IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT
APPEAL NO. WS-10-2-19

Arnold GANDIL, **Appellant** **v.** **UNITED STATES OF AMERICA** **Appellee**	**Appeal from the United States District Court for the Middle District of KENESAW, Sitting at Redland Field**

OPINION OF THE COURT

Jackson, Joseph, Senior Judge.

It is a federal crime to "transmit[] in interstate or foreign commerce any communication containing * * * any threat to injure the person of another," 18 U.S.C. § 875(c). Before us in this appeal are two questions. They are:

1. Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten; and
2. Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten; or whether it is enough to show that a "reasonable person" would regard the statement as threatening.

Arnold Gandil challenges his jury conviction under 18 U.S.C. § 875(c), arguing he did not subjectively intend his Facebook posts to be threatening.

BACKGROUND AND FACTS

In May 2010, Gandil's wife of seven years moved out of their home with their two young children. Following this separation, Gandil began experiencing trouble at work. Gandil worked at Weaver-Felsch Ani-Water Kingdom amusement park as an operations supervisor and a

communications technician. After his wife left, supervisors observed Gandil with his head down on his desk crying, and he was sent home on several occasions because he was too upset to work.

One of the employees Gandil supervised, Edie Roush, made five sexual harassment reports against him. According to Roush, Gandil came into the office where she was working alone late at night, and began to undress in front of her. She left the building after he removed his shirt. Roush also reported another incident where Gandil made a minor female employee uncomfortable when he placed himself close to her and told her to stick out her tongue. On October 17, 2010 Gandil posted on his Facebook page a photograph taken for the Weaver-Felsch Park Halloween Haunt. The photograph showed Gandil in costume holding a knife to Roush's neck. Gandil added the caption "I wish" under the photograph. Gandil's supervisor saw the Facebook posting and fired Gandil that same day.

Two days after he was fired, Gandil began posting violent statements on his Facebook page. One post regarding Weaver-Felsch Park stated:

> Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

Gandil also began posting statements about his estranged wife, Annie Gandil, including the following: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder." Several of the posts about Annie Gandil were in response to her sister's status updates on Facebook. For example, Annie Gandil's sister posted her status update as: "Halloween costume shopping with my niece and nephew should be interesting." Gandil commented on this status update, writing, "Tell [their son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [Annie Gandil's] head on a stick?" Gandil also posted in October 2010:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.

Based on these statements a state court issued Annie Gandil a Protection From Abuse order against Gandil on November 4, 2010. Following the issuance of the state court Protection From Abuse order, Gandil posted several statements on Facebook expressing intent to harm his wife. On November 7 he wrote:

> Did you know that it's illegal for me to say I want to kill my wife? It's illegal. It's indirect criminal contempt. It's one of the only sentences that I'm not allowed to say. Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife. I'm not actually saying it. I'm just letting you know that it's illegal for me to say that. It's kind of like a public service. I'm letting you know so that you don't accidently go out and say something like that
>
> Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife. That's illegal. Very, very illegal. But not illegal to say with a mortar launcher. Because that's its own sentence. It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine. Perfectly legal. I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.
>
> Insanely illegal. Ridiculously, wrecklessly, insanely illegal. Yet even more illegal to show an illustrated diagram. Insanely illegal. Ridiculously, horribly felonious.
>
> Cause they will come to my house in the middle of the night and they will lock me up. Extremely against the law. Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

Annie Gandil testified at trial that she took these statements seriously, saying, "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives." Trial Tr. 97, Oct. 19, 2011. Ms. Gandil further testified that Gandil rarely listened to rap music, and that she had never seen Gandil write rap lyrics during their seven years of marriage. She explained that the lyric form of the statements did not make her take the threats any less seriously.

On November 15 Gandil posted on his Facebook page:

> Fold up your PFA [Protection from Abuse order] and put it in your pocket Is it thick enough to stop a bullet? Try to enforce an Order [t]hat was improperly granted in the first place Me thinks the judge needs an education on true threat jurisprudence. And prison time will add zeroes to my settlement. Which you won't see a lick. Because you suck dog dick in front of children. * * *And if worse comes to worse I've got enough explosives to take care of the state police and the sheriff's department [link: Freedom of Speech, www.wikipedia.org]

This statement was the basis both of Count 2[1], threats to Gandil's wife, and Count 3, threats to local law enforcement. A post the following day on November 16 involving an elementary school was the basis of Count 4:

> That's it, I've had about enough. I'm checking out and making a name for myself Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a kindergarten class. The only question is . . . which one?

By this point FBI Agent Hayney Groh was monitoring Gandil's public Facebook postings, because Weaver-Felsch Park contacted the FBI claiming Gandil had posted threats against Weaver-Felsch Park and its employees on his Facebook page. After reading these and other Facebook posts by Gandil, Agent Groh and another FBI agent went to Gandil's house to interview him. When the agents knocked on his door, Gandil's father answered and told the agents Gandil was sleeping. The agents waited several minutes until Gandil came to the door wearing a t-shirt, jeans, and no shoes. Gandil asked the agents if they were law enforcement and asked if he was free to go. After the agents identified themselves and told him he was free to go, Gandil went inside and closed the door. Later that day, Gandil posted the following on Facebook:

> You know your shit's ridiculous when you have the FBI knockin' at yo' door. 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 Leave her bleedin' from her jugular in the arms of her partner. [laughter] So the next time you knock, you best be serving a warrant. And bring yo' SWAT and an explosives expert while you're at it. Cause little did y'all know, I was strapped wit' a bomb. Why do you think it took me so long to get dressed with no shoes on? I was jus' waitin' for y'all to handcuff me and pat me down. Touch the detonator in my pocket and we're all goin' [BOOM!]

After she observed this post on Gandil's Facebook page, Agent Groh contacted the U.S. Attorney's Office. Gandil was arrested on December 8, 2010 and charged with transmitting in interstate commerce communications containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c).

Gandil moved to dismiss the indictments against him. The District Court denied the motion to dismiss because even if the subjective intent standard applied, Gandil's intent and the attendant circumstances showing whether or not the statements were true threats were questions of fact for the jury. Gandil testified in his own defense at trial. A jury convicted Gandil on Counts 2 through 5, and the court sentenced him to 44 months imprisonment followed by three years supervised release.

[1] Count 1 was dismissed. It was not re-filed for reasons unconnected to this appeal.

STATUTORY INTERPRETATION

Gandil was convicted under 18 U.S.C. § 875(c) for "transmit[ing] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another. . . ." Gandil contends the trial court incorrectly instructed the jury on the standard of a true threat. The court gave the following jury instruction:

> 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 intention to inflict bodily injury or take the life of an individual.

Gandil first argues that, as a matter of statutory interpretation, section 875(c) must be construed to require that he subjectively intend to threaten. We have followed the Third Circuit's standard in *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir.1991), and must disagree.

In *United States v. Kosma*, the Third Circuit held a true threat requires that the defendant intentionally make a statement, written or oral, 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 intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion. *Id.* at 557 (*quoting Roy v. United States*, 416 F.2d 874, 877-78 (9th Cir.1969) (emphasis omitted)).

The Third Circuit rejected a subjective intent requirement that the defendant "intended at least to convey the impression that the threat was a serious one." *Id.* at 558 (*quoting Rogers v. United States*, 422 U.S. 35, 46, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring)). The Third Circuit found "any subjective test potentially frustrates the purposes of section 871 — to prevent not only actual threats on the President's life, but also the harmful consequences which flow from such threats." *Id.* (explaining "it would make prosecution of these threats significantly more difficult"). The same "knowingly and willfully" mens rea *Kosma* analyzed under 18 U.S.C. § 871, threats against the president, applies to § 875(c). *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir.1994) (holding "the government bore only the burden of proving that Himelwright acted knowingly and willfully when he placed the threatening telephone calls and that those calls were reasonably perceived as threatening bodily injury").

Moreover, because section 875(c) targets communication, it "must be interpreted with the commands of the First Amendment clearly in mind." *Fiatts v. United States*, 394 U.S. 705, 707 (1969) (per curiam). Accordingly, like other statutes that target threatening communications, section 875(c) reaches only "true 'threat(s),' " rather than "political hyperbole" or "vehement," "caustic," or "unpleasantly sharp attacks" that fall short of true threats. *Id.*, at 708. As the

Supreme Court has explained, true threats are proscribable because they are "outside the First Amendment." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

While we address the First Amendment concerns specifically below, it is worth noting here that a large majority of the appellate courts have rejected First Amendment challenges to section 875(c) and comparable federal statutes prohibiting the making of various types of threats. These cases consistently find that only "true threats" are proscribable. For statutory interpretation purposes, these cases also consistently find that a requirement of specific, subjective intent to threaten is not required. *United States v. Clemens*, 738 F.3d 1, 2-3 (1st Cir. 2013) (18 U.S.C. 875(c)); *United States v. Francis*, 164 F.3d 120, 122-123 (2d Cir. 1999) (same); *United States v. Fihite*, 670 F.3d 498, 506-512 (4th Cir. 2012) (same); United States v. Myers, 104 F.3d 76, 80-81 (5th Cir.) (same), *cert. denied*, 520 U.S. 1218 (1997); *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (same), *cert. denied*, 134 S.Ct. 59 (2013); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir.) (same), *cert. denied*, 546 U.S. 980 (2005); *United States v. Mabie*, 663 F.3d 322, 332-333 (8th Cir. 2011) (same), *cert. denied*, 133 S.Ct. 107 (2012); *United States v. Fiefhaus*, 168 F.3d 392, 395-396 (10th Cir.) (18 U.S.C. 844(e)), *cert. denied*, 527 U.S. 1040 (1999); *United States v. Alaboud*, 347 F.3d 1293, 1296-1298 (11th Cir. 2003) (18 U.S.C. 875(c)).

This view is widely adopted because it is correct. The jury instructions here already screened out statements that constituted "idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger." The statements that qualify as true threats thus have a significant, serious character.

From a statutory perspective, requiring proof of a subjective intent to threaten where none is present in the statute would undermine one of the central purposes of prohibiting threats. As the Supreme Court has noted, in addition to protecting persons from the possibility that threatened violence will occur, a prohibition on true threats "protect(s) individuals from the fear of violence" and "from the disruption that fear engenders." *R.A.V., supra*, 505 U.S. at 388. A statement that a reasonable person would regard as a true threat creates such fear and disruption, regardless of whether the speaker subjectively intended the statement to be innocuous. *Compare United States v. Castagana*, 604 F.3d 1160, 1164 (9th Cir. 2010) ("even if a perpetrator does not intend that his false information be believed as indicative of terrorist activity, the false information will nevertheless drain substantial resources and cause mental anguish when it is objectively credible.").

The actus reus of the statute is transmitting a threat—that is, a true threat. See White, 670 F.3d at 508. A true threat is determined from the position of an objective, reasonable person, *see Alaboud*, 347 F.3d at 1296–97, unless a particular offense involves "intimidation," *see Black*, 538 U.S. at 359–60, 123 S.Ct. at 1548. Section 875(c), however, is silent as to mens rea, requiring neither an intent to place the victim in fear of bodily harm or death, nor any other showing of specific intent. *See United States v. Francis*, 164 F.3d 120, 122 (2d Cir.1999)

("There is nothing in the language or legislative history of Section 875(c) suggesting that Congress intended it to be a specific-intent crime.").

As a result, § 875(c) is a general-intent offense that requires the Government to show (1) the defendant transmitted a communication in interstate or foreign commerce, (2) the defendant transmitted that communication knowingly, and (3) the communication would be construed by a reasonable person as a serious expression of an intent to inflict bodily harm or death. Cf. *Callahan*, 702 F.2d at 965. Section 875(c) "does not require the government to prove a defendant specifically intended his or her statements to be threatening." *Nicklas*, 713 F.3d at 440.

We therefore conclude this section with the beginnings of the next section – the constitutional concerns. Gandil argues that, without the specific, subjective intent requirement read into the statute, § 875(c) allows for the prosecution of a would-be Good Samaritan who mistakenly shouts "fire!" in a crowded theater. This argument fails for numerous reasons, not the least of which is that one imaginative hypothetical does not justify applying the "strong medicine" of the overbreadth doctrine. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). Like any other law, § 875(c) is not overbroad simply because litigants "can hypothesize some deterrent effect on protected speech." *See Shackelford v. Shirley*, 948 F.2d 935, 940 (5th Cir.1991). Because invalidating § 875(c) on overbreadth grounds is a "last resort," *see Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916, we must, when possible, "construe the statute to avoid constitutional problems," *Ferber*, 458 U.S. at 769 n. 24, 102 S. Ct at 3361 n. 24.

Because we construe the statute as applying to true threats—and only true threats— § 875(c) on its face criminalizes no protected expressive activity. After all, true threats fall "outside the First Amendment," *R.A.V.*, 505 U.S. at 388, 112 S.Ct. at 2546, since they are "so intertwined with violent action that" they "essentially become conduct rather than speech," Francis, 164 F.3d at 123, inflicting injury on the listener "'by their very utterance,'" *Jeffries*, 692 F.3d at 480 (quoting *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. at 769). Accordingly, § 875(c) does not chill constitutionally protected speech, because § 875(c) on its face does not permit the Government to "prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Black*, 538 U.S. at 365, 123 S.Ct. at 1551.

CONSTITUTIONAL CONCERNS

What we have said about the First Amendment in discussing how to interpret the statute dictates the outcome of the Defendant's "pure" constitutional challenge to section 875(c). As we have already suggested, the core question is whether the First Amendment compels that we apply an "intent to threaten" subjective standard (even though none exists in the statute) to protect or save section 875(c) from being unconstitutional. It does not.

This outcome is dictated by a proper understanding of *Virginia v. Black* and the history behind it. The Supreme Court first articulated the true threats exception to speech protected under the First Amendment in *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). During a rally opposing the Vietnam War, Watts told the crowd, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706, 89 S.Ct. 1399 (internal quotation marks omitted). The Court reversed his conviction for making a threat against the president because the statement was "political hyperbole," rather than a true threat. *Id.* at 708, 89 S.Ct. 1399.

The Court articulated three factors supporting its finding: 1. the context was a political speech; 2. the statement was "expressly conditional"; and 3. "the reaction of the listeners" who "laughed after the statement was made." *Id.* at 707-08, 89 S.Ct. 1399. The Court did not address the true threats exception again until *Virginia v. Black* in 2003.

In *Virginia v. Black* the Court considered a Virginia statute that banned burning a cross with the "intent of intimidating" and provided "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." 538 U.S. at 348, 123 S.Ct. 1536 (citation and internal quotation marks omitted). The Court reviewed three separate convictions of defendants under the statute and concluded that intimidating cross burning could be proscribed as a true threat under the First Amendment. *Id.* at 363, 123 S.Ct. 1536. But the prima facie evidence provision violated due process, because it permitted a jury to convict whenever a defendant exercised his or her right to not put on a defense. *Id.* at 364-65, 123 S.Ct. 1536.

The Court reviewed the historic and contextual meanings behind cross burning, and found it conveyed a political message, a cultural message, and a threatening message, depending on the circumstances. *Id.* at 354-57, 123 S.Ct. 1536. The Court then described the true threat exception generally before analyzing the Virginia statute:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States*, supra, at 708 [89 S.Ct. 1399] . . . ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388 . . . . The speaker need not actually intend to act out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid*. Intimidation in the constitutionally prescribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, supra, the history of cross burning

in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

Id. at 359-60, 123 S.Ct. 1536 (citation omitted).

Gandil contends that this definition of true threats means that the speaker must both intend to communicate and intend for the language to threaten the victim. But the Court did not have occasion to make such a sweeping holding, because the challenged Virginia statute already required a subjective intent to intimidate. We do not infer from the use of the term "intent" that the Court invalidated the objective intent standard the majority of circuits applied to true threats. Instead, we read "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to mean that the speaker must intend to make the communication. It would require adding language the Court did not write to read the passage as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence." *Id.* at 359, 123 S.Ct. 1536. This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception.

The "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 360, 123 S.Ct. 1536 (*quoting R.A.V.*, 505 U.S. at 388, 112 S.Ct. 2538). Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from "the fear of violence" and the "disruption that fear engenders," because it would protect speech that a reasonable speaker would understand to be threatening. *Id.*

Gandil further contends the unconstitutionality of the prima facie evidence provision in *Black* indicates a subjective intent to threaten is required, and thereby arching back to the statutory argument we have already rejected. The *Virginia* Court found the fact that the defendant burned a cross could not be prima facie evidence of intent to intimidate. *Id.* at 364-65, 123 S.Ct. 1536. The Court explained that while cross burning was often employed as intimidation or a threat of physical violence against others, it could also function as a symbol of solidarity for those within the white supremacist movement. *Id.* at 365-66, 123 S.Ct. 1536. Less frequently, crosses had been burned outside of the white supremacist context, such as stage performances. *Id.* at 366, 123 S.Ct. 1536. Since the burning of a cross could have a constitutionally-protected political message as well as a threatening message, the prima facie evidence provision failed to distinguish protected speech from unprotected threats. Furthermore, the prima facie evidence provision denied defendants the right to not put on a defense, since the prosecution did not have to produce any evidence of intent to intimidate, which was an element of the crime. *Id.* at 364-65, 123 S.Ct. 1536.

We do not find that the unconstitutionality of Virginia's prima facie evidence provision means the true threats exception requires a subjective intent to threaten. First, the prima facie evidence provision did not allow the factfinder to consider the context to construe the meaning of the conduct, *id.* at 365-66, 123 S.Ct. 1536, whereas the reasonable person standard does encompass context to determine whether the statement was a serious expression of intent to inflict bodily harm. Second, cross-burning is conduct that may or may not convey a meaning, as opposed to the language in this case which has inherent meaning in addition to the meaning derived from context. Finally, the prima facie evidence provision violated the defendant's due process rights to not put on a defense, because the defendant could be convicted even when the prosecution had not proven all the elements of the crime. *Id.* That is not an issue here because the government had to prove that a reasonable person would foresee Gandil's statements would be understood as threats.

The majority of circuits that have considered this question have not found the Supreme Court decision in *Black* to require a subjective intent to threaten. *See United States v. White*, 670 F.3d 498, 508 (4th Cir.2012) ("A careful reading of the requirements of § 875(c), together with the definition from *Black*, does not, in our opinion, lead to the conclusion that *Black* introduced a specific intent-to-threaten requirement into § 875(c). . . ."); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir.2012) ("[T]he position reads too much into *Black*."); *United States v. Mabie*, 663 F.3d 322, 332-33 (8th Cir.2011), *cert. denied*___ U.S. ___, 133 S.Ct. 107, 184 L.Ed.2d 50 (2012) (noting the objective test had been applied many times after *Black*); *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir.2013) (quoting extensively from *Jeffries*, the court "concluded § 875(c) does not require the government to prove a defendant specifically intended his or her statements to be threatening").

The Fourth Circuit in *United States v. White* considered the same criminal statute, 18 U.S.C. § 875(c), and found the Court in *Black* "gave no indication it was redefining a general intent crime such as § 875(c) to be a specific intent crime." 670 F.3d at 509. The Fourth Circuit reasoned that *Black* had analyzed a statute that included a specific intent element, whereas § 875(c) had consistently been applied as a general intent statute. *Id.* at 508. The court further distinguished *Black* by noting the multiple meanings of cross-burning necessitated a finding of intent to distinguish protected speech from true threats. *Id.* at 511. The court in *White* found this same problem did not exist for threatening language because it has no First Amendment value. *Id.* Finally, the court found the general intent standard for § 875(c) offenses did not chill "statements of jest or political hyperbole" because "any such statements will, under the objective test, always be protected by the consideration of the context and of how a reasonable recipient would understand the statement." *Id.* at 509.

In *United States v. Jeffries* the Sixth Circuit agreed that *Black* does not require a subjective intent to threaten to convict under 18 U.S.C. § 875(c). 692 F.3d at 479. Because *Black* interpreted a statute that already had a subjective intent requirement, the Sixth Circuit found the Court was not presented with the question whether an objective intent standard is constitutional.

Id. Jeffries also found that the Court's ruling on the prima facie evidence provision did not address the specific intent question because "the statute lacked any standard at all." *Id.* at 479-80. Like the Fourth Circuit in *White*, the Sixth Circuit explained that the prima facie evidence provision failed to distinguish between protected speech and threats by not allowing for consideration of any contextual factors. *Id.* at 480. In contrast, "[t]he reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made." *Id.*

The Ninth Circuit took a different view, and found the true threats definition in *Black* requires the speaker both intend to communicate and "intend for his language to threaten the victim." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir.2005). The Ninth Circuit reasoned that the unconstitutionality of the prima facie provision meant that the Court required a finding of intent to threaten for all speech labeled as "true threats," and not just cross burning. *Id.* at 631-32 ("[T]he prima facie evidence provision rendered the statute facially unconstitutional because it effectively eliminated the intent requirement."). "We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633.

Regardless of the state of the law in the Ninth Circuit, we find that *Black* does not alter our precedent. We agree with the Fourth Circuit that *Black* does not clearly overturn the objective test the majority of circuits applied to § 875(c). *Black* does not say that the true threats exception requires a subjective intent to threaten. Furthermore, our standard does require a finding of intent to communicate. The jury had to find Gandil "knowingly and willfully" transmitted a "communication containing . . . [a] threat to injure the person of another." 18 U.S.C. § 875(c). A threat is made "knowingly" as when it is "made intentionally and not [as] the result of mistake, coercion or duress." *Kosma*, 951 F.2d at 557 (quotation omitted). A threat is made willfully when "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." *Id.* (citation and emphasis omitted). This objective intent standard protects non-threatening speech while addressing the harm caused by true threats.

Accordingly, the *Kosma* objective intent standard applies to this case and the District Court did not err in instructing the jury. The conviction is AFFIRMED.

Gleason, J. concurs.

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DISSENTING OPINION

Charles Risberg, Judge, dissenting.

I take issue with the majority's resolution of both issues before us. I therefore dissent.

STATUTORY INTERPRETATION

A. The Plain Meaning of Section 875(c) Requires Proof Of Specific Intent To Threaten

Section 875(c) makes it a felony, punishable by up to five years of imprisonment, to "transmit[] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." 18 U.S.C. § 875(c). The provision does not define the central term, "threat." "It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (internal quotation marks omitted).

"Every relevant definition of the noun 'threat' or the verb 'threaten,' whether in existence when Congress passed [Section 875(c)] (1932) or today, includes an intent component." *United States v. Jeffries*, 692 F.3d 473, 483 (6th Cir. 2012) (Sutton, J., concurring dubitante). E.g., 11 Oxford English Dictionary 352 (1st ed. 1933) ("to declare (usually conditionally) one's intention of inflicting injury"); Webster's New Int'l Dictionary 2633 (2d ed. 1954) ("Law, specif., an expression of an intention to inflict loss or harm on another by illegal means, esp. when effecting

coercion or duress"); Black's Law Dictionary 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another"). Every common definition embodies the fundamental notion that a "threat" is the expression of the speaker's intention to injure; "Conspicuously missing from any of these dictionaries is an objective definition of a communicated 'threat,' one that asks only how a reasonable observer [or speaker] would perceive these words." *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring dubitante).

This intuitive understanding is confirmed by everyday use. Two of the most common responses to menacing-sounding statements (and indeed, two of the most common uses of forms of the word) are "Is that a threat?" and "Are you threatening me?" Those questions plainly inquire into the speaker's intent; they would be unnecessary (indeed, nonsensical) if a statement's status as a threat turned on a reasonable person's perception.

B. Legislative History And Early Case Law Confirm The Need For Specific Intent

The history of Section 875 reinforces this commonsense understanding. The first national law addressing the communication of threats was the Patterson Act, enacted in 1932 in response to the Lindbergh baby kidnapping. See Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649, codified at 18 U.S.C. § 876. The law was directed exclusively at extortion, and thus textually prohibited only a "demand or request for ransom" "with intent to extort." 47 Stat. 649. "From the beginning, the communicated 'threat' thus had a subjective component to it." 692 F.3d at 484 (Sutton, J., concurring dubitante).

Seven years later, at the request of the Justice Department, Congress created a new provision to address cases where defendants were not explicitly extorting something for themselves, but were seeking something of value for a third party (e.g., threatening an official to coerce release of a third party from prison), or making threats "on account of revenge or spite" or "animosity" without "any motive or purpose to extort money." Threatening Communications: Hearing on H.R. 3230 Before the H. Comm. on the Post Office & Post Roads, 76th Cong. 7, 9 (1939).

Congress thus expanded the statute by adding a provision, now codified at Section 875(c), to include also "threat[s] to kidnap any person or any threat to injure the person." Pub. L. No. 76-76, 53 Stat. 742 (1939). But while Congress intended these amendments to "render present law more flexible," Threatening Communications, at 5 (statement of William W. Barron, Criminal Division, Dept. of Justice), Congress gave no hint that it meant to write subjective intent out of the statute. Rather, "what dominated the discussion was the distinction between threats made for the purpose of extorting money and threats borne of other (intentional) purposes," such as revenge, spite, and animosity. *Jeffries*, 692 F.3d at 484 (Sutton, J. concurring dubitante). Thus, for example, Members agreed that threats should be actionable "[w]hether the motive of the threat be the acquisition of money or some other personal advantage." Threatening Communications at 12.

The earliest court of appeals decisions addressing the issue overwhelmingly concluded that "a conviction under 18 U.S.C. § 875(c) requires a showing that a threat was intended." *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966); *accord United States v. LeVison*, 418 F.2d 624, 626 (9th Cir. 1969) ("intent to threaten is an essential element of the crime"); *Seeber v. United States*, 329 F.2d 572, 577 (9th Cir. 1964) (noting "vital issue of intent"); *United States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974) ("a conviction under 18 U.S.C. § 875(c) requires proof that the threat was made knowingly and intentionally") (*citing LeVison, Dutsch, and Seeber*); cf. *United States v. Kelner*, 534 F.2d 1020, 1023 (2d Cir. 1976) (describing as "quite proper[]" jury instruction that "a specific intent to communicate a threat to injure" was sufficient for conviction). Some cases also required that the words be reasonably construed as a threat, e.g., Bozeman, 495 F.2d at 510 (words have a "reasonable tendency to create apprehension"). Over time, without ever overruling those earlier cases, the intent requirement quietly fell by the wayside in many circuits, leaving just the objective test that exists in those courts today. *Jeffries*, 692 F.2d at 486 (Sutton, J., concurring dubitante) (suggesting courts simply "g[o]t into grooves") (internal quotation marks omitted).

C. The Majority's Negligence Standard Conflicts With Fundamental Principles Of Statutory Interpretation

The "existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo- American criminal jurisprudence." *Staples v. United Stat*es, 511 U.S. 600, 605 (1994) (*quoting United States v. U.S. Gypsum Co*., 438 U.S. 422, 436 (1978)). The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. *Morissette v. United States*, 342 U.S. 246, 250 (1952).

Thus, for centuries, it has been understood that with rare exception, "to constitute any crime there must first be a 'vicious will.'" *Id.* at 251 (quoting 4 Blackstone's Commentaries 21); accord Joel Prentiss Bishop, Commentaries on the Criminal Law § 227 (2d ed. 1858) ("the essence of an offence is the wrongful intent, without which it cannot exist"); Model Penal Code ("MPC") § 2.02 cmt. 2 (1980) ("It was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.").

Courts therefore "presum[e] that some form of scienter is to be implied in a criminal statute even if not expressed," *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994), and "offenses that require no mens rea generally are disfavored," *Staples*, 511 U.S. at 606 (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985)). Because "Congress [is] presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor," "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *U.S. Gypsum*,

438 U.S. at 437-438. Thus, the Supreme Court will "presume a scienter requirement in the absence of express contrary intent." *X-Citement Video*, 513 U.S. at 71-72; *accord U.S. Gypsum*, 438 U.S. at 437 (presume in "absence of contrary direction"). That presumption "appl[ies] to each of the statutory elements that criminalize otherwise innocent conduct," *X-Citement Video*, 513 U.S. at 72.

The Supreme Court time and again has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *X-Citement Video*, 513 U.S. at 70. Thus, in *Morissette*, the Supreme Court "used the background presumption of evil intent to conclude that the term 'knowingly'" in a theft of government property statute "required that the defendant have knowledge of the facts that made the taking a conversion—i.e., that the property belonged to the United States,"—although the word "knowingly" "in its isolated position [there] suggested that it * * * required only that the defendant intentionally assume dominion over property." *X-Citement Video*, 513 U.S. at 70.

In *Liparota*, the Court invoked the presumption to conclude that a statute prohibiting specified "knowing[]" misuses of food stamps required knowledge both of the stamps' "use[], transfer[], acqui[sition], alter[ation], or possess[ion]," as well as that the use was "in any manner not authorized by [the statute]." 419 U.S. at 425-427. In other words, it required proof of "knowledge of illegality." *Id.* at 430. In *Staples*, the Court likewise invoked the presumption to hold that to be guilty of violating a provision prohibiting possession of "a firearm which is not registered," a defendant must know that the weapon possessed the automatic firing capability that made it subject to registration, although the statute was "silent concerning the mens rea required for a violation." 511 U.S. at 605; see also 26 U.S.C. § 5861(d). And in *X-Citement Video*, the Supreme Court invoked the presumption to hold that a statute prohibiting the "knowing[] transport[ation] or ship[ment]" of "any visual depiction" if its production "involves the use of a minor engaging in sexually explicit conduct," required proof that the defendant both "knowingly transport[ed] or ship[ped]" the depiction and knew those depicted were minors. 513 U.S. at 68, 78. It did so although "the most grammatical reading of the statute" would have required knowledge only of the transportation element of the offense. *Id.* at 70.

A straightforward application of the Supreme Court's precedents compels the conclusion that conviction of violating Section 875(c) requires proof that the defendant intended the charged statement to be a "threat"—"the crucial element separating legal innocence from wrongful conduct." *X-Citement Video*, 513 U.S. at 73. See *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring dubitante) ("It is not enough that a defendant knowingly communicates something * * *; he must communicate a threat, a word that comes with a state-of-mind component."). That conclusion is underscored by "[t]he severity of the[] sanctions" (*U.S. Gypsum*, 438 U.S. at 442 n.18) imposed by Section 875(c)—five years of imprisonment, which "suggest[s] that Congress did not intend to eliminate a mens rea requirement." *Staples*, 511 U.S. at 618; see also *Morissette*, 342 U.S. at 256 (noting courts less likely to infer an intent requirement where penalties "are relatively small" and reputational effects slight). "The reasonable man rarely takes the stage in criminal law. Yet,

when he does, the appearance springs not from some judicially manufactured deus ex machina but from an express congressional directive." *Jeffries*, 692 F.3d at 485 (Sutton, J. concurring dubitante).

Moreover, this case, unlike its predecessors, involves a prohibition on pure speech, and thus necessarily raises grave concerns about suppressing protected speech. "[T]he expectations that individuals may legitimately have" (*Staples*, 511 U.S. at 619) counsels against concluding that negligence is sufficient. "Persons do not harbor settled expectations" that their statements are "subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view." *X-Citement*, 513 U.S. at 71. *Cf. generally United States v. Bailey*, 444 U.S. 394, 405 (1980) (noting that for certain "classes of crimes," "heightened culpability has been thought to merit special attention"). Moreover, the Supreme Court noted in *U.S. Gypsum* that difficulties in line-drawing and the risk of over-deterring socially beneficial behavior compelled the conclusion that "the concepts of recklessness and negligence have no place" in determining the mens rea of antitrust offenses. The Court's reasoning there applies a fortiori to the regulation of speech:

> the behavior proscribed by the [statute] is often difficult to distinguish from the gray zone of socially acceptable * * * conduct. * * * The imposition of criminal liability * * * for engaging in such conduct which only after the fact is determined to violate the statute, * * * without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary * * * conduct lying close to the borderline of impermissible conduct might be shunned by [those] who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.
>
> *U.S. Gypsum*, 438 U.S. at 440-441.

A so-called "objective" standard has no place in regulating pure speech. As Justice Marshall explained, "we should be particularly wary of adopting such a [negligence] standard for a statute that regulates pure speech. * * * . Th[e] 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 v. United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring); *accord Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) (noting that "mens rea requirements * * * provide 'breathing room' * * * by reducing an honest speaker's fear that he may accidentally incur liability for speaking."). At a minimum, Section 875(c) should be construed "so as to avoid substantial constitutional questions," *X-Citement Video*, 513 U.S. at 69, and in favor of the defendant where a statute's "text, structure, and history fail to establish that the Government's position is unambiguously correct," *United States v. Granderson*, 511 U.S. 39, 54 (1994). "Further, the use of criminal sanctions [based on an objective standard] would be difficult to square with the generally accepted functions of the

criminal law. The criminal sanctions would be used, not to punish conscious and calculated wrongdoing," *U.S. Gypsum*, 438 U.S. at 442, but simple negligence.

CONSTITUTIONALITY

A. History

The "bedrock principle underlying the First Amendment * * * is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Accordingly, the Constitution "demands that content-based restrictions on speech be presumed invalid, and that the government bear the burden of showing their constitutionality." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (citation omitted). "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas,"—"well-defined and narrowly limited classes of speech, the prevention and punishment of which" have, as a matter of "histor[y] and traditio[n]," been deemed constitutionally permissible. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted).

For example, the government may punish speech or conduct that is obscene, defamation, and incitement. *Ibid.* (collecting authorities). In *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), this Court carved out a limited exception for "true threats" of physical violence. *Compare NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982) (" 'threat[]' of vilification or social ostracism * * * is constitutionally protected"). *Watts* involved a prosecution for threatening the President, see 18 U.S.C. § 871(a), based on a protester's statement during a rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. In a brief per curiam opinion, the Court concluded from the remark's context that it was not a true threat—it was made at a political rally, was conditioned on another event (induction into the armed forces), and both the speaker and the crowd responded with laughter. *Id.* at 707-708. The Court explicitly refrained from addressing the required mental state, although it expressed "grave doubts about" the lower court's holding there that it was enough to voluntarily utter words with the "apparent determination to carry them into execution." *Id.* at 707 (internal quotation marks omitted, emphasis in original).

The Supreme Court has held that a "category of speech" cannot be "exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation." *Stevens*, 559 U.S. at 469; *Alvarez*, 132 S. Ct. at 2544 (opinion of Kennedy, J.). What's important here is that threats – without more, just threats – have never received that treatment.

"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." 25 The American & English Encyclopaedia of Law 1064 (Charles F. Williams ed., 1894); accord 2 Francis Wharton, Criminal Law & Proc. § 803 (Ronald A. Anderson ed.,

12th ed. 1957); MPC § 212.5 cmt. 1. However, states, "by statute * * * sometimes made [it] a crime to threaten another in manner to amount to disturbance of the public peace," 2 Wharton, Criminal Law § 803, which typically involved oral threats delivered in the presence of the victim. But "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 and must produce that effect, and must be of a character calculated to produce that effect upon a person of ordinary firmness." *Ibid.* (emphasis added).

So, the Supreme Court has repeatedly insisted, in a variety of contexts, that before a person can be held liable for speech, there must be proof he acted with culpable intent. "[M]ens rea requirements * * * provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment).

The Supreme Court's decision in *Claiborne Hardware* is hard to square with the idea that the perceptions of "reasonable" observers are controlling. There, Mississippi merchants sought damages for an NAACP-organized boycott against the organization and its officers, specifically local officer Charles Evers, who had discouraged boycott violations during speeches to African Americans. Evers had warned that boycott violators would be "disciplined," stating that, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," and that the "Sheriff could not sleep with boycott violators at night." 458 U.S. at 902. The organization publicized the names of boycott violators, and in some instances, violators were subject to violent retaliation, resulting in an "atmosphere of fear." *Id.* at 904 (internal quotation marks omitted).

The Court acknowledged that Evers' remarks "might have been understood as * * * intending to create a fear of violence." *Id.* at 927 (emphasis added). Nonetheless, the Court concluded that Evers "did not exceed the bounds of protected speech," *id.* at 929, concluding he could not be liable for incitement unless his advocacy was "directed to inciting or producing imminent lawless action." *Id.* at 928 (quoting *Brandenburg*, 395 U.S. at 447). The Court emphasized that where liability is imposed "in the context of constitutionally protected activity, * * * 'precision of regulation' is demanded," *id.* at 916 (internal quotation marks omitted), because of the "profound national commitment" to free speech, *id.* at 913. The Court noted the lack of evidence that "any petitioner specifically intended to further an unlawful goal." *Id.* at 925 n.68.

B. Virginia v. Black

All of the foregoing history is a precursor to understanding *Virginia v. Black*, which I believe the majority misconstrues. The impermissibility of allowing liability for speech without proof of wrongful intent was front and center in that case, where the Court explained 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 (citations omitted). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360 (emphasis added).

Those statements were central to the Court's reasoning. *Black* involved a Virginia statute that criminalized burning a cross in public "with the intent of intimidating any person," and provided that the public burning of a cross "shall be prima facie evidence of an intent to intimidate." 538 U.S. at 347-348 (quoting Va. Code Ann. § 18.2-423 (1996)). Although cross burning is "widely viewed as a signal of impending terror," *id.* at 391 (Thomas, J., dissenting), because of the "long and pernicious history" of its use for that purpose, *id.* at 363 (opinion of O'Connor, J.), a plurality of the Court explained that a subjective intent requirement was constitutionally necessary to distinguish "constitutionally proscribable intimidation" from protected "core political speech," such as when a cross is burned as a statement of ideology or an expression of group solidarity. *Id.* at 365-366 (opinion of O'Connor, J.). The prima facie evidence provision was facially unconstitutional because it "ignore[d] all the contextual factors that are necessary to decide whether a particular cross burning was intended to intimidate. The First Amendment does not permit such a shortcut." *Id.* at 367. Thus, the prima facie evidence provision "strip[ped] away the very reason a state may ban cross burning with the intent to intimidate." *Id.* at 365.

The other Justices agreed that "a burning cross is not always intended to intimidate, and a nonintimidating cross burning cannot be prohibited." *Id.* At 372 (Scalia, J., joined by Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part). Accord 538 U.S. at 368 (Stevens, J., concurring) (emphasizing "intent to intimidate" language as a defining trait of a valid regulation of threats); *id.* at 385-386 (Souter, J., joined by Kennedy and Ginsburg, JJ., concurring in part and dissenting in part) (distinguishing between "proscribable and punishable" intent to intimidate and a "permissible" lack of intent to intimidate). The requirement that the speaker intends his speech to be threatening was thus central to the Court's holding. *See United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (O'Scannlain, J.) ("[E]ach of the other opinions [in *Black*], with the possible exception of Justice Thomas's dissent, takes the [plurality's] view of the necessity of an intent element."). If the "true threats" doctrine did not require proof of intent to threaten, then "Virginia's statutory presumption was * * * incapable of being unconstitutional in the way that the majority understood it." Frederick Schauer, Intentions, Conventions, and the First Amendment: The Case of Cross-Burning, 2003 Sup. Ct. Rev. 197, 217.

C. The Negligence Standard Impermissibly Chills Protected Speech

Time and again, the Supreme Court has written that criminal prohibitions are "matter[s] of special concern" under the First Amendment because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful

words, ideas, and images." *Reno v. ACLU*, 521 U.S. 844, 871-872 (1997); accord *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment). "Because First Amendment freedoms need breathing space to survive, government may regulate [speech] * * * only with narrow specificity," *Button*, 371 U.S. at 433, "extreme care," *Claiborne Hardware*, 458 U.S. at 927, and "exacting proof requirements." *Madigan*, 538 U.S. at 620.

The negligence standard is the polar opposite of regulating with "extreme care." Under it, "it doesn't matter what [the defendant] thinks," as was the argument below. Punishment is based not on what the defendant intended to communicate, or even the message he would have foreseen had he not "consciously disregard[ed] a substantial and unjustifiable risk" his statement would be construed as a threat. MPC § 212.5 cmt. 2. Instead, it imposes criminal liability based on jurors' determination, months or years later, that a speaker has negligently misjudged how his audience would view his remarks. As Justice Marshall observed, "we should be particularly wary of adopting such a standard for a statute that regulates pure speech," which "create[s] a substantial risk that crude, but constitutionally protected speech might be criminalized." *Rogers*, 422 U.S. at 47 (Marshall, J., concurring). Because "individuals w[ill] have difficulty discerning what a jury would consider objectively threatening," they "may rationally err on the side of caution by saying nothing at all." *Case Comment, United States v. Jeffries*, 126 Harv. L. Rev. 1138, 1145 (2013).

Uncertainty is inherent in tests based on the reaction of a hypothetical "reasonable person." In addition to the widely variable perspectives of individual jurors, demographic factors can shape risk and threat perceptions. Cf. Ian Savage, Demographic Influences on Risk Perceptions, 13 Risk Analysis 413, 419 (1993) (identifying "very statistically significant" "variations in risk perceptions explained by demographics," with some groups "feel[ing] greater exposure and fear"), http://goo.gl/WEgHFK. Liability thus turns on the happenstance of the individual jurors selected to serve, which creates additional uncertainty in an increasingly heterogeneous and fractured society.

It is telling that of Gandil's nearly three hundred "friends," only one person— Chief Hall of the Weaver-Felsch Park Patrol, with his "very limited" Facebook knowledge—was moved to report petitioner's posts to law enforcement; nor is there any indication users sought to "report" or "flag" petitioners' posts to Facebook, although that is simple to do.

Had jurors been seated like the Facebook user who "liked" petitioner's school-shooting post, evidently understanding it was not meant literally; like the user who thought it was ridiculous that petitioner was fired for the "I wish" caption (or the user who "liked" her comment); and the users who "friended" petitioner throughout this period, e.g., the outcome in this case could have been completely different. The vagueness and indeterminacy of the negligence standard heightens its deterrent effect upon speech. Cf. *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 793-794 (1988) ("[s]peakers, however, cannot be made to wait" to

"speak with a measure of security" regarding a "reasonableness" standard for fundraising fees); *Reno*, 521 U.S. at 872 (vague regulations "increas[e] deterrent effect" on speech).

The objective standard becomes worse, not better, in our modern age. Today, potential for misunderstanding is multiplied when using email, where the communications lack the cues of "[g]esture, voice, expression, context," which do "more than merely supplement" the meaning of words used, but "alter it completely." Justin Kruger et al., Egocentrism Over E-Mail: Can We Communicate as Well as We Think?, 89 J. Personality & Soc. Psychol. 925, 933 (2005). Pertinent to this case, the potential for misunderstanding is multiplied "in the context of Internet postings, where the tone and mannerisms of the speaker are unknown," Kyle A. Mabe, Note, Long Live the King: United States v. Bagdasarian and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence, 43 Golden Gate U. L. Rev. 51, 88 (2013), and the speaker may not witness the listener's reaction and thus know to correct misimpressions.

Emoticons—typographical representations of facial expressions—were invented for the very purpose of adding context to electronic communications, but they too are subject to misunderstandings. The testimony in this case was that Gandil believed that the tongue-sticking-out emoticon indicated "jest," while his estranged wife considered it an insult. It is not hard to imagine a benign statement being misconstrued as a threat. A statement that the listener "will regret" a course of action is frequently intended to advise the person of a belief the listener will later think better of it, or that it will turn out badly; but the listener could also interpret it as a threat that the speaker will make the listener regret it by inflicting harm if that course is pursued. Such misunderstandings are common. See, e.g., Exchange Between Bob Woodward and White House Official in Spotlight, CNN Politics (Feb. 27, 2013), http://goo.gl/K3QZkR. There are many sensitive situations— say, a picketer addressing visitors to a health clinic, or a husband texting his wife about plans to move out—where a negligence standard would transform a common misunderstanding into a felony.

Another example is more chilling still because it is not hypothetical. In *United States v. Fulmer*, an informant who had reported a suspected bankruptcy fraud was convicted of threatening an FBI agent because he left the agent a voicemail saying that the "silver bullets are coming." 108 F.3d 1486, 1490 (1st Cir. 1997). The agent, unfamiliar with the term "silver bullets" to describe a simple solution to an intractable problem, found the phrase to be "chilling" and "scary." *Ibid.* Despite two witnesses' testimony that the defendant used "silver bullets" to refer to "clearcut" evidence of wrongdoing, *ibid.*, the court concluded that, under the objective standard, the defendant was validly convicted of threatening the agent. *Id.* At 1491-1492. Thus, the negligence standard poses a very real risk of criminalizing "poorly chosen words." Jennifer E. Rothman, Freedom of Speech and True Threats, 25 Harv. J.L. & Pub. Pol'y 283, 350 (2001).

The record in this case further illustrates the dangers of basing criminal liability on supposedly "objective" interpretations. For example, a coworker posed for a photo with petitioner holding a toy knife to her throat, and clearly understood that, in posing for it, "we were

just joking around. It was never meant seriously." Because the photo was itself a joke, it is not hard to imagine that in posting the photo on Facebook with the caption, "I wish," petitioner might simply have meant to continue the joke. While petitioner might have anticipated that such a joke would fall flat or be deemed tasteless, it is not self-evident that a coworker would take a comment to an acknowledged joke photo "literally," as a death threat. It is not hard to see the opportunity for misunderstanding. The objective standard transforms even negligent misunderstandings into felonies.

* * * *

Let us be clear here. We are not tasked with defending Gandil's statements for their trenchant, pointed observations. Nor are we asked to defend these statements for their artistic merit. We are to judge them only against the First Amendment protection to which he is entitled.

The Government's view is that a true threat will be found from its context, and the majority agrees. But that view would subject to prosecution works that have been a staple of Western writing since the curse poems of antiquity. The fantasies of the aggrieved have been a staple of popular culture during most of recorded history. See Judith Evans Grubbs, Stigmata Aeterna: A Husband's Curse, in Vertis in Usum: Studies in Honor of Edward Courtney 236-237 (2002). It is unsurprising that such writings are enduring, common, and popular, because they address circumstances that arise frequently, and (cathartic) anger is part of conventional models of grieving. E.g., Jennifer Kromberg, The 5 Stages of Grieving the End of a Relationship, Psych. Today, Sept. 11, 2013, http://goo.gl/gxEX3t.

First-person revenge fantasies are such a prevalent theme of blues music as to be cliché. See, e.g., Skip James, .22-20 Blues (Paramount 1931) ("My baby gets unruly and she don't wanna do/take my .22-20 and I cut her half in two"); Bob Dylan, Someday Baby, on Modern Times (Columbia 2006) ("Well, I don't want to brag, but I'm gonna wring your neck/When all else fails I'll make it a matter of self- respect/Someday baby, you ain't gonna worry po' me anymore.").

Similar sentiments are commonplace in rock and country music. But arguably, they have reached their apotheosis in rap music, which has pushed the boundaries of hyperbole. Marshall Mathers, known as "Eminem," recorded several graphic songs addressing his divorce and resulting custody issues with his daughter.

> Don't you get it bitch, no one can hear you / Now shut the fuck up and get what's coming to you / You were supposed to love me / Now bleed bitch, bleed! Bleed bitch, bleed! Bleed!

Popular music likewise commonly features first person discussion of revenge against police for perceived excesses and senseless violence resulting from frustration. However hateful or offensive those songs are, they are entitled to full First Amendment protection. The same

protections extend to the efforts of amateurs writing on comparable themes, moved by similar experiences. (The statement below by Defendant: "[T]here's nothing I said [on Facebook] that hasn't been said already."). While private citizens' writings may not rival the output of Bob Dylan, "[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *Stevens*, 559 U.S. at 479-480 (*quoting Cohen v. Cali*fornia, 403 U.S. 15, 25 (1971)).

According to the Government, it is irrelevant if Facebook users post song lyrics like those above, or post similar compositions of their own for reasons entirely divorced from any wish to place another person in fear: All that matters is whether a jury would determine that an objective observer would perceive the statement as a threat. That view affords differing degrees of protection to identical words based solely on the identity of the speaker. Thus, Eminem can freely record a fantasy about murdering his ex-wife and disposing of her body with his daughter; another person might lawfully post the song lyrics to Facebook recalling a long-ago custody battle; but if a person posts them because he considers the song a brilliant "parody of [singer] Will Smith's unctuous 'Just the Two of Us'" (about Smith's relationship with his son), he has committed a felony if he is in a souring relationship and, unbeknownst to him, a "reasonable" person would consider the words threatening. Indeed, a negligence standard has the perverse effect of making it increasingly dangerous for a speaker to post on a subject the more strongly he feels about it, and thus poses the risk of deterring people from speaking on the subjects most relevant to them.

The conviction for posting a takeoff on the Whitest Kids' "It's Illegal" comedy sketch best illustrates the breadth of the negligence standard's chilling effect. Petitioner posted a virtually word-for-word adaptation of a famous sketch that itself parodies speech restrictions. The only violence is, as in the original, completely unrealistic, involving restricted military weapons (a "mortar launcher"), and it ends with notice of a (nonexistent) group meeting using a pass-phrase associated with presidential assassination ("Sic semper tyrannis."). To underscore that it was not meant literally, petitioner hyperlinked the original satire (also, presumably, not meant literally) so that any reader could instantly view it; to demonstrate he intended the post as commentary rather than a threat, he ended the post by saying "Art is about pushing the limits. I'm willing to go to jail for my Constitutional rights. Are you?" The government investigator, testifying to establish the reaction of a "reasonable person," never bothered clicking the link to watch the original sketch.

If petitioner did not foresee she would interpret the post not as commentary on his speech restrictions in the wake of his wife's PFA, but as him "flat out sa[ying] he wanted to kill his wife," that is still enough to support a felony conviction. If that is the law, the only safe course is to say nothing at all.

CONCLUSION

Section 875(c)'s imposition of severe criminal penalties irrespective of petitioner's intent is "a stark example of speech suppression" that fundamentally conflicts with the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). We cannot and should not sacrifice speech at the altar of hypothetical benefits to law enforcement. Time and again, the Supreme Court has struck the balance the way the Constitution itself did, by favoring speech. *See Stevens*, 559 U.S. at 470 ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.").

I therefore dissent.

IN THE UNITED STATES SUPREME COURT

NO. CI5-CHW3

ARNOLD GANDIL, **PETITIONER** **(Appellant below)** **v.** **UNITED STATES OF AMERICA** **RESPONDENT** **(Appellee below)**	**Appeal from the United States Court of Appeals for the Fourteenth Circuit, Sitting at Comiskey City**

ORDER GRANTING CERTIORARI

The petition of the Defendant – Appellant Arnold Gandil for an order of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby GRANTED. Oral argument shall be conducted on October 25, 2014, in Crawfordsville, Indiana. The argument shall be confined to the following issues:

1. Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten; and

2. Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten; or whether it is enough to show that a "reasonable person" would regard the statement as threatening.

Petitioner shall be entitled to open and close the argument.

FOR THE COURT

Edward Cicotte

Edward Cicotte, Clerk of the Court