This sample is a 100% self-edited paper written in the style of a Supreme Court dissent. It is based on the actual briefs and oral arguments in the Supreme Court case *Elonis v. United States*. It responds to a majority opinion written by a classmate. As of the time that I uploaded this sample to OSCAR, the Supreme Court had not issued its opinion in the case.

SUPREME COURT OF THE UNITED STATES

No. 13-628

ANTHONY DOUGLAS ELONIS, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[December 16, 2014]

JUSTICE GLOSSON dissenting.

I disagree with the Court's conclusion that the government may, consistent with the First Amendment, punish citizens for engaging in speech that inadvertently threatens others. I would require the government to show that Petitioner subjectively intended his speech to be threatening before his conviction could be sustained. I would, therefore, reverse the judgment of the Court of Appeals.

I

It behooves this Court, before deeming a class of

speech unprotected by the First Amendment, to first consider the purposes for which that Amendment was adopted. "Freedom of speech," wrote Benjamin Franklin, "is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." Benjamin Franklin, On Freedom of Speech and the Press, Pennsylvania Gazette, 17 November 1737.

Our founding generation was intimately familiar with the evils of government suppression of unpopular religious and political ideas. They also recognized that freedom of speech, like many other rights, was always in peril for those outside the refuge of the mainstream:

> When a majority is included in a faction, the form of popular Government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens . . . . [A] pure Democracy . . . can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual.

The Federalist No. 10 (Madison). As a Federalist, Madison sought to mitigate these dangers by fashioning a government of horizontal and vertical

checks and balances. Still, many questioned whether that system, by itself, could adequately safeguard especially vulnerable rights for those lacking the numbers to represent their interests in the halls of Congress. Consequently, Madison drafted, and our Nation adopted, the Bill of Rights to explicitly guarantee certain core liberties against government suppression. The first among these amendments contains the following categorical language: "Congress shall make *no law* . . . abridging the freedom of speech." U.S. Const., amend. I. (emphasis added).

In the intervening years, this Court has construed that text to mean something perhaps less categorical than its language might initially suggest. Even so, we have always maintained that these First Amendment carve-outs are "well-defined and narrowly limited," *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942), such that "within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. *New York v. Ferber*, 458 U.S. 747, 763-64, 102 S. Ct. 3348, 3358, 73 L. Ed. 2d 1113 (1982). In judging the weight of those expressive interests, we must account not only for the speech potentially denied protection, but also for any chilling effect on protected speech—an effect "the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom," *United States v. Alvarez*, 132 S. Ct. 2537, 2548, 183 L. Ed. 2d 574 (2012). That is a terrifically high bar to clear before speech may be viewed as outside the First Amendment's protection.

To ensure that our First Amendment exceptions remained closely circumscribed within these strictures, until today, "the Court emphasize[d] *mens rea* requirements that provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *Id*. (BREYER, J., concurring) at 2553.

I have deep concerns about what the Court has done in abandoning these principles in favor of a negligence standard. Consistent with the First Amendment's role in protecting unpopular speakers, our precedent cautions that "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints," *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 80, 103 S. Ct. 2875, 2887, 77 L. Ed. 2d 469 (1983). And yet, the Court's newly-announced negligence standard forces speakers to do something uncomfortably akin to that: it requires speakers to ponder whether the meaning they ascribe to their words is, to the mind of an "ordinary" citizen, reasonable. Under the Courts ruling, it is not enough that a lyricist in fact believes that her speech is nonthreatening art. What matters, in the Court's estimation, is whether the rest of society imagines that a "reasonable" speaker might agree. I find this result to be profoundly offensive to First Amendment principles.

II

Not only is the Court's negligence standard diametrically opposed to the basic counter-majoritarian impetus for the First Amendment, it is

also fundamentally inconsistent with our First Amendment jurisprudence.

Notwithstanding the majority's dismissal of Petitioner's references to our incitement jurisprudence, our true threats doctrine branches off from incitement cases, and it is necessary to consider the contours of each body of law in determining the level of *mens rea* that must be present to trigger the First Amendment exceptions.

Our true threats jurisprudence finds its roots in *Bridges v. California*. There, this Court overturned a contempt of court conviction for a defendant who threatened to shut down the Port of Los Angeles in retribution for a judge's unfavorable ruling in unrelated litigation. *Id.*, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941). We emphasized that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Ibid.* We recognized the dangers of "disrespect for the judiciary" and "disorderly and unfair administration of justice," but we nevertheless held that these evils could not justify even a "very short" moratorium on speech concerning an ongoing case.[1] *Ibid.*

Bridges' constitutional analysis arose out of the nebulous 'clear and present danger test' from our

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[1] Indeed, our dedication to protecting speech even at the risk of prejudicing ongoing litigation stands in stark contrast to strict *sub judice* rules in much of the Western world, further underscoring our usual reticence to limit First Amendment protections.

incitement cases. See *Schenck v. United States*, 249 U.S. 47, 48, 39 S. Ct. 247, 247, 63 L. Ed. 470 (1919). We have since refined our incitement doctrine in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), holding that:

> [T]he 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. The defendant in that case, a Ku Klux Klan member, had complained of "suppression" of the "Caucasian race," and had issued a vague statement warning that "there might have to be some revengence taken." We found that his speech did not constitute incitement, and overturned his conviction. *Ibid.* Concurring, Justice DOUGLAS extolled the heightened incitement formulation, noting that under the clear and present danger standard, unserious threats were "made serious only by judges so wedded to the status quo that critical analysis made them nervous." *Id.* at 454 (DOUGLAS, J., concurring).

That same year, we also overturned a threat conviction in *Watts v. United States*, 394 U.S. 705, 706, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664 (1969). In *Watts*, the defendant was a draft protester. He had stated that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.*, at 705. Addressing the statute on which the defendant's

conviction was sustained, we reasoned that "we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664 (1969) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964)). Although some lower courts had discussed the importance of willfulness to the threat analysis, we reserved that question. *Ibid.* Nonetheless, we noted that the defendant laughed when making his statement, and we concluded that the First Amendment protected the defendant's "crude" and "offensive" statement. *Ibid.*[2]

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[2] The majority triumphantly asserts that "[w]e limited our inquiry to an objective evaluation of the statement and did not look to the speaker's subjective intent to threaten." Infra at 20. That characterization reads too much into our analysis, given the improbability that a speaker who subjectively intended to threaten the President would do so in the factual setting in *Watts*, particularly given our deliberate recounting of the defendant's laughing demeanor.

Moreover, it is entirely reasonable that, given the facts in *Watts*, we would settle the case on the threshold inquiry of whether a threat was *objectively conveyed*. If not, even had the speaker subjectively intended a threat, the First Amendment would

In *N.A.A.C.P. v. Claiborne Hardware*, we found that the Constitution protected a defendant's warning to anyone who broke a boycott of white-owned stores that "we're gonna break your damn neck." *Id.* 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982). The defendant's compatriots included a group of "deacons" who surveiled boycott-breakers and circulated their names in a group publication that "branded [the named individuals] as traitors." *Ibid.* We acknowledged that the defendant's speech "might have been understood as . . . intending to create a fear of violence," *id.* at 927, but we ultimately concluded that the defendant's "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg*." *Id.* at 928.

We again drew on *Brandenberg* in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). There, we overturned a statute providing that cross burning constituted prima facie evidence of an intent to threaten, explaining that:

> "True 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 . . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or

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protect his objectively nonthreatening speech. We do not convict citizens for thoughtcrimes in this country.

> group of persons *with the intent* of placing the victim in fear of bodily harm or death.

Id. at 359-60 (emphasis added). This language, read alongside the preceding cases, illuminates the *mens rea* component of the true threats doctrine. It is both unambiguous and fully consistent with our First Amendment precedent.

Our incitement and true threats precedents articulate speech-protective principles that are in tension, if not wholly incompatible, with the Court's novel negligence standard. In particular, *Brandenberg* explicitly imposes an intent requirement, and Justice DOUGLAS' concurrence in that case illustrates the role that subjective intent can play in policing the boundaries of the incitement exception. *Bridges* stands for the principle that even superficially minor infringements on freedom of speech present serious First Amendment problems. And although the *Watts* Court did not reach the relevance of willfulness, its observation that the defendant made his statement laughingly suggests that subjective intent would have been a crucial inquiry had the Court been presented with an opportunity to reach it. Finally—and perhaps most compellingly—*Claiborne Hardware* affirms that the mere fact that a statement "might have been understood" as a threat does not remove it from First Amendment protection. In light of this Court's speech-protective approach in each of those cases, our references to subjective intent in *Black* are wholly unsurprising and doctrinally appropriate.

Indeed, while the majority accuses the Petitioner

of embarking on a fishing expedition in his reliance on *Black*, one could be forgiven for wondering whether that label might not be better applied to the Court's own jural eisegesis. The Court fixates on our use of the word "encompass," imagining that it alludes to a separate species of true threats that arise in the absence of specific intent. This is sophistry. Our opinions, including those by *Black's* author, commonly use that word in conjunction with an exhaustive delineation of a concept. E.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 162, 124 S. Ct. 619, 671, 157 L. Ed. 2d 491 (2003) overruled by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (joint opinion of SEVENS, J., and O'CONNOR, J.) ("The term 'Federal election activity' encompasses four distinct categories of electioneering."); *Nw. Airlines, Inc. v. Duncan*, 531 U.S. 1058, 121 S. Ct. 650, 148 L. Ed. 2d 571 (2000) (O'CONNOR, J., dissenting from denial of certiorari) (observing that a statutory term rightly "encompasses" only its interpretation by the lower court, and contrasting that interpretation with a "broader" one by a different circuit).

The Court seeks to shore up its shaky interpretation by asserting that "[i]t would require adding language we did not write to read the passage in *Black* as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of intent to commit an act of unlawful violence." *Ante* at 23.

But that reading does not require adding one iota more than was written; the quoted text holds precisely that meaning without the majority's

superfluous verbiage. Had we wanted to discuss the mere intent to utter words, we could have used "state" or "declare" or "articulate" or some equivalent term, but instead, we selected "communicate"—a word that means "to impart knowledge of; make known" and "to give to another; impart; transmit."[3] Indeed, it is doubtful that any other single word could have better encapsulated the intention that another person *perceives* the threat, as distinct from the intent merely to utter the threat in the first place.[4]

The majority does not even deal with *Claiborne Hardware*'s acknowledgment that the speech at issue "might have been understood as . . . intending to create a fear of violence." The Court's opinion references that case only once in a parenthetical citation. *Ante* at 27. That lone reference confusingly emphasizes *Claiborne Hardware*'s pedestrian observation that, in a hypothetical incitement case, "a substantial question would be presented whether [the defendant] could be held liable for the consequences" of someone else's unlawful conduct. See *ante* at 27 (quoting *Claiborne Hardware Co.*, 458 U.S. at 928). This "substantial question," of course, is at the heart of *every* incitement analysis. The majority's reference to it simply begs the question of whether specific

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[3] REFERENCE DICTIONARY, *Communicate*, *available at* http://dictionary.reference.com/browse/communicate.

[4] Indeed, the Court today apparently distinguishes 'communicative value' from mere 'expressive value.' See *ante* at 19 ("Any expressive value that the speaker means to communicate can be phrased in a different way, with little or no loss of communicative value.").

intent plays a role in our First Amendment analysis.

Finally, the Court seeks to justify its standard by reference to *R.A.V. v. St. Paul*, in which we stated that one reason that true threats are outside First Amendment protection is to "protect[] individuals from the fear of violence." *Id.*, 505 U.S. 377, 388, 112 S. Ct. 2538, 2546, 120 L. Ed. 2d 305 (1992).[5] But the Court's adopted standard does not protect individuals from fear of violence either; it asks only whether the reasonable speaker would have intended to place her listeners in fear of harm, not whether the reasonable listener would in fact be in fear of harm.

I believe the Court's reasoning in general, and its negligence standard in particular, is unfounded and irreconcilable with our First Amendment precedent.

III

Consistent with the cases discussed above, I would reject the government's attempt to lower the bar for threat liability to an objective intent standard. I find Justice MARSHALL'S concurrence in *Rogers v. United States* particularly persuasive on this score:

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[5] It is worth noting that this passage discusses a necessary, but not sufficient, condition to depriving speech of First Amendment protection; it is clear that the government cannot prohibit all speech that puts individuals in fear of violence. For instance, actors rehearsing in a park for a play involving a bank robbery may inadvertently place passers-by in fear, but the government could not forbid rehearsing lines in public forums.

> Under 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. In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes . . . .

Id., 422 U.S. 35, 47, 95 S. Ct. 2091, 2098, 45 L. Ed. 2d 1 (1975) (MARSHALL, J., concurring) (citations omitted). Indeed, standards that condition liability on factors outside a speaker's subjective control run the risk that:

> 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.

Virginia v. Hicks, 539 U.S. 113, 119, 123 S. Ct. 2191, 2196, 156 L. Ed. 2d 148 (2003) (citations omitted).

These harms are not constitutionally permissible. Although, as the majority notes, we run such risks in

applying a negligence standard to the dissemination of obscenity, that treatment is premised on considerations that are inapposite here. Unlike potentially threatening speech, potentially obscene speech typically derives from a profit motive, and our theory (right or wrong) has been that the risks of chilling commercial speech are minimal because the profit motive gives commercial speech a robustness not shared by other types of expression. Cf. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61, 65 (1973).

I would heed Justice MARSHALL'S warnings and take this opportunity to hold that the government must show subjective intent to threaten before it may punish a speaker for expressing herself. The First Amendment was, from the beginning, an *individual* right. It protects the "obnoxious individual," Federalist No. 10, against the whims and will of the majority. Its protections, therefore, ought not turn on what an "average," or "reasonable," or "ordinary" person might mean by the same words.

This is not to suggest that a speaker can never exceed the boundaries of constitutionally protected speech by issuing true threats. Instead, I believe that that boundary must be drawn at the actual intent of the individual speaker, rather than by reference to majoritarian principles. The government might still introduce much of the same evidence as it would under an objective standard to show, beyond a reasonable doubt, that the speaker *herself* intended her speech to be a threat. But in modern society, where much of our dialogue occurs in easily-decontextualized online settings, it is more important

than ever to confine our true threats doctrine to subjectively intentional threats. The Court's negligence standard simply does not suffice to protect the freedom of speech that is foundational to all of our other constitutional liberties. There is no question that many will find this particular defendant's speech repulsive, and perhaps even frightening. But this fact alone cannot suffice to deprive him of the First Amendment's guarantee of free speech. Like all citizens of this country, he should have the chance to persuade a jury that his speech did not reflect an actual attempt to threaten anyone. That the Court refuses to recognize this right serves to affirm the maxim that "*bad facts beget bad law*."

For all these reasons, I respectfully dissent.