No. 12-1185

In the Supreme Court of the United States

FRANKLIN DELANO JEFFRIES, II, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for transmission in interstate commerce of a "threat to injure the person of another," in violation of 18 U.S.C. 875(c), requires proof that a defendant subjectively intended his communication to be threatening.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 692 F.3d 473. The order of the district court denying petitioner's motion for judgment of acquittal or a new trial (Pet. App. 26a-72a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2012. A petition for rehearing was denied on October 31, 2012 (Pet. App. 73a-74a). On January 18, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 30, 2013, and the petition was filed on March 29, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of transmitting a threatening communication in interstate commerce, in violation of 18 U.S.C. 875(c). Pet. App. 7a, 26a-27a. Petitioner was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. Judgment, 3:10-CR-100-001 Docket entry No. 118, at 2-3 (June 2, 2011). The court of appeals affirmed. Pet. App. 1a-25a.

1. For more than a decade, petitioner was engaged in a custody dispute with his ex-wife, who had primary custody of their daughter. Pet. App. 29a. In November 2009, petitioner filed a petition for visitation rights. *Ibid.* In January 2010, Chancellor Michael Moyers, the judge overseeing the custody dispute, entered an order stating that he would review the request six months later and scheduled a hearing on the request for July 14, 2010. *Ibid.* The order stated that the judge would determine at that time if petitioner was entitled to additional time with his daughter and explained that that determination would depend upon several factors, among them petitioner's behavior towards his daughter, including his use of profanity. *Ibid.*

On July 9, 2010, five days before the scheduled hearing, petitioner uploaded a video titled "Daughter's Love" to the online video sharing service YouTube. Pet. App. 2a, 28a, 30a. During most of the nearly eight-minute video, petitioner sings and plays a guitar, although he interrupts the song with short tirades. *Id.* at 28a. The song contains passages about relationships between fathers and daughters and the importance of sharing time together, complaints about petitioner's ex-wife, rants against lawyers and the legal system, and menac-

ing threats to kill the judge presiding over his visitation request if the judge did not "[d]o the right thing" at the upcoming custody hearing. *Id.* at 2a-6a, 29a-36a.

In the video, petitioner sings of the impending hearing and directs his words to Chancellor Moyers (though not by name), saying, "This song's for you judge." Pet. App. 3a. During the video, petitioner made the following statements:

> And when I come to court this better be the last time.
> I'm not kidding at all, I'm making this video public.
> 'Cause if I have to kill a judge or a lawyer or a woman I don't care.
>
> * * *
>
> Take my child and I'll take your life.
> I'm not kidding, judge, you better listen to me.
> I killed a man downrange in war.
> I have nothing against you, but I'm tellin' you this better be the last court date.
>
> * * *
>
> So I promise you, judge, I will kill a man.
>
> * * *
>
> And I guarantee you, if you don't stop, I'll kill you.
>
> * * *
>
> So I'm gonna f*** somebody up, and I'm going back to war in my head.
> So July the 14th is the last time I'm goin' to court.
> Believe that. Believe that, or I'll come after you after court. Believe that.
>
> * * *
>
> 'Cause you don't deserve to be a judge and you don't deserve to live.
> You don't deserve to live in my book.

* * *

> And I hope I encourage other dads to go out there and put bombs in their goddamn cars.
> Blow 'em up.
>
> * * *
>
> Don't tell me I can't f***in' cuss.
> Stupid f***in' [Guitar crashes over in the background] BOOM!
> There went your f***in' car. I can shoot you. I can kill you.

Id. at 3a-6a (emphases removed; alterations in original). The video ended with petitioner's exhortation: "Do the right thing July 14th." *Id.* at 6a (emphasis removed). Petitioner's expression throughout the video was serious. *Id.* at 16a; Gov't C.A. Br. 4.

Petitioner posted a link to the video on his Facebook wall and sent links to 29 Facebook users, including a Tennessee State representative, a television news station, and an organization devoted to empowering divorced fathers as equal partners in parenting. Pet. App. 6a. The link included messages stating "Tell the Judge." *Id.* at 31a. The sister of petitioner's ex-wife saw the link and told Chancellor Moyers about it. *Id.* at 6a.

2. Petitioner was indicted on one count of transmitting in interstate commerce a threat to injure and kill Chancellor Moyers, in violation of 18 U.S.C. 875(c). Pet. App. 26a.

At trial, the district court instructed the jury that it must find that petitioner transmitted a "true threat" in order to convict him of violating Section 875(c). Gov't C.A. Br. 15. The court instructed the jury that:

In order to sustain a conviction under Section 875(c) the communication must be a true threat. This means that a reasonable person would:

Number one, take the statement as a serious expression of an intention to inflict bodily harm, and number two, perceive such expression as being communicated to effect some change or achieve some goal through intimidation.

In order to find the defendant guilty it is not enough to merely find that the defendant threatened to inflict bodily harm upon Chancellor Moyers. You must also find that the defendant made the communication to effect some change or achieve some goal through the use of intimidation. Ultimately you must determine whether the communication was transmitted for the purpose to effect some change or achieve some goal through intimidation. In making this determination you must examine the content of the video in the context in which it was made. Please remember that it is irrelevant whether the alleged victim actually received the communication.

In evaluating whether a statement is a true threat, you should consider whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury on Chancellor Moyers and whether the communication was done to effect some change or achieve some goal through intimidation.

* * *

Based upon the totality of the circumstances you must determine whether the communication was made as a true threat or as protected speech. For example, if you find that the communication was

> made as political speech rather than as a true threat, such communication would be protected by the First Amendment of the United States Constitution. The First Amendment does not protect true threats. It is up to you to determine whether the communication in this case rose to the level of a true threat. If you find that the communication did not rise to the level of a true threat, then you must return a not guilty verdict.
>
> The communication must be viewed from an objective or reasonable person perspective. Accordingly, any statements about how Chancellor Moyers perceived or felt about the communication are irrelevant. In fact, it is not relevant that Chancellor Moyers even viewed the communication. The defendant's subjective intent in making the communication is also irrelevant. Unlike most criminal statutes, the government does not have to prove defendant's subjective intent. Specifically, the government does not have to prove that defendant subjectively intended for Chancellor Moyers to understand the communication as a threat, nor does the government have to prove that the defendant intended to carry out the threat.

Id. at 15-17; Pet. App. 7a-8a. Petitioner requested the following instruction:

> In determining whether a communication constitutes a "true threat," you must determine the defendant's subjective purpose in making the communication. If the defendant did not seriously intend to inflict bodily harm, or did not make the communication with the subjective intent to effect some change or achieve some goal through intimidation, then it is not a "true threat."

Pet. App. 8a. The district court declined to include petitioner's requested instruction. *Ibid.*

The jury convicted petitioner of violating 18 U.S.C. 875(c) and the district court denied petitioner's motion for judgment of acquittal or a new trial. See Pet. App. 26a-72a.

3. The court of appeals affirmed, rejecting petitioner's arguments that the district court erred in refusing to instruct the jury that it must find that petitioner subjectively intended to threaten harm to the Chancellor and that the evidence was insufficient to establish a violation of Section 875(c).[1] Pet. App. 1a-25a.

Relying on circuit precedent, the court of appeals held that the district court had correctly declined to give petitioner's proposed subjective-intent jury instruction. Pet. App. 8a-14a. The court stated that the First Amendment does not prohibit criminal punishment for a communication that qualifies as a "true threat." *Id.* at 8a-9a. The court explained that the "true threat" standard prevents the chill of protected speech because it requires jurors to examine the circumstances in which a statement is made and to determine whether a "reasonable person" would perceive the relevant communication "as a serious expression of an intention to inflict bodily harm." *Id.* at 12a (quoting *United States* v. *Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997)). That objective standard, the court stated, serves the First Amendment objective of "permit[ting] individuals to say what they wish" while "'protect[ing] individuals' from the effects of some words—'from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.'" *Id.* at 13a (quoting

[1] Petitioner does not renew his sufficiency challenge in his petition for a writ of certiorari.

R.A.V. v. *City of St. Paul*, 505 U.S. 377, 388 (1992)). The court also noted that every court of appeals but one has held (or "effectively" held) that Section 875(c) is a general-intent offense that does not require proof of a "specific intent to threaten based on the defendant's subjective purpose." *Id.* at 9a (quoting *United States* v. *DeAndino*, 958 F.2d 146, 149 (6th Cir.), cert. denied, 505 U.S. 1206 (1992)); see *id.* at 10a-11a (citing cases).

The court rejected petitioner's argument that this Court's decision in *Virginia* v. *Black*, 538 U.S. 343 (2003), requires courts to employ a subjective-intent test in determining whether a communication qualifies as a true threat under the First Amendment. Pet. App. 12a-14a. The court held instead that *Black* "merely applies—it does not innovate—the [First Amendment] principle" that distinguishes between threats and protected speech. *Id.* at 12a; see *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam).

Judge Sutton, who authored the panel opinion, also wrote a separate "dubitante" opinion in which he questioned the Sixth Circuit's precedent adopting an objective standard as a matter of statutory interpretation. Pet. App. 20a-25a. Relying on dictionary definitions of the word "threaten," Judge Sutton noted that, if presented with the question as a matter of first impression, he might have held that Section 875(c) required proof that a defendant subjectively intended the relevant communication to be a threat. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-33) that his conviction for transmitting a threatening communication in violation of 18 U.S.C. 875(c) must be reversed because the district court did not instruct the jury that it must find that petitioner subjectively intended to threaten the Chan-

cellor. He argues that such an instruction is required under the First Amendment, as construed in *Virginia* v. *Black*, 538 U.S. 343 (2003), and under a proper interpretation of the meaning of the statutory term "threat." That question does not merit review because the district court correctly instructed the jury that it should determine whether petitioner's communication constituted a true threat under an objective "reasonable person" standard. Although some disagreement exists among the courts of appeals on the question whether proof of a true threat requires proof of a subjective intent to threaten, review of that question is not warranted because the circuit split is shallow and may resolve itself without this Court's intervention and because any error was harmless. This Court has repeatedly and recently denied petitions for a writ of certiorari raising the same issue. See, *e.g.*, *Williams* v. *United States*, 133 S. Ct. 1516 (2013) (No. 12-7504); *Mabie* v. *United States*, 133 S. Ct. 107 (2012) (No. 11-9770); *Parr* v. *United States*, 129 S. Ct. 1984 (2009) (No. 08-757); *Stewart* v. *United States*, 546 U.S. 980 (2005) (No. 95-5541). The same result is appropriate here.

1. Section 875(c) of Title 18 of the United States Code makes it unlawful to "transmit[] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." Because that section targets communication, it "must be interpreted with the commands of the First Amendment clearly in mind." *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). Accordingly, like other statutes that target threatening communications, Section 875(c) reaches only "true 'threat[s],'" rather than "political hyperbole" or "vehement," "caustic," or "unpleasantly sharp attacks" that

fall short of true threats. *Id.* at 708. As this Court has explained, true threats may be prohibited because they are "outside the First Amendment," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1991), including when the speaker does "not actually intend to carry out the threat," *Black*, 538 U.S. at 359-360.

a. As a threshold matter, petitioner errs in challenging the jury instruction based on its failure to inform the jury that a guilty verdict must be premised in part on a finding that petitioner subjectively intended his video to be threatening. Although the district court instructed the jury that it need not find that petitioner "subjectively intended for Chancellor Moyers to understand the communication as a threat," it also instructed the jury that it did have to find that petitioner transmitted the communication "*for the purpose* to effect some change or achieve some goal through intimidation." See p. 5, *supra* (emphasis added). As this Court has held, "[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." *Black*, 538 U.S. at 360. Petitioner attempted to use intimidation to force Chancellor Moyers to rule favorably in the upcoming hearing. Petitioner's statements of intimidation—*e.g.*, "[t]ake my child and I'll take your life"—were designed to achieve that goal by putting the Chancellor in fear of death or bodily harm. See Pet. App. 3a; see also, *e.g.*, *id.* at 4a ("I guarantee you, if you don't stop, I'll kill you."); *id.* at 4a-5a ("July the 14th is the last time I'm goin' to court. Believe that. Believe that, or I'll come after you after court. Believe that."). Because the district court's instruction directed the jury that it must find that petitioner intended to achieve an

end through intimidation, review of whether the jury should have been instructed that he subjectively intended his statements to be threatening is unwarranted. See *Jones* v. *United States*, 527 U.S. 373, 391 (1999) (jury instruction must be reviewed as a whole). At the very least, the intimidation instruction makes this case an unsuitable vehicle for considering the question petitioner seeks to present.

b. In any event, petitioner's argument that proof of subjective intent is required by the First Amendment lacks merit. A large majority of the courts of appeals have rejected First Amendment challenges to federal statutes prohibiting the making of various types of threats, holding that the statutes at issue prohibit "true threats" and do not require proof that a defendant specifically (and subjectively) intended for the communications at issue to be taken as threats. See, *e.g.*, *United States* v. *Nishnianidze*, 342 F.3d 6, 14-15 (1st Cir. 2003) (18 U.S.C. 875), cert. denied, 540 U.S. 1132 (2004); *United States* v. *Davila*, 461 F.3d 298, 304-305 (2d Cir. 2006) (18 U.S.C. 876, 2332a), cert. denied, 549 U.S. 1266 (2007); *United States* v. *D'Amario*, 330 Fed. Appx. 409, 412-414 (3d Cir. 2009) (18 U.S.C. 115); *United States* v. *White*, 670 F.3d 498, 507-512 (4th Cir. 2012) (18 U.S.C. 875); *United States* v. *Hankins*, 195 Fed. Appx. 295, 300-301 (6th Cir. 2006) (18 U.S.C. 373); *United States* v. *Frazer*, 391 F.3d 866, 871 (7th Cir. 2004) (18 U.S.C. 844(e)); *United States* v. *Mabie*, 663 F.3d 322, 332 (8th Cir. 2011) (18 U.S.C. 875, 876), cert. denied, 133 S. Ct. 107 (2012); *United States* v. *Wolff*, 370 Fed. Appx. 888, 892 (10th Cir. 2010) (18 U.S.C. 876); *United States* v. *Alaboud*, 347 F.3d 1293, 1297-1298 (11th Cir. 2003) (18 U.S.C. 875).

That view is correct. Nothing in the text of threat statutes such as Section 875(c) requires the government to prove that a defendant subjectively intended his communication to be regarded as a threat. In fact, requiring proof of a subjective intent to threaten would undermine one of the central purposes of prohibiting threats. As this Court has noted, in addition to protecting persons from the possibility that threatened violence will occur, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders." *R.A.V.*, 505 U.S. at 388; see *Black*, 538 U.S. at 360 (quoting same); Pet. App. 9a, 13a (quoting same). A statement that a reasonable person would regard as a threat to kill creates fear and disruption, regardless of whether the speaker subjectively intended for the statement to be taken as a threat. Cf. *United States* v. *Castagana*, 604 F.3d 1160, 1164 (9th Cir. 2010) ("Even if a perpetrator does not intend that his false information be believed as indicative of terrorist activity, the false information will nevertheless drain substantial resources and cause mental anguish when it is objectively credible.").

c. Petitioner relies (Pet 22-25) on dictionary definitions of the words "threat" and "threaten" as well as judicial decisions construing such words in the decades preceding the enactment of Section 875. But none of the sources on which he relies establishes that Section 875(c) proscribes threatening communications only when a defendant subjectively intends to threaten. On the contrary, each definition focuses on the meaning of the communication—*i.e.*, the *effect* of the message—rather than on the *intent* of the communicator. For example, the 1910 edition of *Black's Law Dictionary* (cited at Pet. 23 for definition of "menace") defines "threat" as "the

declaration or show of a disposition or determination to inflict an evil or injury upon another." And a typical early-nineteenth-century case on which petitioner relies refers to a different legal dictionary in defining "threat" as "any menace of such a nature and extent as to unsettle the mind of the person on whom it operates." Pet. 23-24 (quoting *United States* v. *French*, 243 F. 785, 786 (S.D. Fla. 1917)). Those definitions rely on the meaning of the words communicated or on their effect but do not reference the speaker's intent. See *Black's Law Dictionary* 1618 (9th ed. 2009) (defining "threat" as "[a]n indication of an approaching menace" and "[a] person or thing that might well cause harm"). A communication can be a "declaration * * * of a determination to inflict an evil" and can "unsettle the mind of the person on whom it operates" whether the person making the communication subjectively intended that result or not. See, *e.g.*, *The American Heritage Dictionary* 1265 (2d Coll. ed. 1982) (defining "threaten" to include an "overt act calculated *or serving* to make a person fearful") (emphasis added); *Merriam-Webster's Collegiate Dictionary* 1302 (11th ed. 2005) ("threaten" means "to cause to feel insecure or anxious"). Such definitions therefore do not support petitioner's view that Section 875(c) requires proof of a subjective intent to threaten.

d. Petitioner's reliance (Pet. 25-27) on the legislative history of Section 875(c) is even more misplaced. As petitioner notes (Pet. 25-26), Section 875 grew out of a 1934 statute that prohibited interstate "demand[s] or request[s] for a ransom * * * with intent to extort * * * any money or other thing of value." Act of May 18, 1934, ch. 300, 48 Stat. 781 (18 U.S.C. 408d (1940)). In 1939, Congress extended that statute to cover some non-extortionate threats as well. Act of May 15, 1939, ch.

133, § 2, 53 Stat. 744 (18 U.S.C. 408d (1940)). In so doing, Congress created subsections, two of which prohibited extortionate threats and required proof an "intent to extort." § 2(a) and (c), 53 Stat. 744. A third subsection—the subsection that ultimately became Section 875(c)—made it illegal to "transmit in interstate commerce by any means whatsoever any communication containing any threat to kidnap any person or any threat to injure the person of another," but made no mention of intent. The statute was revised and codified in 1948, as part of the codification of the criminal code, as 18 U.S.C. 875, with no substantive changes. See *United States* v. *Heller*, 579 F.2d 990, 995-997 (6th Cir. 1978).

Petitioner urges (Pet. 26-28) a construction of Section 875(c) that would import the intent requirement from the original extortionate-threats-only provision into each subsection of the broader revised provision. The opposite inference is more appropriate. In revising the threats law in 1939, Congress created two provisions that require proof of a specific intent and a third provision that makes no mention of intent. Congress plainly knew how to require proof of specific intent when it wished to do so and the natural implication of its drafting is that the subsection that became Section 875(c) does not require proof of any intent other than the general intent to transmit the communication in question. See *United States* v. *Francis*, 164 F.3d 120, 122 (2d Cir. 1999) ("[N]othing in the language or legislative history of Section 875(c) suggest[s] that Congress intended it to be a specific-intent crime."); *United States* v. *DeAndino*, 958 F.2d 146, 149 (6th Cir.), ("[T]here is nothing in the language of the statute or legislative history [of Section 875(c)] to indicate that Congress intended that there be a heightened mens rea requirement in regard to the

threat element or to indicate that the prosecution has to prove a specific intent to threaten based on the defendant's subjective purpose."), cert. denied, 505 U.S. 1206 (1992).

2. a. Petitioner also relies (Pet. 28-33) on this Court's decision in *Black*, *supra*, and *United States* v. *Alvarez*, 132 S.Ct. 2537 (2012), in arguing that a communication qualifies as a "true threat" only if the speaker subjectively "*means* to communicate a serious expression of an intent to commit an act of unlawful violence" or "directs a threat to a person * * * *with the intent* of placing the victim in fear of bodily harm or death." Pet. 18. But neither case addressed, much less resolved, the question whether a speaker must have a subjective intent to threaten before his communication will be deemed a "true threat" under the First Amendment.

The question in *Black* was whether a Virginia statute banning cross burnings with an intent to intimidate a person or group of persons violated the First Amendment because it was content-based. 538 U.S. at 347, 360-363. The Court held that the statute was not impermissibly content-based, explaining that it prohibited all cross burnings with the intent to intimidate, regardless of the motivation for such actions; it therefore regulated a type of violent intimidation that is particularly "likely to inspire fear of bodily harm." *Id.* at 362-363. A plurality of the Court concluded, however, that the statute's presumption that the burning of a cross was "prima facie evidence of an intent to intimidate" rendered the statute unconstitutional, as interpreted by the jury instructions given in Black's case. *Id.* at 363-367. Because not all cross burnings are intended to intimidate, the plurality reasoned, the statute as interpreted through the jury instructions "create[d] an unacceptable

risk of the suppression of ideas." *Id.* at 365 (quoting *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984)). It is true that the Court in *Black* observed both 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," *id.* at 359, and that a statement made "with the intent of placing the victim in fear of bodily harm or death" is a "*type* of true threat," *id.* at 360 (emphasis added). But *Black* did not hold that the category of true threats is limited to such statements. Because the Virginia statute at issue required an intent to intimidate, the Court had no occasion to consider whether the fear and disruption brought about by true threats justify a prohibition of such statements when a person knowingly makes statements that a reasonable person would understand as expressing a serious intent to do harm. The court of appeals' decision here is therefore consistent with this Court's decision in *Black*.

Similarly misplaced is petitioner's reliance (Pet. 32) on *Alvarez*, which did not concern threatening speech at all. *Alvarez* held that the Stolen Valor Act of 2005, 18 U.S.C. 704, which prohibited making false claims about receiving military decorations or medals "at any time, in any place, to any person," 132 S. Ct. at 2547 (opinion of Kennedy, J.), violated the First Amendment because false speech is not categorically excluded from the Amendment's coverage and the statute's broad prohibitions were not "actually necessary" to achieve the government's asserted interest in protecting the integrity of the military honors system. *Id.* at 2549-2550; see also *id.* at 2551 (Breyer, J., concurring in the judgment). The plurality distinguished the Stolen Valor Act from statutes that permissibly restrict content-based speech,

including those prohibiting true threats. *Id.* at 2544-2545 (citing *Watts*, *supra*).

Petitioner cites (Pet. 32) Justice Breyer's concurrence in *Alvarez*, but any reliance on that concurrence is misplaced. In the course of his analysis, Justice Breyer explained that many existing statutes imposing content-based restrictions on speech comport with the First Amendment because they are "narrower than [the Stolen Valor Act], in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm." 132 S. Ct. at 2554. He gave as examples laws "prohibiting false claims of terrorist attacks, or other lies about the commission of crimes or catastrophes" that "require proof that substantial public harm be directly foreseeable, or, if not, involve false statements that are very likely to bring about that harm." *Ibid.* But Justice Breyer did not suggest that case-specific proof of the foreseeability of substantial harm was required by the First Amendment—much less that the defendant must have the subjective intent to cause such harm. Rather, his opinion illustrated that Congress is capable of cabining content-based restrictions on speech to ensure their constitutionality. Here, the requirement that "a reasonable person * * * would take the statement as a serious expression of an intention to inflict bodily harm," Pet. App. 10a, narrows the statute to seriously harmful statements in precisely the way contemplated by Justice Breyer's concurrence.[2]

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[2] Nor do *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964), and *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per

b. Petitioner argues (Pet. 9-14) that courts of appeals have reconsidered whether it is appropriate to employ an objective standard in the wake of this Court's decision in *Black*. But the only circuit to do so is the Ninth Circuit, and different panels of that court have resolved the question differently.

Contrary to petitioner's contention (Pet. 12), for example, the Tenth Circuit in *United States* v. *Magleby*, 420 F.3d 1136 (2005), cert. denied, 547 U.S. 1097 (2006), did not hold that it should abandon the reasonable-speaker test it had adopted before the decision in *Black*. Although 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,'" *id.* at 1139 (quoting *Black*, 538 U.S. at 360), that statement was dictum. The question before the court, on collateral review, was whether the defendant's appellate counsel had rendered ineffective assistance by failing to challenge the jury instructions on the ground that they did not "convey that he could be convicted only if his cross burning constituted a threat of unlawful violence to identifiable persons." *Ibid.* The court's decision did not turn on whether a subjective intent to threaten is re-

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curiam), aid petitioner (see Pet. 32). *Brandenburg* held only that "advocacy of the use of force or of law violation" may be proscribed when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. *New York Times* held that "a public official [cannot] recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made * * * with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. Because neither case involved threats, neither case had occasion to address (much less resolve) the question presented here.

quired for a "true threat." *Id.* at 1141- 1143.[3] Petitioner also cites the Seventh Circuit's decision in *United States* v. *Parr*, 545 F.3d 491 (2008), cert. denied, 129 S. Ct. 1984 (2009), but acknowledges (Pet. 11) that that court declined to "resolve the issue," see *id.* at 500. And, while petitioner urges (Pet. 7) that Judge Sutton in this case effectively invited further review of the instant decision, Judge Sutton's "dubitante" opinion voiced a statutory concern, not a First Amendment concern, and he did not even request a vote on petitioner's petition for rehearing en banc. Pet. App. 73a.

The Ninth Circuit is the only court of appeals to issue decisions holding that the First Amendment requires proof of subjective intent to threaten harm, but its approach has been inconsistent, both before and after the decision in *Black*. In *United States* v. *Cassel*, 408 F.3d 622, 626 (2005), the court considered whether 18 U.S.C. 1860, which makes it a crime to "by intimidation * * * hinder[], prevent [], or attempt[] to hinder or prevent, any person from bidding upon or purchasing any tract of" federal land at public sale, required proof that a

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[3] In *United States* v. *Pinson*, 542 F.3d 822 (10th Cir.), cert. denied, 555 U.S. 1059 (2008) and 555 U.S. 1195 (2009), the court reviewed jury instructions in a prosecution for violating 18 U.S.C. 871, which makes it a crime to "knowingly and willfully" threaten the President (or certain other federal officials) through the mail. The court noted that it, "like most other[]" circuits, had interpreted the term "willfully" in Section 871 as requiring "an objective standard to evaluate whether a defendant 'willfully' made a threat." 542 F.3d at 831-832. Although the court also stated that "[t]he burden is on the prosecution to show that the defendant understood and meant his words as a threat, and not as a joke," *id.* at 832, that language appears to be dictum because the issue on appeal was whether the instructions required that the jury find that the defendant actually intended to carry out the threat, *ibid.*

defendant intended to intimidate his victim. The court canvassed pre-*Black* circuit decisions addressing whether various federal statutes criminalizing threats required proof of a subjective intent to threaten or intimidate. 408 F.3d at 628-630. Some decisions, the court noted, had held that no such proof was required if a reasonable person would have understood the defendant's statement to be threatening; other decisions had held that a particular statute required proof of a subjective intent to threaten and that such a proof requirement defeated any First Amendment challenge. *Ibid.* (citing *United States* v. *Hanna*, 293 F.3d 1080 (2002); *Planned Parenthood of the Columbia/Willamette, Inc.* v. *American Coal. of Life Activists*, 290 F.3d 1058 (2002) (en banc), cert. denied, 539 U.S. 958 (2003); *United States* v. *Orozco-Santillan*, 903 F.2d 1262 (1990); *United States* v. *Twine*, 853 F.2d 676 (1988); *United States* v. *Gilbert*, 813 F.2d 1523, cert. denied, 484 U.S. 860 (1987); *Roy* v. *United States*, 416 F.2d 874 (1969)).

The panel in *Cassel* then concluded that this Court in *Black* had announced a rule that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Cassel*, 408 F.3d at 633. Less than two months after the decision in *Cassel*, however, the Ninth Circuit reaffirmed its earlier holding that, in order to prove a threat against the President in violation of 18 U.S.C. 871(a), the government need only establish that a reasonable person would view the statement as threatening, albeit in a case that did not involve a First Amendment challenge. *United States* v. *Romo*, 413 F.3d 1044, 1051 & n.6 (2005), cert. denied, 547 U.S. 1048 (2006). The panel in *Romo* explained that the decision in *Cassel* "did not address whether statutes

like 18 U.S.C. § 871(a) require intent." *Id.* at 1051 n.6. The court later noted that the Ninth "[C]ircuit has thus far avoided deciding whether to use an objective or subjective standard in determining whether there has been a 'true threat'" and that, since *Black*, it has "analyzed speech under both an objective and a subjective standard." *Fogel* v. *Collins*, 531 F.3d 824, 831 (2008).

More recently, in *United States* v. *Bagdasarian*, 652 F.3d 1113 (2011), the Ninth Circuit considered a prosecution for violating 18 U.S.C. 879(a)(3), which makes it a crime to, *inter alia*, "knowingly and willfully threaten[] to kill, kidnap, or inflict bodily harm upon * * * a major candidate for the office of President." As the panel in *Bagdasarian* noted, the Ninth Circuit had previously held, as a matter of statutory construction, that a conviction for violating Section 879(a)(3) required proof of a subjective intent to threaten. 652 F.3d at 1117 & n.13 (citing *United States* v. *Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992), overruled on other grounds by *Planned Parenthood*, *supra*). Although it was thus clear under circuit precedent that the government was required to prove a subjective intent to threaten in that case, the panel nonetheless sought to "clear[] 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." *Id.* at 1116-1117. The panel concluded that "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech." *Id.* at 1117. The panel opined that the contrary statement in *Romo* "must be limited to cases in which the defendant challenges compliance only with the objective part of the test and 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 1117 n.14.

The Ninth Circuit is therefore the only court of appeals that has held that any statute criminalizing threats requires proof of a subjective intent to threaten and it has done so in the face of contrary prior panel decisions. Given that *Bagdasarian* was issued less than two years ago, and in light of the possibility that the Ninth Circuit will resolve its apparent internal disagreements through the en banc process, review by this Court of that issue would be premature at this time. Although the Ninth Circuit denied the government's en banc petition in *Bagdasarian*, it may reconsider the question in a future case, particularly in light of the decision below and other more recent decisions that all reject the argument that *Black* requires a "subjective" intent analysis in all "true threat" cases. See Pet. App. at 12a-14a; *Mabie*, 663 F.3d at 332; *White*, 670 F.3d at 507-512.

3. Petitioner's assertion (Pet. 19-22) that resolution of the question presented has taken on more urgency because of the Internet's rise as a forum for speech also lacks merit. Petitioner argues that application of First Amendment principles to communications on the Internet is difficult because such communications "take[] the form of fragments of online video, text messages, and 'tweets'" and are "presented with little or no context, and broadcast to audiences that are often unclear even as to the identity of the speaker." Pet. 19. But this Court has consistently applied ordinary First Amendment principles to Internet speech. See, *e.g.*, *United States* v. *Williams*, 553 U.S. 285, 291, 297-300 (2008). Petitioner argues that the jury convicted him based on "its necessarily limited grasp of what a reasonable YouTube viewer infers from a whimsical or convoluted

video presented in that medium." Pet. 20. But the jury was instructed that it must consider the video in context—and the threatening lyrics of the video, including the dedication of the song to the Chancellor himself, Pet. App. 3a ("[t]his song's for you, judge"), are more than sufficient to support the jury's conclusion that the video constituted a threat. Petitioner's complaint that the person who notified the Chancellor about the threatening video was "not a 'Facebook friend' of petitioner's," Pet. 19-20, also carries no weight in light of petitioner's invitation when sharing the video with friends, family, and other Facebook users to "[t]ell the Judge," Pet. App. 31a.

4. Finally, review of the question whether Section 875(c) requires proof of a subjective intent to threaten is unwarranted in this case because any possible defect in the district court's instructions was harmless. No rational juror could have concluded that petitioner did not subjectively intend to threaten Chancellor Moyers. In the video, which petitioner uploaded five days before his scheduled July 14 custody hearing before the judge, petitioner stated several times that he was "not kidding," and he repeatedly "promise[d]" and "guarantee[d]" that he would "kill" to achieve his aims. Pet. App. 3a-6a, 29a-36a. Petitioner paused in the middle of his song to emphasize that the judge should "[b]elieve" him. *Id.* at 34a. Petitioner's facial expression throughout the video was serious, and nothing in the video suggested that it was intended as merely a joke or prank. *Id.* at 32a-35a. The video opened with petitioner's dedication of the video to the Chancellor ("This song's for you, judge"), and concluded with an admonition to the Chancellor to "[d]o the right thing July 14th." *Id.* at 32a-36a. At the end of his song, moreover, petitioner

mimics a car bomb and states: "There went your f***ing car. I can shoot you. I can kill you. I can f*** you." *Id.* at 36a. Finally, when petitioner disseminated his video to various strangers and acquaintances, he included the instruction to "[g]ive this to the Judge," *id.* at 17a—a clear indication that petitioner wanted the video to be seen by the judge so that it would have its intended effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2013