

No. 13-983

IN THE
Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND NINE MEDIA
ORGANIZATIONS, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST¹

Amici curiae, described fully in Appendix A, are The Reporters Committee for Freedom of the Press, Advance Publications, Inc., Association of Alternative Newsmedia, First Look Media, Freedom of the Press Foundation, Investigative Reporting Workshop at American University, National Press Photographers Association, Newspaper Association of America, The Newspaper Guild - CWA, and Tully Center for Free Speech.

This case concerns a topic that has a direct impact on the news media. Although journalists should not face the possibility of prosecution for fulfilling their role of informing the public and providing commentary and analysis on current issues, they have faced just such inquiries in the past in true threats cases. The government's practice of erroneously relying on an objective intent test for true threats offenses to support investigations into editorials, cartoons, and commentary must come to an end because it infringes on journalists' First Amendment freedoms.

¹ Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

As advocates for the rights of the news media who gather and disseminate information and commentary to the public, *amici* have a strong interest in ensuring that journalists retain their full range of First Amendment protections, including the right to comment on matters of public concern without the fear of facing government sanction.

Amici call for this Court to reject the objective intent test for true threats crimes. If that standard survives, it will open the door to more investigations and prosecutions of journalists for speech that clearly does not constitute a real expression of an intent to threaten harm to another person. Leaving members of the news media to guess at what a reader or listener might take seriously is likely to lead to a chilling effect as journalists choose to hold back their opinions or a controversial quote, or censor a letter to the editor, out of fear that they could be held responsible for a reader or listener's overreaction. Thus, *amici* respectfully request that this Court reverse the decision below.

SUMMARY OF ARGUMENT

Journalists and news media organizations are active and lively participants in public discourse, but they draw particular attention when their coverage deals with controversial ideas or statements. Often, fully addressing such an issue requires a journalist to offer analysis, quote outspoken sources, or comment for themselves. Such activities are protected under the First Amendment, but this Court risks eroding that protection if it adopts an objective intent test for analysis of true threats.

Public commentary is frequently meant to provoke – whether by urging listeners to rethink their position on an issue or to take action – and this country has a long history of protecting provocative speech. Recent instances of federal investigations into journalists for clearly legitimate activities point to the need to establish a true threats test that will protect typical reporting and news gathering activities. A subjective analysis is necessary to shield satirists, cartoonists, and commentators expressing their own views, and even reporters who faithfully relay only what other people say.

This Court's decision in *Virginia v. Black* points to the need for a subjective intent test in all true threats cases. In *Black*, the Court recognized the danger to First Amendment principles if a speaker's intent may be assumed simply from a listener's reaction, holding that burning a cross by itself could not be sufficient prima facie evidence of intent to threaten. But even if the ruling in *Black* does not require the application of a subjective test in every

true threats case, the First Amendment necessitates that the Court adopt such a standard now.

This Court should be mindful of the effects its decision in this case could have on journalists participating in protected activities under the First Amendment. A subjective intent test will continue to catch truly threatening statements while leaving the maximum space for protected speech to thrive.

ARGUMENT

Americans have long held the right to comment and criticize people publicly, including both “informed and responsible criticism” and “the freedom to speak foolishly and without moderation.” *Baumgartner v. U.S.*, 322 U.S. 665, 673-674 (1944). It is fundamental to the First Amendment that even the most imprudent of speech be granted as much leeway as possible and any government attempts to restrict speech be narrowly tailored to that goal. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) (stating that “[t]he hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting”); *see also* G. Robert Blakey and Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. Rev. 829, 1072-1073 (2002) (noting that “in a society where freedom of speech is a core value, the price to pay is small; errors should always be on the side of free speech or expressive conduct”).

Journalists and members of the news media have long counted on a generous reading of First

Amendment freedoms in order to both report objectively on events and to provide commentary to add to public discussion of current issues:

America has enjoyed a proud history of political satire and political cartooning, dating to pre-Revolutionary War days. Furthermore, it is a fundamental principle that the First Amendment protects the right to engage in debate on public issues and public figures, which is vehement, caustic and which, at times, subjects public figures to ridicule and unpleasantly sharp attacks.

Lauren Gilbert, *Mocking George: Political Satire as 'True Threat' in the Age of Global Terrorism*, 58 U. Miami L. Rev. 843, 855 (2004).

This Court has specifically recognized the importance of ensuring the First Amendment leaves room for parody and satire, despite the often “caustic” and arguably “outrageous” nature of much of this type of commentary. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-55 (1988) (recognizing that “despite their sometimes caustic nature,” satirical commentaries “have undoubtedly had an effect on the course and outcome of contemporaneous debate”). In fact, satire and commentaries in that vein are designed to embarrass and expose, often through mockery. Gilbert, *supra*, at 858; *see also Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C. Cir. 2013) (pointing out that “it is the nature of satire that not everyone ‘gets it’ immediately”). As this Court has seen, it can be difficult to distinguish these forms of acceptable

ridicule from expression that does not receive the same First Amendment protections. “Various doctrinal protections,” including defamation and incitement “preserve ‘the breathing space which freedoms of expression require in order to survive.’” *Farah*, 736 F.3d at 534 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)). The true threat doctrine should be no different.

Given the proliferation of harsh commentary in today’s media landscape, itself a reflection of a fractured and divided public, particularly in the political arena, it is particularly important that this Court draw a very clear line between allowable parody, satire and exaggeration, and punishable true threats. *Amici* believe a subjective intent test is crucial to establishing that line.

I. This Court’s decision in *Black* suggests that a subjective intent analysis is constitutionally warranted for true threat statutes.

In *Virginia v. Black*, this Court defined “true threats” to be “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.” *Black*, 538 U.S. at 359. In *Black*, this Court examined a Virginia statute banning cross burning with the intent to intimidate someone. The statute allowed juries to assume that the act of burning the cross was sufficient evidence of intent to intimidate. This Court held otherwise, recognizing that the same act could be either “constitutionally proscribable

intimidation” or, on the other hand, could be indicative “only that the person is engaged in core political speech.” *Id.* at 365. The Court held that allowing a jury to infer an unlawful intent from an ambiguous act violated the First Amendment. The subjective intent requirement was necessary to keep the statute from becoming overbroad and restricting constitutionally-protected speech.

The Third Circuit below decided that the language of *Black* did not overturn the circuit’s case law requiring only the negligence standard of the objective “reasonable person” test, because *Black* dealt with a statute that had a subjective intent requirement and the holding did not extend more broadly than that. *U.S. v. Elonis*, 730 F.3d 321, 329 (3d Cir. 2013). The court, first quoting the standard from *Black*, held that

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. But the difference between “means to communicate” and “intends the statement to be understood as” seems like a distinction without a difference; either way, this Court in *Black* wanted to

avoid a negligence standard by ensuring that there was an intent to make a true threat. The Ninth Circuit better understood the meaning of *Black*, when it recognized that the Court wanted to allow for expansive First Amendment protections and only minimal restrictions. That circuit has read *Black* to require a subjective intent test in all true threats cases, which serves to best protect the interest of news media outlets and their representatives. *See U.S. v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (holding “that only intentional threats are criminally punishable consistently with the First Amendment [. . .] A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim”). Although there were four opinions for this Court in *Black*, the Ninth Circuit correctly points out that “[e]ight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction.” *Id.* at 632-633.

The Seventh Circuit has also allowed for the application of a subjective intent test. Although the circuit has not had the opportunity to address the issue directly, dicta indicates its skepticism of an objective true threats test post-*Black*:

It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality's discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable.

U.S. v. Parr, 545 F.3d 491, 500 (7th Cir. 2008). An objective test is untenable given the long-standing First Amendment protection for hyperbole and caustic commentary.

Other circuits that have addressed this question have largely found *Black* to be limited to the Virginia statute at issue in 2003 and have not adopted subjective intent tests. *U.S. v. Jeffries*, 692 F.3d 473, 480-481 (6th Cir. 2012). This misreads *Black* and is an unnecessarily limited approach.

Like the statute in *Black*, the statute at issue here, 18 U.S.C. § 875(c) prohibits sending a threatening message, this time proscribing the “transmi[ssion] in interstate commerce” of “any threat to injure the person of another.” The Third Circuit has read *Black* to mean that a speaker need only intend to transmit a message – any message – in order to satisfy the mens rea requirement for § 875(c). But *Black* is not as limited as the Third Circuit believes.

It is impossible to imagine, in light of this Court’s well-established commitment to First Amendment protections, that the intent requirement imposed in *Black* was meant to be limited to an intent merely to communicate, rather than an intent that one’s message be understood in a threatening way.

II. Even if *Black* did not mandate a subjective intent test in all true threats cases, the Court should recognize one here.

First Amendment interests require granting as much leeway as possible for speakers to express themselves, and true threat cases are no exception to this well-established law. A subjective intent test would not relieve truly dangerous people of responsibility for their statements; rather, it would leave room for more commentary in the public sphere. Though such dialogue might be acerbic, it still merits as much protection as the First Amendment can offer.

Representatives of the news media are particularly concerned about the intersection of true threats jurisprudence and protected commentary and satire. “[T]he purpose of satire and parody often is to make the object of the satire suffer, whether through the hostility that the satire produces in the minds of the reader or more directly, through the target’s own awareness of the assault made upon him or her.” Gilbert, *supra*, at 860. Threatening language generally has the same tendency to “make the object [. . .] suffer,” and can similarly do so directly or indirectly.

A subjective intent test for true threats is consistent with First Amendment precedent. An objective test in true threats cases, on the other hand, is essentially the kind of penalty for speech that that has been repeatedly rejected in other areas of First Amendment jurisprudence:

[W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech [. . .] I would therefore interpret [the statute] to require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out.

Rogers v. U.S., 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring) (interpreting 18 U.S.C. § 871, which addresses threats against the president).

In fact, three terms ago, when this Court considered criminal liability for speech when no injury occurred, it concluded that false speech cannot automatically be considered fraudulent. *U.S. v. Alvarez*, 132 S.Ct. 2537, 2547 (2012) (invalidating the Stolen Valor Act and stating “[w]ere the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases”). Nor in the area of defamation of a public official or public figure, another form of unprotected speech, does the Court employ so low a standard for determining liability, requiring knowledge of falsity or reckless disregard for the truth before a claim may be actionable. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

Similarly, incitement, another unprotected area of speech, requires the subjective intent of “advocacy [that] is directed to inciting or producing imminent lawless action.” *Brandenburg v. Ohio*, 395 U.S. 444,

447 (1969). Only after that subjective test is satisfied do judges and juries turn to the objective question of whether the speech “is likely to incite or produce such [imminent lawless] action.” *Id.*

More recently, this Court reiterated the limits on the government’s power to restrict speech based on a listener’s feelings. *See Snyder v. Phelps*, 131 S.Ct. 1207, 1220 (2011) (quoting *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780 (1971) (holding that “[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner”)). A subjective intent test for true threat statutes is necessary to maintain those clear limits on government power.

At least one court has also found higher intent requirements necessary even in the face of national security concerns. A federal district court ruled in an espionage case brought against two civilians that the First Amendment checked the government’s power to pursue individuals who had made no pledges to the government to protect state secrets. In these heightened cases, prosecutors had to prove that the speaker was subjectively aware that conveying information could potentially harm the United States – and intended to bring about that result. *See U.S. v. Rosen*, 445 F.Supp.2d 602, n. 56 (E.D.Va. 2006) (noting that “the additional scienter requirement . . . is not superfluous because it relates not to the nature of the information, but to the subjective

understanding of the defendant as to the possible effect of the disclosure”).

Black is certainly instructive in this case and should be read to require a subjective intent test for all true threats cases. However, because this Court’s general First Amendment jurisprudence points to the need for more than a negligence standard when it comes to the *mens rea* for crimes relating to expression, a reading of *Black* that does not call for a subjective test does not end the discussion. Regardless of how broadly or narrowly this Court reads its decision in *Black*, it should still adopt a subjective intent test for true threat crimes to remain consistent with other First Amendment precedents.

III. Media outlets and journalists need the freedom to engage fully in news coverage and commentary without the fear of a threats prosecution.

Adopting a purely objective test to evaluate true threats risks infringing on the First Amendment rights of journalists and media representatives to comment on issues of public concern. Under the current framework, reporters, editors and photographers have been subject to specious investigations on the theory that their work represents a real threat of physical harm to another person. These investigations have been widely criticized, but the fact that they continue reinforces the need for this Court to make clear that prosecution under a threat statute requires proof of a subjective intent to threaten.

A. Journalists interjecting their own commentary into the public sphere need protection from true threat statutes.

Although journalists are obviously not in the business of threatening people, statements that deserve First Amendment protection have come under fire in recent years as journalists have been accused of making true threats instead of legitimate commentary.

In 2001, the editor of the student newspaper at SUNY-Stony Brook wrote an editorial with the headline, “Editorial: Dear Jesus Christ, King of Kings, All I Ask Is That You Smite George W. Bush.” Gilbert, *supra*, at 848. The editorial asked Jesus to “claim the life” of then-President Bush and several members of his administration, adding that it would be fine if Jesus sent “some crazy mortal” to do the job. *Id.* There can be little doubt that the editor’s statement posed no real risk to the president. Nevertheless, both the university police and the Secret Service investigated, appearing at the newspaper’s offices and taking the editor into custody. *Id.* at 849. Law enforcement had the editor sign waivers for the search of his home and the review of his medical records. He was not offered an attorney. *Letter from Reporters Committee for the Freedom of the Press, to Brian Stafford, Director, U.S. Secret Service* (Feb. 15, 2001), available at <http://www.rcfp.org/news/documents/ssprotest.pdf>. “[The editor] was told by Secret Service agents that his editorial was not protected by the First Amendment and that charges could be filed against

him.” *Id.* The editor reported that remaining newspapers disappeared from racks on campus and from the newspaper’s loading dock. Gilbert, *supra*, at 849. The Secret Service continued to defend its actions as necessary to counter a real threat. *Id.* All this despite the fact that “[t]he editorial was clearly a form of satire and political hyperbole.” Letter from the Reporters Committee.

In an even more egregious example of targeting journalists for protected speech, the Secret Service visited *The Los Angeles Times* in July 2003 after an editorial cartoonist for the paper published a cartoon based on a Pulitzer-Prize winning photo taken during the Vietnam War. The original photo showed a South Vietnamese general executing a Viet Cong prisoner in the street. The cartoon depicted a character aiming a gun at the head of President George W. Bush. The executioner’s uniform said “Politics” and the cartoon was set in Iraq. Gilbert, *supra*, at 849-850. The Secret Service’s reaction was ironic given the cartoonist’s intent, which he later said was “to condemn those persons who sought to use the current situation in Iraq to assassinate the President's character.” *Id.* The agency’s actions were so outrageous that Rep. Christopher Cox, chairman of the House Homeland Security Committee, said the Secret Service owed the cartoonist an apology for its “profoundly bad judgment.” *Lawmaker: Questioning of Cartoonist Wrong*, A.P. (July 23, 2003), available at <http://www.editorandpublisher.com/PrintArticle/Lawmaker-Questioning-of-Cartoonist-Wrong>.

These journalists were all expressing themselves on matters of public concern in a way that should be fully protected by the First Amendment. The fact that there is any question as to whether they could be prosecuted under a true threats regime demonstrates how crucial it is that a finder of fact be required to consider the speaker's subjective intent in determining whether their speech is truly unprotected.

B. Journalists who may quote or republish threatening material need protection from true threat statutes.

It is not only when journalists speak for themselves that they are at risk for true threats charges. In fact, as with many areas of First Amendment jurisprudence, there is the fear that members of the news media may be held responsible simply from republishing or linking to certain material.

In 2003, the *Tucson Citizen* published a letter to the editor that stated, "Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter." *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 515, 115 P.3d 107 (2005). A Muslim couple in the newspaper's distribution area sued the newspaper for assault and intentional infliction of emotional distress. The trial court refused to dismiss the emotional distress claim on the theory that the letter could be read as a true threat. *Id.* The Arizona Supreme Court took an appeal at that stage and dismissed the claim, but it

did so on an objective standard, holding that “[g]iven the letter’s conditional nature and ambiguity,” it could not be considered a true threat. *Id.* at 521. This of course begs the question of whether a more concrete and less conditional threat might have resulted in liability for the newspaper, and thus demonstrates the need for clarity from this Court that a subjective standard in true threats cases is constitutionally required.

To take another example, in 2010, a reporter for *The Times Tribune* in Scranton, Pennsylvania, quoted U.S. Rep. Paul Kanjorski talking about then-Florida gubernatorial candidate Rick Scott. Kanjorski said of Scott, “Instead of running for governor of Florida, they ought to have him and shoot him. Put him against the wall and shoot him.” Roderick Random, *Kanjorski Ponders ‘Nuts,’ Bolts from Blue*, *The Times-Tribune* (Oct. 23, 2010), available at <http://thetimes-tribune.com/opinion/editorials-columns/roderick-random/kanjorski-ponders-nuts-bolts-from-blue-1.1052739>. Kanjorski’s statements are similar to many that courts have found to be true threats, or that could at least arguably be considered a true threat under an objective analysis. The concern of *amici* is that the reporter could also be held liable under an objective threat statute simply for publishing the quote. In fact, if a speaker’s intent to threaten is irrelevant, any publisher could be as easily held to account as the original speaker. This Court should avoid that result.

Speakers often face challenges to their First Amendment rights, including claims that they have

entered a territory where their expression is no longer protected. A subjective intent test that examines whether a speaker meant his or her statement to be threatening is necessary to ensure the broad protections the First Amendment requires.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision below.

Respectfully submitted,

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

Association of Alternative Newsmedia (“AAN”) is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

First Look Media, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

Newspaper Association of America (“NAA”) is a nonprofit organization representing the interests of

more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. CWA is America's largest communications and media union, representing over 700,000 men and women in both private and public sectors.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

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