No. 13-1129

In the Supreme Court of the United States

HAROLD TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's online statements calling for the murders of three court of appeals judges and promising that he could "get it done" constitute "true threats" punishable under 18 U.S.C. 115.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 720 F.3d 411. The order of the district court (Pet. App. 54a-61a) is unreported but is available at 2009 WL 7265601.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2013. A petition for rehearing was denied on October 15, 2013 (Pet. App. 62a). On January 2, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 14, 2014, and the petition was filed on that date. 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 New York, petitioner was convicted on one count of threatening a federal official, in violation of 18 U.S.C. 115(a)(1)(B). See Pet. App. 11a-13a. He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-39a.

1. In 2000, petitioner began operating a website and purchasing weekly time on a shortwave radio station to broadcast the "Hal Turner Show," which he described as a "talk radio show." Pet. App. 3a. By 2003, the show was popular with violent white-supremacist groups such as the Aryan Nations and the Ku Klux Klan. *Ibid.* Because of his popularity, petitioner received invitations to speak at national rallies associated with these groups. *Ibid.* As a result, the Federal Bureau of Investigation (FBI) contacted petitioner, who agreed to report to them if he learned that any violent acts were about to occur. *Ibid.* Between 2003 and 2007, petitioner provided the FBI with some useful information. *Ibid.* Petitioner ignored the FBI's repeated warnings about his own violent internet speech, however, and the FBI ended its relationship with petitioner in 2007. *Id.* at 3a-4a.

On June 2, 2009, a panel of the United States Court of Appeals for the Seventh Circuit, consisting of Chief Judge Easterbrook and Judges Bauer and Posner, issued an opinion in *National Rifle Association of America* v. *City of Chicago*, 567 F.3d 856 (2009), rev'd *sub nom. McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), holding that the City of Chicago's handgun ban did not violate the Second Amendment. See

Pet. App. 1a-2a, 4a. The same day, petitioner published a blog entry on his public website entitled "OUTRAGE: Chicago Gun Ban UPHELD; Court says 'Heller' ruling by Supreme Court not applicable to states or municipalities!" *Id.* at 4a. Petitioner's post exclaimed that "American gun owners have been put in spectacular jeopardy by a federal court ruling that enables states or cities to ban all—ALL—firearms ownership!" *Ibid.*

In the same blog post, petitioner wrote directly about the members of the Seventh Circuit panel. Pet. App. 4a-8a. Petitioner stated that "[t]he government—and especially these three Judges—are cunning, ruthless, untrustworthy, disloyal, unpatriotic, deceitful scum." *Id.* at 5a. He further stated that "Government lies, cheats, manipulates, twists and outright disobeys the supreme law and founding documents of this land because they have not, in our lifetime, faced REAL free men willing to walk up to them and kill them for their defiance and disobedience." *Ibid.* Petitioner then wrote: "Let me be the first to say this plainly: These Judges deserve to be killed. Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions." *Ibid.*

Petitioner also referenced the 2005 murders of United States District Judge Joan Lefkow's husband and mother, which he attributed to Judge Lefkow's role in another case involving a white-supremacist organization. Pet. App. 5a-6a. Petitioner wrote that after the case, "a gunman entered the home of that lower court Judge and slaughtered the Judge's mother and husband. Apparently, the 7th U.S. Circuit court didn't get the hint after those killings." *Id.* at

6a. Petitioner added that "[i]t appears another lesson is needed," and stated that "[i]f they are allowed to get away with this by surviving, other Judges will act the same way." *Ibid.* Petitioner concluded his post by writing that "[t]hese Judges deserve to [be] made such an example of as to send a message to the entire judiciary: Obey the Constitution or die." *Id.* at 6a-7a.

The following day, petitioner posted an "update" to his blog post. Pet. App. 7a. He stated that the "Judges official public work addresses and a map of the area are below. Their home addresses and maps will follow soon. Behold these devils." *Ibid.* The photos and names of Chief Judge Easterbrook and Judges Bauer and Posner followed, along with the room numbers for each of the judges' chambers within the Everett McKinley Dirksen United States Courthouse and a photograph and map to the courthouse's location in Chicago. *Ibid.* In the photograph of the courthouse, petitioner also identified the location of "Anti-truck bomb barriers." *Ibid.*

The targeted judges became aware of petitioner's blog post the same day. Pet. App. 7a. Judge Posner, concerned for his safety, notified the United States Marshals' Service. *Ibid.* When Judge Easterbrook learned of the postings, his first reaction was to fear "that somebody was threatening to kill [him]." *Id.* at 7a-8a. Each of the judges was aware of the murder of Judge Lefkow's family, and each was also aware that an individual mentioned by petitioner in his posts had been convicted of soliciting the murder of Judge Lefkow herself. *Id.* at 8a.

At the time of the blog posts in question, other posts by petitioner were readily accessible on his website and provided context from which a reader

could infer petitioner's intent. Pet. App. 8a-11a. In the post immediately preceding his first post about the Seventh Circuit judges, petitioner accused a Connecticut state legislator and the Connecticut Office of State Ethics of tyranny, stating: "It is our intent to foment direct action against these individuals personally. These beastly government officials should be made an example of as a warning to others in government: Obey the Constitution or die." *Id.* at 8a (footnote omitted). Petitioner also warned that "[i]f any state attorney, police department or court thinks they're going to get uppity with us about this; I suspect we have enough bullets to put them down too." *Ibid.* Petitioner later admitted that when he wrote "our intent" in this post, he meant his own intent. *Id.* at 8a n.2.

In another post, petitioner stated that he was "going after" those involved in the "financial meltdown." Pet. App. 9a. He explained that, although he could not "legally undertake killing" himself, his "eight years on the radio and on the internet has gotten [him] in touch with enough of the right people to get it done." *Ibid.* He again referenced the murders of Judge Lefkow's family, stating: "Judge Lefkow made a ruling in court that I opined made her 'worthy of death.' After I said that, someone went out and murdered her husband and mother inside the Judges Chicago house." *Id.* at 9a-10a.

2. On July 22, 2009, petitioner was indicted on one count of "threaten[ing] to assault and murder three United States judges with the intent to impede, intimidate, and interfere with such judges while engaged in the performance of official duties and with intent to retaliate against such judges on account of the per-

formance of official duties," in violation of 18 U.S.C. 115(a)(1)(B). Pet. App. 11a (brackets in original). Because petitioner's postings targeted three Seventh Circuit judges, the case was initially assigned to a district judge from the Western District of Louisiana, who was sitting by designation in the Northern District of Illinois. *Id.* at 11a-12a. On petitioner's motion, the case was transferred to the Eastern District of New York. *Id.* at 12a.

The district court denied petitioner's motion to dismiss the indictment, finding that the First Amendment did not protect petitioner's threats against the judges. Pet. App. 54a-61a. Following two mistrials, petitioner was retried and convicted. *Id.* at 12a. The government presented evidence of the blog posts and the reactions of the three targeted Seventh Circuit judges. Testifying in his defense, petitioner admitted that he had written the blog posts in question, but claimed that his statements were mere political hyperbole and did not amount to a threat of violence. *Ibid.*

The district court instructed the jury that "a statement is a threat if it was made under such circumstances that a reasonable person hearing or reading the statement and familiar with its context would understand it as a serious expression of an intent to inflict injury," and that the jury could convict petitioner only if it found beyond a reasonable doubt that petitioner "acted with the intent to impede, intimidate, or interfere with the United States judges while engaged in the performance of their official duties, or with the intent to retaliate against the United States judges on account of the performance of their official duties." Pet. App. 12a-13a. The district court further

instructed the jury that "[t]he First Amendment protects vehement, scathing, and offensive criticism of public officials, including United States judges" and that if the jurors found that the "statements for which [petitioner] is charged were no more than mere political hyperbole then you may be justified in finding that no threat was in fact made." *Id.* at 13a. Finally, the district court stated: "I instruct you, however, that a threat as I have defined the term in these instructions is not protected by the First Amendment of the Constitution." *Ibid.*

The jury found petitioner guilty on the sole count of the indictment. Pet. App. 13a.

3. a. The court of appeals affirmed. Pet. App. 1a-39a. As relevant here, the court rejected petitioner's argument "that the trial evidence was insufficient to prove that he threatened Judges Easterbrook, Bauer, and Posner within the meaning of § 115(a)(1)(B), as opposed to engaging in First Amendment-protected speech."[1] *Id.* at 13a; see *id.* at 14a-28a. The court explained that a conviction under 18 U.S.C. 115(a)(1)(B) requires proof of "both objective and subjective elements: to be convicted, [petitioner] must have both (1) 'threaten[ed] to assault . . . or murder' a federal judge, and (2) 'inten[ded] to impede, intimidate, or interfere with such . . . judge . . . while engaged in the performance of official duties, or . . . inten[ded] to retaliate against such . . . judge . . . on account of the performance of

[1] The court of appeals also held that the district court's jury instructions contained no prejudicial error, Pet. App. 29a-33a, and rejected the remainder of petitioner's arguments, *id.* at 33a-39a. Petitioner does not renew those arguments in his petition for a writ of certiorari.

official duties.'" Pet. App. 16a (brackets and ellipses in original) (quoting 18 U.S.C. 115(a)(1)(B)). The court noted that petitioner's sufficiency challenge was limited to the objective component—*i.e.*, whether his words constituted a "true threat"—because he did not challenge that the evidence was sufficient to prove his intent to "intimidate or retaliate against" the judges. *Ibid.*

The court of appeals stated that the Second "Circuit's test for whether conduct amounts to a true threat 'is an objective one—namely, whether an ordinary, responsible recipient who is familiar with the context of the [communication] would interpret it as a threat of injury.'" Pet. App. 17a (brackets in original) (quoting *United States* v. *Davila*, 461 F.3d 298, 305 (2d Cir. 2006), cert. denied, 549 U.S. 1266 (2007)). "Prohibitions on true threats," the court explained, "'protect[] individuals from the fear of violence' and 'from the disruption that fear engenders[],'" "even where the speaker has no intention of carrying [the threats] out." *Id.* at 17a-18a (brackets in original) (quoting *Virginia* v. *Black*, 538 U.S. 343, 360 (2003)).

After reviewing the record, the court of appeals concluded that the evidence presented at trial was sufficient for a reasonable jury to conclude that petitioner's communications were true threats. Pet. App. 18a-28a. The court acknowledged that petitioner "was entitled to condemn and disparage the Seventh Circuit" and to offer "political criticism." *Id.* at 18a. The court concluded, however, that "[t]he evidence was more than sufficient * * * for a jury to conclude that [petitioner's] statements were not 'political hyperbole,' as he contended, but violent threats against the judges' lives." *Id.* at 19a. Examining "[t]he full

context of [petitioner's] remarks," the court of appeals found "a gravity readily distinguishable from mere hyperbole or common public discourse." *Id.* at 20a. The court emphasized that, in addition to writing that the three identified judges should be killed, petitioner referenced the murder of Judge Lefkow's family and stated that "[a]pparently, the 7th U.S. Circuit court didn't get the hint after those killings. It appears that another lesson is needed." *Ibid.* The court concluded that "[s]uch serious references to actual acts of violence carried out in apparent retribution for a judge's decision would clearly allow a reasonable juror to conclude that [petitioner's] statements were a true threat." *Id.* at 20a-21a.[2]

The court of appeals also emphasized that petitioner did more than merely reference the murders of Judge Lefkow's family—petitioner "implied a causal connection between [his] calls for judges' deaths and actual murders." Pet. App. 21a. The court thus concluded that petitioner's "statements about Judges Easterbrook, Bauer, and Posner, were quite reasonably interpreted by the jury as the serious expression of intent that these judges, too, come to harm." *Ibid.* "The seriousness of the threat, moreover, was further shown by [petitioner's] posting of the judges' photographs and work addresses," which, when "[c]oupled with [petitioner's] admission that releasing addresses was an 'effective way to cause otherwise immune pub-

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[2] The court also noted that the Fourth Circuit has "affirmed a threat conviction in very similar circumstances—where a speaker 'conclud[ed] [his] email by comparing [the recipient] to Judge Lefkow, whose relatives had been murdered.'" Pet. App. 21a (brackets in original) (quoting *United States* v. *White*, 670 F.3d 498, 512 (4th Cir. 2012)).

lic servants to seriously rethink how they use [their] power,'" provided "abundant evidence from which" the jury could "conclude that [petitioner] was threatening the judges in retaliation for their ruling, rather than engaging in mere political hyperbole." *Id.* at 21a-22a (fourth brackets in original).

The court of appeals rejected petitioner's argument that his writings could not qualify as a "true threat" because they were phrased in the passive voice and because he never expressly stated that he intended to kill the judges. Pet. App. 22a. Petitioner's contention that "only communications that facially threaten unequivocal, unconditional, immediate, and specific injury may be prohibited consistent with the First Amendment," the court explained, could not be squared with circuit precedent or with this Court's decision in *Black*. *Id.* at 22a-27a. In *Black*, the court of appeals noted, this Court rejected a First Amendment challenge to a state law that prohibited cross burnings intended to intimidate, though the Court acknowledged that "a burning cross does not inevitably convey a message of intimidation," let alone an intent to kill. *Id.* at 27a (quoting *Black*, 538 U.S. at 357). Examining the full context of petitioner's words, the court of appeals concluded that petitioner's "intent to interfere with these judges—to intimidate them through threat of violence—could not have been more clearly stated in his pointed reference to their colleague, whose family members had been killed," and his statement that "the 7th Circuit court didn't get the hint." *Id.* at 23a.

The court of appeals also rejected petitioner's argument that, because his communications "purported to be directed at third parties," they could not be

punished unless they qualified as incitement as defined by this Court's decision in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam). Pet. App. 27a-28a. The court of appeals explained that petitioner "again relie[d] overmuch on the literal denotation and syntax of [his] statements, refusing to acknowledge that threats—which may be prohibited, consistent with the First Amendment—need be neither explicit nor conveyed with the grammatical precision of an Oxford don." *Ibid.* Because petitioner's conduct constituted a threat, the court concluded, "it need not also constitute incitement to imminent lawless action to be properly proscribed." *Id.* at 28a.

The court held that the record contained sufficient evidence for a reasonable jury to conclude that petitioner's statements "constituted a threat of serious harm to the three victim judges, and that [petitioner] undertook this threat with the intent to intimidate them while they were engaged in the performance of their duties or to retaliate against them for said performance." Pet. App. 28a. The court of appeals also concluded, based on its own "independent review of the record," that petitioner's "conduct constituted a true threat for First Amendment purposes." *Ibid.*[3]

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[3] The court of appeals recognized that "[t]he Ninth Circuit has invoked the constitutional facts doctrine in the context of a threats conviction, suggesting that an appellate court '[d]efer[s] to the jury's findings on historical facts, credibility determinations, and elements of statutory liability,' but then 'conduct[s] an independent review of the record to determine whether the facts as found by the jury establish the core constitutional fact' of a true threat." Pet. App. 15a (brackets in original) (quoting *United States* v. *Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002)). The court found it unnecessary, however, to decide which standard of review applied

b. Judge Pooler dissented in part. Pet. App. 39a-53a. She agreed with the panel majority that a communication is a true threat if "an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury." *Id.* at 42a (brackets in original) (quoting *Davila*, 461 F.3d at 305). She also agreed both that "[a]n absence of explicitly threatening language" in a communication "does not preclude the finding of a threat," *id.* at 44a (quoting *United States* v. *Malik*, 16 F.3d 45, 49 (2d Cir.), cert. denied, 513 U.S. 968 (1994)), and that "[s]peech may be ambiguous as to *who* will cause injury and still constitute a threat," *id.* at 45a. In Judge Pooler's view, however, petitioner's "communications were advocacy of the use of force and not a threat." *Id.* at 48a. Although she agreed that "[i]t is clear that [petitioner] wished for the deaths of Judges Easterbrook, Posner, and Bauer" and that petitioner's statements were not "mere hyperbole or common public discourse," Judge Pooler considered petitioner's communications to be "an exhortation toward 'free men willing to walk up to them and kill them' and not as a warning of planned violence directed toward the intended victims." *Id.* at 48a-49a (quoting *id.* at 5a). In reaching that conclusion, she relied on "the fact that [petitioner's] words were posted on a blog on a publicly accessible website" and noted that she might have reached a different conclusion "if, for example, the statements were sent to the Judges in a letter or email." *Ibid.*

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because in this case "the result is the same whether the constitutional fact doctrine is (or is not) implicated." *Id.* at 16a.

ARGUMENT

Petitioner contends (Pet. 9-20) that the court of appeals erred in concluding that the record contained sufficient evidence to permit a reasonable jury to find that his communications qualified as a proscribable "true threat." Review of the court of appeals' fact-bound decision is unwarranted because it was correct and does not conflict with any decision of this Court or of any other court of appeals.

1. Section 115 of Title 18 of the United States Code criminalizes, *inter alia*, "threaten[ing] to assault, kidnap, or murder * * * a United States judge * * * with intent to impede, intimidate, or interfere with such * * * judge * * * while engaged in the performance of official duties, or with intent to retaliate against such * * * judge * * * on account of the performance of official duties." 18 U.S.C. 115(a)(1)(B). Because that section targets communications, 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 115(a)(1)(B) 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 are simply "outside the First Amendment," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), including when the speaker does "not actually intend to carry out the threat," *Virginia* v. *Black*, 538 U.S. 343, 359-360 (2003).

The court of appeals in this case correctly concluded that petitioner's postings targeting the three Sev-

enth Circuit judges for death constituted a "true threat" rather than mere "political hyperbole." Petitioner agrees that a communication of "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" qualifies as a true threat and is not entitled to First Amendment protection. Pet. 15 (emphasis omitted) (quoting *Black*, 538 U.S. at 359). Petitioner has also conceded that he intended with the communications in question to intimidate the three judges.[4] Pet. App. 16a. The only question before the court of appeals, therefore, was whether petitioner's statements would cause a reasonable recipient who is familiar with the context of the statements to interpret them as a threat of injury. See *id.* at 17a. The court of appeals correctly answered that factual question in the affirmative.

Petitioner's blog post was not ambiguous. He wrote, "Let me be the first to say this plainly: These Judges deserve to be killed." Pet. App. 5a. Petitioner accused the judges of being "traitors" and of "intentionally violat[ing] the Constitution." *Id.* at 6a. Petitioner opined that, if the three judges were "allowed to get away with this by surviving, other Judges will act the same way." *Ibid.* He wrote that the "Judges deserve to be made such an example of as to send a message to the entire judiciary: Obey the Constitution or die." *Id.* at 6a-7a. Petitioner also invoked the

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[4] The parties and lower courts agree that Section 115(a)(1)(B) requires proof of a subjective intent to, *inter alia*, intimidate or retaliate. This case therefore does not implicate the questions presented in *Elonis* v. *United States*, cert. granted, No. 13-983 (June 16, 2014), and this Court need not defer disposition of the petition for a writ of certiorari in this case pending its decision in *Elonis*.

murders of Judge Lefkow's husband and mother after her decision in a controversial case and stated that "[i]t appears another lesson is needed" because "[a]pparently, the 7th U.S. Circuit court didn't get the hint after those killings." *Id.* at 6a. In an earlier post on his blog, petitioner stated that, although he would not personally kill the targets of his rants, he knew "how to get it done." *Id.* at 9a. Petitioner took credit for causing the murders of Judge Lefkow's family in particular, stating:

> Federal District Judge Joan Humphrey Lefkow in Chicago is proof.
>
> Judge Lefkow made a ruling in court that I opined made her "worthy of death." After I said that, someone went out and murdered her husband and mother inside the Judges Chicago house.

Id. at 10a. Petitioner also posted photos of Judges Bauer, Easterbrook, and Posner, along with a map to the precise location of their chambers that included notations about the placement of "Anti-truck bomb barriers." *Id.* at 7a.

In sum, petitioner expressly called for the murders of the three judges and claimed that his doing so was sufficient "to get it done." Pet. App. 9a. Any reasonable person would interpret those statements, viewed in context, as a true threat. Indeed, Chief Judge Easterbook testified that his initial reaction "was that somebody was threatening to kill [him]." *Id.* at 8a. And petitioner does not dispute that his intent was to intimidate his targets. Petitioner's communications therefore violated 18 U.S.C. 115 and do not warrant First Amendment protection. *Watts*, 394 U.S. at 708.

Petitioner errs in contending that his communications were not true threats because he "did not threaten that he personally would 'commit an act of unlawful violence.'" Pet. 15-16 (quoting *Black*, 538 U.S. at 359). Petitioner presumably would not dispute that a statement such as "I will send my cousin to kill those judges" would qualify as a true threat even though the speaker would not express an intent to commit violence himself (and would not direct the statement to the judges directly, see Pet. 14). Petitioner's statements in this case are the functional equivalent: he expressed his wish that the three judges be killed and cited the murder of Judge Lefkow's family as "proof" that his expression of such a wish was sufficient to make it happen. Petitioner's statements communicated to any reasonable observer that he intended to cause the deaths of the three judges. Such statements are true threats.

2. Petitioner further errs in arguing (Pet. 9-15) that the court of appeals' decision conflicts with decisions of this Court. Review is not warranted because the court of appeals faithfully applied this Court's First Amendment cases.

a. Petitioner first argues (Pet. 9-10) that the court of appeals' decision conflicts with this Court's decision in *Watts*, *supra*. Petitioner is incorrect. In *Watts*, the Court reversed a conviction for violating 18 U.S.C. 871(a), which proscribes threats against the President. See 394 U.S. at 705-708. The Court held that the statute must be limited to proscribing only "true 'threats'" and explained that whether a statement qualifies as a true threat should be judged by the "context" of the statement, including whether it was "expressly conditional" and any "reaction of the lis-

teners." *Id.* at 708. The court of appeals correctly applied the holding and underlying principles of *Watts* in this case. See Pet. App. 19a-25a. Petitioner's communications were not expressly or impliedly conditional. See *id.* at 5a ("Let me be the first to say this plainly: These Judges deserve to be killed."). And the only evidence in the record about the reaction of individuals who read petitioner's posts established that the judges who were the subject of petitioner's rant feared for their lives as a result of the communications. See *id.* at 7a-8a; see also Pet. 14 (noting that there was no proof that any other person read petitioner's posts). Petitioner thus errs in asserting that "[t]he objective factors here likewise show that petitioner's blog post was political speech protected under *Watts*." Pet. 9. The objective factors show the opposite.

b. Petitioner also errs in arguing (Pet. 10-12) that the decision below conflicts with this Court's decision in *Virginia* v. *Black*, *supra*, because the court of appeals "imputed" criminal intent to petitioner based on his statement "that judges 'deserve to be killed'" rather than "establish[ing] the criminal intent that would remove petitioner's statement from the protection of the First Amendment." Pet. 11. Petitioner misunderstands the question that was before the court of appeals. On appeal, petitioner conceded that the evidence was sufficient to prove that he intended with his communications to intimidate the judges, Pet. App. 16a, and that evidence therefore established the requisite criminal intent to violate 18 U.S.C. 115. The question before the court of appeals was whether the content of his communications, viewed in context, objectively qualified as a true threat.

In *Black*, this Court considered 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)).

The decision below is fully consistent with *Black* because no comparable presumption was employed in this case. Section 115 criminalizes only communications that both threaten to "assault, kidnap, or murder" a federal judge and were made with the intent to "impede, intimidate, or interfere" with the judge's official duties or to retaliate based on official acts. 18 U.S.C. 115(a)(1)(B). Because petitioner conceded that the evidence was sufficient to prove that he intended to intimidate the judges, Pet. App. 16a, the questions presented in *Black* concerning inferences about intent have no bearing on petitioner's case.

c. Petitioner similarly errs in arguing (Pet. 13-15) that the decision below is inconsistent with this Court's decision in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). The Court in *Brandenburg* reaffirmed that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Petitioner argues (Pet. 13-14) that, because his communications were not directed at or likely to incite or produce imminent lawless action, they are protected by the First Amendment. Petitioner is incorrect.

A communication may be deemed unworthy of First Amendment protection either because it is a true threat or because it is incitement—or because it is both. If a communication qualifies as a true threat, a court need not consider whether it is separately proscribable as incitement. In this case, the court of appeals (and the jury) correctly determined that petitioners' communications constituted a true threat; they thus had no need to consider whether petitioner's words also were directed at and likely to cause imminent lawless action. Even if petitioner were correct that his communications were not proscribable as incitement—a debatable proposition at best—his communications fell outside the protection of the First Amendment because they were a true threat. [5]

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[5] Petitioner's contention (Pet. 14), that the court of appeals' decision conflicts with this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), is similarly flawed. The Court in *Claiborne Hardware* held that statements by the NAACP's Mississippi field secretary in support of an organized boycott were

Petitioner is also wrong in contending (Pet. 13) that the court of appeals erred in relying on the jury's conclusion that his communications were a true threat. The court of appeals expressly held, based on its own independent review of the record, that petitioner's "conduct constituted a true threat for First Amendment purposes." Pet. App. 28a.

3. Petitioner argues (Pet. 15-19) that the court of appeals' decision conflicts with decisions of the Fifth, Eighth, and Ninth Circuits. Petitioner is incorrect.

Petitioner relies primarily on the Ninth Circuit's decision in *United States* v. *Bagdasarian*, 652 F.3d 1113 (2011). The defendant in *Bagdasarian* was convicted of "knowingly and willfully threaten[ing] to kill, kidnap, or inflict bodily harm upon * * * a major candidate for the office of the President," in violation of 18 U.S.C. 879(a)(3), after posting messages in October 2008 stating "fk the niggar, he will have a 50 cal in the head soon" and "shoot the nig" on a Yahoo! Finance Message board under a subject thread captioned "Obama." *Bagdasarian*, 652 F.3d at 1115-1116. A divided panel of the Ninth Circuit reversed, concluding that these statements did not amount to a "true threat." *Id.* at 1118-1122. The panel majority held that the evidence in the record was "not sufficient to support a conclusion that a reasonable person who read the postings within or without the relevant con-

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protected by the First Amendment because they were not incitement as defined in *Brandenburg*. *Id.* at 927-928. The Court did not consider, however, whether the defendant's statements—which were not addressed to anyone in particular, but were instead "directed to all 8,000-plus black residents of Claiborne County," *id.* at 900 n.28—constituted a true threat. In contrast, petitioner's communications threatened specific individuals with violence and placed those individuals in fear for their physical safety.

text would have understood them either to mean that Bagdasarian threatened to injure or kill the Presidential candidate." *Id.* at 1119. The court reasoned that Section 879(a)(3) "does not criminalize predictions or exhortations to others to injure or kill the President." *Ibid.* The panel noted that courts of appeals generally agree that incitement cannot be punished under a threat statute. *Id.* at 1119 n.18.

The court of appeals' decision in this case does not conflict with the Ninth Circuit's decision in *Bagdasarian*. The court below did not conclude that petitioner's communications were a true threat *because* they sought to incite others to take violent action against the judges. The court concluded that they were a true threat because a reasonable recipient would interpret them to threaten violence against the judges. The Ninth Circuit in *Bagdasarian* reached the opposite conclusion on the facts of that case. But neither court announced a categorical rule that either all statements or no statements that exhort others to take violent actions qualify as true threats. The defendant in *Bagdasarian* did not couple his exhortation with alleged "proof" that calling for the killing of the object of his criticism would result in that person's being killed; petitioner did do that. Pet. App. 10a.

As the panel majority in *Bagdasarian* noted, see 652 F.3d at 1119 n.19, the Ninth Circuit had previously held in *Planned Parenthood of the Columbia/Willamette, Inc.* v. *American Coalition of Life Activists*, 290 F.3d 1058 (2002) (en banc), cert. denied, 539 U.S. 958 (2003), that posters identifying abortion providers and bearing the caption "GUILTY" constituted true threats to the providers even though the posters did not expressly threaten to harm the providers, *id.*

at 1062, 1085-1086. The panel reasoned that, viewed in context, the message that the posters conveyed to a reasonable recipient was threatening in light of the history of murders of other doctors who had been identified on similar posters. *Id.* at 1085. Petitioner's communications were even more threatening: petitioner not only invoked previous murders but *expressly* called for the murders of these judges and took credit for causing the earlier murders.[6]

The other cases cited by petitioner (Pet. 16-17) also do not conflict with the decision below. In *United States* v. *Dinwiddie*, 76 F.3d 913, cert. denied, 519 U.S. 1043 (1996), the Eighth Circuit merely noted that the *Brandenburg* test "applies to laws that forbid inciting someone to use violence against a third party" and not to statutes "that prohibit someone from directly threatening another person." *Id.* at 922 n.5. And in *United States* v. *Howell*, 719 F.2d 1258 (1983), cert. denied, 467 U.S. 1228 (1984), the Fifth Circuit explained that "the *Brandenburg* test applies by its terms to advocacy, not to threats." *Id.* at 1260.[7]

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[6] Petitioner is incorrect (Pet. 16) that the Ninth Circuit in *Bagdasarian* acknowledged a "conflict" between *Bagdasarian* and this case. The Ninth Circuit noted only the fact of petitioner's conviction, that the case had not yet reached the Second Circuit, and that "[i]t would in any event not cause us to change our view with respect to * * * the result that we reach in this case." 652 F.3d at 1122 n.22.

[7] Petitioner's suggestion (Pet. 17) that the decision below conflicts with prior Second Circuit cases does not provide a basis for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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