FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

SUPREME COURT OF NEW JERSEY
DOCKET NO. 086617

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal As of Right from a Unanimous Final Judgment of the Superior Court of New Jersey, Appellate Division.
v.	:	
CALVIN FAIR,	:	Indictment No. 15-08-01454-I
Defendant-Respondent.	:	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.

RESPONSE TO AMICI CURIAE AND SUPPLEMENTAL APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101

DANIEL S. ROCKOFF
Assistant Deputy
Public Defender
Attorney ID: 103522014
Of Counsel and
On the Brief
Daniel.Rockoff@opd.nj.gov

DEFENDANT IS NOT CONFINED

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF CONTENTS

PAGE NOS.

PROCEDURAL HISTORY AND STATEMENT OF FACTS 1

LEGAL ARGUMENT 3

POINT I

As the Appellate Division correctly held, N.J.S.A. 2C:12-3a violates the First Amendment because it infringes on the federal constitution's guarantee that no law shall abridge the freedom of speech. U.S. Const., Amends. I, XIV 3

POINT II

N.J.S.A. 2C:12-3a also violates the independent guarantee in New Jersey's state constitution that no law shall be passed to restrain or abridge the liberty of speech. N.J. Const., Art. I, Pars. 6, 18 19

POINT III

The Appellate Division also correctly held that the trial court failed to ensure a truly unanimous verdict. U.S. Const., Amends. V, VI, XIV; N.J. Const., Art. I, Pars. 1, 9, 10; R. 1:8-9. 24

CONCLUSION 32

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

INDEX TO DEFENDANT'S RECORD CITATIONS

Fair's Appellate Division brief cited the record as follows:

"Da" – defendant's Appellate Division appendix;
"1T" – pre-trial transcript dated December 16, 2016;
"2T" – pre-trial transcript dated September 29, 2017;
"3T" – trial transcript dated June 19, 2019;
"4T" – trial transcript dated June 20, 2019;
"5T" – trial transcript dated June 25, 2019;
"6T" – trial transcript dated June 26, 2019; and
"7T" – sentencing transcript dated August 30, 2019.

Fair's initial Supreme Court brief added the following citations:

"Db" – defendant's Appellate Division brief;
"Dm" – defendant's motion to dismiss the State's proposed notice of appeal as of right;
"Dma" – defendant's appendix to the motion to dismiss;
"Dsa" – defendant's Supreme Court appendix;
"Sb" – State's Appellate Division brief; and
"Ss" – State's Supreme Court brief.

In this Supreme Court reply to amici, Fair also uses the following citations:

"Dsb" – defendant's initial Supreme Court brief;
"ACLU" – amicus brief filed by the American Civil Liberties Union of New Jersey;
"ACDL" – amicus brief filed by the Association of Criminal Defense Lawyers of New Jersey;
"AG" – amicus brief filed by the Attorney General of New Jersey; and
"Dsa2" — defendant's supplemental appendix to this reply to amici.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

INDEX TO DEFENDANT'S APPENDIX (Dsa2)

Amicus Curiae Brief of the American Civil Liberties Union, the Abrams Institute for Freedom of Expression, the Cato Institute, the Center for Democracy & Technology, and the National Coalition Against Censorship, Elonis v. United States, 575 U.S. 723 (2015) Dsa2 1-36

Amicus Curiae Brief for the Marion B. Brechner First Amendment Project and Rap Music Scholars (Professors Erik Nielson and Charis E. Kubrin), Elonis v. United States, 575 U.S. 723 (2015) Dsa2 37-69

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF AUTHORITIES

PAGE NOS.

Cases

Abrams v. United States, 250 U.S. 616 (1919) 3, 8

Citizens United v. FEC, 558 U.S. 310 (2010) 15

Cohen v. California, 403 U.S. 15 (1971) 9

Coughlin v. Sullivan, 100 N.J.L. 42 (1924)... 22

Elonis v. United States, 575 U.S. 723 (2015) 11, 13-15, 17-18

Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127 (2000).......................... 19

Houston v. Hill, 482 U.S. 451 (1987).. 8

Mazdabrook Commons Homeowners' Ass'n. v. Khan, 210 N.J. 482 (2012)........ 19

N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).. 9

O'Brien v. Borowski, 961 N.E.2d 547 (Mass. 2012) 20

Perez v. Florida, 580 U.S. 1187 (2017) 4

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 17

Reno v. ACLU, 521 U.S. 844 (1997) 11-12

Riley v. California, 134 S.Ct. 2473 (2014).. 18

Rogers v. United States, 422 U.S. 35 (1975)... 15

State v. Barnes, 54 N.J. 1 (1969) 2

State v. Benedict, 11 Vt. 236 (1839) 16

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF AUTHORITIES (cont'd)

PAGE NOS.

Cases (cont'd)

State v. Boettger, 450 P.3d 805 (Kan. 2019) 5, 7

State v. Burkert, 231 N.J. 257 (2017) 10, 20

State v. Butterworth, 104 N.J.L. 579 (1928) 22

State v. Bzura, 261 N.J. Super. 602 (App. Div. 1993) 26, 31

State v. Carroll, 456 N.J. Super. 528 (App. Div. 2018) 3, 10, 18

State v. Fair, 469 N.J. Super. 538 (App. Div. 2021) .... passim

State v. Frisby, 174 N.J. 583 (2002) 25-26

State v. Gonzales, 444 N.J. Super. 62 (App. Div. 2016) 24, 28

State v. Parker, 124 N.J. 628 (1991) 25

State v. Pomianek, 221 N.J. 66 (2015) 20

State v. Schmid, 84 N.J. 535 (1980) 19-20

State v. Scott, 86 N.J.L. 133 (1914) 22

State v. Skinner, 218 N.J. 496 (2014) 13

State v. Taylor, 866 S.E.2d 740 (N.C. 2021) 6

State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011) 26

Texas v. Johnson, 491 U.S. 397 (1989) 9

United States v. Cassel, 408 F.3d 622 (9th Cir. 2005) 5-6

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF AUTHORITIES (cont'd)

PAGE NOS.

Cases (cont'd)

United States v. Heineman, 767 F.3d 970 (10th Cir. 2014) 5-7

Virginia v. Black, 538 U.S. 343 (2003)... passim

Watts v. United States, 394 U.S. 705 (1969)... 3-4, 10, 21

West Virginia v. Board of Education v. Barnette, 319 U.S. 624 (1943) 9

Whitney v. California, 274 U.S. 357 (1927)... 6, 8

Constitutional Provisions

N.J. Const., Art. I, Par. 1..24

N.J. Const., Art. I, Par. 6..1, 19

N.J. Const., Art. I, Par. 9.. 24

N.J. Const., Art. I, Par. 10.. 24

N.J. Const., Art. I, Par. 18...1, 19, 21

U.S. Const., Amend. I.. passim

U.S. Const., Amend. V 24

U.S. Const., Amend. VI.. 24

U.S. Const., Amend. XIV 3, 24

Rules of Court

R. 2:2-1(a)(1) 1-2

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF AUTHORITIES (cont'd)

PAGE NOS.

Statutes

N.J.S.A. 2C:12-3a .... passim

N.J.S.A. 2C:12-3b .... passim

Books

Adam Hochschild, American Midnight: The Great War, A Violent Peace, and Democracy's Forgotten Crisis (2022) 16

Geoffrey R. Stone, Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism (1st ed. 2005) 10, 16

Video

'Whitest Kids U Know: It's Illegal to Say …,' YouTube (posted May 2007), https://www.youtube.com/watch?v=QEQOvyGbBtY 14

Briefs

Brief for the Petitioner, Elonis v. United States, 575 U.S. 723 (2015) 15, 18

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Fair continues to rely on the procedural history and facts in his initial Supreme Court brief and Appellate Division brief. (Dsb 1-8; Db 1-9)

On December 9, 2021, the Appellate Division unanimously held that N.J.S.A. 2C:12-3a is unconstitutionally overbroad and that the criminal prosecution violated principles of free speech. State v. Fair, 469 N.J. Super. 538, 548-54 (App. Div. 2021). (Dsb 2) The Appellate Division also unanimously held that the trial court failed to ensure a truly unanimous verdict. Id. at 555-58. (Dsb 2) The court partially dismissed the indictment and remanded for a new trial on the remainder. Id. at 558. (Dsb 2)

The State filed a notice of appeal as of right, asserting "a substantial question arising under the Constitution of the United States or this State." R. 2:2-1(a)(1). (Dsb 3; Dma 1)

On the freedom of speech issue, Fair responded that this Court should affirm as modified, and hold that N.J.S.A. 2C:12-3a violates Article I, Paragraphs 6 and 18 of the New Jersey Constitution, and the First Amendment to the United States Constitution. (Dsb 1-2; Dsb 8-63) On the unanimity issue, Fair responded that this Court should affirm on the opinion below. (Dsb 63-64) On the remedy issue, Fair responded that this Court should dismiss with prejudice the indictment's combined N.J.S.A. 2C:2C:12-3a "and/or" b charge, in whole or in part. (Dsb 46-49; Dsb 65)

Alternatively, this Court should dismiss the indictment without prejudice, but require the State to re-present any amended indictment to a new grand jury. (Dsb 49-50; Dsb 65) As a second alternative, this Court should affirm on the remedy below, which struck the "reckless disregard" provision and ordered a new trial, but did not order re-presentment of any amended indictment. (Dsb 50-52; Dsb 65)

On November 7, 2022, this Court ordered that it would hear the matter pursuant to R. 2:2-1(a)(1).[1] As per the Court's scheduling order, the American Civil Liberties Union of New Jersey, the Association of Criminal Defense Lawyers of New Jersey, and the Attorney General of New Jersey all filed amicus briefs. (ACLU; ACDL; AG)

[1] As to the scope of review, this Court has long held that when it accepts a case pursuant to R. 2:2-1(a)(1), "we would like to be clearly understood that … we will consider all points raised in the case," including "non-constitutional claims." State v. Barnes, 54 N.J. 1, 4 (1969).

LEGAL ARGUMENT

POINT I

As the Appellate Division correctly held, N.J.S.A. 2C:12-3a violates the First Amendment because it infringes on the federal constitution's guarantee that no law shall abridge the freedom of speech. U.S. Const., Amends. I, XIV.

This Court must affirm the Appellate Division's unanimous holding that N.J.S.A. 2C:12-3a violates the First Amendment, both on its face and as applied in the prosecution of Fair. (Dsb 8) True threats, where the speaker intends to terrorize the audience via speech that instills a reasonable fear of attack, are a limited exception to the First Amendment's guarantee of a "free trade in ideas." Virginia v. Black, 538 U.S. 343, 358 (2003) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (the "theory of our Constitution" is that "fighting faiths" must be subjected to the "competition of the market," not "persecute[ed]" by the government)); Watts v. United States, 394 U.S. 705 (1969) (articulating the true threat exception, whilst narrowing it to speech where the defendant did not merely intend his expression as a hyperbolic message against government officials, as symbolic discontent against the government); State v. Carroll, 456 N.J. Super. 528, 539-40 (App. Div. 2018) (prosecuting speech as a true threat requires the government to prove that the "speaker[] subjective[ly] inten[ded]" to threaten, and that "a reasonable person would [have] underst[oo]d"

the speech as a real threat). (Dsb 8-9) N.J.S.A. 2C:12-3a infringes on the First Amendment because it does not require the government to meet its constitutional burden in prosecutions of speech. (Dsb 17-18) As applied, the prosecution against Fair violated his right to freely express messages critical of the government, in person and online. (Dsb 3-8; Dsa 4; Da 36-37)

Fair continues to rely primarily on the arguments in his prior Supreme Court brief, his Appellate Division brief, and the Appellate Division opinion. United States Supreme Court precedent in Watts and Black, at minimum, "strongly suggests" that distinguishing true threats from constitutionally protected speech turns on whether the speaker intended to threaten; hence, "the 'reckless disregard' element in N.J.S.A. 2C:12-3a is unconstitutionally overbroad." Fair, 469 N.J. Super. at 554 (quoting Perez v. Florida, 580 U.S. 1187, 1187-90 (2017)) (Sotomayor, J., concurring in the denial of certiorari) ("Together, Watts and Black … strongly suggest that it is not enough that a reasonable person might have understood the words as a threat — a jury must find that the speaker actually intended to convey a threat."). (Dsb 16-18)[2] Thus, in Watts, 394 U.S. at 705-08,

[2] Fair submits that Justice Sotomayor's interpretation of the First Amendment doctrine articulated in Watts and Black is in line with our state constitutional rights, no matter what happens in light of this week's order granting the defendant's petition for certiorari in Counterman v. Colorado, Supreme Court Docket No. 22-138 (presenting the question of whether "the government must show that the speaker subjectively … intended the threatening nature of the statement").

the Supreme Court ordered Watts acquitted because his alleged threat on the grounds of the Washington Monument against President Lyndon Johnson was intended as hyperbole; as Watts's counsel argued, Watt's threat to shoot the President was only meant as a "crude" symbolic stand-in for his expression of enmity toward the policies of the Selective Service System during the Vietnam War. (Dsb 9-11)

In Black, eight justices embraced an intent requirement in true threat prosecutions — notwithstanding that the expression at issue, cross burning, is as objectively "scar[y]" as speech gets — because the same may be intended to express a protected message, no matter how loathsome the viewpoint. (Dsb 11-12) These eight justices were comprised of two separate majorities. First, Justice O'Connor's five-justice opinion defined true threats as expression where the speaker "mean[t]" to communicate "an intent" to commit violence. Id. at 358-59. (Dsb 12-13) See also United States v. Heineman, 767 F.3d 970 (10th Cir. 2014) (interpreting this sentence to require that the speaker intend to threaten); United States v. Cassel, 408 F.3d 622 (9th Cir. 2005) (same); State v. Taylor, 866 S.E.2d 740 (N.C. 2021) (same); State v. Boettger, 450 P.3d 805 (Kan. 2019) (same). (Dsb 25-26) In the next sentence, Justice O'Connor's five-justice opinion clarified that the speaker "need not actually intend to carry out the threat." Black, 538 U.S. at 359-60. See also Heineman, 767 F.3d at 980 (interpreting this sentence as

qualifying the requirement that the speaker intend to threaten); Boettger, 450 P.3d at 814 (same). (Dsb 26-27) Thereafter, Justice O'Connor's five-justice opinion further clarified that Virginia's "intimidation" statute was a "constitutionally proscribable" true threat, as it requires "intent of placing the victim in fear of bodily harm or death." Black, 538 U.S. at 360. See also Taylor, 866 S.E.2d at 753 (interpreting this sentence as identifying "the speaker's subjective intent to threaten" as "the characteristic" which transforms protected speech into a proscribable true threat); Cassel, 408 F.3d at 631 (same); Heineman, 767 F.3d at 981 (same). (Dsb 26-28) Notably, Justice O'Connor's five-justice opinion re-emphasized in its discussion the long-standing principle that speech cannot be proscribed merely because "the vast majority of citizens" might fear "evil consequence." Id. at 358 (quoting Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring)). (Dsb 13)

Second, Justice O'Connor's four-justice opinion and Justice Souter's three-justice opinion each determined that the First Amendment required the State to prove that the speaker intended to threaten. Justice O'Connor's four-justice opinion clarified that the jury must decide "whether a particular cross burning is intended" to arouse fear, because if it were "not … intended to intimidate," it would "almost certainly be protected expression" and "somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect";

relieving the government of its burden "strips the away the very reason why a State may ban cross burning …. The First Amendment does not permit such a shortcut." Black, 538 U.S. at 365-67. (Dsb 13-14) See also Heineman, 767 F.3d at 978-79 (Justice Connor's plurality opinion found a "First Amendment flaw" in not distinguishing between a cross burning with the intent to threaten or intimidate, and cross burning for other purposes); Boettger, 450 P.3d at 815 (Justice O'Connor's plurality opinion found the speaker's intent to threaten "must exist in order to distinguish cross burning as a means of protected expression under the First Amendment from cross burning as a threat of impending violence unprotected by the First Amendment"). (Dsb 28-29) Justice Souter's three-justice opinion likewise clarified that not requiring the government to prove the speaker's intent to threaten amounts to "official suppression of ideas," because the "practical effect" is "to draw nonthreatening ideological expression within the ambit of the prohibition[.]" Black, 538 U.S. at 386-87. (Dsb 14-15) See also Heineman, 767 F.3d at 979 (Justice Souter's plurality opinion "assumed that intent to instill fear is an element of a true threat required by the First Amendment"); Boettger, 450 P.3d at 815 (Justice Souter's coalition distinguished between "punishable intent" and "permissible intent"). (Dsb 29)

The Court in Black contemporaneously recognized that it had distinguished true threats by proof of the speaker's intent to threaten. Justice O'Connor's

plurality opinion stated that she "agreed" with Justice Souter about distinguishing between "intent to intimidate" and a "solely ideological reason for burning." Black, 538 U.S. at 366. (Dsb 15) Justice Souter's plurality opinion stated that "as Justice O'Connor notes," juries must distinguish between "intent to intimidate" and "nonthreatening ideological expression" where the "evidence … fails to point … to … criminal intent." Id. at 386. (Dsb 15) Justice Thomas, the sole holdout, acknowledged that he had lost because his eight colleagues were protecting "an individual [who] might wish to burn a cross … without an intent … [to] threat[en]." Id. at 399-400. (Dsb 16)

Our society's commitment to a free exchange of ideas requires narrowing the true threat exception to instances where the speaker intended to threaten. (Dsb 18-19) Absent that limitation, the government would be punishing ideas and opinions and exhortations merely because it objects to or disagrees with the speaker's viewpoint or message. But "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death." Abrams, 250 U.S. at 630 (Holmes, J., dissenting); Whitney, 274 U.S. at 374-76 ("Fear of serious injury cannot alone justify suppression of speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondages of irrational fears") (Brandeis, J., concurring). (Dsb 13; Dsb 20) Speech, especially "challenges to police action,"

Houston v. Hill, 482 U.S. 451, 458-49 (1987), is frequently "vehement, caustic, and sometimes unpleasantly sharp," N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), and "emotive." Cohen v. California, 403 U.S. 15, 26 (1971). (Dsb 20) Nonetheless, the government has no authority to "prohibit" ideas it finds "offensive or disagreeable," Texas v. Johnson, 491 U.S. 397, 414 (1989), no matter how "[un]orthodox." West Virginia v. Board of Education v. Barnette, 319 U.S. 624, 642 (1943). (Dsb 21)

A mere showing that an ordinary audience would react fearfully to a communication, or that the speaker disregarded such risk, does not adequately safeguard ideological expression from punishment. (Dsb 39) One insurmountable problem is that in a diverse society like the United States, biases and prejudices frequently cause audiences to feel more threatened by the same speech from minority communities. (Dsb 39-41) A legal test for true threats that does not require proof of the speaker's intent to threaten has the capacity to chill speech from minority speakers, who already are significantly less likely to feel that the First Amendment protects them. (Dsb 41-42) Another insurmountable problem is that, as in Black, advocacy of even hate-filled ideas is tolerated, notwithstanding that such ideas can be reasonably expected to cause fear, because permitting the government to restrict what ideas Americans may say and hear is the more dangerous course. (Dsb 42-44) A final insurmountable problem with a test that

disregards the intent of the speaker is that historically, ordinary people often perceive ideas outside of their limited worldview as threatening, and not infrequently react with hysteria to non-conforming speech. (Dsb 44-46)

A recklessness standard is inconsistent with Watts and Black, as the court in Boettger found. (Dsb 35) It has the capacity to chill all manner of constitutionally protected speech. (Dsb 35-39) Indeed, here the defendant's argument at trial that he lacked intent to threaten fell on deaf ears (Dsb 39; Dsb 48-52), because the statute required the jury to convict even if Fair only intended his oral and online speech as criticism of his government.

In its amicus brief, the Attorney General argues that a reckless disregard standard gives sufficient "breathing room," and that a specific intent standard would not advance First Amendment values. (AG 16-22) But see Carroll, 456 N.J. Super. at 537, 540 (persuaded that the specific intent standard and reasonable listener standard should both apply to the true threat exception, because "freedom of expression needs breathing room") (quoting State v. Burkert, 231 N.J. 257, 281 (2017)). Respectfully, the Attorney General is wrong. Absent a specific intent standard, the perennial danger is the government will "criminalize a person's speech simply because it espouses ideas with which the State disagrees." Carroll, 456 N.J. at 537. Moreover, a speaker may self-censor to avoid being misjudged,

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

because "the cost … of being imprisoned is potentially staggering." (Dsb at 34, quoting Geoffrey R. Stone, Perilous Times (1st ed. 2005)).

A subjective intent element in true threat prosecutions is especially necessary to ensure "adequate breathing room" for online speech, like Fair's Facebook postings. See Amicus Curiae Brief of the American Civil Liberties Union, the Abrams Institute for Freedom of Expression, the Cato Institute, the Center for Democracy & Technology, and the National Coalition Against Censorship at 5, Elonis v. United States, 575 U.S. 723 (2015). (Dsa2 1-36)[3] It is undisputed that the Internet enjoys the highest rung of First Amendment protection, id. at 7 (citing Reno v. ACLU, 521 U.S. 844 (1997)) (Dsa2 13), and that "a significant amount of speech on political, social and other issues occurs online[.]" Id. at 6. (Dsa2 12) "For many people throughout the United States — and indeed, the world — the Internet has become the predominant means for communication and public discourse …. [A]ny person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." Id. at 23 (quoting Reno, 521 U.S. at 870). (Dsa2 29) Thus, "the ideas, opinions, emotions, actions, and desires capable of communication through the Internet are limited only by the human capacity for expression. If First Amendment

[3] For the Court's convenience, defendant is appending the two amicus briefs that he is citing from Elonis. (Dsa2 1-36; Dsa2 37-69)

protections are to enjoy enduring relevance in the twenty-first century, they must apply with full force to speech conducted online." Id. at 24-25 ("no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech) (citing Reno, 521 U.S. at 870). (Dsa2 30-31)

The reasons for a subjective intent requirement in true threat prosecutions "apply with equal, if not greater, force to online speech they do to offline speech." Id. at 25. (Dsa2 31) "Anyone conversant with public discourse … as expressed on Internet public comment threads, is undoubtedly familiar with Americans' frequent resort to strong and even offensive language." Id. at 18. (Dsa2 24) Moreover, online speech is "often abbreviated, idiosyncratic, decontextualized,… ambiguous," and "susceptible to multiple interpretations." Id. at 6. (Dsa2 12) Indeed, "[i]n speaking to an unknown or invisible audience, it is impossible and unproductive to account for the full range of plausible interpretations." Id. at 25 (citation omitted). (Dsa2 31) Moreover, actions "completely beyond the control of the speaker" may "place the speaker's statements in front of audiences that the speaker had no expectation or intent to reach …. Statements made to a close-knit community could easily be misinterpreted when taken out of context or read by a newcomer who is not yet familiar with the conventions or practices of that community." Id. at 26. (Dsa2 32) Without a subjective intent standard, "speakers

would bear the burden of accurately anticipating the potential reaction of unfamiliar listeners or readers." Id. at 27. (Dsa2 33)

Moreover, whether the speech is in person or online, a subjective intent element in true threat prosecutions is especially necessary to ensure "political and artistic expression" is not "wrongfully squelched and punished." See Amicus Curiae Brief for the Marion B. Brechner First Amendment Project and Rap Music Scholars (Professors Erik Nielson and Charis E. Kubrin) at 24, Elonis v. United States, 575 U.S. 723 (2015) (Dsa2 37-69). One reason is that "marginalized people" often speak about society in a manner that draws the "ire and vitriol of police, politicians, religious leaders and civil groups." Id. at 3. (Dsa2 47) In the African-American community, for example, "forms of inflammatory self-expression" are common, id. at 17 (quoting State v. Skinner, 218 N.J. 496, 500 (2014)) (Dsa2 61), as are "references to violence and barbs." Id. at 9. (Dsa2 53) "[B]lack vernacular generally … long has employed … a black linguistic code." Id. at 11. (Dsa2 55) "[B]roader stereotypes" about "young men of color" often cause audiences to view rap as "dangerous and threatening," for example. Id. at 3-4, 20 ("visceral responses … inform people's perceptions"). (Dsa2 47-48) There is a long and shameful history of official suppression of criticism of police from African-American artists. Id. at 17-19. (Dsa2 61-63) Even today, police task forces continue "surveilling rappers." Id. at 19. (Dsa2 63) A "speaker's First Amendment

rights should not hang on what amounts to guesswork about an audience's hypothetically reasonable knowledge of … artistic and political" expression. Id. at 5. (Dsa2 49) "Unless the defendant-speaker's subjective intent is taken into consideration, … biases and prejudices may subtly cause jurors and jurists to erroneously find true threats where none exist." Id. at 4. (Dsa2 48)

The Attorney General is wrong to argue that a specific intent test would not advance First Amendment values. (AG 19) Elonis, for example, was prosecuted in part for adapting the work of a satirical and educational video in which comedian Trevor Moore used absurdity and irony to poke fun at legal prohibitions on the freedom of speech. Elonis, 575 U.S. at 727-28 (quoting 'Whitest Kids U Know: It's Illegal to Say …,' available at https://www.youtube.com/watch?v=QEQOvyGbBtY). The more than 7 million viewers of the sketch might disagree with the government that its critical ideas and rhetorical techniques have no social or political value worth adapting; examination of intent is essential. Similarly, Elonis was prosecuted in part for adapting rap lyrics from Eminem, id. at 731, who is known for "his violent, menacing lyrics (some of them aimed directly at [Eminem's] ex-wife, Kim Mathers)." Amicus Curiae Brechner First Amendment Project at 15. (Dsa2 59) As amici put it in Elonis, valuable speech may have been punished because the jury was not instructed to consider Elonis's specific intent, notwithstanding that "violent and

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening." Amicus Curiae ACLU et al. in Elonis, at 19 (citation omitted). (Dsa2 25) Similarly, Fair was prosecuted for speaking critically of his government's policies, orally and online. Safeguarding "political speech," of course, "is central to the meaning and purpose of the First Amendment." Citizens United v. FEC, 558 U.S. 310, 329 (2010). The speech in Elonis and Fair each promoted several First Amendment values. See Stone at 7-9 (Dsb 18-20; Dsb 34) Requiring such speakers to give "wide berth to any comment that might be construed as threatening in nature," without regard to intent, has "substantial costs" in discouraging debate. Rogers v. United States, 422 U.S. 35, 44-48 (1975) (Marshall, J., concurring). (Dsb 11) The prosecution here was overbroad, and infringed on First Amendment values, because the jury was not allowed to consider the speaker's intent.

Other arguments from the Attorney General echo those made earlier by Monmouth County. The Attorney General is wrong to argue that the specific intent standard does not comport with our history. (AG 22) First, "the requirement of subjective intent has deep historical roots. If anything, recent cases to the contrary are themselves a departure from this original understanding." Amicus Curiae ACLU et al. in Elonis, at 10-11 n.3. (Dsa2 16-17) That is, "It seems to be well settled that the making of threats, in words not written, followed by no result more

serious than the terror of the person threatened, [wa]s not an indictable offense at common law." Brief for the Petitioner, Elonis v. United States, 575 U.S. 723 (2015) (citing 25 The American & English Encyclopaedia of Law 1064 (Charles F. Williams ed., 1894); 2 Wharton, Criminal Law § 803 ("it is usually held, however, that a threat, in order to violate the public peace, must be intended to put the person threatened in fear of bodily harm"); State v. Benedict, 11 Vt. 236, 239 (1839) (a "threat … must be intended to put the person threatened in fear of bodily harm")). Moreover, as discussed previously, the United States Supreme Court's modern understanding of the First Amendment took root during and after the first world war, an era when popular hysteria against and prosecutions of the ideas of non-conformers exposed a dire need for expansive First Amendment protections. (Dsb 44-46) See, e.g., Stone at 154, 182 (during World War I and the first Red Scare, "many established Americans, fearing that the nation had been inundated by an alien tide, were hostile to … eastern European arrivals[,]" and "distanced themselves from socialists, pacifists, anarchists, German Americans, aliens, and others dissenters"); Adam Hochschild, American Midnight: The Great War, A Violent Peace, and Democracy's Forgotten Crisis (2022) at 6, 271 (as ex-President Theodore Roosevelt explained about popular hysteria against German speakers, "The sound of the German language … reminds us of the murder of a million helpless old men, unarmed men, women and children"; as President Wilson

explained, "I want to say — I cannot say it too often — any man who carries a hyphen about with him carries a dagger that he is ready to plunge into the vitals of this Republic."); id. at 132 (the Bolsheviks "frightened" "most people in the United States").

The Attorney General similarly repeats Monmouth County's complaint that it will not be able to meet its burden of proving the defendant's intent to threaten. (Dsb 33-34) It is true that the government has an interest in "protecting individuals from the fear of violence" and "from the disruption that fear engenders," as well as "the possibility that threatened violence will occur." R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992). But, as amici argued in Elonis, "the First Amendment constrains the government's ability to advance that interest through means that punish or chill protected expression …. Requiring the government to demonstrate subjective intent to threaten as part of any true threat prosecution strikes the constitutionally appropriate balance between the government's interest in protecting against the harms caused by threats and the country's constitutional tradition of encouraging the free and uninhibited exchange of ideas." Amicus Curiae ACLU et. al. in Elonis, at 22-23. (Dsa2 28-29) And "a requirement that the government demonstrate a speaker's subjective intent to threaten would not unduly impede its ability to prosecute speakers who intentionally threaten others." Id. at 27. (Dsa2 33) On the contrary, "Nor has the government demonstrated that it will

be unable to make cases under a subjective standard. Indeed, times have never been better for the government to prove subjective intent using the defendant's own records, now that most people carry with them 'a digital record of nearly every aspect of their lives — from the mundane to the intimate,' Riley v. California, 134 S.Ct. 2473, 2490 (2014), and are continually tapping out their innermost thoughts[.]" Petitioner, Elonis v. United States, at 59. As the New York Times editorialized, "In a country devoted to broad speech protections, it is not too much to require the government to prove that a speaker intended to make a threat before it can put him behind bars." (Dsb 33)

Finally, the Attorney General repeats Monmouth County's refusal to acknowledge that N.J.S.A. 2C:12-3a is not consistent with the plain meaning of Virginia v. Black. (Dsb 29-32) Respectfully, in Carroll and Fair, our Appellate Division read Black correctly. This Court must affirm the Appellate Division's unanimous First Amendment holding.

POINT II

N.J.S.A. 2C:12-3a also violates the independent guarantee in New Jersey's state constitution that no law shall be passed to restrain or abridge the liberty of speech. N.J. Const., Art. I, Pars. 6, 18.

This Court must also hold that Article I, Paragraphs 6 and 18 of the New Jersey Constitution narrow the true threat exception to cases where the State proves intent to threaten. Fair continues to rely primarily on the state constitutional law arguments in his prior Supreme Court brief and Appellate Division brief. He also adopts the arguments of the American Civil Liberties Union of New Jersey.

The free speech provisions of the New Jersey Constitution are "broader than practically all others in the nation," and bestow "greater protection than the First Amendment." (Dsb 53) See Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000); Mazdabrook Commons Homeowners' Ass'n. v. Khan, 210 N.J. 482, 492 (2012); State v. Schmid, 84 N.J. 535 (1980) (free speech provisions in the state constitution are "more sweeping in scope than the language of the First Amendment"). (Dsb 55)

At least one other state, Indiana, has found that the free speech provision of its state constitution independently mandates that the government prove specific intent to threaten when prosecuting speech as a true threat. (Dsb 58) As discussed previously, other states or federal circuits including Kansas, North Carolina, and the Ninth and Tenth Circuits, have construed the First Amendment to require the

same. (Dsb 21-29) Massachusetts has also so construed the First Amendment. O'Brien v. Borowski, 961 N.E.2d 547, 557 (Mass. 2012). Other jurisdictions, including the Seventh Circuit, D.C. Circuit, New Hampshire, and Rhode Island, have expressed support in dicta for a specific intent requirement. (Dsb 29-30) If the proclamations about the "sweeping" scope of our state constitution's free speech protections mean anything, then our New Jersey Constitution must narrow the true threat exception to instances where the speaker intends to terrorize. Schmid, 84 N.J. at 558-59 (our State Constitution "imposes upon the State government an affirmative obligation to protect … the freedoms of speech and assembly"). Some recent precedents in this State, including State v. Burkert, 231 N.J. 257 (2017), and State v. Pomianek, 221 N.J. 66 (2015), already suggest the need for a constitutional specific intent requirement. (Dsb 58-62)

Political speech like Fair's enjoys special protection under our State Constitution. "Where political speech is involved, our tradition insists that government allow the widest room for discussion, the narrowest range for its restriction." Schmid, 84 N.J. at 558. (Dsb 56)

Fair agrees with the ACLU of New Jersey and disagrees with the Attorney General about the scope of the New Jersey Constitution. He would highlight several of the ACLU-NJ's arguments. First, it is relevant that the defendant spoke from his own home, and not from someone else's property: "The protections of the

[New Jersey Constitution] are particularly triggered, given the strong history and traditions of this State of safeguarding the privacy and inviolability of a person's home against intrusion, particularly by law enforcement." (ACLU 2; ACLU 12-15) Moreover, it is relevant that "Mr. Fair's purpose was also to express political speech, in that he was complaining about government policies that led to intrusion into his own home by law enforcement, and thus petitioning for redress of grievances under N.J. Const., Art. I, ¶18." (ACLU 15) Finally, under our state constitution, there are "due process and equal protection concerns that arise when criminal liability is based in part on whether the defendant is aware of how the alleged victim or a hypothetical 'reasonable person' would construe the defendant's expression, rather than how the defendant subjectively intended that expression." (ACLU 2) Specifically, "Implicit bias and the additional phenomenon of racial anxiety … carry the risk that … expression is subjectively perceived by the victim very differently than how [it was] intended." (ACLU 26-28)

The abuse of the police power to suppress messages that the government does not like is as old as history. See Watts, 394 U.S. at 712 ("Suppression of speech as an effective police measure is an old, old device, outlawed by the Constitution.") (Douglas, J., concurring). It is inconceivable that our state constitution would fail to guard against the official suppression of ideas by police in the name of security; New Jersey, after all, has its own history of official

suppression, including in the era preceding the adoption of our state constitution. See, e.g., State v. Scott, 86 N.J.L. 133, 134, 138-39 (1914) (where, after the assassination of President McKinley, defendant was charged with criticizing police for using "Force [to] Brutally Attack Peaceful Strikers," the court acknowledged it could not "preclude fair criticism on the conduct of public officials entrusted with the administration of government affairs …. [Though] couched in hot and intemperate language, and obviously a most caustic and scathing arraignment of the police department and force of the city of Paterson, … [a]t the most, it evinces a deep animosity against the city government … for alleged maladministration[.]"); Coughlin v. Sullivan, 100 N.J.L. 42, 42, 45 (1924) (defendants in Jersey City had the right to hand out pamphlets that "criticized the municipal administration," because the "general police power of the municipality to preserve law and order" must be "reconciled" with the "constitutional guarantee of free speech"); State v. Butterworth, 104 N.J.L. 579, 585-87 (1928) (where silk mill workers tried to assemble in a public square in front of a city hall, the police unlawfully interfered with the right to assembly, and took the speaker into custody).

The danger here is that there was no true threat, and that law enforcement suppressed oral and online messages that were critical of the government. In a prosecution of speech as a true threat, the State Constitution must be construed to

require proof that the speaker intended to terrorize, and that a reasonable listener would have perceived a real threat.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

POINT III

The Appellate Division also correctly held that the trial court failed to ensure a truly unanimous verdict. U.S. Const., Amends. V, VI, XIV; N.J. Const., Art. I, Pars. 1, 9, 10; R. 1:8-9.

This Court must affirm the Appellate Division's holding that the trial court failed to ensure "substantial agreement as to just what [the] defendant did," Fair, 469 N.J. Super. at 555, so as to avoid a jury verdict "impermissibly fragmented" by whether it was the oral or written speech that violated the law, and also whether the law violated was N.J.S.A. 2C:12-3a "and/or" b. Id. at 558. (Dsb 64) Fair continues to rely on his Appellate Division brief and the Appellate Division opinion. He also now adopts the arguments of the Association of Criminal Defense Lawyers of New Jersey.

The State presented distinct evidence of two very different types of statements by Fair on May 1, 2015: first, while inside his home, he spoke to officers who were physically present in his front yard. (Dsb 3-6; 4T 81-18 to 115-22; Dsa 4) Second, he posted statements about the officers to an online Facebook page. (Dsb 6-8; Da 36-37)

On paper, the indictment, jury instruction, and verdict sheet were all poorly structured. The prosecutor's one-count indictment alleged a combined violation of two statutes, N.J.S.A. 2C:12-3a "and/or" b. (Db 10) But see State v. Gonzales, 444 N.J. Super. 62, 71-77 (App. Div. 2016) ("and/or" is a "verbal monstrosity that

"creat[es] ambiguity" and gives rise to the "spectre of a verdict that may have lacked unanimity" and a "shared vision of what defendant did"). (Db 19) These statutes have distinct elements, including different required acts and mental states. (Db 10-11) At the prosecutor's request, the jury instruction and verdict sheet both "mirror[ed]" that combined "and/or" charge in the indictment. (Db 11-12)

The court did not instruct the jury that unanimity was required as to either N.J.S.A. 2C:12-3a or N.J.S.A. 2C:12-3b individually. Instead, the court emphasized that unanimity was only required as to the combined a "and/or" b charge. (Db 12)

During deliberations, the jury expressed confusion, in a written note: "Do both 2C:12-3(a) and 2C:12-3(b) have to be proven beyond a reasonable doubt or just one or the other?" (Db 12) See State v. Frisby, 174 N.J. 583, 600 (2002) (juror confusion an important factor in determining whether absence of specific unanimity charge caused undue prejudice); State v. Parker, 124 N.J. 628, 633 (1991) (same). (Db 18) The court answered by addressing only the burden of proof, not that the unanimity requirement applied to 3(a) or 3(b) individually. The court told the jury that "a person is guilty if he [violates] … the (a) portion. The other is the 2C:12-3(b) [portion]… So yes, the answer is it could be … one or the other, but in either event it has to be proven beyond a reasonable doubt to your satisfaction." (Db 12-13) The court's answer relayed that each juror could vote to

convict based on "one or the other," while failing to explain that jurors collectively could not convict on the combined charge without also unanimously determining that Fair had violated 3a, or unanimously determining that Fair had violated 3b. (Db 18-19)

When the jury reported its verdict, it only reported that all members agreed Fair was guilty of the combined charge. (Db 13)

The errors here violated the requirement in the federal and state constitutions, as well as the court rules, that a jury unanimously agree on what the defendant did. (Db 13-15)

One fragmented verdict scenario is that jurors agree a defendant violated a single statute, but disagree as to why. (Db 15-16) See, e.g., Frisby, 174 N.J. at 598-99; State v. Tindell, 417 N.J. Super. 530, 551, 554 (App. Div. 2011). Such non-unanimous patchwork verdicts are not permitted because they leave the judiciary unable to verify that a crime has been committed. (Db 16) Here, the jury may have so fragmented over whether it was the oral statements or online postings that violated the law. (Db 16-17)

Another fragmented verdict scenario is that jurors disagree as to which statute was violated. (Db 17) See, e.g., State v. Bzura, 261 N.J. Super. 602, 612-615 (App. Div. 1993), where jurors may have split over whether the defendant violated N.J.S.A. 2C:28-2a or N.J.S.A. 2C:28-2c. (Db 17) Here, the jury may have

so fragmented over whether it was N.J.S.A. 2C:12-3a or 3b that was violated. (Db 17-18)

The Appellate Division decision agreed "that the jury verdict insufficiently guarded against the lack of jury unanimity." Fair, 469 N.J. Super. at 541. The Appellate Division "agree[d] with the argument that the judge's instructions did not ensure that the jury was unanimous on whatever portion of N.J.S.A. 2C:12-3 it may have convicted defendant of committing." Id. at 548. The Panel found, "the fact that the judge's instructions allowed the jury to convict even when its members may have disagreed on which of the multiple theories was sustained poses too grave a risk that they were not unanimous on at least one of those theories." Id. at 558.

The Panel explained, "the jury was … presented with evidence of multiple statements defendant made that could have been understood as being directed at Healey," including in-person statements and online statements. Id. at 556-57. The Panel recognized that "there was a potential for some jurors to conclude it was only the 'head shot' statement that was the terroristic threat, while others could have found the 'yu will pay' and 'we will have tha last laugh … waitonit' postings to be the terroristic threats, or some segment of jurors could have found only the 'I kno wht yu drive & where yu motherfu$kers live at' was the terroristic threat." Id. at 557.

The Panel recognized, as per Gonzalez, "the dangers of the phrase 'and/or' in similar circumstances." Id. at 545 n.2. The Panel recognized that 3a and 3b presented "different elements," and that in total the State presented "three different [statutory] theories." Id. at 555-56. The Panel recognized that the judge never "explained … that a guilty verdict could not be rendered if only some of the jurors found a violation of subsection (a) but not (b), and the others found a violation of subsection (b) but not (a)," even after "the jury recognized the problem and asked during their deliberations about the multi-faceted question," which "should have prompted clear guidance from the judge that the jury could not find defendant guilty via a fragmented verdict." Id. at 556. The Panel repeated, "the judge … did not instruct that all jurors needed to agree on which provision was violated," subsection a or subsection b. Id. at 558.

Fair is in complete agreement with the ACDL, which explained "we do not know what subsection of N.J.S.A. 2C:12-3 the jury found that defendant violated, and we do not know which alleged statements they found constituted terroristic threats." (ACDL 4) Courts must guard against a "patchwork verdict," where a defendant is convicted because "different jurors conclude[ed] that the defendant committed different acts." (ACDL 4) The State can "proceed on alternative theories of guilt," but "courts must carefully craft jury instructions and verdict sheets to make clear that jurors must be unanimous as to the … subsection, and …

conduct upon which their verdict stands." (ACDL 2) Here, "that was not done, and a new trial is required." (ACDL 5) The "panel's holding perfectly identifies the unanimity requirement that should be applied in this matter, and … this Court [should] affirm substantially for the reasons expressed by Judge Fisher in the panel's thoughtful and well-reasoned opinion." (ACDL 12)

Monmouth County erroneously argued in its brief that the jury could not have been split factually as to what the defendant did, and in particular that, "It is not possible that only some of the jurors convicted defendant based on the 'head shot' comment whereas the rest of the jurors convicted defendant based on some other comment or comments." (Ss 54) The record says otherwise: the jury may have been split as to whether the threat was proven by oral speech to officers in his yard, or by the entirely distinct act of transmitting speech about officers, through the website Facebook, to his online followers. To illustrate, on direct examination, the prosecutor elicited Officer Healey's testimony that a complaint for terroristic threats was only issued "after" law enforcement had reviewed Fair's May 1, 2015 Facebook posts. (4T 124-11 to 19) Also on direct examination, the prosecutor elicited Officer Schwerthoffer's testimony that he "pulled these Facebook posts on May 1, 2015." (4T 203-16 to 18) In summation, the prosecutor argued that the online speech also served as a basis to convict: "It was Calvin Fair who was screaming out the window over at Conover Street on May 1, 2015. There's … no

debate even … who made those Facebook posts …. The defendant is clearly guilty of terrorist threats." (5T 54-4 to 12) The prosecutor continued, "[E]ven after two hours Mr. Fair is still heated. He's still angry and frustrated with the Freehold Borough Police Department. And he explains his perspective as to why he feels he's being treated unfairly. And this is the post where if any of you sat here and said I'm still not sure, after seeing this post, this is the one that says the defendant is guilty of the charge of terroristic threats." (5T 67-13 to 21) (emphasis added) The prosecutor continued, "he continues and says 'I know what you drive and I know where you live.' It's at that moment, if you look at the panorama, that the idea of terroristic threats has crystallized." (5T 68-19 to 22) The prosecutor continued, "Once this post is seen, there's no question about it. No question about it." (5T 73-2 to 4) The prosecutor continued, "I'm going to go on the Internet, because I know — I know that they look at me …. I'm going to go on that on my wall and I'm going to say to the Freehold Borough and to Patrolman Healey … I know where you live, I know what you drive. If that's not done with the idea to terrorize him, then again find him guilty [sic]." (5T 78-12 to 21) The prosecutor concluded by arguing that the online speech was also a threat: "I know where you live and I know what you drive. If that's not clear that that's a threat, send him on his way." (5T 79-11 to 13) Moreover, even if the prosecutor had not made these arguments, no limiting instruction prevented the jury from fragmenting, and

delivering a patchwork verdict, as to whether it was the oral or online communications that made defendant guilty.

Also, Monmouth County erroneously argued in its brief that there is no unanimity problem because N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b) are "not two separate statutes; they are two subsections of the same statute. And a defendant will be guilty of that same crime, in contravention of the same statute, whether a jury bases its verdict on subsection (a) or subsection (b)." (Ss 50) Respectfully, this argument is wrong. In Bzura, 261 N.J. Super. at 612, for example, the Appellate Division reversed because of a unanimity problem in a case with subsections N.J.S.A. 2C:28-2a and N.J.S.A. 2C:28-2c. (Db 17)

The government improperly relied on a composite theory of guilt. The jury may have fractured as to whether it was the oral or online speech that violated the law, and also may have fractured as to whether the law violated was N.J.S.A. 2C:12-3a "and/or" b. The Appellate Division opinion should be affirmed on the opinion below.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

CONCLUSION

For the foregoing reasons, this Court should affirm as modified, hold that N.J.S.A. 2C:12-3a violates the state and federal constitutions, and dismiss the indictment. As to the unanimity issue, this Court should affirm on the opinion below.

In addition to this reply brief, Fair relies on all arguments in his initial Supreme Court brief, Appellate Division brief, Law Division brief, and the amicus briefs filed by the ACLU-NJ and ACDL-NJ.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant

BY: /s/ Daniel S. Rockoff______
Assistant Deputy Public Defender
Attorney ID No. 103522014

Dated: January 18, 2023

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

13-983

IN THE

Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION, THE CATO INSTITUTE, THE CENTER FOR DEMOCRACY & TECHNOLOGY, AND THE NATIONAL COALITION AGAINST CENSORSHIP, IN SUPPORT OF PETITIONER

Jack M. Balkin
David A. Schulz
Jonathan M. Manes
Abrams Institute for
Freedom of Expression
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Joan E. Bertin
National Coalition Against
Censorship
19 Fulton Street, Suite 407
New York, NY 10038

Steven R. Shapiro
Counsel of Record
Brian M. Hauss
Lee Rowland
American Civil Liberties Union
Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Emma J. Llansó
Center for Democracy
& Technology
1634 I Street, NW, 11th Floor
Washington, DC 20006

Ilya Shapiro
Cato Institute
1000 Massachusetts Avenue, NW
Washington, DC 20001

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. SUBJECTIVE INTENT TO THREATEN IS AN ESSENTIAL ELEMENT OF ANY TRUE THREAT 7

A. This Court's Threat Jurisprudence Is Most Plausibly Read As Requiring Proof Of A Subjective Intent To Threaten. 7

B. First Amendment Principles Favor A Subjective Intent To Threaten Requirement. 15

II. A SUBJECTIVE INTENT REQUIREMENT IS PARTICULARLY IMPORTANT FOR PROTECTING ONLINE SPEECH 23

CONCLUSION 29

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF AUTHORITIES

CASES

Brandenburg v. Ohio,
395 U.S. 444 (1969) 20, 21

ACLU v. Reno,
929 F. Supp. 824 (E.D. Pa. 1996).......................... 24

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 7

Forsyth Cnty. v. Nationalist Movement,
505 U.S. 123 (1992) 19

Hess v. Indiana,
414 U.S. 105 (1973) 20

Morissette v. United States,
342 U.S. 246 (1952) 16, 17

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 19, 20, 21

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 18, 21

RAV v. City of St. Paul,
505 U.S. 377 (1992) 9, 22

Reno v. ACLU,
521 U.S. 844 (1997) 7, 23, 24, 25

Rogers v. United States,
422 U.S. 35 (1975) 15, 17, 23

United States v. Alvarez,
132 S. Ct. 2537 (2012) 20

United States v. Bagdasarian,
652 F.3d 1113 (9th Cir. 2011) 11

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

United States v. Cassel,
408 F.3d 622 (9th Cir. 2005) 11, 12, 13, 15

United States v. Clemens,
738 F.3d 1 (1st Cir. 2013)..................................... 11

United States v. Dinwiddie,
76 F.3d 913 (8th Cir. 1996) 16

United States v. Fulmer,
108 F.3d 1486 (1st Cir. 1997)......................... 16, 21

United States v. Jeffries,
692 F.3d 473 (6th Cir. 2012) ....*passim*

United States v. Kosma,
951 F.2d 549 (3d Cir. 1991).................................. 16

United States v. Magleby,
420 F.3d 1136 (10th Cir. 2005) 11

United States v. Martinez,
736 F.3d 981 (11th Cir. 2013) 10

United States v. Morrison,
529 U.S. 598 (2000) 22

United States v. Nicklas,
713 F.3d 435 (8th Cir. 2013) 11

United States v. Parr,
545 F.3d 491 (7th Cir. 2008) 11

United States v. Saunders,
166 F.3d 907 (7th Cir. 1999) 16

United States v. Stevens,
559 U.S. 460 (2010) 7, 18

United States v. Twine,
853 F.2d 676 (9th Cir. 1988) 22

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

United States v. White,
670 F.3d 498 (4th Cir. 2012) .... *passim*

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 17

Virginia v. Black,
538 U.S. 343 (2003) .... *passim*

Watts v. United States,
394 U.S. 705 (1969) .... *passim*

Watts v. United States,
402 F.2d 676 (D.C. Cir. 1968) 8

CONSTITUTION & STATUTES

U.S. Const. amend I. .... *passim*

18 U.S.C. § 871 23

18 U.S.C. § 871(a) 7, 8

18 U.S.C. § 875 22

18 U.S.C. § 875(c) 3

18 U.S.C. § 876 22

18 U.S.C. § 2252 17

OTHER AUTHORITIES

Danah Boyd, *It's Complicated: The Social Lives of Networked Teens* (2014) 25

Dmitri Williams et al., *From Tree House to Barracks: The Social Life of Guilds in World of Warcraft*,
1 Games & Culture 338 (2006) 26

Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*,
2003 Sup. Ct. Rev. 197 (2003) 14

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283 (2001) ... 19

Jorge Peña & Jeffrey T. Hancock, *An Analysis of Socioemotional and Task Communication in Online Multiplayer Video Games*, 33 Comm. Res. 92 (2006)....................................... 26

Oliver Wendell Holmes, Jr., *The Common Law* (1881) 17

Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225 (2006) ....*passim*

U.S. Census Bureau, *Computer and Internet Trends in America* (Feb 3, 2014), http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf................... 24

William Blackstone, *Commentaries on the Laws of England* (1769).. 16, 17

Wikipedia, The Free Encyclopedia, *Internet*, https://en.wikipedia.org/wiki/Internet (last visited Aug. 7, 2014)... 24

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

INTEREST OF *AMICI CURIAE* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court in free speech cases, both as direct counsel and as *amicus curiae*, including cases outlining the scope of the true threat doctrine. *See Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Virginia v. Black*, 538 U.S. 343 (2003). The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members.

The Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, and access to information as informed by the values of democracy and human freedom. It does not purport to speak for Yale University. The Institute's activities are both practical and scholarly, supporting litigation and law reform efforts as well as academic scholarship, conferences, and other events on First Amendment, new media, and related issues. The Institute is committed to robust protections for speech, including hostile, challenging, or unpopular speech, and is particularly concerned with maintaining and expanding protections for speech online.

---

[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

The Cato Institute (Cato) was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is of central concern to Cato because the First Amendment is part of the bulwark for liberty that the Framers set out in the Constitution.

The Center for Democracy & Technology (CDT) is a non-profit public interest organization that advocates on free speech and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups that are united in their commitment to freedom of expression. (The positions advocated in this brief do not necessarily reflect the views of all of its member organizations.) Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of authors, teachers, students, librarians, readers, artists, museum-goers, and others around the

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

country. NCAC is particularly concerned about laws affecting online speech which are likely to have a disproportionate effect on young people who use social media as a primary means of communication, may engage in ill-considered but harmless speech online, and may employ abbreviated and idiosyncratic language that is subject to misinterpretation.

STATEMENT OF THE CASE

Petitioner Anthony Elonis was convicted on four of five counts in a federal indictment charging him with making threatening statements in violation of 18 U.S.C. § 875(c). The statements that led to the indictment are spelled out at length in Petitioner's brief, Pet. Br. at 9–16, and the opinions below. Pet. App. 1a–29a, 30a–48a, 49a–60a. All of the statements appeared on a Facebook page that Elonis had created using a pseudonym, and many took the form of rap lyrics. For present purposes, it is sufficient to note that many of the postings expressed violent thoughts and desires involving, among others, Petitioner's estranged wife.

Prior to trial, Elonis moved to dismiss the indictment on the ground that the government had failed to allege that his statements were made with an intent to threaten. The district court rejected his motion, citing Circuit precedent. Pet. App. 51a. At trial, Elonis asked the court to instruct the jury that "the government must prove that he intended to communicate a true threat." J.A. 21. The district court denied that request as well, and instructed the jury instead:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intent to inflict bodily injury or to take the life of an individual.

J.A. 301. Following his conviction, Elonis filed post-trial motions arguing that the government should have been required to prove subjective intent. J.A. 6.The district court again disagreed and sentenced Elonis to 44 months' imprisonment followed by three years' supervised release. J.A. 314–15.

The court of appeals affirmed, rejecting Elonis's argument that the Third Circuit precedent cited by the district court had been superseded by this Court's subsequent decision in *Virginia v. Black*, 538 U.S. 343 (2003), and disagreeing with Elonis's contention that "*Black* indicates a subjective intent to threaten is required." Pet. App. 16a.

SUMMARY OF ARGUMENT

This case involves a series of disturbing comments expressing Petitioner's violent thoughts and desires involving his estranged wife, among others. Those comments were undeniably crude and offensive. A properly charged jury might or might not have concluded that they also constituted a threat in context. The jury in this case was not properly charged, however. Instead, it was permitted to convict without a finding that Elonis intended his

comments to be understood as a threat. Because the First Amendment requires a showing of subjective intent to threaten as a predicate to criminal liability, Petitioner's conviction must be reversed.

To ensure that public discussion remains "uninhibited, robust, and wide-open," the First Amendment protects speech that is "vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). That protection does not extend to a speaker who threatens another with death or serious bodily harm. But while the distinction between protected speech and an unprotected "true threat" is easy to state, it can be exceedingly difficult to apply. Words are slippery things, and one person's opprobrium may be another's threat. A statute that proscribes speech without regard to the speaker's intended meaning runs the risk of punishing protected First Amendment expression simply because it is crudely or zealously expressed. Moreover, where the line between protected and unprotected speech is unclear, a speaker may engage in self-censorship to avoid the potentially serious consequences of misjudging how his words will be received. Statutes criminalizing threats without requiring the government to demonstrate a culpable *mens rea* are thus likely to sweep in speech protected under the First Amendment, including core political, artistic, and ideological speech. To ensure adequate breathing room for such speech, this Court should make clear that subjective intent to threaten is an essential element of any constitutionally proscribable true threat.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Establishing subjective intent to threaten as a constitutional *mens rea* requirement for true threats would not require any deviation from this Court's precedents. In both the true threat and incitement contexts, this Court has consistently recognized the importance of subjective intent to incite or threaten as an element of any statute criminalizing pure speech. Most recently, in *Virginia v. Black*, this Court stated that "[t]rue threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359 (internal quotation marks omitted). Although lower courts have divided over how to interpret *Black*, this Court's plain language and reasoning strongly support the conclusion that *Black* defined true threats to include only those statements made with the intent to threaten. Even if *Black* failed to decisively resolve the issue, however, the First Amendment principles undergirding this Court's decisions strongly caution against the criminalization of speech that was not intended as a threat, even if the speaker negligently failed to anticipate the listener's response.

Finally, the fact that the speech at issue in this case occurred online only underscores the need for a subjective intent requirement. Today, a significant amount of speech on political, social, and other issues occurs online, and is often abbreviated, idiosyncratic, decontextualized, and ambiguous. As such, it is susceptible to multiple interpretations, making a subjective intent requirement particularly necessary to ensure that protected online speech is neither punished nor chilled. As more and more

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

speech moves onto the Internet, the constitutional protections afforded to online speech will increasingly determine the actual scope of First Amendment freedoms enjoyed by our society. To protect those freedoms, this Court made clear in *Reno v. ACLU*, 521 U.S. 844 (1997), that the Internet enjoys the highest level of First Amendment protection. It should reaffirm that principle here by holding that subjective intent to threaten is an essential element of any true threat prosecution, regardless of whether the challenged statement occurred online or off.

ARGUMENT

I. SUBJECTIVE INTENT TO THREATEN IS AN ESSENTIAL ELEMENT OF ANY TRUE THREAT

A. This Court's Threat Jurisprudence Is Most Plausibly Read As Requiring Proof Of A Subjective Intent To Threaten.

This Court has recognized that there are certain "classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," but it has always cautioned that these categories must be "well-defined" and "narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *accord United States v. Stevens*, 559 U.S. 460, 468–69 (2010). In *Watts v. United States*, this Court added "true threats" to the catalogue of constitutionally proscribable speech. 394 U.S. at 707–08. *Watts* concerned a prosecution under 18 U.S.C. § 871(a), which prohibits knowing and willful threats against

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

the President, for a draft protester's statement at a rally against the Vietnam War that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. Observing that contextual factors indicated that the defendant was engaged only in "a kind of very crude offensive method of stating a political opposition to the President," and construing § 871(a) in light of First Amendment principles, the Court concluded that the statute's use of the term "threat" excluded the defendant's political hyperbole.[2]

This Court next addressed the scope of the true threat exception in *Virginia v. Black*. Under the most straightforward reading, *Black* clarified the true threat exception by requiring the government to demonstrate subjective intent to threaten as an essential *mens rea* element of the crime. Unmoored from the constraints of this subjective intent requirement, anti-threat statutes are neither "well-defined" nor "narrowly limited." Rather, they create a significant risk that the government will criminally sanction, and also chill, core First Amendment expression.

Black considered whether a state statute criminalizing cross burning with intent to intimidate,

[2] Although *Watts* did not provide occasion for the Court to resolve whether intent to threaten is an essential element of a constitutionally proscribed "true threat," it expressed "grave doubts" about the lower court's conclusion that the statute's *mens rea* component required only general intent to utter the charged words. *Id.* at 707–08 (internal quotation marks omitted) (citing *Watts v. United States*, 402 F.2d 676, 686–93 (D.C. Cir. 1968) (Skelly Wright, J., dissenting)).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

and which included a provision stating that the act of burning a cross itself constituted "prima facie evidence of an intent to intimidate," violated the First Amendment. 538 U.S. at 348. In scrutinizing the statute, the Court reiterated its holding in *Watts* that the First Amendment "permits a state to ban a true threat." *Id.* at 359 (internal quotation marks omitted). It then defined "true threats" as "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." *Id.* The Court explained that "[t]he speaker need not actually intend to carry out the threat," because "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.'" *Id.* at 359–60 (quoting *RAV v. City of St. Paul*, 505 U.S. 377, 388 (1992)). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat," the Court wrote, "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." *Id.* at 360 (emphasis added). With this definition in place, the Court held that the Virginia cross burning statute "does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.* at 362.

The majority then fractured over the constitutionality of the statute's prima facie evidence provision, which allowed the jury to infer intent to intimidate solely from the act of cross burning. A plurality of Justices viewed the prima facie evidence provision as facially unconstitutional because, in

removing the State's burden to prove the defendant's intent to intimidate, it "strip[ped] away the very reason why a State may ban cross burning with the intent to intimidate" and chilled core First Amendment speech by allowing the State to convict someone who burned a cross for political or artistic reasons. *Id.* at 365. Justice Scalia disagreed that the prima facie evidence provision was facially unconstitutional, but agreed that an as-applied challenge to the prima facie evidence provision could lie where defendants were convicted for burning crosses without the requisite intent to intimidate. *Id.* at 379–80 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part). Finally, Justice Souter, joined by Justices Kennedy and Ginsburg, argued that the entire statute should be struck down as content discriminatory. *Id.* at 385–86.

In *Black*'s wake, lower courts have divided over whether the decision requires the government to demonstrate subjective intent to threaten as a constitutionally essential element of any true threat prosecution, or whether the Court's ruling was limited to the specific statute before it. Like the Third Circuit in this case, most Circuits to consider the issue have concluded that "*Black* did not work a 'sea change,' tacitly overruling decades of [Circuit] case law by importing a requirement of subjective intent into all threat-prohibiting statutes." *United States v. Martinez*, 736 F.3d 981, 987–88 (11th Cir. 2013).[3] *See also United States v. Jeffries*, 692 F.3d

[3] As Petitioner points out, the requirement of subjective intent has deep historical roots. If anything, recent cases to the

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

473, 479–80 (6th Cir. 2012) ("*Black* does not work the sea change that Jeffries proposes."), cert. denied, 134 S. Ct. 59 (2013); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("We are not convinced that *Black* effected the change that White claims."); *accord United States v. Nicklas*, 713 F.3d 435, 439–40 (8th Cir. 2013) (quoting *Jeffries*); *cf. United States v. Clemens*, 738 F.3d 1, 12 (1st Cir. 2013) (holding, on plain error review, that "[a]bsent further clarification from the Supreme Court, we see no basis to venture further and no basis to depart from our circuit law").

Other courts have disagreed, reasoning that the "clear import" of *Black* "is that only *intentional* threats are criminally punishable consistently with the First Amendment." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (O'Scannlain, J.). *See also United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.") (Reinhardt, J.); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (stating that "an entirely objective definition" of true threats may "no longer [be] tenable" after *Black*); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (stating that a constitutionally proscribed true threat "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" (quoting *Black*, 538 U.S. at 360)); *White*, 670 F.3d at 520 (Floyd, J., concurring in part and dissenting in part) ("*Black* . . . makes our

---

contrary are themselves a departure from this original understanding. Pet. Br. at 36–39.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

purely objective approach to ascertaining true threats no longer tenable.”).

Although courts adhering to the majority view of *Black* have been reluctant to revise their prior precedents in the absence of plain command, the minority view provides the better reading of the decision. First, as mentioned above, *Black* expressly defined true threats as “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). As the Ninth Circuit has held, “[a] natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.” *Cassel*, 408 F.3d at 631. Some courts have maintained that *Black*’s discussion of specific intent was descriptive rather than normative. According to this theory, the Court included a specific intent element in its true threat definition only because it was there “addressing a *specific intent statute* that requires, as an element of the offense, a specific intent to intimidate.” *White*, 670 F.3d at 517 (Duncan, J., concurring). This interpretation of *Black* is difficult to square with the decision’s language and structure. The Court’s true threat definition makes no reference to a particular statute or set of facts, but rather lays out a general explanation of what the concept of a true threat entails (specific intent to threaten) and does not entail (specific intent to carry out the threat). Moreover, the definition of a true threat occurs in Part III.A of the majority opinion, which defines the general contours of the First Amendment analysis,

rather than Part III.B, which applies that analysis to the statute under consideration.

References to specific intent echo throughout the majority and plurality opinions in *Black*. The majority, for example, described "intimidation" as "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 360. It makes little sense to impose this intent to threaten requirement for one type of true threat but not others. *See White*, 670 F.3d at 522 (opinion of Floyd, J.). Indeed, "[t]he Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another 'prima facie evidence of an intent to intimidate.'" *Cassel*, 408 F.3d at 631.

In striking down the prima facie evidence provision as facially unconstitutional, the plurality explained that the provision violates the First Amendment because it "does 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 (emphases added). *See also id.* at 367 ("The provision . . . ignores all of the contextual factors that are necessary to decide whether a particular cross burning *is intended to intimidate*. The First Amendment does not permit such a shortcut." (emphasis added)). "If the First

Amendment did not impose a specific intent requirement, 'Virginia's statutory presumption was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it." *White*, 670 F.3d at 523 (opinion of Floyd, J.) (quoting Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217).

The other opinions in *Black* similarly reflect a consensus on the Court that intent to threaten is an essential element of any true threat. Justice Scalia, in his partial concurrence, disagreed with the Court's facial invalidation of the statute, but agreed that the jury instructions in Black's case, which stated that "[t]he burning of a cross, *by itself*, is sufficient evidence from which you may infer the required intent," were constitutionally deficient because they made it "impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it—*including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate—or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross." 538 U.S. at 377, 380 (opinion of Scalia, J.). And Justice Souter, in his partial concurrence, argued that the prima facie evidence provision rendered the entire statute facially unconstitutional because "its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Id.* at 385 (opinion of Souter, J.). *See also id.* at 386 ("What is significant is

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one."). Thus, eight of the Justices in *Black* "agreed that intent to intimidate is necessary [for true threats] and that the government must prove it in order to secure a conviction." *Cassel*, 408 F.3d at 632 & n.7.

B. First Amendment Principles Favor A Subjective Intent To Threaten Requirement.

Even if *Black* did not already settle the issue, First Amendment principles compel the conclusion that subjective intent to threaten is an essential element of any true threat. Under the purely objective standard for evaluating true threats, a speaker may be "subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention." *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring). In other words, it is essentially a "negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Id.* Standing alone, this objective analysis "asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

known others would see it that way." *Jeffries*, 692 F.3d at 484-85 (Sutton, J., concurring *dubitante*).[4]

This Court has frequently noted the importance of intent in criminal law. "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil." *Morissette v. United States*, 342 U.S. 246, 251–52 (1952). It is a principle with ancient lineage. *See* 4 William Blackstone, *Commentaries on*

[4] Courts applying a purely objective standard have split over whether to apply a reasonable speaker test or a reasonable listener test. *See United States v. Saunders*, 166 F.3d 907, 913 & n.6 (7th Cir. 1999) (collecting cases). Under the reasonable speaker test, a statement is a true threat if it was made "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (internal quotation marks omitted). The reasonable listener test, by contrast, asks only whether "whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (internal quotation marks omitted). Only the reasonable speaker standard qualifies as a negligence-based standard. The reasonable listener standard is more appropriately characterized as a strict liability standard because it would allow a jury to convict a speaker "for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant." *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997). *See also* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1246 (2006) ("In reasonable listener jurisdictions, the only intent element is that the statement was knowingly made.").

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

the Laws of England 21 (1769) ("And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all."); Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881) ("Even a dog distinguishes between being stumbled over and being kicked."). Thus, absent an explicit statutory direction to the contrary (which may raise its own constitutional issues), this Court presumes an intent requirement for criminal laws, *Morrisette*, 342 U.S. at 250, particularly where *mens rea* serves as the "crucial element separating legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (interpreting the term "knowingly," as used in the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252, to require the government to demonstrate that defendants charged with trafficking in child pornography were aware of both the minority of the performers and the sexually explicit nature of the material).

When a criminal prosecution is premised on speech, as here, the general presumption in favor of a subjective intent requirement is reinforced by this country's constitutional tradition of allowing breathing room for the free exchange of ideas. *See Rogers*, 422 U.S. at 44, 47 (opinion of Marshall, J.) (stating that the Court "should be particularly wary of adopting . . . a [negligence] standard for a statute that regulates pure speech," because a purely "objective construction" of true threats "would create a substantial risk that crude, but constitutionally protected, speech might be criminalized" or chilled).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Anyone conversant with public discourse in this country, particularly as expressed on Internet public comment threads, is undoubtedly familiar with Americans' frequent resort to strong and even offensive language. "The language of the political arena," in particular, "is often vituperative, abusive, and inexact," and "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted).[5] Sometimes there will be sufficient contextual detail to make it objectively clear whether a speaker is issuing a true threat or is engaged in some form of protected First Amendment expression. But many times—and particularly in the case of Internet speech, where the context surrounding a particular statement on a message board or comments thread may be exceedingly thin or difficult to ascertain—whether a given statement qualifies as a threat will be in the eye or ear of the beholder. In those circumstances, the purely objective true threat standard provides insufficient breathing for protected First Amendment expression. *Watts*, 394 U.S. at 708.

---

[5] Although this case does not involve speech advocating a particular political or ideological agenda, the question of whether subjective intent to threaten is required to characterize speech as a true threat outside the First Amendment will likely determine the rule for political and ideological speech as well. As this Court has explained, the determination of whether particular speech lies wholly outside the First Amendment is a categorical one that does not turn on a "simple cost-benefit analysis." *Stevens*, 559 U.S. at 471.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Moreover, because the jury in a true threat case is likely to hold the common prejudices of its place and time, the threat of prosecution under the purely objective standard hangs most heavily over the heads of those advocating unpopular or unconventional ideas. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). The risk of criminal prosecution is especially great for those holding unpopular or controversial views whose "violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening." *White*, 670 F.3d at 525 (opinion of Floyd, J.); *cf. Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

To avoid that risk, many speakers will self-censor. "The purely objective approach allows speakers to be convicted for negligently making a threatening statement—that is, for making a statement the speaker did not intend to be threatening, but that a reasonable person would perceive as such. This potential chills core political speech." *White*, 670 F.3d at 524 (opinion of Floyd, J.) *See also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 316 (2001) ("Punishing merely negligent speech will chill legitimate speech by forcing speakers to steer clear of any questionable speech."). "Put simply, an

objective standard chills speech." Crane, *supra* note 4, at 1273.

This Court has addressed similar First Amendment problems in the incitement context by imposing subjective intent as an essential element of criminal liability. For example, in *Brandenburg v. Ohio*, this Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation [i.e., incitement] except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," and stated that any statute failing to recognize these requirements "sweeps within its condemnation speech which our Constitution has immunized from governmental control." 395 U.S. 444, 448 (1969) (per curiam); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (concluding that the defendant's speech was not incitement, in part because "there was no evidence or rational inference from the import of the language that his words were intended to produce, and likely to produce, imminent disorder").[6] And, in *Claiborne Hardware*, the Court

[6] The Court has also used this "breathing room" rationale to justify subjective intent requirements for other statutes criminalizing pure speech. In *United States v. Alvarez*, for example, two Members of this Court explicitly recognized that statutes criminalizing false speech should be interpreted as requiring the government to demonstrate that the speaker made the false statements "with knowledge of their falsity and with the intent that they be taken as true," so as to "provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

held that although a boycott organizer's impassioned statements for black citizens to support the boycott "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence," the "emotionally charged rhetoric of [his] speech did not transcend the bounds of protected speech set forth in *Brandenburg*," because there was "no evidence—apart from the speeches themselves—that [he] authorized, ratified, or directly threatened acts of violence." 458 U.S. at 927–29. "To rule otherwise," the Court recognized, "would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 928 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Requiring the government to demonstrate subjective intent to threaten in true threat cases would not substantially hinder its ability to prosecute actually intended threats. As in most criminal prosecutions, where intent is an essential element of the crime, the jury may infer the defendant's *mens rea* from the totality of the evidence, including the statement itself. The subjective intent requirement "simply permit[s] the speaker an opportunity to explain his statement—an explanation that may shed light on the question of whether this communication was articulating an idea or expressing a threat." Crane, *supra* note 4, at 1275. In some cases, the defendant might have a perfectly plausible explanation for her choice of words. *See Fulmer*, 108 F.3d at 1490 (defendant argued that his allegedly threatening statement to an FBI agent—"[t]he silver bullets are coming"—was code for clear-cut evidence of wrongdoing). In others, the defendant might argue that she lacked the requisite mental

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

capacity to subjectively intend a threat. *See United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988) (conditioning the viability of the defendant's diminished capacity defense on the court's conclusion that 18 U.S.C. §§ 875 and 876 are specific intent statutes); *see generally* Crane, *supra* note 4, at 1236 & nn. 44–47.

Critics of the subjective intent requirement have generally argued that it gives insufficient weight to the harm caused by objectively threatening statements, regardless of whether those statements were intended to threaten. *See, e.g.*, *Jeffries*, 692 F.3d at 480 ("What is excluded from First Amendment protection—threats rooted in their effect on the listener—works well with a test that focuses not on the intent of the speaker but on the effect on a reasonable listener of the speech."). To be sure, the government has a legitimate interest in "protecting individuals from the fear of violence" and "from the disruption that fear engenders," as well as "the possibility that the threatened violence will occur." *RAV v. City of St. Paul*, 505 U.S. 377, 388 (1992). In particular, violence against women represents a serious societal problem that needs to be addressed.[7] But the First Amendment constrains the government's ability to advance that interest through means that punish or chill protected expression. That is the risk created by the government's proposed rule in this case, which will not be limited to these facts. "Statements deemed threatening in nature only upon

[7] *See United States v. Morrison*, 529 U.S. 598, 629–630 (2000) (Souter, J., dissenting) (citing statistics regarding violence against women in the U.S.).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

'objective' consideration will be deterred [by 18 U.S.C. § 871] only if persons criticizing the President are careful to give a wide berth to any comment that might be construed as threatening in nature. And that degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Rogers*, 422 U.S. at 47–48 (opinion of Marshall, J.). Requiring the government to demonstrate subjective intent to threaten as part of any true threat prosecution strikes the constitutionally appropriate balance between the government's interest in protecting against the harms caused by threats and the country's constitutional tradition of encouraging the free and uninhibited exchange of ideas.

II. A SUBJECTIVE INTENT REQUIREMENT IS PARTICULARLY IMPORTANT FOR PROTECTING ONLINE SPEECH

For many people throughout the United States—indeed, the world—the Internet has become the predominant means for communication and public discourse. "This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue." *Reno*, 521 U.S. at 870. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Id.* When this Court decided *Reno* in 1997, the government estimated that "[a]s many as 40 million

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

people use the Internet." *Id.* (alteration in original) (internal quotation marks omitted). By 2010, "22 percent of the world's population had access to computers[,] with 1 billion Google searches every day, 300 million Internet users reading blogs, and 2 billion videos viewed daily on YouTube." Wikipedia, The Free Encyclopedia, *Internet*, https://en.wikipedia.org/wiki/Internet (last visited Aug. 7, 2014). In the United States, 74.8 percent of all households access the Internet at home in 2012, up from 18.0 percent in 1997, and 45.3 percent of individuals 25 and older were using smartphones. U.S. Census Bureau, *Computer and Internet Trends in America* (Feb 3, 2014), http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf.

Now, more than ever, "[t]he content on the Internet is as diverse as human thought." *Reno*, 521 U.S. at 870 (internal quotation marks and citation omitted). And, just as with offline speech, the types of content available "defy easy classification." *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996). Individuals can communicate with each other and the broader public through all manner of Internet-based media, including email, chat rooms, direct messaging services, newsgroups, videos, blogs, websites, games, social networks such as Facebook, and remote hosting services for shared files. The ideas, opinions, emotions, actions, and desires capable of communication through the Internet are limited only by the human capacity for expression. If First Amendment protections are to enjoy enduring relevance in the twenty-first century, they must apply with full force to speech conducted online. As this Court made absolutely clear in *Reno*, there is "no

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

basis for qualifying the level of First Amendment scrutiny that should be applied" to speech conducted on the Internet. *Reno*, 521 U.S. at 870.

The reasons for imposing a subjective intent to threaten requirement on true threat prosecutions apply with equal, if not greater, force to online speech than they do to offline speech. First, online speakers often have less information about the composition of the audience they are targeting with a communication. A message posted to a publicly accessible website or mailing list is potentially viewable by anyone with an Internet connection anywhere in the world. A speaker may post a statement online with the expectation that a relatively small number of people will see it, without anticipating that it could be read—and understood very differently—by a much broader audience.[8]

Second, online communications can easily become decontextualized by third parties. A speaker might send an email to one person, only to see that person forward the message to dozens of others or post it on a public mailing list. Or a speaker may

---

[8] *See e.g.*, Danah Boyd, *It's Complicated: The Social Lives of Networked Teens* 31–32 (2014) ("In speaking to an unknown or invisible audience, it is impossible and unproductive to account for the full range of plausible interpretations [of a statement]. Instead, public speakers consistently imagine a specific subset of potential readers or viewers and focus on how those intended viewers are likely to respond to a particular statement. As a result, the imagined audience defines the social context. In choosing how to present themselves before disconnected and invisible audiences, people must attempt to resolve context collapses or actively define the context in which they're operating.").

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

post a comment on his own Facebook profile page, intending it to be seen only by those friends he has allowed to view his page, and later find that one of those friends has taken a screen-capture of his comments and posted the image to an entirely different website. These actions, completely beyond the control of the speaker, place the speaker's statements in front of audiences that the speaker had no expectation or intent to reach. Further, such decontextualization circumvents any effort by a speaker to provide additional context, outside the plain words of the statement, that would make the non-threatening intent of the statement clear. Different online communication fora will often develop their own conventions for expressing emotion and sarcasm. *See* Jorge Peña & Jeffrey T. Hancock, *An Analysis of Socioemotional and Task Communication in Online Multiplayer Video Games*, 33 Comm. Res. 92, 98 (2006) ("[Computer-mediated communication] participants tend to express themselves employing collective conventions, such as a shared jargon and argot . . . . CMC conventions can be considered as surrogates for nonverbal communication and can be employed to express emotions, moods, humor, sarcasm, and irony."). Even within a single online environment, such as a multiplayer online game, sub-communities will form and develop their own communication styles. *See* Dmitri Williams et al., *From Tree House to Barracks: The Social Life of Guilds in World of Warcraft*, 1 Games & Culture 338, 357 (2006). Statements made to a close-knit community could easily be misinterpreted when taken out of context or read by a newcomer who is not yet familiar with the conventions or practices of that community. Thus,

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

use of an objective test for online communication would inevitably chill constitutionally protected speech, as speakers would bear the burden of accurately anticipating the potential reaction of unfamiliar listeners or readers.

A subjective intent requirement addresses this problem by allowing a jury to consider more evidence contextualizing the online comment than could be considered under a purely objective standard, including the defendant's intended audience, other remarks clarifying the challenged statement's meaning, the defendant's motive for making the statement, and so forth. And, just as with offline speech, a requirement that the government demonstrate a speaker's subjective intent to threaten would not unduly impede its ability to prosecute speakers who intentionally threaten others. While a speaker cannot control what happens to her statement after she posts it, there are certainly a number of judgments speakers make each time they engage in online communication. These choices are often relevant to both the objective import of the speaker's words *and* the speaker's subjective intent in posting them. For example, a speaker may decide to send an email or a one-to-one chat message directly to another individual with whom he has a preexisting relationship. Or a speaker may decide to post a message to a personal social media account, access to which is restricted to an audience of his choosing. A speaker may include her message on an issue-specific message board, and the message may be on- or off-topic for that forum. A speaker may also decide to publish her message on a platform that is publicly visible, and may take steps to increase the chances that the message is viewed by a particular

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

individual or group (for example, posting publicly on Twitter and including a hashtag that is relevant to the topic or including another person's username in the post). Each of these scenarios presents different, situation-specific information about a speaker's choices regarding the scope, reach, and intended audience of her statement—precisely the sort of evidence that could be relevant to a jury's assessment of the speaker's subjective intent.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

CONCLUSION

For the foregoing reasons, this Court should hold that subjective intent to threaten is an essential element of any true threat, regardless of whether the relevant statement occurred on the Internet or elsewhere. Accordingly, the judgment below should be reversed.

Respectfully submitted,

Steven R. Shapiro
Counsel of Record
Brian M. Hauss
Lee Rowland
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Jack M. Balkin
David A. Schulz
Jonathan M. Manes
Abrams Institute for Freedom of Expression
Yale Law School
P.O. Box 208215
New Haven, CT 06520
(203) 432-9387

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Ilya Shapiro
Cato Institute
1000 Massachusetts
Avenue, NW
Washington, DC 20001
(202) 842-0200

Emma J. Llansó
Center for Democracy
& Technology
1634 I Street NW,
11th Floor
Washington, DC 20006
(202) 637-9800

Joan E. Bertin
National Coalition Against
Censorship
19 Fulton Street,
Suite 407
New York, NY 10038
(212) 807-6222

Dated: August 22, 2014

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

No. 13-983

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,
Petitioner,
v.

UNITED STATES,
Respondent.

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

AMICI CURIAE BRIEF OF THE MARION B. BRECHNER FIRST AMENDMENT PROJECT AND RAP MUSIC SCHOLARS (PROFESSORS ERIK NIELSON AND CHARIS E. KUBRIN) IN SUPPORT OF PETITIONER

CLAY CALVERT
Counsel of Record
MARION B. BRECHNER
FIRST AMENDMENT PROJECT
2060 Weimer Hall
Gainesville, FL 32611
(352) 273-1096
ccalvert@jou.ufl.edu

Counsel for Amici Curiae

August 18, 2014

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. Origins of Hip Hop and Rap 6

II. The Complexity, Hyperbole, and Rhetoric of Rap: Meanings Lost in Translation 8

III. Fear of Rap: Another Moral Panic 17

IV. Rap is Art, Even If It Often is Misinterpreted and Misunderstood 21

CONCLUSION 24

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

TABLE OF AUTHORITIES

CASES:

Brown v. Entertainment Merchants Association,
131 S. Ct. 2729 (2011) 17

Citizens United v. Federal Election Commission,
558 U.S. 310 (2010) 11

Cohen v. California,
403 U.S. 15 (1971) 18, 24

Illinois v. Oduwole,
985 N.E.2d 316 (Ill. App. Ct. 2013),
appeal denied, 2013 Ill. LEXIS 796
(Ill. May 29, 2013) 4

In re S.W.,
45 A.3d 151 (D.C. Cir. 2012) 4

New Jersey v. Skinner,
2014 N.J. LEXIS 803 (N.J. Aug. 4, 2014) 17

United States v. Elonis,
730 F.3d 321 (3d Cir. 2013) 2, 16

United States v. Jeffries,
692 F.3d 473 (6th Cir. 2013) 4

CONSTITUTION:

U.S. Const. amend I . . . . *passim*

STATUTES:

18 U.S.C. § 875(c) 2, 3, 5, 11, 24

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

OTHER AUTHORITIES:

Ernest Allen, Jr., *Message Rap*, *in* DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 159 (William Eric Perkins ed., 1996) 11

Sally Banes, *Physical Graffiti: Breaking is Hard to Do*, *in* AND IT DON'T STOP 6 (Raquel Cepeda ed., 2004) 8

NOTORIOUS B.I.G., *Things Done Changed*, *on* READY TO DIE (Bad Boy Records 1994) 23

Peter Blecha, TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS (2004) 18

Adam Bradley, BOOK OF RHYMES: THE POETICS OF HIP HOP (2009) 9

Adam Bradley & Andrew DuBois, THE ANTHOLOGY OF RAP (2010) 9, 10

Jeff Chang, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION (2005) 6

Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007) 20

Michael Eric Dyson, KNOW WHAT I MEAN? REFLECTIONS ON HIP HOP (2007) 12, 19

Mark Edmundson, *Poetry Slam: Or, the Decline of American Verse,* HARPER'S MAG., July 2013, at 65 21

EMINEM, *Sing for the Moment*, *on* THE EMINEM SHOW (Aftermath 2002) 15

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Murray Forman, THE 'HOOD COMES FIRST: RACE, PLACE, AND SPACE IN RAP AND HIP HOP (2002) 12

Carrie Fried, *Who's Afraid of Rap? Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999) 20

Virginia C. Fowler, NIKKI GIOVANNI: A LITERARY BIOGRAPHY (2013) 14

Henry Louis Gates, Jr., THE SIGNIFYING MONKEY (1988) 9

Patrick Goldstein, *The Hard Cold Rap of Ice-T,* L.A. TIMES, Apr. 24, 1988, http://articles.latimes.com/1988-04-24/entertainment/ca-2445_1_rap-wizard 23

Tipper Gore, *Hate, Rape, and Rap*, WASH. POST, Jan. 8, 1990 19

Travis L. Gosa, *Why Do Students Resist Hip Hop Studies?*, *in* TEACHING POLITICS BEYOND THE BOOK: FILM, TEXT, AND NEW MEDIA IN THE CLASSROOM 109 (Robert W. Glover & Daniel Tagliarina eds., 2013) 22

Corinne Heller, *Eminem's Daughter, Hailie Jade Scott Mathers, 18, Graduates High School (With Honors) & Pays Tribute to Parents*, E! ONLINE NEWS, June 29, 2014, *available at* http://www.eonline.com/news/555402/eminem-s-daughter-hailie-jade-scott-mathers-18-graduates-high-school-with-honors-pays-tribute-to-parents 16

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Hip-hop on Trial. INTELLIGENCE SQUARED AND GOOGLE+ "VERSUS" DEBATE SERIES, June 27, 2012, http://www.youtube.com/watch?v=r3-7Y0xG89Q 19, 23

Cheryl L. Keyes, RAP MUSIC AND STREET CONSCIOUSNESS (2002) 8

Bakari Kitwana, THE RAP ON GANGSTA RAP (1994) 14

Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52.3 SOC. PROBS. 360 (2005) 13

Charis E. Kubrin & Erik Nielson, *Rap on Trial*, RACE & JUST. (published online before print Mar. 7, 2014), available at doi: 10.1177/2153368714525411 . . . . 15, 20

George Lipsitz, FOOTSTEPS IN THE DARK: THE HIDDEN HISTORIES OF POPULAR MUSIC (2007) 18, 19

Theresa Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance,* 40.2 SOC. PERSP. 265 (1992) 12

Erik Nielson, *"Can't C Me": Surveillance and Rap Music*, 40.6 J. BLACK STUD. 1254 (2010) 18

Erik Nielson, *"Here Come the Cops": Policing the Resistance in Rap Music*, 15.4 INT'L J. CULTURAL STUD. 349 (2011) 19-20

N.W.A., *Fuck tha Police*, *on* STRAIGHT OUTTA COMPTON (Ruthless Records 1988) 17

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Imani Perry, PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP (2004) 13

Petition for Writ of Certiorari, *Elonis v. United States*, No. 13-983, 2013 U.S. Briefs 983; 2014 U.S. S. Ct. Briefs LEXIS 599 (Feb. 14, 2014) . . 16

Russell A. Potter, SPECTACULAR VERNACULARS: HIP-HOP AND THE POLITICS OF POSTMODERNISM (1995) 9

Catherine T. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. NEGRO EDUC. 245 (1991) 12

Emmett G. Price, HIP HOP CULTURE (2006) 7

Eithne Quinn, NUTHIN' BUT A "G" THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP (2005) 13

Reagan, in South Bronx, Says Carter Broke Vow, N.Y. TIMES, Aug. 6, 1980 7

Tricia Rose, BLACK NOISE (1994) 6, 8

Tricia Rose, THE HIP HOP WARS (2008) 14

Geneva Smitherman, TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA (1977) 11

Lester K. Spence, STARE IN THE DARKNESS: THE LIMITS OF HIP-HOP AND BLACK POLITICS (2011) 21

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

WU-TANG CLAN, *Clan in Da Front*, on ENTER THE WU-TANG CLAN (36 CHAMBERS) (Loud Records 1993) . 10

Jay Z, DECODED (2010) 11

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

INTERESTS OF *AMICI CURIAE*[1]

The Marion B. Brechner First Amendment Project is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current cases and controversies affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition, and freedom of thought. The Project's director has published scholarly articles on the true threats doctrine, the subject at issue in this case, and presented a scholarly, refereed conference paper in early August 2014 regarding the intersection of true threats and rap music, which is at issue in this case.

Erik Nielson is Assistant Professor of Liberal Arts at the University of Richmond, where his research and teaching focus on hip hop culture and African American literature. He has published several peer-reviewed articles on African American music and poetry, with a particular emphasis on rap music. He frequently lectures on hip hop culture at conferences in the United States, Canada, and the United Kingdom, and his work has been featured in a wide range of major news media outlets. He also has served as an expert witness and

---

[1] Pursuant to Rule of Court 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

consultant in multiple criminal cases involving rap music as evidence of alleged underlying criminal activity.

Charis E. Kubrin is Professor of Criminology, Law and Society and (by courtesy) Sociology at the University of California, Irvine. She has published widely on the intersection of music, culture, and social identity, particularly as it applies to hip hop and minority youth in disadvantaged communities. Perhaps her most important scholarly work in this area, an article titled "Gangstas, Thugs and Hustlas: Identity and the Code of the Street in Rap Music," was published in the journal *Social Problems* and has been cited more than 150 times and reprinted in four edited volumes. She has served as an expert witness and consultant in multiple criminal cases involving rap music as evidence of alleged underlying criminal activity. In 2005, she received the Ruth Shonle Cavan Young Scholar Award from the discipline's flagship organization, the American Society of Criminology.

SUMMARY OF ARGUMENT

The history and conventions of rap music, the heavily stigmatized artistic and often political genre of musical expression through which Petitioner Anthony Douglas Elonis conveyed much of the speech at issue in this case, illustrate why the Court should: a) require proof of the defendant-speaker's subjective intent to threaten under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c); and b) reverse the decision by the United States Court of Appeals for the Third Circuit in *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

This brief, focusing on and grounded in the work of leading rap music scholars, demonstrates the interpretative problems of meaning and understanding of rap lyrics that, unless the defendant-speaker's subjective intent is taken into account, may cause a person, particularly one unfamiliar with the genre or who holds negative stereotypes about it, to falsely and incorrectly interpret them as a threat of violence or unlawful conduct.

Rap music resides squarely within a long tradition of African American storytelling and verbal competition, one that privileges exaggeration, metaphor, and, above all, wordplay. Underlying this tradition is the practice of signifying, or the obscuring of apparent meaning; in the process of signifying, ambiguity is prized, meaning is destabilized, and gaps between the literal and the figurative are intentionally exploited. This practice, along with rap's dense slang and penchant for imbuing words with new meaning(s), makes it especially susceptible to misreading and misinterpretation. It thus is critical that the defendant-speaker's subjective intent is considered under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

Although it emerged as a voice for marginalized people who were often seeking an alternative to crime and violence, rap has, for several decades, drawn the ire and vitriol of police, politicians, religious leaders, and civic groups who maintain it is particularly threatening to American society. Indeed, research by social scientists reveals that people view rap as more dangerous and threatening when compared to other music genres. These negatively stigmatized perceptions

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

stem, in large part, from broader stereotypes, both about the genre itself and the primary creators of rap music – young men of color. Unless the defendant-speaker's subjective intent is taken into consideration, such biases and prejudices may subtly cause jurors and jurists to erroneously find true threats where none exist.

Yet these stereotypes ignore the importance of rap music, which not only is a global, multibillion-dollar industry, but also an influential and recognized form of artistic expression. With audiences dwarfing their traditional literary counterparts, rappers have introduced the world to a powerful new poetry – one memorized and recited by millions of people – that has given voice to communities of marginalized people and, at its best, has served as an anthem of resistance in the face of injustice.

Furthermore, the case now before the Court is far from the only recent legal dispute residing at the intersection of rap music and alleged threats. See, e.g., *United States v. Jeffries*, 692 F.3d 473, 475 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 59 (2013) (true threats case involving song written in a style that was "part country, part rap"); *Illinois v. Oduwole*, 985 N.E.2d 316, 324 (Ill. App. Ct. 2013), *appeal denied*, 2013 Ill. LEXIS 796 (Ill. May 29, 2013) (terrorist threats case involving writings that "constituted the formative stages of a rap song" by defendant with an "aspiring rap career"); *In re S.W.*, 45 A.3d 151, 153 (D.C. Cir. 2012) (threats case centering on "modified lyrics" of rap song by multi-platinum hip hop artist Lil Wayne). The problems with muddled musical meanings addressed here thus are likely to arise again in threats cases and,

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

in turn, necessitate consideration of the speaker-defendant's subjective intent.

With this background on rap in mind, a fundamental question illustrates a key problem with focusing only on a recipient-observer's "reasonable" perspective in the true threats analysis: What level of knowledge of rap and understanding of its complicated conventions is a defendant-speaker to assume, in advance of communication, that a hypothetically reasonable person possesses in order to properly understand a rap message? Because the answer is anything but clear and because a speaker's First Amendment rights should not hang on what amounts to guesswork about an audience's hypothetically reasonable knowledge of a complex artistic and political genre of expression, the actual subjective intent of the defendant-speaker must be considered in both the First Amendment and statutory true threats analyses.

In summary, because artistic and political genres of expression like rap, through which alleged threats ostensibly are conveyed, involve a substantial likelihood that intended meanings may be misunderstood, *amici curiae* respectfully urge the Court to require proof of a defendant-speaker's subjective intent to threaten under both the First Amendment and 18 U.S.C. § 875(c).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

ARGUMENT

I. Origins of Hip Hop and Rap

In order to understand rap music, one must first understand hip hop. Hip hop is, broadly speaking, a cultural movement comprised of several artistic elements, including graffiti, break dancing, DJing, and – critically for purposes of this case and brief – rap music. See Tricia Rose, BLACK NOISE 2 (1994). Rap thus constitutes one facet – specifically, a verbal and musical one – of the larger culture of hip hop.

Hip hop evolved with political overtones, as a means through which black and Latino youth could comment on and challenge the social conditions they confronted on a daily basis – conditions driven by deindustrialization, economic restructuring, and a precipitous rise in incarceration. As a result of these social and economic shifts, the landscape of urban America deteriorated rapidly, including in places like the South Bronx, widely regarded as ground zero for hip hop.

By the 1970s, the South Bronx was a scene of utter devastation. With thousands of burnt-out, abandoned buildings, the physical landscape mirrored the hopelessness faced by its residents. They were forced to deal with the combined effects of poverty, unemployment, and isolation from mainstream America. See Jeff Chang, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 17 (2005).

By the late 1970s, conditions were so dire that President Jimmy Carter, Pope John Paul II, and Mother Teresa all made trips there to witness what had become an international symbol of urban failure.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

In 1980, after then-Presidential candidate Ronald Reagan visited the area, he proclaimed not seeing "anything like this since London after the Blitz." *Reagan, in South Bronx, Says Carter Broke Vow,* N.Y. TIMES, Aug. 6, 1980, at A16.

Hip hop emerged as an expressive outlet for residents of these disadvantaged communities, a collective voice that was, in many ways, being silenced in a rapidly-changing America. Importantly, it began as (and continues to be) an agent of social and political change.

For one, it helped erode the violent gang culture that consumed places like the Bronx. Whereas gangs had long claimed territory through fighting, hip hop "posses" or "crews" (often comprised of former gang members) sought an alternative to violence. Hip hop pioneer Afrika Bambaataa, for example, once a leader of the infamous Black Spades gang, created the Universal Zulu Nation to redirect gang activity into positive social action centered around hip hop. See Emmett G. Price, HIP HOP CULTURE 12 -13 (2006).

Through Bambaataa's efforts and those of many other young men and women, street gangs lost their grip on the Bronx and, more generally, New York City. By weakening gang culture throughout the city, hip hop achieved something that police and politicians had for years failed to accomplish. This marked the beginning of a movement, one centered on positive social change, which soon spread to urban centers nationwide.

And yet, given its roots in communities marred by pervasive crime and violence, hip hop and its musical

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

subcomponent, rap, have long been misconstrued as extensions of urban dysfunction rather than a response to it. To an outside observer, for instance, the frenetic and aggressive maneuvers of break dancers engaged in head-to-head competitions (called "battles") can appear out of control or violent; in fact, there have been cases in which police intervened because they mistakenly believed the dancers were fighting. See Rose, *supra,* at 50.

In reality, however, the dancers are practicing a highly complex, rehearsed set of maneuvers that are anything but violent. Journalist Sally Banes, after watching a battle between rival crews in 1981, correctly observed that break dancing amounts to "ritual combat that transmutes aggression into art." Sally Banes, *Physical Graffiti: Breaking is Hard to Do*, *in* AND IT DON'T STOP 6, 9 (Raquel Cepeda ed., 2004).

Without an understanding of the history and traditions of hip hop culture, its artistic elements are vulnerable to misinterpretation. Over the last three decades, this has proven especially true for rap music.

II. The Complexity, Hyperbole, and Rhetoric of Rap: Meanings Lost in Translation

Defined as "a musical form that makes use of rhyme, rhythmic speech, and street vernacular, which is recited or loosely chanted over a musical soundtrack," (Cheryl L. Keyes, RAP MUSIC AND STREET CONSCIOUSNESS 1 (2002)), rap is what Harvard University professor Henry Louis Gates, Jr. describes as "the new vanguard of American poetry," one "born of young black and brown men and women who found their voices in rhyme, and chanted a poetic discourse to

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

the rhythm of the beat." Adam Bradley & Andrew DuBois, THE ANTHOLOGY OF RAP xxvi (2010).

As Gates, Jr. and many others have pointed out, rap music may have emerged from New York's burgeoning hip hop culture, but it resides within a long tradition of African American storytelling and language games that privilege parody, pastiche, and, above all, wordplay. Russell A. Potter, SPECTACULAR VERNACULARS: HIP-HOP AND THE POLITICS OF POSTMODERNISM 18 (1995).

Rap's artistic lineage is easily spotted, for example, in century-old "toasts" – long poems, orally transmitted in rhymed verse, that often are humorous, even bawdy or violent. It also is found in verbal competitions such as "the dozens," in which two opponents trade insults, often in rhyme, until a winner emerges. See Adam Bradley, BOOK OF RHYMES: THE POETICS OF HIP HOP 183 (2009). Although the insults may appear to breach the lines of healthy competition – references to violence and barbs aimed at "yo' mama" are common – the contestants and onlookers understand they are not to be taken literally.

Underlying these poems and word games is the process of signifying, or "the obscuring of apparent meaning." Henry Louis Gates, Jr., THE SIGNIFYING MONKEY 53 (1988). In the signifying tradition, ambiguity is prized, meaning is destabilized, and gaps between the literal and the figurative are intentionally exploited. As Gates, Jr. notes, the relationship between meaning and intent is therefore "skewed." Gates, Jr., *supra* at 54. An insult can be a compliment, a seeming threat just a mere joke.

Signifying lies at the heart of rap music. To the uninitiated, the lyrics at times may seem alarming, even dangerous. For example, in rap battles – competitions, reminiscent of the dozens, in which rappers verbally spar in rhymed verse – it is common to use the term "body bag" to describe an opponent's victory over an adversary (e.g., "you just got body-bagged"). Under most circumstances, the ostensible threat of being "body bagged" suggests extreme violence, but in rap battles, it becomes a metaphor that strips the phrase of any such intent.

Similarly, when GZA from the well-known group Wu-Tang Clan raps, "I'll hang your ass with this microphone" and later warns "I come sharp as a blade and I cut you slow," he is asserting his virtuosity as a lyricist rather than making literal threats of violence. WU-TANG CLAN, *Clan in Da Front*, *on* ENTER THE WU-TANG CLAN (36 CHAMBERS) (Loud Records 1993). Recognizing this type of rhetorical flexibility is essential to interpreting rap music.

Most, if not all, art forms require some level of expertise to be fully understood. Anyone reading Geoffrey Chaucer or T.S. Eliot for the first time can attest to this fact. Yet, rap's complexities make it particularly challenging. For starters, rappers employ all the same devices as other poets, including extensive use of symbolism and metaphor; they are also highly focused on form, choosing words not only for their meanings and connotations, but also for their place in the meter and rhyme scheme of the song. BRADLEY & DUBOIS, *supra* at xxx-xxxi.

At the same time, rap music is characterized by dense slang, coded references, intentional

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

mispronunciations, and sometimes blazing-fast delivery, all of which defy interpretation at every turn. This often is the point in rap, as well as in black vernacular generally, which long has employed semantic inversion (reversing word meaning), neologism (inventing new words), and other devices to maintain a "black linguistic code." Geneva Smitherman, TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA 70 (1977). Speaking to this "code" in rap, Grammy-award-winning rapper Jay Z writes, "[t]he art of rap is deceptive," noting that lyrics are imbued with multiple, unresolved layers of meaning so that "great rap remains a mystery" JAY Z, DECODED 54-55 (2010). This alone makes it clear why the subjective intent of the defendant-speaker should be considered under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

Even with its inherent mystery, rap music often serves as an explicit, even confrontational, vehicle for political commentary and resistance. Rappers frequently echo, or even quote directly, pioneering authors of the Harlem Renaissance, such as Langston Hughes and Claude McKay; the influential speeches of Malcolm X, Huey P. Newton, and Martin Luther King, Jr.; the radical poetry of Black Power era artists such as Amiri Baraka and Jayne Cortez; and the innovative song-poems of Gil Scott Heron and the Last Poets. See Ernest Allen, Jr., *Message Rap*, *in* DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 159, 161 (William Eric Perkins ed., 1996). Safeguarding political speech, of course, is "central to the meaning and purpose of the First Amendment." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010)).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

For many rappers, building upon the political legacy of their artistic predecessors – and broadcasting it to the masses – is an express purpose of the music. Rapper Chuck D of the group Public Enemy once described rap as "CNN for black America," while Queen Latifah, another influential rap artist, compared it to "a newspaper that people read with their ears." Catherine T. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. NEGRO EDUC. 245, 252 (1991).

While it would be misleading to extend the rap-as-journalism analogy too far, rap historically has functioned as a musical form that, through invented stories and characters, draws attention to a variety of pressing social issues, particularly those facing disadvantaged urban communities. For this reason, scholars readily acknowledge its potential to serve as a vehicle for resistance, one that is often "socially aware and consciously connected to historic patterns of political protest." Michael Eric Dyson, KNOW WHAT I MEAN? REFLECTIONS ON HIP HOP 64 (2007). As sociologist Theresa Martinez puts it, rap is "an expression of oppositional culture." Theresa Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance,* 40.2 SOC. PERSP. 265, 268 (1992).

Rap's oppositional stance became especially controversial with the emergence of "gangsta" rap, a subgenre first popularized in the late 1980s and early 1990s by West Coast artists such as Ice-T, N.W.A., and Snoop Dogg. See Murray Forman, THE 'HOOD COMES FIRST: RACE, PLACE, AND SPACE IN RAP AND HIP HOP 191 (2002).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Drawing on the rich tradition of the "bad man" in African American storytelling – a figure found in rhymed tales dating back to the nineteenth century, the urban novels of Iceberg Slim and Donald Goines, and the "blacksploitation" films of the 1970s – gangsta rappers began using their rhymes to celebrate the outlaw figure and reject traditional constructs of "legitimate" American life. See Eithne Quinn, NUTHIN' BUT A "G" THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP (2005). Their lyrics often contained graphic, highly exaggerated depictions of violence, criminal behavior, and misogyny, which were patterned after the pimps, hustlers, and gangsters found elsewhere in black and mainstream popular culture. See Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52.3 SOC. PROBS. 360 (2005).

For all its explicit and potentially offensive content, gangsta rap, along with related varieties of rap that foreground depictions of violence or criminality, has allowed young men and women of color to create a poetic universe in which they are masters of their environments. Often perceiving themselves as social outcasts and targets of institutional discrimination, they craft lyrics that give voice to the conditions in urban America that many people are not willing to confront – drug addiction, gun violence, and police brutality, to name a few – all while constructing themselves as figures of power within these precarious urban spaces. Imani Perry, PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP, 104 - 110 (2004).

Many critics have decried gangsta rap's violent, criminal themes, arguing that the music perpetuates

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

social ills without attempting to solve them. Yet once again, a closer look reveals a more nuanced reality than many critics recognize.

Take, for example, Tupac Shakur, one of rap's most well-known and highly respected artists. He had the words "Thug Life" tattooed across his chest, which was widely interpreted – misinterpreted, it turns out – as a sign that Shakur embraced violent gang life. In fact, one thing the tattoo signified was a complex code of ethics called "THUG LIFE," signed by members of the Bloods and Crips (rival gangs), that Shakur helped write in order to *reduce* the devastation caused by gang violence and drug addiction. Notably, acclaimed poet and university professor Nicki Giovanni now wears a "Thug Life" tattoo on her arm to honor Shakur's work. Virginia C. Fowler, NIKKI GIOVANNI: A LITERARY BIOGRAPHY 122 (2013).

While attracted to the political commentary, audiences are, no doubt, also drawn to gangsta rap's highly exaggerated, sordid tales of urban life, making it the most popular (and most profitable) subgenre of rap. Recognizing its enormous potential for commercial success, record companies long have pressured new acts to adopt gangsta-type rhetoric – a trend that continues today. Bakari Kitwana, THE RAP ON GANGSTA RAP 23 (1994).

To bolster the violent rhetoric, it is common for rappers, not unlike some well-known method actors or even professional wrestlers, to stay in character after they have left the stage, all the while acting as if they lead the lives they rap about. It is what Professor Tricia Rose calls rap's "pretense of no pretense." Tricia Rose, THE HIP HOP WARS 38 (2008). As the near-

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

universal adoption and use of stage names by rappers indicates, however, they live through invented characters and explore narrative voice, both on and offstage. Their preference for the first-person perspective may tempt listeners to conflate author and narrator, but as with other fictional forms, this is a mistake.

Indeed, many of the best-selling artists who have presented themselves as hardcore criminals – consider successful gangsta rapper Rick Ross, who attended college and even served as a corrections officer – are, in fact, well-educated, marketing savvy professionals. See Charis E. Kubrin & Erik Nielson, *Rap on Trial*, RACE & JUST. (2014).

Hence, when Marshall Mathers, the best-selling rapper in history, takes on the persona Eminem, one is not meant to interpret his violent, menacing lyrics (some of them aimed directly at his ex-wife, Kim Mathers) as literal reflections of intent. Mathers may push the envelope with rhetoric that, to some, is unsettling, but like other rappers, he counts on his listeners to appreciate the important distinction between an artist and his art.

In a lyric that captures the important distinction between fiction and reality in rap, Mathers, in the persona of Eminem, self-knowingly raps on the hit song "Sing For the Moment" that "[i]t's all political, if my music is literal and I'm a criminal, how the fuck could I raise a little girl? I couldn't, I wouldn't be fit to." EMINEM, *Sing for the Moment*, *on* THE EMINEM SHOW (Aftermath 2002). Mathers knows his music is not literal, of course, and that being a criminal is merely his persona. And in June 2014, about twelve years

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

after that song was released, Eminem's "little girl," daughter Hailie Jade Scott Mathers, graduated Summa Cum Laude from high school and thanked both her mother and father "because they have pushed me to be the person I am and have given me all the support to achieve what I have." Corinne Heller, *Eminem's Daughter, Hailie Jade Scott Mathers, 18, Graduates High School (With Honors) & Pays Tribute to Parents*, E! ONLINE NEWS, June 29, 2014, *available at* http://www.eonline.com/news/555402/eminem-s-daughter-hailie-jade-scott-mathers-18-graduates-high-school-with-honors-pays-tribute-to-parents.

Petitioner Anthony Douglas Elonis, who testified at trial that his own Facebook posts were partly inspired by Eminem, appears to be doing much the same thing with lines like these:

> Little Agent Lady stood so close
> Took all the strength I had not to turn the bitch ghost
> Pull my knife, flick my wrist, and slit her throat.
>
> (*United States v. Elonis*, 730 F.3d 321, 326 (3d Cir. 2013)).

Although offensive, these lyrics are consistent with those found in Eminem's songs and many others that derive from the gangsta rap tradition. Elonis himself declares that "[a]rt is about pushing limits," Petition for Writ of Certiorari at 10, *Elonis v. United States*, No. 13-983, 2013 U.S. Briefs 983; 2014 U.S. S. Ct. Briefs LEXIS 599 (Feb. 14, 2014). Indeed, it is evident from his lyrics that Anthony Douglas Elonis has chosen a musical genre long defined by doing just that.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

As the Supreme Court of New Jersey acknowledged just this month, rap constitutes "a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture," but ultimately it is merely one of several "fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings." *New Jersey v. Skinner*, 2014 N.J. LEXIS 803, *12 (N.J. Aug. 4, 2014).

III. Fear of Rap: Another Moral Panic

As the commercial success of artists like Eminem, Jay Z, and Tupac Shakur attests, rap music is now immensely profitable and arguably constitutes the most influential musical genre of the last thirty years. During that same time period, it also has become the most controversial. Although society has embraced other forms of entertainment that contain graphic depictions of sex, violence, and criminal behavior – violent video games (protected by the Court in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011)), horror films, gangster novels, or any number of Emmy-winning shows on HBO, for instance – rap has for decades drawn the ire and vitriol of police, politicians, religious leaders, and civic groups who maintain that it especially threatens American society.

Perhaps the most illustrative example is found in the response to N.W.A.'s 1988 protest song "Fuck tha Police," which fiercely criticized discriminatory police practices in Los Angeles. See N.W.A., *Fuck tha Police*, *on* STRAIGHT OUTTA COMPTON (Ruthless Records 1988). When the song was released, Milt Ahlerich, assistant director of the FBI, was infuriated by N.W.A.'s lyrics. In an unprecedented move, he sent a

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

letter expressing his disgust and displeasure to N.W.A.'s label, Ruthless Records. See George Lipsitz, FOOTSTEPS IN THE DARK: THE HIDDEN HISTORIES OF POPULAR MUSIC 164 (2007).

The FBI's response triggered a reaction from police departments across the country, which worked collectively to disrupt N.W.A.'s concerts, helping to set a precedent for the frequent attempts by police, even today, to prevent rap shows in their jurisdictions. See Erik Nielson, *"Can't C Me": Surveillance and Rap Music*, 40.6 J. BLACK STUD. 1254, 1258 (2010).

Although saying "Fuck tha Police" may be offensive, the Court has recognized the importance of protecting dissenting political speech, including safeguarding a very similar phrase, "Fuck the Draft." *Cohen v. California*, 403 U.S. 15 (1971).

N.W.A.'s troubles with the law were hardly isolated incidents. In the late 1980s and early 1990s, artists across the country such as LL Cool J, Too Short, and 2 Live Crew were being arrested for performances that authorities regarded as lewd or profane. See Peter Blecha, TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS 118 (2004).

Arguably the most famous clash with law enforcement came in 1992, when rapper Ice-T formed a heavy metal group called Body Count and released a song called "Cop Killer." (An irony worth noting is that for years Ice-T has played police detective Odafin "Fin" Tutuola on the NBC show *Law & Order: Special Victims Unit*.)

Ice-T was already a polarizing figure after Tipper Gore singled him out in a 1990 op-ed in which she

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

depicted rap music as "dangerous" and "frightening." Tipper Gore, *Hate, Rape, and Rap*, WASH. POST, Jan. 8, 1990, at A15. When "Cop Killer" was released, it thus was not surprising that President George H.W. Bush and Vice President Dan Quayle denounced it and that police nationwide launched a campaign to force Time Warner to pull the song from store shelves, which the company eventually did. See LIPSITZ, *supra* at 167-168.

These kinds of attacks against rap have not come solely from police and politicians. In 1993, New York pastor and civil rights activist Calvin O. Butts held a high-profile demonstration in which he threatened to drive a steamroller over a pile of rap cassettes and compact discs that he claimed contained vulgar material. And for years, C. Delores Tucker, another civil rights activist, led an unrelenting campaign against gangsta rap, calling on rap artists to stop producing music with unabashedly violent and misogynistic themes. See DYSON, *supra* at 131-132.

Even today, the suspicion, fear, and anger rap provokes remain. Rap is routinely vilified in the press by critics from a variety of perspectives, either as "fake" music or as a scourge to minority communities. Journalist Jason Whitlock, articulating the latter view, argues that the image of African American men "has been destroyed by hip hop, at home and globally." See *Hip-hop on Trial,* INTELLIGENCE SQUARED AND GOOGLE+ "VERSUS" DEBATE SERIES, June 27, 2012, http://www.youtube.com/watch?v=r3-7Y0xG89Q.

Alongside such bold criticism is the continued scrutiny of law enforcement, including police task forces across the country created for the express purpose of surveilling rappers. See Erik Nielson, *"Here*

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Come the Cops": Policing the Resistance in Rap Music, 15.4 INT'L J. CULTURAL STUD. 349, 350 (2011). Additionally, the last decade has witnessed an alarming increase in the use of rap lyrics as evidence in criminal proceedings, a practice that often involves de-legitimizing rap as art altogether and (mis)characterizing it as autobiography Kubrin & Nielson, *supra*; see Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007). This practice has sent dozens of young artists to jail.

Research reveals that people often view rap as more dangerous and threatening when compared to other music genres. In a 1999 experimental study, social psychologist Carrie Fried set out to explain why. She presented two groups of people with an identical set of violent lyrics, but she also removed any information that could identify the true source of those lyrics. One group was told the lyrics came from a country song, while the other was told they came from a rap song. Fried found that respondents characterized the lyrics as significantly more threatening and dangerous when they were labeled as rap rather than country. Carrie Fried, *Who's Afraid of Rap? Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999).

As Fried and others have suggested, the visceral responses that many people have to rap music stem in large part from broader racial stereotypes, especially about young men of color. These stereotypes inform people's perceptions and behaviors in a variety of settings beyond music, ranging from the justice system to the educational system and the workplace.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

IV. Rap is Art, Even If It Often is Misinterpreted and Misunderstood

In a July 2013 article in *Harper's Magazine*, University of Virginia professor Mark Edmundson provocatively declared the "decline of American verse," taking contemporary poets to task for, among other things, being unambitious and unwilling to offend – and for avoiding pressing social or political issues. American poetry today, claims Edmundson, is "timid, small, in retreat." Mark Edmundson, *Poetry Slam: Or, the Decline of American Verse,* HARPER'S MAG., July 2013, at 65.

This generalization ignores the importance of rap music. Anything but "timid" or "in retreat," rap today is a cultural force, its verses filling the airwaves from New York to New Delhi, from South Korea to South Africa.

With audiences that dwarf their traditional literary counterparts, rappers have introduced the world to a powerful new poetry, memorized and recited by millions of people, that has given voice to entire communities of marginalized people, and at its best, has served as an anthem of resistance in the face of global injustice. Its visible role in uniting voters during President Barack Obama's 2008 campaign – or motivating demonstrators during the recent Arab Spring protests – are but two of many testaments to its significance and global influence. See Lester Spence, STARE IN THE DARKNESS: THE LIMITS OF HIP-HOP AND BLACK POLITICS 161-163 (2011).

Yet the tendency to discount rap music as a form of poetry persists, even as its place in the academy has

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

become more secure. Rap lyrics now appear in a variety of major literary anthologies, and since the early 1990s, colleges and universities have offered hundreds of classes on hip hop. Now some of the country's most elite universities – including Harvard and Cornell – have made significant institutional investments by establishing major research archives that serve as repositories of hip hop music, literature, art, and scholarship. See Travis L. Gosa, *Why Do Students Resist Hip Hop Studies?*, *in* TEACHING POLITICS BEYOND THE BOOK: FILM, TEXT, AND NEW MEDIA IN THE CLASSROOM 109 (Robert W. Glover & Daniel Tagliarina eds., 2013).

And when, in July of 2012, Cornell University announced that hip hop pioneer Afrika Bambaataa would become a visiting member of the faculty, he became one of the latest in a long line of rap artists who have taken teaching appointments at institutions of higher education.

Rap's growing relevance in academic settings is hardly surprising. Although it took shape in predominantly black and Latino communities in the late twentieth century, its artistic antecedents can be traced back centuries and across oceans. Consider, for instance, the head-to-head poetry battles of ancient Greece; the rhymed couplets of medieval French romances; or the timeless verse, teeming with newly-coined words, of William Shakespeare. In many ways, rap music is universal, part of a long tradition of expressing and commenting on the human condition.

Today, its potential is mostly keenly felt in marginalized communities. In the United States, the impact has been especially profound. A multibillion

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

dollar industry, hip hop has not only generated career opportunities for people who otherwise would not have had them, but it has also offered an artistic outlet for countless young people. Speaking to the possibilities that hip hop opened up, rapper Ice-T once said, "[I]f I hadn't had a chance to rap, I'd either be dead or in jail." Patrick Goldstein, *The Hard Cold Rap of Ice-T,* L.A. TIMES, Apr. 24, 1988, http://articles.latimes.com/1988-04-24/entertainment/ca-2445_1_rap-wizard.

Rapper Notorious B.I.G. echoes this sentiment when in "Things Done Changed" he raps, "If I wasn't in the rap game, I'd probably have a key knee-deep in the crack game." NOTORIOUS B.I.G., *Things Done Changed*, *on* READY TO DIE (Bad Boy Records 1994). After more than thirty years, it is impossible to know how many other young men and women could say the same thing, but Ice-T's and Notorious B.I.G.'s sentiments speak to the transformative, elevating potential of rap music.

It may still be difficult for some people to comprehend rap music as an art form, never mind a positive one, but time has a way of changing our perspectives. At a 2012 symposium in London, John Sutherland, emeritus professor of English at University College London, argued for rap's place in the canon, declaring that "in 20 years' time, Tupac Shakur will be ranked with Walt Whitman as a great American poet." See *Hip-Hop on Trial, supra*. Like Whitman, whose work was hugely influential and, at the same time, deeply controversial, today's rappers are changing the landscape of American poetry. Admittedly, this new poetry is not pleasing to everyone, especially those who misinterpret its sophisticated use of identity, wordplay, signifying, and exaggeration.

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

But since when has poetry ever been saddled with the burden of pleasing everyone? Indeed, one person's lyric may be another's vulgarity, as the Court observed in *Cohen v. California*, 403 U.S. 15, 25 (1971), but that difference in interpretation does not make it a true threat.

CONCLUSION

This brief demonstrated the multiple interpretative problems of meaning and understanding that surround rap music, the genre of expression used by Petitioner Anthony Douglas Elonis. Unless a defendant-speaker's subjective intent is taken into account, these problems may cause a juror, particularly one unfamiliar with the genre or who holds negative stereotypes about it, to falsely and incorrectly interpret rap lyrics as a threat of violence or unlawful conduct. As a result of such misinterpretation and misunderstanding, important political and artistic expression may be wrongfully squelched and punished.

Amici thus respectfully request that the Court reverse the decision below of the United States Court of Appeals for the Third Circuit and hold that proof of a defendant-speaker's subjective intent to threaten is required under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

FILED, Clerk of the Supreme Court, 18 Jan 2023, **086617**

Respectfully submitted,

Clay Calvert
Counsel of Record
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
Gainesville, FL 32611
(352) 273-1096
ccalvert@jou.ufl.edu

Counsel for Amici Curiae