No. 13-983

IN THE
Supreme Court of the United States

ANTHONY D. ELONIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

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

BRIEF OF PEOPLE FOR ETHICAL TREATMENT OF ANIMALS, INC. (PETA), CAROL CROSSED, CHRIS COATNEY, DANIEL MILLER, OPERATION RESCUE, CITIZENS FOR A PRO-LIFE SOCIETY, PRO-LIFE ACTION LEAGUE, INC., MISSIONARIES TO THE PREBORN, DEFEND LIFE, SURVIVORS, PRO-LIFE ACTION MINISTRIES, AND VOTELIFE AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE *AMICI CURIAE* [1]

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. (PETA) is a nonprofit charitable organization dedicated to protecting animals from abuse, neglect, and cruelty. PETA operates under the principle that animals are not ours to eat, wear, experiment on, use for entertainment, or abuse in any way. PETA advances this mission through investigations, litigation, education, and advocacy. PETA's advocacy efforts include organizing protest campaigns, consistent with the greatest protest traditions of this nation.

CAROL CROSSED is a resident of Rochester, New York, whose religious faith is inextricably intertwined with activism. She has been active in peaceable protest against war, nuclear weapons, the suppression of rights of women and children, and abortion. She has been arrested twice in one day with the legendary peace activist, Fr. Daniel Berrigan, S.J.

CHRIS COATNEY is an anti-abortion protester in the Detroit area who spends many hours "sidewalk counseling" and urging women to choose alternatives to abortion. Coatney was ordered to

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

stay away from one abortion provider's premises, although no finding was made as to Coatney's subjective intent, which was wholly non-violent. He is now appealing his "stay away" order to the Michigan Court of Appeals.

DANIEL MILLER is a coordinator for sidewalk counselors in Milwaukee, Wisconsin, who was likewise subject to a "stay away" order based on his counseling activities outside of an abortion clinic.

OPERATION RESCUE is a leading Christian pro-life activist organization, based in Wichita, KS, led by Troy Newman and Cheryl Sullenger. Operation Rescue campaigns to expose wrongdoing and unsafe conditions at abortion providers, forcing many to close. It also operates a fleet of Truth Trucks that traverse the United States and uses other peaceful, legal means to oppose abortion.

CITIZENS FOR A PRO-LIFE SOCIETY is a Detroit area activist organization, founded on Catholic principles of morality and social justice. It advocates the sanctity of human life, especially the right to life of unborn children, through public demonstrations, pickets, educational programs, literature distribution, conferences, seminars, workshops, and lectures. It also reaches out to mothers in crisis pregnancy and offers material and spiritual aid. Its director, Dr. Monica Miller, Ph.D., is an associate professor of theology at Madonna University, Livonia, Michigan, and the author of many books and articles, including ABANDONED: THE UNTOLD STORY OF THE ABORTION WARS (2012).

PRO-LIFE ACTION LEAGUE, INC., based in Chicago, Illinois was sued for antitrust and racketeering (RICO) violations by NOW and the abortion industry in 1986. The case lasted 28 years and led to three U.S. Supreme Court opinions, the last two in its favor by 8-1 and 8-0 margins. Founded in the early 1980's by Joseph and Ann Scheidler, and now led by Eric Scheidler, the League conducts a broad spectrum of lawful educational and activist programs including Truth Tours.

MISSIONARIES TO THE PREBORN is a Milwaukee group of Christian activists who have come together as a last line of defense for their preborn neighbors. Led by Pastor Matt Trewhella, the Missionaries carry on peaceable Truth Tours and other activities to end abortion.

DEFEND LIFE, a Washington, D.C.-Maryland activist group founded in 1987 by Eileen Bolgiano and Jack Ames, opposes abortion and conducts Truth Tours in the mid-Atlantic area, displaying the graphic truth of abortion. Defend Life also holds an annual convention, conducts some sidewalk counseling, and hosts a pro-life lecture series.

SURVIVORS is a pro-life activist ministry, based in California and led by Jeffrey Lee White. The group is dedicated to educating the youth of America, specifically those born before the *Roe v. Wade* decision. The group takes an active stand and engages in extensive training on peaceable activism.

PRO-LIFE ACTION MINISTRIES, based in St. Paul, Minnesota and led by Brian Gibson, ministers to women by sidewalk counseling and public witness

in the Twin Cities and elsewhere. It conducts an annual national symposium on lawful, peaceable, non-violent sidewalk counseling methods.

VOTE LIFE AMERICA, is based in the Chicago area, and is led by Jim Finnegan and Arlene Sawicki. It conducts educational and activist campaigns, including picketing and voter education drives.

"If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued." *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1019 (9th Cir. 2001), *aff'd in part, vacated in part, remanded by* 290 F.3d 1058 (9th Cir. 2002). That key tenet, embodied in the First Amendment and the cherished freedoms it protects, is at stake here. Indeed, *amici* have a substantial interest in the outcome of this case because it has a real potential to chill political protest activity. Specifically, the Third Circuit's opinion below is troubling because, unless proof of a subjective intent to threaten is required to secure a conviction under 18 U.S.C. § 875(c) (or myriad similar statutes already on the books), this statute may be used as a weapon to draw and wield against protestors or opposition groups that challenge controversial policies or seek to promote change.

Throughout history, many courageous Americans have shared the sentiment of Dr. Martin Luther King, Jr. that "[h]e who accepts evil without

protesting against it is really cooperating with it."[2] Indeed, political protest has played an integral role in facilitating social progress in the United States since its Founding, which itself was an act of political protest.[3] For example, the Abolitionist, Women's Suffrage, and Civil Rights Movements all succeeded in securing rights for individuals previously denied what are today considered basic freedoms. In other instances, organized protests have provided an opportunity for everyday Americans to unite to more effectively communicate their opposition to government policies. Examples of these organized protests include the Boston Tea Party, anti-Vietnam War protests, pro-life demonstrations, and, most recently, the Occupy Wall Street protests.

To be clear: we do not here mean to condone violence or true threats of violence intended to induce fear of imminent harm. And when protest clearly crosses over into violence or threats of violence, there is good reason for it to fall outside of the First Amendment's categorical protection. But that boundary is often murky. Inherent in most

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[2] *See* DR. MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 51 (1958).

[3] *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies. . . .").

protests are messages of opposition to authority, language meant to arouse passions, and calls to action. Those whose policies are challenged or who prefer the *status quo* may perceive such forceful language as intimidating or threatening. So while we do not defend truly threatening or violent behavior, we believe that the boundary demarcating such behavior from protected protest activity must be drawn so as to bring close cases within the ambit of protection.

Requiring only an objective "reasonable person" inquiry in order to bring speech outside of the protection of the First Amendment does not adequately police that boundary. Rather, such a rule would allow majority groups or the Government to use the criminal threats statute as a sword to silence opposition on issues where dissenting voices are critical.[4]

This Court put it perhaps most powerfully in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which arose in the tumultuous throes of the Civil Rights Movement. In that case, seventeen white merchants brought a lawsuit against two corporations, the NAACP and Mississippi Action for Progress ("MAP"), as well as 146 individuals, seeking lost profits resulting from the seven year

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[4] For additional discussion of the dangers of statutes being used as a "sword" to silence political protestors, see Brian J. Murray, Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999).

boycott of their stores in Port Gibson, Mississippi. *Id.* at 889-90. The purpose of the boycott was to "secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice." *Id.* at 907. During the boycott, Charles Evers, the Field Secretary of the NAACP in Mississippi, gave several rousing speeches stating that boycott violators would be disciplined, and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *See id.* at 900 n.28, 902. In one speech he also cautioned that the "Sheriff could not sleep with boycott violators at night." *Id.* at 902. As part of the boycott, observers known as "enforcers," "deacons," or "black hats," kept track of who entered white-owned businesses and their names were read at Claiborne County NAACP meetings. *Id.* at 894. Though the boycott was peaceful, for the most part, there were some recorded instances of violence: in two cases, shots were fired into boycott violators' homes, a brick was thrown through a violator's windshield, and a garden was damaged. *Id.* at 904.

At trial, 130 of the defendants were held jointly and severally liable on three different conspiracy theories, *id.* at 890-92, and were ultimately held responsible for plaintiffs' lost earnings during the seven-year boycott, *id.* at 898. The Mississippi Supreme Court reversed as to two theories of liability, and held that plaintiffs failed to prove their case as to MAP and thirty-seven individual defendants. *Id.* at 894, 896. The court, however, rejected the remaining defendants' First Amendment defense based on the fact that certain defendants

"acting for all others" engaged in physical force against persons and property during the boycott. *Id.* at 894. Likewise, the court reasoned, "[i]ntimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results." *Id.*

This Court reversed, however, underscoring the need for a subjective inquiry in order to prevent majority groups from using "true threats" to punish and silence protestors. The Court found two critical justifications to be compelling. *First*, while acknowledging that the defendants sought to "persuade others to join the boycott through social pressure and the 'threat' of social ostracism," *id.* at 909-10, the Court nevertheless held that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action," *id.* at 910. While the First Amendment does "not protect violence," *id.* at 916, "[t]he claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the First Amendment." *Id.* at 911. *Second*, the Court recognized the dangers of imposing liability "on an individual solely because of his association with another." *Id.* at 918-19. Instead, it held that "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals *and that the individual held a specific intent to further those illegal aims*." *Id.* at 920 (emphasis added). As to Evers's liability in particular, the Court acknowledged that "[i]n the passionate atmosphere in which the speeches were delivered, they might have been understood as . . .

intending to create a fear of violence whether or not improper discipline was specifically intended." *Id.* at 927. Yet—in a passage critical to the current case before this Court—it continued that since "there [wa]s no evidence—apart from the speeches themselves—that Evers . . . directly threatened acts of violence," *id.* at 929, he could not be held liable for the violent actions of other group members.

Throughout our history, courageous Americans like Charles Evers have—by their words and actions—inspired others to challenge discrimination and other forms of injustice. To equate these freedom-fighters with common felons is, we submit, utterly wrong. *Amici* respectfully submit this brief to highlight the threat to such protest activity posed by the Third Circuit's ruling in *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013). Requiring only an objective "reasonable person" test to determine what is a "threat" before an individual can be convicted pursuant to 18 U.S.C. § 875(c), as that decision does, will surely chill protest activity, bankrupting the very "marketplace of ideas" that has played a critical role in the progress of this nation. *See* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 1064-65 (2002) (hereinafter "Blakey & Murray") ("[W]here political, social, economic, other opponents are given the powerful weapon of civil litigation to curtail the free speech or expressive conduct of the opposition, a weapon not limited by prosecutorial discretion . . . First Amendment freedoms are not only unjustifiably curtailed but also the fundamental

principles of the criminal law are impermissibly distorted."). Fidelity to core First Amendment values requires the Court to avoid that result.

SUMMARY OF ARGUMENT

The issue before this Court cuts to the core of the First Amendment and threatens one of the most basic freedoms enjoyed by American citizens: the right to protest. The statute at issue in this case, 18 U.S.C. § 875(c), states, "[w]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." Though the statute does not specify a state of mind requirement, proof of a subjective intent to threaten should be required for two reasons:

1. This Court's First Amendment jurisprudence requires that any categorical exception to First Amendment protection be narrowly drawn, including the "true threats" exception at issue in this case. To require only an objective requirement, like the Third Circuit below, would sweep speech that was traditionally protected by the First Amendment outside of its protective realm. Likewise, it would offer those who oppose a protestor's message to use the statute as a sword to silence opposition. This outcome would not comport with well-settled First Amendment jurisprudence holding that speech should be protected to the greatest extent possible, even when it may be perceived as threatening.

2. Likewise, bedrock principles of criminal law require proof of subjective intent before convicting under the statute. Since our system of federal criminal law is rooted in the common law, when no state of mind is listed in a statute, strict liability is the exception, not the rule. Instead, this Court has instructed that, generally, where a statute is silent as to state of mind, proof of scienter, or knowledge, is the *minimum* required both as to the conduct at issue, and to the result. But allowing an objective-only test here would require merely a showing of "negligence" based on what a "reasonable person" would perceive as threatening. This low threshold is unacceptable where at least knowledge is the default presumption. And in the context of the First Amendment, where the Court has made clear that categorical exceptions should not be overly broad, proof of specific intent ("purpose") is required instead of knowledge to assure the greatest possible protection for speech.

ARGUMENT

I. REQUIRING PROOF OF A SUBJECTIVE INTENT TO THREATEN FOR CONVICTION UNDER 18 U.S.C. § 875(C) IS COMPELLED BY THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

The right of American citizens to engage in political protest lies at the heart of the First Amendment. Indeed, the United States is a nation founded as an act of political protest, and the Founders repeatedly expressed a desire to protect

political dissent. James Madison expressed a desire to protect liberty even where it resulted in political factions:

> By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community. . . .
>
> There are . . . two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.
>
> It could never be more truly said than of the first remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.
>
> The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. . . .

THE FEDERALIST NO. 10, at 78 (Clinton Rossiter ed., 1961). Likewise, in a 1787 letter to Abigail Adams, Thomas Jefferson stated,

> The spirit of resistance to government is so valuable on certain occasions, that I wish it to be always kept alive. It will often be exercised when wrong, but better so than not to be exercised at all. I like a little rebellion now and then. It is like a storm in the atmosphere.

Letter from Thomas Jefferson to Abigail Adams (Feb. 22, 1787), *available at* http://founders.archives.gov/documents/Jefferson/01-11-02-0182 (last visited Aug. 21, 2014). Unsurprisingly, those who influenced the Founders also agreed that political dissent was worth protecting. *See, e.g.*, JOHN STUART MILL, ON LIBERTY, ch. 2 (1859) ("[E]very opinion which embodies somewhat of the portion of truth which the common opinion omits[] ought to be considered precious, with whatever amount of error and confusion that truth may be blended."). Ultimately these urges to protect dissent took form in the Bill of Rights in 1791, wherein the First Amendment codified the protection of speech in the United States Constitution. It makes clear: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

Since its adoption, the First Amendment has expanded over time. For example, it now applies not just to Congress, but also to the States. U.S. Const. amend. XIV; *see also Gitlow v. New York*, 268 U.S.

652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."). And it protects not just speech, but also other forms of protest activity, including demonstrating,[5] leafleting,[6] publishing and disseminating literature,[7] marching and demonstrating,[8] and picketing.[9]

To be sure, some speech remains regulable based on its content alone.[10] But this Court has determined that these categorical exceptions to First

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[5] *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

[6] *See, e.g.*, *United States v. Grace*, 461 U.S. 171, 183 (1983); *Schneider v. Irvington*, 308 U.S. 147, 165 (1939).

[7] *See, e.g.*, *Jamison v. Texas*, 318 U.S. 413, 414 (1943).

[8] *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

[9] *See, e.g.*, *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Police Dep't v. Mosley*, 408 U.S. 92, 94 (1972).

[10] *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (excepting the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"); *New York v. Ferber*, 458 U.S. 747, 765-66 (1982) (excepting child pornography); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980) (excepting commercial speech in some instances); *Watts v. United States*, 394 U.S. 705, 707 (1969) (excepting "true threats").

Amendment protection should be "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky*, 315 U.S. at 571-72. Indeed, this Court "since the 1960s ha[s] narrowed the scope of the traditional categorical exceptions," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), and recently noted its reluctance to create new categorical exceptions, even for speech that may be "valueless or unnecessary." *See United States v. Stevens*, 559 U.S. 460, 469-71 (2010).

The "true threats" categorical exception at issue in this case often arises in the context of political protests or similarly emotionally charged situations. Several decisions of this Court have emphasized, however, that this category of unprotected speech must be narrowly circumscribed so as to give the First Amendment adequate breathing space. In *Watts v. United States*, 394 U.S. 705 (1969) (per curiam), this Court held that a statute punishing those who knowingly or willfully threaten the President was constitutional on its face only because the Government was initially required to "prove a true 'threat'" in order to fulfill the "willfullness" requirement of the statute. *Id.* at 707-08. The Court concluded that the speech at issue, which took place during an anti-Vietnam demonstration, [11] was

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[11] On August 27, 1966, at a public rally on the grounds of the Washington Monument, Watts stated, "[t]hey always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my

"political hyperbole" and not a "true threat" based on a non-exhaustive list of contextual factors. *Id.* at 708. The Court warned that although "[t]he language of the political arena . . . is often vituperative, abusive, and inexact," attempts to criminalize pure speech should be interpreted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *Id.* at 708. Thus, it is imperative that "a threat . . . be distinguished from what is constitutionally protected speech." *Id.* at 707.

That same year, this Court issued another per curiam First Amendment opinion in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that case, the Court dealt with the categorical exception "incitement to violence" in the context of the Ohio Criminal Syndicalism statute, which criminalized, in part, "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 445. Notably, in *Brandenburg* this Court explained 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*

(continued…)

physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J. They are not going to make me kill my black brothers." *Watts*, 394 U.S. at 706.

producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447 (emphasis added). The Court drew a distinction between "abstract teaching" of the "moral propriety or even moral necessity for a resort to force and violence," and "preparing a group for violent action." *Id.* at 448. As the Court noted, a statute that fails to draw the distinction between speech and incitement to violence "sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id.*

Then, in *Claiborne Hardware*, the Court emphatically reiterated that political speech needs broad protection—even speech that some may perceive as threatening. In that case, the Court required that "an individual h[o]ld a specific intent to further" illegal conduct before his or her speech is excepted because, in "this sensitive field" of First Amendment rights, "the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 458 U.S. at 920 (internal quotations omitted). Again, this Court demonstrated that the "true threats" exception must be drawn narrowly.

Subsequent cases addressing the "true threats" exception have only confirmed this narrow scope first outlined by this Court in *Watts*, *Brandenburg*, and *Claiborne Hardware*. For example, in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), while this Court stated that "threats to patients or their families, however communicated, are proscribable under the First Amendment," *id.* at 773, it declined to decide whether the anti-abortion posters at issue

were "true threats," since they could be avoided if the clinic merely "pull[ed] its curtains." *Id.* Notably, however, the Court struck down the portion of the injunction that prohibited all "images observable" because it "burden[ed] more speech than necessary to achieve the purpose of limiting threats to clinic patients." *Id.* The Court also struck down the bar prohibiting anyone from speaking to a person seeking services of a clinic within 300 feet of the clinic, because "[a]bsent evidence that the protesters' speech is independently proscribable (*i.e.*, 'fighting words' or threats), . . . this provision cannot stand." *Id.* at 774. *Madsen* indicates that the "true threats" exception—like the other categorical exceptions for obscenity or fighting words—is a "narrowly limited class[] of speech." *Chaplinsky*, 315 U.S. at 571.

Likewise, in *R.A.V.*, this Court struck down an ordinance prohibiting "cross burning" or placing a "Nazi swastika" or other symbol or object "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color creed, religion or gender," 505 U.S. at 380, because the ordinance "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresse[d]," *id.* at 381. Again emphasizing the narrowness and viewpoint-neutrality of the "true threats" exception, this Court explained:

> the Federal Government can [for example] criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment (protecting

> individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.

Id. at 388 (citing *Watts*, 394 U.S. at 707). But the Court warned that "the Federal Government may not criminalize . . . threats against the President that [merely] mention his policy on aid to inner cities." *Id.* at 388. To do so would unconstitutionally criminalize speech based on viewpoint.

Finally, in *Virginia v. Black*, 538 U.S. 343 (2003), this Court's most recent word on "true threats," it held that a Virginia statute prohibiting cross burning with the intent to intimidate passed constitutional muster since it banned intentional conduct rather than mere expression. The Court explained 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." *Id.* at 360 (emphasis added). To be clear, the Court reiterated: "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear of bodily harm or death*." *Id.* (emphasis added). In other words, since the statute required a showing of subjective intent, it was not unconstitutional on its face.

A plurality of the Court, however, struck down a provision specifying that any cross burning was

prima facie evidence of intent to intimidate. The plurality reasoned:

> the prima facie provision strips away the very reason why a State may ban cross burning *with the intent to intimidate*. The prima facie evidence provision permits a jury to convict in every cross-burning case . . . . The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

Id. at 365 (emphasis added). The plurality reasoned that effectively writing the subjective intent element out of the statute "would create an unacceptable risk of the suppression of ideas" since the act of burning a cross may "mean only that the person is engaged in core political speech." *Id.* Thus, *Black* is this Court's clearest articulation of the need for proof of subjective intent to threaten in a criminal threats case.

Which brings us to *Elonis*. Here, the Third Circuit's judgment—which concluded that an individual could be convicted under 18 U.S.C. § 875(c) upon only a "reasonable person's" view of what constitutes threatening speech—simply cannot be squared with this Court's jurisprudence requiring that First Amendment exceptions (and especially that for "true threats") be narrowly drawn. *See, e.g.*, *Chaplinsky*, 315 U.S. at 571-72. Indeed, requiring only an objective test would sweep any statement by a political protestor (like Charles Evers) reasonably *perceived* as threatening—likely by a member of the majority on a controversial political issue—outside of

the protective realm of the First Amendment. Justice Marshall rightly noted the danger of a broad threats exception in his concurrence in *Rogers v. United States*, 422 U.S. 35 (1975), a case dealing with a prosecution under 18 U.S.C. § 871 for threatening the President,

> [u]nder the objective construction . . . the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. . . . charging the defendant with the responsibility for the effect of his statements on his listeners. . . . [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech."

Id. at 47. For similar reasons, applying the "true threats" exception to such a wide swath of speech is also contrary to this Court's caselaw requiring "precision of regulation." *See Claiborne Hardware*, 458 U.S. at 916. Therefore, a subjective component to the statute is required because "[i]n this nebulous area of hybrid activity, composed of both protected and unprotected activity, lurks the potential for the abrogation of protected freedoms in the name of reaching unprotected behavior." *See* Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 743 (1999). Since requiring only an objective determination would place speech that has been traditionally protected beyond the reach of the First Amendment,

the criminal statute would be imprecise and overly broad.

Finally, the chilling effect on political protest that would likely result from an objective-only statutory standard is also contrary to this Court's cases protecting even the most "vituperative, abusive, and inexact," language "of the political arena." *Watts*, 394 U.S. at 708. Where this Court has stated that "debate on public issues should be uninhibited" and "robust," *id.*, an objective-only requirement will "necessarily lead to self-censorship by speakers or actors, who are forced to guess where the line between protected and unprotected speech or expressive conduct will be drawn," *see* Blakey & Murray, *supra* at 1063. This Court explained the concern with chilling speech in *Virginia v. Hicks*, 539 U.S. 113 (2003):

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."

Id. at 119 (internal citations omitted). The statute at issue should not be read to allow interference with the "uninhibited marketplace of ideas." *Id.*

In short, without requiring proof of a subjective intent to threaten in order to convict under 18 U.S.C. § 875(c), "protestors will necessarily lack the ability to gauge accurately the extent to which a 'context'

created by others will be taken into account—well after the fact—by a court or a jury in evaluating their speech or expressive conduct." Blakey & Murray, *supra* at 1064. Therefore, "protestors who *should be protected by the First Amendment* will be inevitably and justifiably afraid of crossing the murky line between vociferous protest into the areas of 'true threat.'" *Id.* A subjective intent component is necessary to comport with this Court's jurisprudence and to assure that political protest—vital to the history and tradition of this country—is not chilled or silenced altogether.

II. REQUIRING PROOF OF A SUBJECTIVE INTENT TO THREATEN FOR CONVICTION UNDER 18 U.S.C. § 875(C) IS ALSO COMPELLED BY BEDROCK PRINCIPLES OF FEDERAL CRIMINAL LAW

Federal criminal law is modeled after the common law, which treated crime as "a compound concept, generally constituted only from concurrence of an evil-meaning mind . . . [and] an evil-doing hand . . . ." *See Morrissette v. United States*, 342 U.S. 246, 251 (1952). William Blackstone described the common law conception of crime this way:

> [A]s a vitious [sic] will without a vitious act is no civil crime, so, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.

WILLIAM BLACKSTONE, COMMENTARIES *21.

With the common law as a guide, federal criminal offenses generally prescribe both an action and a related state of mind. Three states of mind are typically found in federal criminal statutes: "'intent' (purpose), 'knowledge' (conscious awareness), . . . 'recklessness' (conscious risk taking)" and in some cases "negligence may also be a lesser form of state of mind," but it presents "conceptual difficulties." *See* Blakey & Murray, *supra* at 1045; *see also, e.g.*, *United States v. U.S. Gypsum*, 438 U.S. 422, 444 (1978) (finding that "concepts of recklessness and negligence have no place" in liability for antitrust offenses). Generally, courts will "presume a scienter requirement" for each element of a criminal offense. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71-73 (1994) ("*Morissette* . . . instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.").

Indeed, even silence as to the state of mind of a particular element of a statute does not mean that no *mens rea* is required. Given that federal criminal law is rooted in the common law, strict liability offenses are the exception, not the rule. *See U.S. Gypsum Co.*, 438 U.S. at 437-38. Where a statute is ambiguous as to state of mind, the general rule imposed by this Court is that proof of "knowledge" is required as to conduct, *United States v. Bailey*, 444 U.S. 394, 408 (1980) ("[T]he cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to

support a conviction."), and "knowledge" is required as to factual circumstances if they establish liability, *see Staples v. United States*, 511 U.S. 600, 615-16 (1994). In certain classes of cases, however, "heightened culpability has been thought to merit special attention." *Bailey*, 444 U.S. at 405.

Since the common law "disfavored" strict liability offenses, without any evidence that Congress intended to override that rule, some finding of scienter is required for conviction under 18 U.S.C. § 875(c). *See U.S. Gypsum*, 438 U.S. at 438 ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."). And this Court has articulated the general rule that "knowledge" is the *minimum* required as to a desired result (here, fear or disruption) when the statute is otherwise silent. *See Morrissette*, 342 U.S. at 252 (requiring that a "scienter" must be read into common law-type statutes silent as to state of mind); *Bailey*, 444 U.S. at 408 (reiterating that knowledge is required for statutes lacking state of mind); *U.S. Gypsum*, 438 U.S. at 444 n.21 (requiring knowledge as to result). Requiring an objective-only ("reasonable person" or "negligence") standard to convict under 18 U.S.C. § 875(c), instead of the baseline "knowledge" standard, ignores these traditional notions of criminal law. *See, e.g.*, *Rogers*, 422 U.S. at 47 (Marshall, J., concurring) (describing an "objective interpretation" of what is a threat as a "negligence standard, charging the defendant with responsibility for the *effect of his statements on his listeners*"

(emphasis added)). Thus, the objective-only standard adhered to by the Third Circuit below is insufficient to convict an individual under the statute as a matter of well-established criminal law.

Indeed, here, basic notions of criminal justice cry out at least for a scienter requirement. But as this Court noted in *Bailey*, "heightened culpability has been thought to merit special attention" in certain cases. 444 U.S. at 405. This is just such a case. The answer to the "why purpose/intent" question lies in the unique and personal nature of First Amendment rights. *See supra* Section I. A "subjective intent, or purpose, requirement serves to protect listeners from either fear or disruption while at the same time permitting a *maximum amount of free speech*—speech that will be, in fact, largely free from the self-censorship[.]" *See* Blakey & Murray, *supra* at 1067 (emphasis added). As Justice Marshall explained in his *Rogers* concurrence, in the "sensitive area" of First Amendment rights, an overly stringent "degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." 422 U.S. at 47-48 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). A mere knowledge requirement would be overly restrictive in this "sensitive area" of First Amendment rights. Thus, the correct formulation of 18 U.S.C. § 875(c) requires proof of subjective intent to threaten, which comports with traditional notions of federal criminal law and protects more speech than an objective ("negligence") requirement, or a knowledge ("general intent") standard.

CONCLUSION

This case implicates the most basic American freedom—the right to openly oppose government policies or to advocate for change, and to encourage others to follow suit. For the reasons described above, this Court's First Amendment jurisprudence, as well as bedrock principles of federal criminal law, require proof of subjective intent to threaten in order to convict under 18 U.S.C. § 875(c). To require only an objective ("reasonable person" or "negligence") standard would allow those who seek to squelch political protest to use the statute as a sword, silencing those who disagree with their opinions or policies. Thus, an objective-only test would run contrary to this Court's charge, in the context of the First Amendment, to interpret statutory language "against the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Watts*, 394 U.S. at 708.

Amici respectfully request that this Court rule in favor of Mr. Elonis and adhere to its precedent by protecting political speech, which is, indeed, "at the core of what the First Amendment is designed to protect." *Black*, 538 U.S. at 365.

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