel with another, with a rapier, or small-sword, back-sword, pistol or other dangerous weapon, although death does not thereby ensue, or shall be second in any such duel, then and in such case, every person so offending shall be adjudged to be guilty of a high misdemeanor, and, on conviction, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labor, not exceeding four years, or both; and shall not, after such conviction, hold any office of profit or trust under this state.

65. If any person shall knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or sign, with a fictitious name, any letter or letters threatening to accuse any person of a crime of an indictable nature by the laws of this state, with intent to extort from him or her any moneys, wares, merchandise, goods, or chattels, or other valuable thing, or demanding money, goods, or chattels, or other valuable thing, or threatening to maim, wound, kill, or murder any person, or to burn his or her house, out-house, barn, or other building, or stack or stacks of corn, grain or hay, though no money, goods or chattels, or other valuable things, be demanded by such letter or writing, then every person so offending shall be deemed guilty of a misdemeanor, and, on conviction, shall be
*173] *punished by fine, not exceeding three hundred dollars, or imprisonment at hard labor, not exceeding nine months, or both.

66. If any person shall steal, or shall rip, cut, or break, with intent to steal, any lead or iron bar, iron rail, iron gate, or iron palisado, or any lock fixed to any dwelling-house, out-house, stable, or any other building, or shall pull, cut, gather, or take away, with intent to steal, any flax, grass, or indian corn, wheat, rye, barley, oats, or grain of any kind, standing and growing, of another, then every person offending in any of the premises shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine, not exceeding fifty dollars, or imprisonment at hard labor, not exceeding nine months, or both.

67. If any person shall dig, pull up, pick, or gather, with intent to steal any turnips, potatoes, cabbage, parsnips, carrots, peas, beans, muskmelons, watermelons, apples, peaches, plums, cherries, or other roots, vegetables, or fruit of any kind, standing or growing, of another, under the value of twenty dollars, every person so offending shall be deemed guilty of a misdemeanor, and on conviction, shall be punished by fine, not exceeding forty dollars, or imprisonment in the county jail, not exceeding three months, or both: and that every

REVISED STATUTES

OF THE

STATE OF NEW-JERSEY.

PASSED 1874.

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1874.

bidden or declared to be unlawful by this section, he shall be deemed and taken to be guilty of a misdemeanor, and on conviction thereof shall be punished by fine or imprisonment, or both, at the discretion of the court before which such conviction shall be had; *provided*, that in no case shall such fine exceed the sum of two hundred and fifty dollars, or such imprisonment the term of six months.

B—Against the Public Peace.

31. If any person shall, by word, message, letter, or any other way, challenge another to fight a duel, with a rapier, or small sword, back-sword, pistol or other dangerous weapon, or shall accept a challenge, although no duel be fought, or knowingly be the bearer of such challenge, or shall any way abet, prompt, encourage, persuade, seduce, or cause any person to fight a duel, or to challenge another to fight such duel, every person so offending shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine not exceeding five hundred dollars, or imprisonment at hard labor, not exceeding two years, or both; *and further*, if any person shall engage in, and fight a duel with another, with a rapier, or small-sword, back-sword, pistol or other dangerous weapon, although death does not thereby ensue, or shall be a second in any such duel, then and in such case, every person so offending shall be adjudged to be guilty of a high misdemeanor, and on conviction shall be punished by fine, not exceeding one thousand dollars, or imprisonment, at hard labor, not exceeding four years, or both; and shall not, after such conviction, hold any office of profit or trust under this state.

32. If any person shall knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or sign, with a fictitious name, any letter or letters threatening to accuse any person of a crime of an indictable nature by the laws of this state, with intent to extort from him or her any moneys, wares, merchandise, goods, or chattels, or other valuable thing, or demanding money, goods or chattels, or other valuable thing, or threatening to maim, wound, kill or murder any person, or to burn his or her house, out-house, barn, or other building, or

stack or stacks of corn, grain or hay, or to do any civil injury to any person, or to his property, though no money, goods or chattels, or other valuable things, be demanded by such letter or writing, then every person so offending shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine, not exceeding three hundred dollars, or imprisonment at hard labor, not exceeding nine months, or both.

33. Every person who shall be engaged in any fight or combat, with fists, commonly denominated prize fighting, whether such fight or combat be for money or any other valuable thing, or merely to test the skill or bodily powers of the pugilists or combatants, and every person who shall be aiding, assisting, or abetting, in any such fight or combat, shall be deemed guilty of a high misdemeanor, and on conviction thereof, shall be punished by imprisonment at hard labor, not exceeding two years, or by fine, not exceeding one thousand dollars, or both.

34. If any captain, commandant, or owner of any steamboat, or other vessel shall knowingly permit such boat or vessel to be used in, or for, the conveyance or transportation of persons into this state, for the purpose of being engaged in, or aiding, assisting, abetting or witnessing any such fight or combat as is mentioned in the preceding section of this act, he or she shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by imprisonment at hard labor, not exceeding two years, or by fine, not exceeding five hundred dollars, or both.

35. Every person who shall be present at any such fight or combat, whether coming from a foreign state or not, for the purpose of witnessing the same, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by imprisonment at hard labor, not exceeding one year, or by fine, not exceeding two hundred dollars, or both.

36. If any person or persons do or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder or hurt any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation directed to be made by the act of this state entitled "An act to prevent routs, riots, and unlawful assemblies,"

New Jersey. Laws, statutes, etc. Revised statutes

COMPILED STATUTES

OF

NEW JERSEY

PUBLISHED UNDER THE
AUTHORITY OF THE LEGISLATURE BY VIRTUE OF
AN ACT APPROVED APRIL 12, 1910

IN FIVE VOLUMES
VOLUME II

CLAMS AND OYSTERS—INTERSTATE PARK

NEWARK, N. J.
SONEY & SAGE
1911

eral employés to combine and notify their employer that unless he discharges certain enumerated persons they will, in a body, quit his employment. State v. Donaldson, 32 L. 151.

The statute, in requiring an overt act, does not require full execution of the conspiracy in order to make it punishable. State v. Hickling, 41 L. 208.

Liability for acts of co-conspirators.—Where a combination to perpetrate a particular fraud is proved, evidence of a conversation with the parties, although all might not have been present during the whole of the conversation, is good against all. Patten v. Freeman, 1 L. 113. So, if an individual connect himself with a conspiracy, it is no defense to say that the whole plot was concocted before he became an associate. By joining them and aiding in the execution of their plan, he adopts their prior acts and declarations. Den, Stewart v. Johnson, 18 L. 90.

Conspiracy to commit crime.—An indictment charged defendants with conspiring to pervert and obstruct the administration of the election laws by doing certain acts with intent to unlawfully influence the result of a certain election. Held, that a crime was sufficiently shown. Moschell v. State, 53 L. 498, 22 A. 50.

Fraudulent voting at an election, whether consisting of voting disqualified persons, repeating, or voting under the names of other voters, is a "perversion or obstruction of the due administration of law," which by this section, is made the subject of a criminal conspiracy. State v. Nugent, 77 L. 84, 71 A. 485.

Conspiracy to slander.—A conspiracy to slander a person by charging him with a criminal offense is indictable. State v. Hickling, 41 L. 208.

Indictment.—A general charge in an indictment of a conspiracy to cheat is sufficient without setting forth the means used, or if an overt act be alleged it is not necessary to set forth all the means used in the execution of the plot. State v. Young, 37 L. 184.

An indictment for a conspiracy to obtain goods by false pretenses must charge the doing of an overt act, or it will be void. Wood v. State, 47 L. 180.

An indictment which sets out that certain persons, being members of, composing and acting as, a municipal board, conspired to cheat the city of its moneys by corruptly purchasing supplies for the city at excessive prices, and by paying salaries to persons who rendered no service, is good. Madden v. State, 57 L. 324, 30 A. 541. After this general allegation of a corrupt intent, it is not essential that the statement of the means by which the conspiracy was to be executed should also show it. Id.

An indictment charging specific facts bringing defendants within this section, and charging them so as to inform defendants with absolute certainty of the character and nature of the offense, is sufficient, though not charging that defendants conspired to commit an act for the perversion or obstruction of the due administration of the law; and the indictment is not open to the objection for the further reason that it is couched in the language of this section. State v. Nugent, 77 L. 84, 71 A. 485.

II. AGAINST THE PUBLIC PEACE

38. Duelling.—Any person who shall, by word, message, letter, or in any other way, challenge another to fight a duel, or shall accept a challenge, although no duel be fought, or knowingly be the bearer of such challenge; or who shall in any way abet, prompt, encourage, persuade, seduce, or cause any person to fight a duel, or to challenge another to fight such duel; or who shall engage in and fight a duel with another, although death does not thereby ensue; or who shall be a second in any such duel, shall be guilty of a misdemeanor. (P. L. 1898, p. 805.)

Indictment.—Requisites in an indictment for challenging. State v. Gibbons, 4 L. 40.

39. Sending or delivering threatening letters.—Any person who shall knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or sign, with a fictitious name, any letter or letters threatening to accuse any person of a crime of an indictable nature under the laws of this state, with intent to extort from any person any money or other valuable thing; or demanding money or other valuable thing, or threatening to maim, wound, kill or murder any person, or to burn his or her house, outhouse, barn, or other building, or stack or stacks of corn, grain or hay, or to do any civil injury to any person, or to his property, though no money or other valuable thing be demanded by such letter or writing, shall be guilty of a misdemeanor. (P. L. 1898, p. 805.)

40. Fighting.—Any two or more persons who shall fight together, or shall commit or attempt to commit assaults and batteries upon each other, or shall be present aiding, assisting or abetting the same either in public or a private place, shall be jointly guilty of a misdemeanor. (P. L. 1898, p. 806.)

In general.—Under an indictment for manslaughter, a defendant cannot be convicted of the offense set forth in this section. State v. Scaduto, 74 L. 289, 65 A. 908.

41. Prizefighting.—Any person who shall be engaged in any fight or combat, with fists, with or without gloves, whether such fight or combat be for money or any other valuable thing, or for any benefit for any other person, or merely to test the skill or bodily powers of the pugilists or combatants, and every person who shall aid, assist or abet in any such