No. 13-983

In the Supreme Court of the United States

ANTHONY D. ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government's brief in opposition is most remarkable for what it *does not* say. It does not dispute that the question whether the First Amendment requires proof of subjective intent to threaten arises "repeatedly" (Br. in Opp. 13), and it acknowledges that two circuits have weighed in just since the Third Circuit decided this case, see *id.* at 14 (citing *United States* v. *Clemens*, 738 F.3d 1 (1st Cir. 2013)); *id.* at 20 (citing *United States* v. *Martinez*, 736 F.3d 981 (11th Cir. 2013), pet. for cert. filed, No. 13-8837 (filed Feb. 21, 2014)). Since the government filed its brief, *still another* court has decided the issue. *Brewington* v. *State*, No. 15S01–1405–CR–309, 2014 WL 1716539, at *1, 10-11 (Ind. May 1, 2014). Nor does the government deny that the issue is an important one: Indeed, it identifies several "comparable federal statutes prohibiting the making of various [other] types of threats" that raise the same concern. Br. in Opp. 14.

The government does not even dispute that the Third Circuit's rule "embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners," *Rogers* v. *United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring), or that imposing prison time for a crime of pure speech based on simple negligence conflicts with "[b]ackground norms for construing criminal statutes," *United States* v. *Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*), , cert. denied, 134 S. Ct. 59 (2013). The government identifies no vehicle problem that would prevent the Court from resolving this issue. See pp. 10-11, *infra*.

The government even has to concede that there is a "circuit split" "on the question whether proof of a true threat requires proof of a subjective intent to threaten." Br. in Opp. 13; see also Adrienne Scheffey, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats after* Virginia *v.* Black, 69 U. Miami L. Rev. (forthcoming Fall 2014), *available at* http://goo.gl/eUJZa6 (pp. 28-31 of SSRN version).

Ultimately, the government can muster just three threadbare arguments against granting the writ. First, it contends, the split is not as deep as petitioner argues, and the Ninth Circuit might abandon the position it has maintained for more than a decade. Br. in Opp. 20. Second, "[r]equiring proof of a subjective intent to threaten" would permit some speech with undesirable effects. *Id*. at 15. Third, this Court has denied review to other petitions raising this issue. *Id*. at 13. None of those arguments withstands scrutiny.

A. The Split Is Real

1. The government's attempt (Br. in Opp. 18-21) to manufacture uncertainty about the Ninth Circuit's application of a subjective intent test since *Virginia* v. *Black*, 538 U.S. 343 (2003), is unavailing. In *United States* v. *Cassel*, 408 F.3d 622 (2005) (O'Scannlain, J.), the Ninth Circuit resolved any uncertainty that might remain from its previous practice by holding that, under *Black*, "only *intentional* threats are criminally punishable consistent[] with the First Amendment." *Id*. at 631. The Ninth Circuit has since reaffirmed its rule in terms too plain to

obfuscate: "[C]learing up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment," that court held, "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech"; it is "not sufficient that objective observers would reasonably perceive such speech as a threat." *United States* v. *Bagdasarian*, 652 F.3d 1113, 1116-1117 (2011). Since *Bagdasarian*, the Ninth Circuit has reaffirmed that bedrock position at least *four times*, in decisions the government does not bother to acknowledge. Compare Pet. 22 n.5 (collecting authorities), with Br. in Opp. 19-20; see *United States* v. *Keyser*, 704 F.3d 631, 638 (2012) ("In order to be subject to criminal liability for a threat, the speaker must subjectively intend to threaten."). Unlike the brief in opposition, the government's *Ninth Circuit* filings display no uncertainty about the governing standard. See Gov't Br. 14-15, *Keyser* (No. 10-10224) ("To determine whether the mailings in this case constituted true threats," the court considers, *inter alia*, "whether [defendant] meant to communicate a serious expression of an intent to commit an act of unlawful violence.") (internal citation and quotation marks omitted).

The government's claim of uncertainty centers on *United States* v. *Romo*, 413 F.3d 1044 (9th Cir. 2005). But, as the government concedes, that "case did not involve a First Amendment challenge," Br. in Opp. 19, and *Bagdasarian* explicitly held that *Romo*'s statement "must be limited to cases" like *Romo* itself,

"in which the defendant * * * does not contend either that the subjective requirement has not been met or that the statute has been applied in a manner that is contrary to the Constitution," *id.* at 20 (quoting *Bagdasarian*, 652 F.3d at 1118 n.14). Because *Romo* involved no First Amendment claim, it does not represent a departure from the Ninth Circuit's consistent post-*Black* practice.

The government's suggestion that the Ninth Circuit might reconsider its position "through the en banc process," Br. in Opp. 20, is fanciful. The government has maintained since at least 2005 that "law in the Ninth Circuit remains in a state of flux" that, given time, would eventually resolve itself. Br. in Opp. 10, *Stewart* v. *United States* (No. 05-5541); accord Br. in Opp. 13, *Parr* v. *United States* (No. 08-757). The government's insistence on awaiting en banc consideration reaffirms its previous acknowledgement that this issue involves a "**QUESTION[] OF EXCEPTIONAL IMPORTANCE**," Amended Gov't Pet. For Rehearing En Banc 7, *United States* v. *Bagdasarian*, 652 F.3d 1113 (2011) (No. 09-50529). But as the government concedes, "the Ninth Circuit denied the government's en banc petition in *Bagdasarian*," *ibid.* Indeed, "no judge * * * requested a vote on whether to rehear the matter en banc." Order, *Bagdasarian*, 652 F.3d 1113 (No. 09-50529) (filed Dec. 2, 2011). If the government won not even a *single vote* for rehearing, it is well past time to stop entertaining its shopworn assurances that circuit uniformity is just around the corner.

2. Indeed, any judicial reconsideration is likely to deepen, not erode, the split, as more courts begin to

acknowledge that the Ninth Circuit's test is compelled by *Black*. The government acknowledges that "the Tenth Circuit did cite *Black* for the proposition that '[t]he threat must be made with the intent of placing the victim in fear of bodily harm or death,'" Br. in Opp. 17 (quoting *United States* v. *Magleby*, 420 F.3d 1136, 1139 (2005)); and that the Seventh Circuit has recognized that *Black* undermines its position, *id*. at 17-18 (citing *United States* v. *Parr*, 545 F.3d 491, 500 (2008)). One academic commentator noted, "the Second, Seventh, and Sixth Circuits appear disposed to abandon the purely objective test." Scheffey, 69 U. Miami L. Rev. at 31. And just days ago, the Indiana Supreme Court concluded that "[t]he 'intent' that matters is * * * whether [the defendant] *intends* [the threat] to 'plac[e] the victim in fear of bodily harm or death,'" and "[t]he speaker's intent, then, is often the deciding factor between whether a communication is 'constitutionally proscribable intimidation' or protected 'core political speech.'" *Brewington*, 2014 WL 1716539, at *10 (quoting *Black,* 538 U.S. at 359-360, 365).

3. Because *Brewington* conflicts with the Seventh Circuit's current test, it underscores an aspect of the conflict that makes this Court's review particularly pressing: Many state supreme courts have adopted a standard conflicting with that of the corresponding federal circuit. See Pet. 23-25. The government does not deny that such state-federal conflict represents an important reason for this Court to grant review; it only maintains that this concern is "overstate[d]" (Br. in Opp. 21), based on its peculiar reading of Ninth

Circuit and state precedents. But the Ninth Circuit's actual position plainly conflicts with the objective standard that the supreme courts of California, Hawaii, Montana, Oregon, and Washington have adopted. See Pet. 23-24.

The state supreme courts of Massachusetts, Rhode Island, and Vermont likewise all require subjective intent to threaten, see Pet. 3, 21, 23, while the corresponding federal circuits require only an objective one, see *ibid.* The government tries to minimize this conflict by claiming that the Massachusetts and Rhode Island decisions represent *dicta*. See Br. in Opp. 21-23. The government's conception of "*dicta*" is, to put it mildly, unconventional. The government admits that the Massachusetts Supreme Judicial Court concluded that a "'true threat' require[s] that the speaker subjectively intend to communicate a threat," Br. in Opp. 21 (quoting *O'Brien* v. *Borowski*, 961 N.E.2d 547, 557 (2012) (internal quotation marks omitted)), and that the Rhode Island Supreme Court likewise concluded that true threats are only those "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *State* v. *Grayhurst*, 852 A.2d 491, 515 (2004) (quoting *Black*, 538 U.S. at 359), see Br. in Opp. 22. Because those courts *also* held that the statutes in question required a subjective showing and thus satisfied the constitutional test, *O'Brien*, 961 N.E.2d at 557; *Grayhurst*, 852 A.2d at 515, the government maintains those statements were *dictum*. Br. in Opp. 21-22. Under the government's peculiar conception, a court could establish a constitutional rule only when

invalidating a statute or government action, not when upholding it. But this Court has never given case holdings such a narrow sweep. Cf. *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 126 (1996) (describing what *Washington* v. *Davis*, 426 U.S. 229, 237 (1976), "held," although that case upheld the action at issue).

Finally, the government's contention that *State* v. *Miles*, 15 A.3d 596 (Vt. 2011), applied an objective standard is hard to square with *Miles*' statement that "[w]ithout a finding that [the defendant's] statement represented an actual intent to put another in fear of harm or to convey a message of actual intent to harm a third party, the statement cannot reasonably be treated as a threat." *Id.* at 599. It is harder still to reconcile with *Miles*' progeny, which clearly read the decision to require subjective intent in various contexts. *E.g.*, *State* v. *Johnstone*, 75 A.3d 642, 647 (Vt. 2013) (quoting *Miles* in concluding "even an expression of a desire or plan to harm someone cannot reasonably be treated as a threat under [state probation conditions] '[w]ithout a finding that [the] statement represented an actual intent to put another in fear'"); cf. *State* v. *Cahill*, 80 A.3d 52, 57 (Vt. 2013) (citing *Black* for proposition that jury must find that the defendant "intended to threaten [the victim]"). At most, the language in *Miles* the government cites indicates that Vermont *also* requires that a threat satisfy the objective test.

B. The Third Circuit's Negligence Rule Is Wrong

1. The government does not dispute that "what an objective test does" is "reduc[e] culpability on the all-

important element of [18 U.S.C. § 875(c)] to negligence." *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*). The government does not even *attempt* to reconcile its position with this Court's traditional "reluctan[ce] to infer that a negligence standard was intended in criminal statutes," particularly "for a statute that regulates pure speech." *Rogers*, 422 U.S. at 47 (Marshall, J. concurring).

Instead, the government defends the Third Circuit's negligence standard on grounds of pure expedience: "A statement that a reasonable person would regard as a true threat creates * * * fear and disruption, regardless of whether the speaker subjectively intended the statement to be innocuous." Br. in Opp. 15. But the fact that a type of statement causes harm has never been thought a sufficient basis for imposing even strict *civil* liability for it, much less subjecting a person to imprisonment. For example, a public official undoubtedly suffers injury to reputation when a newspaper prints a defamatory falsehood, regardless of whether the author believed the statement to be true. But because speech needs "breathing space to survive," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), the First Amendment requires a heightened showing that the statements were made "with knowledge that [the information] was false or with reckless disregard of whether it was false or not." *New York Times* v. *Sullivan*, 376 U.S. 254, 280 (1964).

By the same token, fundamental principles of First Amendment law prohibit imprisoning a person for negligently misjudging how others would construe his words. First Amendment doctrine in many con-

texts imposes "*mens rea* requirements that provide breathing room * * * by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

2. It is therefore unsurprising that this Court explained in *Black* 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," 538 U.S. at 359 (citations omitted), and that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

Parsing *Black*'s language, the government argues that the Court's statement that intentional threats are "a '*type* of true threat,'" did not explicitly "hold that the category of true threats is limited to such statements." Br. in Opp. 16 (emphasis added by the government). And, the government adds, "[b]ecause the Virginia [cross-burning] statute * * * required an intent to intimidate, the Court had no occasion to consider" whether an intent to intimidate was constitutionally required. *Ibid.* But the government offers no explanation why the Court would have invalidated the statute's presumption of intent to threaten from the mere fact of cross burning, unless an intent to intimidate were constitutionally required. See *Black*, 538 U.S. at 366 (plurality opinion) (concluding provision is constitutionally invalid because it "does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross

burning done with the purpose of threatening or intimidating"). "If there is no such First Amendment requirement, 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. There Is No Reason To Delay Review

The government's claim (Br. in Opp. 13) that "[t]his Court has repeatedly and recently denied petitions for a writ of certiorari raising the same issue" neglects to mention the significant differences between those cases and this case. In none of those cases did petitioners note state courts of last resort that had construed *Black* to require a showing of subjective intent, nor did they consider conflicts between state courts and corresponding federal circuits. And in each of those cases, the government identified vehicle problems that would have prevented this Court from reaching the issue and affording relief. See Br. in Opp. 10-11, 23-24, *Jeffries* v. *United States* (No. 12-1185) (jury instruction required finding defendant had "*purpose to* * * * achieve some goal through intimidation" akin to finding of subjective intent, so any error "was harmless"); Br. in Opp. 22-23, *Williams* v. *United States* (No. 12-7504) (different statute; any error was harmless); Br. in Opp. 11, 16, 29, *Mabie* v. *United States* (No. 11-9770) (petitioner "waived th[e] argument" by "propos[ing] that the district court define the term 'true threat' with reference to the perspective of a 'reasonable recipient'"; "any error

was harmless": "jury may well have understood that it was required to find a subjective intent to threaten"); Br. in Opp. 7, 9, 13, 16, *Parr* (No. 08-757) (different statute; interlocutory posture; jury instruction required finding "petitioner 'intended his statement to be understood [as a threat]'"; "court of appeals did not reach [question]"; any error was harmless); Br. in Opp. 6, 10-11, 13, *Stewart* (No. 05-5541) ("any error * * * [was] harmless"; "[p]etitioner did not argue in the court of appeals that *Black* requires proof of an intent to threaten"; "[i]n light of the ambiguity in the [jury] instructions, this case does not squarely present the question").

By contrast, this case is striking for the government's inability to identify *any issue* that would prevent the Court from resolving this frequently recurring question. Compare Br. in Opp. 18-19 & n.3, *Martinez* v. *United States* (No. 13-8837) (case concerns "sufficiency of the indictment, not the content of any jury instructions," and petitioner is limited to claim of facial invalidity because of stipulation that threat was made "with 'an apparent determination to carry [it] out'").[1]

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[1] The government notes that the jury instructions stated that the statute did not prohibit "idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger." Br. in Opp. 14 (quoting C.A. App. 547). The government tellingly does not contend that the instruction poses an obstacle to resolution of the question presented, and indeed it could not: The *very next sentence* instructed the jury that all that

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As a coalition of First Amendment advocacy groups explains, "th[e] lower courts urgently need this Court's guidance" on this frequently recurring issue. Br. of Thomas Jefferson Center *et al*. as *amici curiae* 3. This is an "ideal case" to resolve persistent confusion about the constitutional standard governing threats because it involves the use of social media that "underlie the vast majority of contemporary threat cases." *Id.* at 2-3. Further review is warranted.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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mattered was how an objective "reasonable person" would have viewed statements; it was irrelevant if petitioner considered statements "idle or careless talk[or] exaggeration" so long as a "reasonable person" would have taken them seriously. C.A. App. 547. Cf. *Rosemond* v. *United States*, 134 S. Ct. 1240, 1252 (2014) (broad statement in instruction did not "cure[] the court's error" where next sentence erroneously explained its application to that case).

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