No. 02-1762

In the Supreme Court of the United States

JESSIE AGUILAR ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an indictment charging petitioner with knowingly mailing a threatening communication, in violation of 18 U.S.C. 876, was defective because it did not allege that petitioner intended that his communication would be understood as a threat.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is unpublished, but the judgment is noted at 61 Fed. Appx. 921.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2003. The petition for a writ of certiorari was filed on May 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entry of a conditional guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of mailing a threatening communication, in violation of 18 U.S.C. 876. He was sentenced to 46 months of imprisonment, to be

followed by three years of supervised release. The court of appeals affirmed. Pet. App. B1-B2.

1. While petitioner was in county jail awaiting transfer to prison to serve a state sentence for assault and injury to the elderly, he mailed a letter to reporter Paige Hewitt at the Houston Chronicle. In the letter, petitioner stated that he had left a device containing anthrax in the central ventilation system of one of the Houston Chronicle's buildings and that the device was set to go off on October 31, 2001. He further stated that he had installed the anthrax device "[b]ecause I can"; that he had studied hazardous materials and bioterrorism since he was 12 years old; and that Houston was vulnerable because it was "easy to acquire entry" into its major buildings. He concluded the letter by warning Ms. Hewitt that she had "9 days to save [her] coworkers." He signed the letter with his name, "Jessie A. Espinoza." Gov't C.A. Br. 3; Presentence Report (PSR) paras. 5, 7.

On October 29, 2001, petitioner's letter arrived at the Houston Chronicle. The letter was forwarded to Ms. Hewitt's editor, who contacted security personnel. PSR paras. 4-5

2. A federal grand jury returned an indictment charging petitioner with mailing a threatening communication, in violation of 18 U.S.C. 876. In particular, the indictment charged that petitioner "knowingly did deposit in an authorized depository for mail matter * * * and knowingly caused to be delivered by the Postal Service * * * a written communication * * * containing a threat to injure another; that is, to release a biological agent, anthrax, 'in one of the Houston Chronicle's Buildings.'" Superseding Indictment 1.

Petitioner moved to dismiss the indictment on the ground that it failed to charge an element of the

crime—namely, that he specifically intended to threaten the recipient of the letter. The district court denied the motion. Pet. App. A.

Petitioner then pleaded guilty to the Section 876 charge, reserving the right to appeal the denial of his motion to dismiss the indictment. At the hearing at which he entered his guilty plea, petitioner admitted that he knowingly caused the letter to be mailed to Ms. Hewitt and that he intended to commit the acts set forth in the indictment. 2/4/02 Tr. 13, 15. At sentencing, petitioner stated that his motive for sending the letter had been to draw attention to abuses in the Texas state prison system. 4/22/02 Tr. 6, 9-10.

The district court sentenced petitioner to a 46-month term of imprisonment, to run consecutively to his state sentence. Pet. App. C3-C4.

3. The court of appeals affirmed petitioner's conviction in an unpublished per curiam opinion. Pet. App. B1-B2. The court rejected petitioner's claim that a defendant's specific intent to make a threat is an element of an offense under 18 U.S.C. 876 that must be alleged in the indictment. The court relied on circuit precedent holding that "an offense pursuant to 18 U.S.C. § 876 [is] a general intent crime." Pet. App. B2 (citing *United States* v. *DeShazo*, 565 F.2d 893, 894-895 (5th Cir.), cert. denied, 435 U.S. 953 (1978)).

ARGUMENT

Petitioner contends (Pet. 3-10) that the indictment in this case was defective because it did not allege that he acted with the specific intent to make a threat. The Fifth Circuit, consistently with most other circuits, has correctly held that 18 U.S.C. 876 and similar statutes do not require that a defendant subjectively intended that his communication be understood as a threat. It neces-

sarily follows that no such intent need be alleged in the indictment in a Section 876 prosecution. The Ninth Circuit, while construing Section 876 to require proof of the defendant's intent to threaten, has not held that such intent must be expressly alleged in the indictment. This case does not, therefore, implicate the narrow circuit conflict that petitioner identifies or otherwise warrant this Court's review. This Court recently denied certiorari in a case raising a similar claim under 18 U.S.C. 875(c). See *Morales* v. *United States*, 536 U.S. 941 (2002) (No. 01-8544).

1. The Federal Rules of Criminal Procedure describe an indictment as "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). On several occasions, this Court has held that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States* v. *Bailey*, 444 U.S. 394, 414 (1980) (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)). As long as the statutory language itself expressly and unambiguously sets forth the elements needed to define the offense, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself." *Hamling*, 418 U.S. at 117.

The indictment in this case was sufficient under that standard. Petitioner was prosecuted under the first paragraph of Section 876, which has since been designated as Section 876(a). Federal Judiciary Protection Act of 2002, Pub. L. No. 107-273, § 11008(d)(1), 116 Stat. 1818. As relevant here, that provision prohibits "knowingly deposit[ing]" in the mails "any communica-

tion" that contains "any threat to injure the person of the addressee or of another." 18 U.S.C. 876(a). The indictment, tracking the statutory language, charged that petitioner "knowingly did deposit" in the mails and "knowingly caused to be delivered by the Postal Service" a communication addressed to Paige Hewitt at the Houston Chronicle that "contain[ed] a threat to injure another; that is, to release a biological agent, anthrax, 'in one of the Houston Chronicle's Buildings.'" Superseding Indictment 1. The indictment fairly informed petitioner of the charge against which he had to defend, and was sufficient to enable him to assert a claim of double jeopardy in a future prosecution.

The indictment was not deficient for failing to allege that petitioner intended his communication to be understood as a threat. Ordinarily, in the absence of any indication by Congress to the contrary, "proof that the defendant acted knowingly is sufficient to support a conviction." *Bailey*, 444 U.S. at 408; see *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 523 (1994). As stated above, Section 876(a), by its terms, requires that a defendant "knowingly" mail a communication containing a threat, and the indictment accordingly alleged that petitioner acted "knowingly." Section 876(a) does not contain any requirement that the defendant acted with the specific intent to threaten. In contrast, Section 876(b) and Section 876(d) expressly require an "intent to extort," 18 U.S.C. 876(b) and (d), thereby providing additional indication that Congress did not mean to require an intent to threaten in Section 876(a).

The First Amendment does not require that a specific intent element be read into Section 876(a). The First Amendment is satisfied by confining Section 876(a) to "true" threats, *Watts* v. *United States*, 394

U.S. 705, 707-708 (1969) (per curiam)—that is, statements that "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 123 S. Ct. 1536, 1548 (2003). Such "true" threats are proscribable under the First Amendment in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992). Whether or not the person making such a communication acted with the specific intent to threaten, the fear and disruption engendered among its targets may well be the same. See, *e.g.*, *United States* v. *Kosma*, 951 F.2d 549, 556-557 (3d Cir. 1991).[1]

2. The courts of appeals, with one exception, have construed the various federal threat statutes, including the provision at issue here, to reach communications that, objectively viewed, constitute "true" threats. They have not required the government to prove that the defendant acted with the subjective intent to threaten. See, *e.g.*, *United States* v. *Whiffen*, 121 F.3d 18, 20-21 (1st Cir. 1977); *United States* v. *Francis*, 164 F.3d 120, 121-123 (2d Cir. 1999); *United States* v. *Himelwright*, 42 F.3d 777, 782-783 (3d Cir. 1994); *United States* v. *Worrell*, 313 F.3d 867, 874 (4th Cir.

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[1] While the Court stated in *Virginia* v. *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 to a particular individual or group of individuals," 123 S. Ct. at 1548 (emphasis added), the Court was not asked to (and did not) decide whether the true threats standard is an objective one or a subjective one (or both). Since the Virginia law at issue required an intent to intimidate, the question was not squarely presented.

2002), cert. denied, 123 S. Ct. 1948 (2003); *United States* v. *Myers*, 104 F.3d 76, 80-81 (5th Cir.), cert. denied, 520 U.S. 1218 (1997); *United States* v. *DeAndino*, 958 F.2d 146, 148-149 (6th Cir.), cert. denied, 505 U.S. 1206 (1992); *United States* v. *Aman*, 31 F.3d 550, 553-556 (7th Cir. 1994); *United States* v. *Patrick*, 117 F.3d 375, 377 (8th Cir. 1997); *United States* v. *Welch*, 745 F.2d 614, 619-620 (10th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Costello*, 760 F.2d 1123, 1127-1128 (11th Cir. 1985).

In *United States* v. *Twine*, 853 F.2d 676, 681 (1988), the Ninth Circuit construed what is now Section 876(a)—as well as Section 875(c), which proscribes the transmission of threats in interstate commerce—to require a showing of "a subjective, specific intent to threaten" in order to convict. The court reasoned that such a requirement serves "to insure that no one would be convicted for an act because of mistake, inadvertence, or other innocent reason." *Id.* at 680; accord *United States* v. *King*, 122 F.3d 808 (9th Cir. 1997) (reaffirming *Twine* in a prosecution under Section 876).[2]

The Ninth Circuit's concern for persons who make threats because of "mistake, inadvertence, or other innocent reason[s]" is insubstantial. In a prosecution under Section 876(a), the government must prove not only that the defendant knowingly transmitted the communication, but also that the communication is a "true" threat as described above. It is doubtful that a defendant could be convicted under Section 876(a) for

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[2] By contrast, the Ninth Circuit, in accord with the other circuits, has held that specific intent to carry out the threat (or ability to do so) is not an essential element of the threat statutes. *United States* v. *Orozco-Santillan*, 903 F.2d 1262, 1265-1266 (9th Cir. 1990); *Twine*, 853 F.2d at 681 n.4.

the "mistake[n]" or "inadverten[t]" transmission of a threat even absent a specific intent requirement. Accordingly, the conflict created by the Ninth Circuit's decisions in *Twine* and *King* does not warrant this Court's review.

In any event, petitioner's reliance on *Twine* is misplaced. *Twine* does not hold that a defendant's specific intent to threaten must be alleged in the indictment in order to charge a Section 876 offense. Rather, *Twine* construed the term "knowingly" in Section 876 to include a specific intent to threaten. See 853 F.2d at 679-680. *Twine*'s construction of the term "knowingly," even if correct, would be of no assistance to petitioner, because the indictment in this case, by alleging that petitioner acted "knowingly," would thereby have met *Twine*'s requirement to allege that he acted with the subjective intent to threaten. Petitioner cites no decision of the Ninth Circuit, and the government is aware of none, holding that an indictment charging a violation of Section 876 is fatally deficient for failure to allege a specific intent to threaten.

3. Petitioner also asserts (Pet. 8-9) that, unless Section 876(a) is understood to require a subjective intent to threaten, Congress lacked the legislative authority to enact it. Petitioner is mistaken. Section 876(a), by its terms, applies exclusively to threatening communications sent through the mails. Under both the Post Office Clause and the Commerce Clause of Article I, Congress has the legislative authority to proscribe the sending of threats through the mails, whether or not the sender subjectively intended to threaten.[3]

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[3] Contrary to petitioner's suggestion (Pet. 8-9), Congress's authority to regulate threats sent by mail is not limited to those

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sent from one State to another. Congress's power under the Constitution's Post Office Clause, Art. I, § 8, Cl. 7, is distinct from the Commerce Clause power and clearly reaches all items passing through the mails, "even if their passage is purely intrastate." *United States* v. *Elliott*, 89 F.3d 1360, 1364 (8th Cir. 1996) (affirming mail fraud conviction based on intrastate mailings and refusing to apply Commerce Clause analysis), cert. denied, 519 U.S. 1118 (1997). In any event, as this Court has recognized under the Commerce Clause, Congress may protect the channels and instrumentalities of interstate commerce "even though the threat may come only from intrastate activities." *United States* v. *Morrison*, 529 U.S. 598, 609 (2000) (quoting *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)); see *United States* v. *Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 249-252 (4th Cir. 2001) (upholding, under the Commerce Clause, Congress's extension of the mail fraud statute to intrastate deliveries by private or commercial intrastate carrier), cert. denied, 535 U.S. 926 (2002).