No. 13-983

IN THE

Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

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.

2. Whether, by virtue of the First Amendment, proof of a defendant's subjective intent to threaten is required for conviction under § 875(c).

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid,

1. Both parties have filed blanket consents to the filing of *amicus* briefs.

   This brief was authored entirely by counsel for *amicus*, as listed on the cover, and by law student Joshua H. Crawford of Suffolk University Law School, and not by counsel for either party in whole or in part. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

efficient, and reliable determination of guilt and swift execution of punishment.

The defendant/petitioner in this case proposes a rule of law by which a person who has made a statement that any reasonable person would consider to be a threat of murder and which does in fact strike terror into the heart of the victim would be able to escape criminal punishment merely by claiming he was "just kidding" if the contrary could not be proved beyond a reasonable doubt. In addition to claiming that the statute in question should be construed this way, he further claims that any statute not allowing such a defense is unconstitutional. Such unwarranted and unnecessary overprotection of threats would be contrary to the interests of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Anthony Elonis was charged with "transmitting in interstate commerce communications containing a threat to injure the person of another" under 18 U. S. C. § 875(c). *United States* v. *Elonis*, 730 F. 3d 321, 326 (CA3 2013).

The charges and convictions stem from a series of posts on the social media website Facebook shortly after Elonis's wife left him, taking their two young children with her. *Id*., at 324. Soon after his wife left, Elonis was seen weeping at his desk and began to act out at work. In October of that year, after posting a photograph showing Elonis in a Halloween costume holding a knife to a coworker's neck with the caption "I wish" under the photograph, Elonis was fired. *Ibid*. At this point Elonis's behavior deteriorated further. Over the next 2 months Elonis would make a number of Facebook posts in which he would reference killing police,

the local sheriff's department, school children, an FBI agent, and, often in great detail, his estranged wife. As an example of one of the posts, on November 15, 2010, Elonis 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
>
> "That was improperly granted in the first place. Me thinks the judge needs an education on true threat jurisprudence
>
> . . .
>
> "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]" *Id.*, at 325-326.

Elonis's wife was not a Facebook "friend" and therefore not automatically notified of his posts about her. See Brief for Petitioner 5-6, 12. However, family members and mutual friends remained Facebook "friends" with him and brought the apparent threats to her attention. See J. A. 151. She testified, "I felt like I was being stalked. I felt extremely afraid for mine and my childrens' and my families' lives." J. A. 153.

Elonis asked for a jury instruction saying that a statement "cannot constitute a 'true threat' under the statute unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation," J. A. 20, citing *United States* v. *Alkhabaz*, 104 F. 3d 1492, 1495 (CA6 1997) and *United States* v. *Bagdasarian*, 652 F. 3d 1113 (CA9 2011). The prosecution requested instruction on the objective "reasonable person" standard. J. A. 25. As the latter standard was

established in binding Third Circuit precedent, *United States* v. *Kosma*, 951 F. 2d 549, 556 (CA3 1991), the District Court gave the objective instruction. See J. A. 30, 301. Elonis was convicted, and the Third Circuit affirmed. See *Elonis*, 730 F. 3d, at 335.

SUMMARY OF ARGUMENT

The petitioner and supporting *amici* simply assume that the objective standard used in this case constitutes a "negligence" mental element with no analysis and no authority other than conclusory statements in a couple of concurring opinions. It is not. The mental state element for this crime is a "knowledge" standard—knowledge of the basic fact of the content of the statement. The further characterization of the statement as a true threat under an objective standard is indistinguishable from other cases where this Court has held that only knowledge of the basic fact was required.

An alternative to the objective standard is worth mentioning, though not CJLF's preferred position. If the Court adopts the Model Penal Code position that mental state is always the defendant's actual mental state and never involves "reasonable person" tests, it should also adopt the Model Penal Code rule that when a statute is silent on the mental element either purpose, knowledge, or reckless disregard will suffice. Under that standard, it would be sufficient that the maker of a statement acted with reckless disregard of whether it would be taken as a threat.

The standard used in this case presents no serious constitutional doubt. In *Chaplinsky* v. *New Hampshire* and *Hamling* v. *United States*, this Court upheld against First Amendment challenge statutes that required only that the defendant knew the content of the expression and left the characterization "fighting

words" or "obscenity," respectively, to reasonable person or community standards. Statements in *Virginia* v. *Black* which are at most ambiguous should not be construed to work a major change in the law in a case where the issue was not presented.

On basic principles of statutory construction, 18 U. S. C. § 875(c) contains no mental element of "subjective intent," "specific intent," or "purpose," which are largely the same thing here. By creating a lesser included offense without the specific intent requirement of the prior, greater offense, Congress implicitly created a general intent offense.

The victims of threats, not the makers of threats, are the ones who need "breathing space." In today's "anything goes" society, violent speech in what passes for art flourishes uninhibited by the federal threat statute and its long-standing interpretation as having a "reasonable person" standard. As the two cases in *Virginia* v. *Black* illustrate, it is only threats targeted at identifiable victims, not violent or hateful speech painting with a broad brush, that are subject to prosecution. Persons who want to make social or political commentary can easily stay far away from the unprotected zone without any diminution of their ability to make their point. Victims, on the other hand, need protection from threats that are veiled or that skate on the edge of what is allowed. Such almost-threats contribute nothing of value to the marketplace of ideas and do not deserve any "breathing space."

ARGUMENT

I. The mental state choice in this case is between knowledge and purpose, not between subjective intent and negligence.

The petitioner's central argument, in a nutshell, is that the mental state for a crime of pure speech cannot be mere negligence, and therefore a person who makes statements that are clearly threats of violence on their face must be allowed a "just kidding" defense.

The premise may very well be true, but the conclusion does not follow. The choices are not limited to subjective intent (or purpose or specific intent) and negligence.[2] Between these two endpoints are the middle grounds of knowledge and reckless disregard. They are clearly constitutional, and knowledge would fit better what has, until fairly recently, been the nearly universal interpretation of the statute in question.

A. Knowledge and Purpose.

In the traditional taxonomy of mental state, crimes were designated either "specific intent" or "general intent." See *United States* v. *Bailey*, 444 U. S. 394, 403 (1980). Burglary, for example, required breaking and entering with the specific intent to commit larceny or a felony inside, see 3 W. LaFave, Substantive Criminal Law § 21.1(e) (2d ed. 2003), while the same wrongful act with only a general intent to commit the act would be a lesser offense. See *id*., § 21.2 (criminal trespass). The objective standard for determining what is a threat for the purpose of the statute in the present case, 18 U. S. C. § 875(c), has been described as a "general

2. Cf. Brief for Petitioner 20 ("Without a subjective intent requirement, Section 875(c) would impose criminal punishment for negligent speech in violation of the First Amendment.")

intent" requirement, distinguished from the subjective intent to threaten, which would be a "specific intent" requirement. See *United States* v. *Jeffries*, 692 F. 3d 473, 478 (CA6 2012) (quoting *United States* v. *DeAndino*, 958 F. 2d 146, 149 (CA6 1992)).

This classification scheme has long been criticized, and the trend has been toward adoption of a different hierarchy of mental states, generally along the lines suggested in the American Law Institute's Model Penal Code.[3] See *Bailey*, 444 U. S., at 403-404; see also *Dixon* v. *United States*, 548 U. S. 1, 7 (2006) ("a more specifically defined hierarchy of culpable mental states," citing *Bailey*). "The different levels in this hierarchy are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *Bailey*, *supra*, at 404.

The legislative authority, if it chooses to, can include a requirement of purpose or specific intent. A different subsection of the statute at issue in this case does indeed include such a requirement. In 18 U. S. C. § 875, subdivision (b) defines a higher degree of the offense, distinguished from the lesser degree in subdivision (c) by the additional requirement of an "intent to extort." The higher degree is punishable by a maximum of twenty years instead of five. *Virginia* v. *Black*, 538 U. S. 343 (2003), involved a statute in which the Virginia legislature chose to outlaw burning a cross with "an intent to intimidate." *Id*., at 347 (plurality opinion). These statutes require that the person making the provocative statement (verbal or symbolic) do so with a particular purpose in mind. In the terms of MPC § 2.02(2)(a)(i), "it is his conscious object to engage in conduct of that nature or to cause such a result."

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3. See American Law Institute, Model Penal Code and Commentaries § 2.02 (1985) ("MPC").

However, legislatures do not always or even usually require this most culpable mental state, and there is often good reason not to. See 1 W. LaFave § 5.2(b), at 342. Proving what is inside the defendant's head beyond a reasonable doubt can be a difficult and sometimes impossible task, see *Giles* v. *California*, 554 U. S. 353, 387 (2008) (Breyer, J., dissenting), and a person who does a wrongful act knowing what he is doing often should be held responsible for it, whether he had a wrongful purpose or not. In the MPC taxonomy, this next level down is "knowingly," defined as "he is aware that his conduct is of [the proscribed] nature or that such circumstances exist." MPC § 2.02(2)(b)(i).[4]

We should note at this point that although the Model Penal Code's hierarchy of mental states is widely, if not universally, regarded as superior to the old specific versus general intent terminology, the MPC's details of the definitions of these states do not enjoy the same degree of acceptance. Courts have found the "knowledge" mental element satisfied in situations outside the MPC definition, including "reasonable person" standards. See 1 LaFave § 5.2(b), at 347. Thus while the American Law Institute rejects "reasonable person" standards for the mental states of purpose and knowledge, see MPC § 2.02, Comment, at 234, that does not settle the matter.

Petitioner offers surprisingly little support for his assertion that the objective standard amounts to a mental state of negligence. He merely cites a couple of concurring opinions, see Brief for Petitioner 3-4, and those opinions offer little more than bare assertions. See *Rogers* v. *United States*, 422 U. S. 35, 47 (1975) (Marshall, J., concurring); *United States* v. *Jeffries*, 692

4. Paragraph (ii) deals with elements relating to the results of conduct, not relevant here.

F. 3d 473, 484 (CA6 2012) (Sutton, J., concurring dubitante). The student law review note often cited in this area similarly just cites the *Rogers* concurrence and nothing more. See Rothman, Freedom of Speech and True Threats, 25 Harv. J. L. & Pub. Policy 283, 316 (2001).

This Court has inferred a mental state element in criminal statutes where Congress has neither included one nor disclaimed any, see Brief for Petitioner 28, but the inferred mental state is typically knowledge, not purpose or specific intent. The classic case of *Morissette* v. *United States*, 342 U. S. 246, 270-271 (1952), held that "knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion." Petitioner also relies on *United States* v. *X-Citement Video*, 513 U. S. 64 (1994), but that case also inferred a factual knowledge element, not a subjective purpose. The statute required only that the proprietor of X-Citement Video knew that the notorious Traci Lords was underage, and that was all it needed to eliminate any constitutional doubts. See *id*., at 66-67, 78.

The only case petitioner cites that deviates from the pattern of purely factual knowledge is *Liparota* v. *United States*, 471 U. S. 419 (1985). A conclusion that the defendant in a food stamp fraud case had to know his conduct was illegal resulted from the unusual nature of that statute, so that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id*., at 426.

The closest analogy to the present case can be found in the pornography cases. In *Hamling* v. *United States*, 418 U. S. 87, 119-120 (1974), the statute on mailing obscene materials had a "knowingly" requirement, and

the defendants contended that the government must prove both their knowledge of the contents and their knowledge that it qualified as obscene. The Court rejected the argument, requiring only knowledge of the objective fact of the contents. " 'The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated.' " *Id*., at 120-121 (quoting *Rosen* v. *United States*, 161 U. S. 29, 41-42 (1896)).

The present case is a close fit to *Hamling*. The defendant knew the basic fact of what he wrote, and he knew he published his statements on a medium that reaches not only interstate but worldwide. This is sufficient to make this a "knowing" mental state requirement.

Negligence, on the other hand, is a poor fit to the mental state at issue here. The essence of negligence is taking unreasonable risks. See 1 LaFave § 5.4(a)(1), at 367. There was no risk in what the defendant said or how he published it. These are certainties. There would be a risk factor if the status of the statements as threats depended on how the actual target actually perceived them, and petitioner tries to make that argument, see Brief for Petitioner 3-4, but actual target reaction is not an element of this crime. The only risk is how the trier of fact will judge the defendant's actions. But that is the same risk as in *Hamling*. It does not transform the mental state element from knowing to negligent.

There are many areas of law where an element involves a judgment by the jury made after the fact. Murder, for example, is generally defined with an element that the killing be unlawful. See 2 LaFave § 14.1, at 416. Whether the killing was unlawful may

involve a judgment about the legality of the use of deadly force, such as whether it was justified in self-defense or performance of duty. The risk that the jury may see this differently than the defendant does not transform murder into a crime of negligence rather than intent.

The District Court's use of the word "foresee" in the jury instruction does not convert the required mental state from knowing to negligent. In context, this word does not refer to prediction of any future event or assessment of a risk of any event occurring in the future. It is merely an awkward way of phrasing the objective "reasonable person" test. This case is presently before this Court to resolve a circuit split on subjective versus objective mental state, see Pet. for Cert. 16, but there is also a "circuit crack" in the various formulations of the objective test. *United States* v. *White*, 670 F. 3d 498, 510 (CA4 2012) collects the cases. The Eleventh Circuit's formulation, referring to neither speakers nor listeners nor foreseeing, is best. "[T]he inquiry is whether there was sufficient evidence to prove beyond a reasonable doubt that the defendant intentionally made the statement under such circumstances that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm." *United States* v. *Alaboud*, 347 F. 3d 1293, 1296-1297 (CA11 2003) (citation and internal quotation marks omitted).

Under the objective test applied in the present case, the mental state element is one of *knowingly* making a threat. The subjective standard the defendant seeks would be one of *purposely* making a threat. That is the choice before the Court. *Negligence* is not at issue here.

B. The Reckless Disregard Alternative.

There is another alternative worth mentioning here. As noted, *supra*, at 8, the Model Penal Code rejects "reasonable person" standards for the mental state of knowledge and requires actual knowledge. However, the MPC also rejects the suggestion of petitioner that courts should read the highest degree of mental culpability, purpose, into a statute that has no mental element stated in the text. Instead, the MPC's rule of interpretation is that where no mental state is specified, purpose, knowledge, *or* recklessness will suffice. See MPC § 2.02(3) and Comment, at 244.

If both of these positions are accepted, then juries would be instructed to find the mental element satisfied if the defendant had the purpose to make a threat *or* he knew the statement would be perceived as a threat *or* he acted with reckless disregard of whether the statement would be perceived as a threat.

The defamation cases establish that a mental state of reckless disregard is sufficient to satisfy the First Amendment. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964) ("same standard" for criminal cases).

II. The mental element of knowledge and the objective test present no serious constitutional doubt.

When a case presents both nonconstitutional and constitutional questions, principles of judicial restraint generally require the court to resolve the nonconstitutional question first and then express no opinion on the constitutional question if it is not necessary to decide the case. See, *e.g.*, *Slack* v. *McDaniel*, 529 U. S. 473, 484-485 (2000). This nor-

mally straightforward maxim becomes a bit more complicated when the doctrine of constitutional doubt is invoked in a statutory interpretation argument. If the statutory interpretation question is otherwise close, a look at the constitutional question is necessary. See, *e.g.*, *Jones v. United States*, 526 U. S. 227, 239-240 (1999).

After setting up the straw man of a negligence mental element in a prohibition of pure speech, the petitioner and supporting *amici* present the Court with various arguments to knock it down. The real question is whether there is genuine doubt of the constitutionality of a statute with a mental element of the defendant's knowing what he said coupled with an objective standard for characterizing the statement as unprotected speech. The answer is no. This Court squarely resolved that question long ago, and it has recently reiterated that subjective purpose is not required in a First Amendment "pure speech" case.

The proposition that knowledge and not purpose is sufficient to exclude a statement from the protection of the First Amendment can be seen in the classic hypotheticals of obviously unprotected statements. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). Would it matter what his purpose was in falsely shouting fire? Would the speech be protected if he had some purpose other than causing a panic? Of course not. It does matter, obviously, that he had knowledge of the basic fact that there was no fire, but purpose is irrelevant.

Similarly, publishing the sailing dates of troop transports was so obviously unprotected speech shortly after World War I as to require no discussion. See Chafee, Freedom of Speech in War Time, 32

Harv. L. Rev. 932, 939 (1919). Would it matter if the newspaper publisher had the innocent purpose of enabling the soldiers' families to see them off, rather than the nefarious purpose of assisting German U-boats to sink the ships? Of course not. Subjective purpose would matter if the publisher were charged with treason for aiding the enemy, cf. *Haupt* v. *United States*, 330 U. S. 631, 641 (1947), but it does not matter for the purpose of determining whether the publication is constitutionally protected from any government restraint.

The classic "fighting words" case, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), provides a close parallel to the present case. This Court's brief opinion found that Chaplinsky's words were unprotected "fighting words" likely to cause a breach of the peace. *Id*., at 574. The Court also rejected a claim that the statute was too vague, *ibid*., referring to the state court opinion for the meaning of the statute. See *id*., at 572-573.

Turning to the New Hampshire Supreme Court's opinion, we find a more complete discussion. Chaplinsky made an argument very similar to the one made in this case. The passage quoted in part by this Court, *id*., at 573, reads in full:

> "The defendant further says that our statute is invalid because it is so vague and indefinite that one coming within its purview may not know what is prohibited. In this connection, the claim is made that the test of what is offensive is purely subjective in the sense that it is to be determined by the way the addressee reacts to it. The defendant therefore argues that nobody can know what is offensive language, since one man may be offended by words to which another man would take no exception. We have never construed the statute by any such test.

> The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The legislature had no such vague, shifting test in mind. As was long ago said, they had in mind the tendency of words, not their actual result. The analogy was that of the distinction between civil and criminal libel. *State* v. *Brown*, 68 N. H. 200.
>
> "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." *State* v. *Chaplinsky*, 91 N. H. 310, 320, 18 A. 2d 754, 762 (1941).[5]

In affirming this decision on the vagueness challenge, quoting the "men of common intelligence" standard, this Court rejected the idea that an objective, "reasonable person" standard for determining whether speech is protected gives insufficient protection to speech or insufficient notice to speakers. Cf. Brief for Petitioner 46-47.

That rejection was strongly reinforced in *Hamling* v. *United States*, 418 U. S. 87 (1987). That case involved a statute which forbade mailing obscene materials and declared that "[w]hoever knowingly uses the mails for the mailing" of such material was guilty of a crime. See *id*., at 98, n. 8. The "principal question" of the case was whether obscenity should be judged by the standard in effect at the time of the offense and trial, *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), or the standard announced while the case was on appeal, *Miller* v. *California*, 413 U. S. 15 (1973). See 418 U. S., at 98. In addition, though, the defendants made a

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5. The state court also recognized that although the expression "damned Fascist" was "fighting words" in 1941, it might not always be. See *id*., at 321, 18 A. 2d, at 762. The era in which the statement was made was a relevant circumstance in determining whether it was "fighting words."

scienter argument not materially different from the one in this case.

The District Court instructed the jury that guilt required that the defendants knew the character of the materials and knew they were mailed but that their belief as to whether the materials qualified as "obscene" was irrelevant. *Hamling*, 418 U. S., at 119-120. The defendants argued for a subjective test, that their own awareness that the materials were obscene was required. See *id*., at 120. The Court had rejected that argument in the previous century, *Rosen* v. *United States*, 161 U. S. 29, 41-42 (1896), and it rejected it again in *Hamling*, at 123-124:

> "We think the 'knowingly' language of 18 U. S. C. § 1461, and the instructions given by the District Court in this case satisfied the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U. S. C. § 1461 nor by the Constitution."

If the Constitution does not require even subjective awareness that the speech falls into an unprotected category, it surely cannot require a subjective purpose to make an unprotected statement. In *Hamling*, the character of the materials was easily sufficient to put the defendants on notice that they were quite likely to be regarded as obscene. See 418 U. S., at 92-93 (describing materials). In the present case, no rational

person could doubt that the defendant's statements might be regarded as threatening. Indeed, the defendant himself expressed an awareness that his statements raised an issue under "true threat jurisprudence." See *Elonis*, 730 F. 3d, at 325.

> Under the *Miller* test, obscenity is determined by
>
> "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Hamling*, 418 U. S., at 102 (quoting *Miller*, 413 U. S., at 24).

This test provides no greater ability to determine precisely in advance what speech is unprotected than the objective test for threats provides. Indeed, it is considerably more difficult to apply. The prior law was even less definite, causing one Justice to famously declare regarding hard-core pornography, "perhaps I could never succeed in intelligibly [defining it]. But I know it when I see it . . . ." *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964) (Stewart, J., concurring). Any claim that the reasonable person standard at issue in this case is unconstitutional because a person might misjudge which side of the line a borderline threat falls on is unsupportable in light of *Hamling*.

Finally, it is worth noting that only four years ago this Court rejected an argument that it should read a specific intent requirement into a statute to avoid constitutional doubts. See *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 16-17 (2010). The Court held that the statute plainly required only "knowledge about

the organization's connection to terrorism," *ibid*., and it upheld the statute as constitutional, at least as applied to the speech at issue in the case. See *id*., at 39.

A common thread in all these hypotheticals and cases is that the defendant's inner purpose in speaking has nothing to do with the reason the speech is unprotected. The harms of a panic in a theater, sinking a troop transport, starting a brawl, debasing our society, or strengthening a terrorist organization are the same regardless of *why* the speaker did it. Some mental state element is required to avoid punishing innocent persons, such as the bookstore owner who does not know what is in an allegedly obscene book on his shelf, see *Smith* v. *California*, 361 U. S. 147, 152-153 (1959), but the most culpable and most difficult to prove mental state, subjective purpose, is far beyond what is required.

Virginia v. *Black*, 538 U. S. 343 (2003), did not make the change petitioner ascribes to it. The plurality opinion noted, "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). The statement "a collie is a type of dog" does not imply that Labrador retrievers are not dogs. Quite the contrary, "a type" strongly implies that there are other types. Similarly, the word "encompass" in the same paragraph, *id*., at 359, means that the kinds of threats at issue in the case are included but does not imply that other kinds are excluded.

The reasons given why threats are not protected also strongly imply that other kinds of threats are also included in "true threats." "[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 360 (quoting *R. A. V.* v. *City of St. Paul*, 505 U. S. 377, 388 (1992)). The subjective intent of the speaker is completely irrelevant to two of the three reasons. A statement that most people would regard as a threat and that the target does take as a threat causes just as much fear and disruption regardless of the speaker's purpose.

Even if there were enough ambiguity in the *Black* opinion to make a plausible argument that it means what petitioner claims, it should not be given that interpretation. Given the nearly uniform interpretation of the federal threat statute to the contrary, this would be a major change in the law. To make such a change in a case that does not present the issue would be "contrary to the fundamental principle of judicial restraint that courts should . . . [not] formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 450 (2008) (citations and internal quotation marks omitted). While that principle is not invariably observed, to be sure, its violation should not be lightly attributed.

When the statute is properly understood and the "negligence" straw man is put away in the barn where he belongs, there is no substantial doubt as to the constitutionality of this statute as construed by most of the courts of appeals. *Hamling* makes unmistakably clear that knowledge of the character of the speech is sufficient scienter for the First Amendment, and the legal characterization of that speech as inside the boundary of an unprotected category is not something the defendant needs to subjectively know. *Chaplinsky* makes clear that the test for unprotected speech may be how a reasonable person would judge the statement.

The question therefore reduces to one of straightforward statutory interpretation, unhindered by the constitutional doubt doctrine.

III. Under standard principles of statutory interpretation, 18 U. S. C. § 875(c) contains no specific intent, subjective intent, or purpose element.

The issue of the intent required by 18 U. S. C. § 875(c) is often phrased in terms of whether Congress intended that this be a specific or general intent crime. See *United States* v. *Teague*, 443 F. 3d 1310, 1319 (CA10 2006) (collecting cases). In those terms, the Ninth Circuit found that 18 U. S. C. § 875(c) requires a specific intent and therefore a subjective mental state in *United States* v. *Twine*, 853 F. 2d 676, 680 (CA9 1988). The other circuits held it is a general intent crime. See *Teague*, *supra*, at 1319.

More recently, the terminology has shifted. The debate now is in terms of subjective intent. *United States* v. *Cassel*, 408 F. 3d 622, 633 (CA9 2005), involving a different federal statute, concluded that *Virginia* v. *Black*, 538 U. S. 343 (2003), created a constitutional requirement of "proof that the speaker subjectively intended the speech as a threat." The other circuits have not agreed that *Black* made this change. See *Elonis*, 730 F. 3d, at 330-332. They are correct. See *supra*, at 18; Brief for the United States 41-42. In this context, there is no real difference between "subjective intent," "specific intent," and "purpose."

No such refined mental element can be squared with the language of 18 U. S. C. § 875. Subsection (c) reads: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of an-

other, shall be fined under this title or imprisoned not more than five years, or both." Absent from subsection (c) is any mention of a specific intent requirement. However, this is not the case with the rest of 18 U. S. C. § 875. Both sections (b) and (d) of 18 U. S. C. § 875 have a requirement that a person accompany a threat "with intent to extort from any person, firm, association, or corporation, any money or other thing of value . . ." in order to constitute a violation. This Court has repeatedly stated, "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp.* v. *United States*, 508 U. S. 200, 208 (1993) (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983)).

To make this point even more clear, it is helpful to overlay the language of subdivisions (b) and (c), with the common language in roman type, the added words of (b) in italics, and the added word of (c) in strikeout:

> "Whoever*, with intent to extort from any person, firm, association, or corporation, any money or other thing of value,* transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than *twenty* ~~five~~ years, or both."

The only difference in the definition of the offense is the specific intent element present in (b) and absent from (c). Other than that, the offense definitions are identical. The other difference is the maximum penalty. Subdivision (c) is a lesser included offense of subdivision (b). Of course it is true that when Congress omits any mention of a mental state it generally does not intend that there be no mental element, but it is a

much greater stretch to argue that Congress intended that a statute have a specific intent or purpose element without specifying what it is.

The distinction between subsection (c) and the other subsections of 18 U. S. C. § 875 is made clear by its history. Section 875 is the result of a law passed in 1932 which crimalized the use of mail to transmit a threat to injure or kidnap any person or to accuse a person of a crime or demand ransom for a person. Pub. L. No. 72-274, 47 Stat. 649 (1932). However, to fall within the scope of the act the communication had to be sent "with intent to extort from any person any money or other thing of value." *Ibid*. The act was later amended by Pub. L. No. 73-231, 48 Stat. 781 (1934) to apply to threats transmitted "by any means whatsoever," but still required the specific intent of extortion.

The act was again amended in 1939, this time expanded to apply to threats to kidnap or injure that were not made with the specific intent to extort. Pub. L. No. 76-76, 53 Stat. 742, 744 (1939). This new subdivision was added because of the Justice Department's inability to address "a number of threats of a very serious and socially harmful character not covered by the existing law" S. Rep. No. 349, 76th Cong., 1st Sess. 4 (May 1, 1939). The "serious and socially harmful character" of the threats demonstrates a concern, not with the subjective intent of the sender, but with the effect that the threat has on the listener and society. Thus, the lesser offense is one of making a threat "not accompanied by an intent to extort," *ibid*., without specifying any alternative specific intent.

"*Morissette*, reinforced by *Staples*,[6] instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States* v. *X-Citement Video*, 513 U. S. 64, 72 (1994). This presumption should extend no further than its purpose requires, particularly since it involves courts writing words into statutes that the legislature did not put there. In the older terminology, it requires inferring only a general intent requirement, not a specific intent. In Model Penal Code terms, it requires an inference that any of the mental states of purpose, knowledge, or recklessness is sufficient. See *supra*, at 12. In this case, as in *Hamling*, it requires only that the defendant knew the contents of the statement and that most people would regard the statement as a threat. Skating on the edge of threats is not innocent conduct. Innocent people stay well away from threats when they speak.

IV. The victims of threats, not the makers of threats, are the ones who need "breathing space."

Arguments for a broad interpretation of the First Amendment—and a restrictive view of the ability of government to protect innocent people—regularly invoke the notion that freedom of speech requires "breathing space." See, *e.g.*, *Snyder* v. *Phelps*, 562 U. S. __, 131 S. Ct. 1207, 1219, 179 L. Ed. 2d 172, 185 (2011). In some contexts, that may be true. The boundary between protected and unprotected speech will often be fuzzy. The value of speech in the twilight zone near

6. *Staples* v. *United States*, 511 U. S. 600, 622, n. 3 (1994) (knowledge that a gun is an automatic, not that the law requires it to be registered).

that boundary may be such that the risk of protecting speech that is actually proscribable is greater than the risk of inhibiting speech that is actually protected.

The "breathing space" argument is particularly weak as applied to threats. "From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *R. A. V.* v. *City of St. Paul*, 505 U. S. 377, 382-383 (1992) (quoting *Chaplinsky*, 315 U. S., at 572).

In assessing whether any speech of "social value as a step to truth" may be inhibited by a restriction on threats, it is important to keep in mind the distinction between the two cases joined in *Virginia* v. *Black*. The provision that burning of a cross alone was prima facie evidence of an intent to intimidate (and thus *a* type of true threat) was invalid because it did not distinguish the two types of cases:

> "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. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission." 538 U. S., at 366.

The two cases before the court were a cross burning at a rally to make a broad public statement and a cross burning on a neighbor's lawn intimidating one targeted family. *Id*., at 348-350. Those cases are different, and they need to be distinguished. With this distinction in mind, an *amicus* brief submitted in support of the petitioner actually illustrates why speech of (barely) arguable value is in no danger.

"Gangsta rap" is a subgenre of rap that is typically violent, often misogynist, and sometimes racist. The *amicus* brief claims we should find social value in gangsta rap. See generally Brief of Marion B. Brechner First Amendment Project *et al*. as *Amici Curiae* ("Brechner Brief"). The premise is doubtful. Most persons of sense would likely agree that the world would be a better place if this subgenre vanished from its face tomorrow. But that is not going to happen, which is why their argument is invalid. Even if we swallow hard and accept the premise strictly for the sake of argument, the conclusion that a subjective standard of intent is necessary to prevent chilling this speech does not follow.

In Part III of their brief, the *amici* note various "attacks" on rap. Most of these "attacks" are people exercising their own freedom of speech. An assistant director of the FBI sent a letter. Brechner Brief 17-18. The wife of a Senator (and future Vice President) wrote an op-ed. *Id*., at 18-19. The President and Vice President made public statements. *Id*., at 19. Police organized a boycott to pressure companies not to sell the records. See *ibid*. Civil rights activists also denounced the genre. *Ibid*. A journalist made an argument in a debate series. *Ibid*. And what exactly is wrong with any of that? Hasn't this Court said repeatedly that the remedy for bad speech is more speech? See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 498 (1996).

The only claims of any action through government power are a vague allegation that police somehow disrupted performances and an assertion that some artists were arrested on lewdness charges. See Brechner Brief at 18. Conspicuously absent is any claim that at any time any artist was arrested or charged under a threat statute, despite the nation supposedly being in a "moral panic." If none of the numerous and powerful people engaged in this "panic" ever thought to use a threat statute against rap, then the threat statutes must not have been much of a threat, even though the objective standard was the prevailing if not universal interpretation of the federal threat statute at the time.

This brings us back to the distinction in *Black*. Violent, hateful, despicable statements made in broad terms that cannot reasonably be construed as actual threats to specific targets are not "true threats" as that term is understood in *Black*, and that is true regardless of the speaker's subjective intent. Barry Black can spew his hate at his Klan rally, and the gangsta rappers can spew their hate as well, all under the ample protection of the First Amendment. Avoiding the kind of targeted threat that falls in or anywhere near the unprotected territory of "true threats" is easily done and does not significantly chill the ability of the haters to spread their message.

Statements that can reasonably be understood as actual threats to harm identified targets have little or no place in the marketplace of ideas. In *Chaplinsky*'s words, they have "slight (or no) social value as a step to truth." A person who wants to make a statement on any social or political issue or any other topic of public discussion can quite easily avoid making such threats without any reduction in his ability to get his point across.

The victims of threats are the ones who need the breathing space.[7] Threat-makers can strike terror into people's hearts by making veiled threats or by trying to skate on the edge of what is allowed, as Elonis attempted in this case. Given the utter lack of any legitimate reason for doing so, a little bit of chilling near the border does no harm and may do considerable good.

In today's "anything goes" world, violent expression needs no more breathing space than it already has. America does not need a "just kidding" defense for those who threaten to kill people.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be affirmed.

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Respectfully submitted,

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7. We understand the psychological impact of threats on victims will be presented in other briefs and so do not repeat that argument here.