No. 13-983

**In The**
# SUPREME COURT OF THE UNITED STATES

ANTHONY DOUGLAS ELONIS,

Petitioner,

v.

UNITED STATES,

Respondent.

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

Michael E. Rosman
*Counsel of Record*
Christopher J. Hajec
Center for Individual Rights
1233 20th St., NW, Suite 300
Washington, DC 20036
rosman@cir-usa.org
(202) 833-8400

*Attorneys for Amicus Curiae*

## QUESTION PRESENTED

Under this Court's clear statement doctrine, grounded in important federalism concerns, should the term "threat" in 18 U.S.C. § 875(c) be interpreted narrowly, to require proof of a subjective intent to threaten?

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**CONSTITUTIONAL AND STATUTORY AUTHORITIES**

## INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Rights is a public interest law firm based in Washington, D.C. It has a longstanding interest in issues of federalism. It litigated *United States v. Morrison,* 529 U.S. 598 (2000), and has participated in a number of other litigations, representing both *amici* and parties, concerning the proper scope of the federal government's reach under the Commerce Power and other enumerated powers. The Center for Individual Rights has an interest in this Court's interpreting 18 U.S.C. § 875(c) in this case to minimize that statute's intrusion into an area of traditional state concern. The Center also has an interest in the continued vitality of the clear statement doctrine, under which ambiguous terms in statutes are to be read to limit federal intrusion into areas of traditional state authority, as a safeguard of our nation's federal system of government.

---

[1] This brief is filed with both parties' consent evidenced by their blanket consent letters filed with this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

This Court's interpretation of 18 U.S.C. § 875(c) on the question of whether that provision requires proof of a subjective intent to threaten, or is satisfied merely by proof of an objective intent, should be guided by important considerations of federalism.

Under the clear statement doctrine, a federal statute should not be read to expand federal incursion into an area of traditional state concern without a clear statement to that effect by Congress. Here, whether the text of § 875(c) requires proof of a subjective or merely an objective intent to threaten is ambiguous, and courts have differed on the question. Given this ambiguity, and the divergent understandings of the statute's text, the statute is anything but a clear statement by Congress. Yet to read the statute as authorizing convictions when no subjective intent to threaten has been proven would expand federal activity much further into the traditional state domain of defining and punishing crimes against persons than would reading the statute to require proof of a subjective intent to threaten.

The clear statement doctrine thus entails the narrower interpretation of the statute, in the interests of safeguarding the federal structure of our system of government.

## ARGUMENT

### I. UNDER THE CLEAR STATEMENT DOCTRINE, AN AMBIGUOUS FEDERAL STATUTE IS TO BE READ TO MINIMIZE FEDERAL INCURSION INTO AN AREA OF TRADITIONAL STATE CONCERN.

Section 875(c) makes it a federal crime for any person to "transmit in interstate or foreign commerce any communication containing …. any threat to injure the person of another…." The word "threat" is left undefined. Also, the jurisdictional sweep of this provision is very broad; for example, it is likely to be interpreted to ban "threats," however defined, in all, or virtually all, communications over the internet, even those between next-door neighbors. *See, e.g., United States v. MacEwan,* 445 F.3d 237, 245-46 (3d Cir. 2006) (holding that downloading images of child pornography from the internet was within the power of Congress to regulate under the Commerce Clause, regardless of whether the images were transmitted across state lines); *United States v. Kammersell,* 196 F.3d 1137, 1139 (10th Cir. 1999) (holding a bomb threat communicated through the internet from one person in Utah to another person in Utah sufficient to sustain federal jurisdiction under § 875(c) because the instant message sent by defendant was automatically routed to a Virginia server before being rerouted to the recipient's computer in Utah).

Yet such crimes as threats and assaults have traditionally been left to the states to define and punish. As this Court has explained, "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez,* 514 U.S. 549, 561 n.3 (1995) (inter-

nal citations and quotation marks omitted). Thus, "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Id.* (internal citations and quotation marks omitted).

To protect that "sensitive relation," *inter alia,* the clear statement doctrine has been developed by this Court. As this Court held in *United States v. Bass,* 404 U.S. 336, 349 (1971), "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." In particular, "we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* On this basis, this Court in *Bass* interpreted an ambiguous federal statute prohibiting the possession of firearms by felons narrowly, requiring in each case proof of a connection with interstate commerce. *Id.* at 350.

In *Jones v. United States,* 529 U.S. 848, 858-59 (2000), this Court read another federal criminal statute narrowly for the same reason, interpreting an unclear federal arson statute as not applying to arsons of owner-occupied homes not actively used in interstate commerce because "arson is a paradigmatic common-law state crime" and the federal-state balance would be affected by a broader reading.

Drawing on these precedents, last Term this Court overturned a conviction under the Chemical Weapons Convention Implementation Act because of federalism concerns. *Bond v. United States,* 134 S. Ct. 2077 (2014). In that case, the petitioner had been

convicted under the Act because she had placed dangerous chemicals on objects likely to be touched by her best friend, who also happened to be her husband's paramour. *Id.* at 2085. This Court, finding insufficient indication that Congress intended the statute to reach such conduct, declined to extend it so far. Noting that "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute," and finding the statute's definition of "chemical weapon" not a clear statement of Congress's intent to criminalize simple assaults carried out with chemicals, this Court declined to interpret the statute so broadly as to cover such assaults. *Id.* at 2090-93. As this Court explained, "the most sweeping reading of the statute would fundamentally upset the Constitution's balance between national and local power," and it declined to conclude that Congress had intended such a result without a clearer statement that it had. *Id.* at 2093.

## II. IF THE WORD "THREAT" IN § 875(C) DOES NOT CLEARLY INCLUDE A SUBJECTIVE INTENT TO THREATEN, IT IS, AT MOST, AMBIGUOUS.

Petitioner convincingly shows in his brief that the normal understanding of the word "threat" actually *includes* a subjective intent to threaten. Petitioner's Br. 22-24. At *most,* then, Congress's failure to state explicitly that a subjective intent to threaten is an element of § 875(c), and its reliance on the unadorned word "threat," creates an ambiguity about what level of intent is required.

Before *Virginia v. Black,* 538 U.S. 343 (2003) (which bears on the level of intent required in § 875(c) under the First Amendment), was decided, courts interpreted "threat" under § 875(c) and in similar provisions divergently with respect to intent. Whichever view is right as a matter of statutory interpretation *irrespective* of federalism (or First Amendment) concerns, the very disagreement shows that Congress made anything but a clear statement.

Before *Black* was decided in 2003, some federal circuit courts, interpreting this bare word "threat," took the view that the intent that must be shown to prove a violation of § 875(c) was merely the intent to transmit a communication containing what a reasonable person would understand as a threat to injure the person of another. For example, the First Circuit adopted this interpretation in *United States v. Whiffen,* 121 F.3d 18 (1st Cir. 1997), mainly on policy grounds. The court held that this interpretation would preclude prosecutions of threats perceived only by unusually sensitive individuals, and also that it made it easier for the government to prosecute people successfully, explaining that "[t]his approach [] protects listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten" or the government cannot prove such intent. *Id.* at 21. *See also United States v. Himelwright,* 42 F.3d 777, 782 (3d Cir. 1994) (pronouncing the objective standard in summary fashion); *United States v. Darby,* 37 F.3d 1059, 1065-66 (4th Cir. 1994) (citing a Fourth Circuit presumption and accordingly presuming that the ob-

jective standard applied because the statute did not explicitly state that specific intent was required).

Other circuits (or, in the case of the Fourth, the same circuit in an earlier case) took a more stringent view, holding that the government must prove that a defendant had a subjective intent to threaten. *E.g., United States v. Twine,* 853 F.2d 676, 680-81 (9th Cir. 1988) (adopting the subjective standard because the importance of stopping threats against the president, which in an earlier case had supported adopting the objective standard for a statute criminalizing such threats, was lacking with respect to § 875(c), which criminalized threats generally); *United States v. Dutsch,* 357 F.2d 331, 333 (4th Cir. 1966) (stating in support of an admissibility holding that "a conviction under 18 U.S.C. § 875(c) requires a showing that a threat was intended")[2]; *United States* v. *Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974) ("a conviction under 18 U.S.C. 875(c) requires proof that the threat was made knowingly and intentionally") (citing *Dutsch, supra).*

Other courts have interpreted the term "threat" in a comparable federal statute with similar divergency. *Compare, e.g., United States v. Metzdorf,* 252 F. 933, 934, 938 (D. Mont. 1918) (reading the term "threat" in 18 U.S.C. § 871, which as then phrased made it a crime to deposit in the mail material containing "any threat to take the life of or inflict bodily harm upon the President of the United States" narrowly, holding that "[a] threat is an avowed present

---

[2] In *Darby, supra,* the Fourth Circuit disagreed with its earlier statement, dubiously characterizing it as a mere *dictum*.

determination or intent to injure presently or in the future. In threats to influence, existence of intent to execute is not essential; in the threats denounced by the [instant] part of the statute, it is otherwise")[3] *and United States v. Patillo,* 431 F.2d 293, 297-98 (4th Cir. 1970) ("[A] threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President.... There is no danger to the President's safety from one who utters a threat and has no intent to actually do what he threatens") *with U.S. v. Hoffman,* 806 F.2d 703, 707 (7th Cir. 1986) (adopting the objective test respondent urges here with respect to § 871 "[b]ecause sec. 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself") (internal quotation marks and citations omitted) *and United States v. Ogren,* 54 M.J. 481, 486 (C.A.A.F. 2001) (adopting the objective test for § 871 because "[t]he objective test more closely tracks Congress's intent in passing § 871 than the subjective test").

That federal courts have adopted such divergent views about what level of intent must be proven under both § 875(c) and a comparable provision amply shows that Congress here spoke ambiguously.[4]

---

[3] It is worth noting that the difference between "threats to influence" and other threats on this point is relevant to any argument, based on *expressio unius,* that the subsections of § 875 that bracket § 875(c) explicitly require specific intent; in both, it is the intent to "influence." § 875(b), (d); *Metzdorf,* 252 F. at 937.

[4] Another consequence of this ambiguity may be that this Court should avoid the First Amendment issues petitioner raises en-

## III. THE SUBJECTIVE READING OF § 875(C) MINIMIZES THE INCURSION OF THAT STATUTE INTO AN AREA OF TRADITIONAL STATE CONCERN.

Threats that meet the objective test (whether or not they also are subjectively intended) are a wider circle of threats than those that meet the subjective test. For many threats that meet the objective test might not meet the subjective test, whereas all or almost all that meet the latter meet the former.

Here, for example, petitioner's Facebook posts might be regarded as threatening by a reasonable person, but it is a further, and by no means clear, question whether he subjectively intended them as threats. *See also Ogren,* 54 M.J. at 482-83, 488 (noting that whereas an incarcerated Naval seaman recruit's graphically descriptive statements that he would kill the president would be perceived as threatening by a reasonable person, it was a further question whether he only intended to "blow off steam" and express displeasure at his incarceration).

By contrast, it is hard to imagine a threat that meets the subjective test but not the objective one. A defendant's subjective intent to threaten by given words or actions would not be enough to communi-

---

[Footnote continued from previous page]

tirely, by interpreting the statute in his favor. *See, e.g., Jones,* 529 U.S. at 857 ("'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter'") (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408 (1909)).

cate a threat, unless a reasonable person would perceive the words or actions as threatening, except in any rare instances where an unreasonable interpretation by an observer happened to align with a real but ineptly-communicated menace from the defendant.

Also, the subjective standard is harder to meet than the objective one, *see, e.g., Whiffen,* 121 F.3d at 21, and thus requiring proof of subjective intent will limit federal prosecutions in this area of traditional state concern, minimizing disruption of the traditional federal-state balance.

## CONCLUSION

Because Congress has made no clear statement in § 875(c) about what level of intent to threaten must be proven, but left the standard ambiguous, this Court should adopt the narrower, less-intrusive subjective test on federalist grounds. Accordingly, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

Michael E. Rosman
*Counsel of Record*
Christopher J. Hajec
Center for Individual Rights
1233 20th St. NW, Suite 300
Washington, DC 20036
rosman@cir-usa.org
(202) 833-8400

*Attorneys for Amicus Curiae*

August 22, 2014