

Comment,
THE IMPLICATIONS OF THE U.S.
SUPREME COURT'S DECISION IN *ELONIS*
V. UNITED STATES FOR VICTIMS OF
DOMESTIC VIOLENCE

A battered woman suffering at the hands of her husband finally, with her young children, escapes her husband's reign of terror. Only a few days after making it to safety, she learns her husband is posting on his Facebook about her; the posts detail methods in which her husband could have killed her and mock an order of protection a court granted her against her husband. Imagine the fear this woman is experiencing. For Mrs. *Elonis*, this fear was reality.¹

Section 875(c) of article 18 of the U.S. Code prohibits the transmission "in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another."² The U.S. Supreme Court handed down a ruling in June 2015 in the case of *Elonis v. United States* addressing this statute.³ In this case, the Supreme Court addressed the interpretation of language in 18 U.S.C. § 875(c), specifically whether conviction under the statute requires the defendant to possess a subjective intent to threaten the victim or whether a reasonable person in the victim's position, considering all context, would feel threatened (an objective intent standard).⁴ Furthermore, the Court had to decide if an objective standard is sufficient for conviction under the statute, whether it is a permissible standard under the First Amendment.⁵

The defendant in *Elonis v. United States* was charged with making threatening statements under 18 U.S.C. § 875(c) against individuals other than his estranged wife;⁶ however, the Facebook posts directed at Mr. *Elonis*' estranged wife are what make the outcome of this case so troublesome. Victims of do-

¹ *Elonis v. United States*, 575 U.S. ____ 1, 1-6 (June 2015).

² 18 U.S.C. § 875(c) (2015).

³ See generally *Elonis*, 575 U.S. ____.

⁴ See *id.* at 1.

⁵ *Id.*

⁶ *Id.* at 6.

mestic violence face the highest level of lethality when leaving their abusers.⁷ The Supreme Court decision in *Elonis v. United States* held that a defendant can only be convicted under 18 U.S.C. § 875(c) if he or she subjectively intends the communication made to be a true threat.⁸ This interpretation of the statute places victims of domestic violence at great risk. If a woman has left her abuser and he posts content on Facebook or other social media platforms which describe ways to kill or cause bodily harm to his estranged partner, the woman has no recourse under 18 U.S.C. § 875(c) if the prosecution cannot prove beyond a reasonable doubt that her abuser's mens rea rises to the level of intent for the statements to be true threats. With the highest point of lethality in an abusive relationship being at the time of separation, victims of domestic violence need statutes like 18 U.S.C. § 875(c) to be interpreted as requiring an objective intent standard to provide them with a remedy against their abusers using social media platforms to make true threats toward them.

This Comment will provide an in-depth description and analysis of the Supreme Court's decision in *Elonis v. United States*. Part I will provide the procedural history of the case including arguments made by each side in briefs submitted to the Supreme Court. Part II will explain the *Elonis* decision, providing insight into the majority opinion as well as Justice Alito's concurrence and Justice Thomas' dissent. Finally, Part III will address how the outcome of *Elonis v. United States* fails victims of domestic violence, potential negative implications of this outcome, and a better standard the Supreme Court should have adopted in its decision.

Part I

In May 2010, Anthony Douglas Elonis and his wife separated, and his wife took their two young children to live with her.⁹ Shortly after Mrs. Elonis left, Mr. Elonis began listening to rap music regularly and posting his own rap lyrics to his

⁷ Amy Karan & Lauren Lazarus, *A Lawyer's Guide to Assessing Dangerousness for Domestic Violence*, 78 FLA. B.J. 55, 56 (Mar. 2004).

⁸ *Elonis*, 575 U.S. ___ at 13.

⁹ *Id.* at 1.

Facebook page, which was listed under the name Tone Dougie.¹⁰ Many of the lyrics posted by Mr. Elonis contained violent, graphic content.¹¹ Near Halloween of that same year, Mr. Elonis posted a photo of himself and a co-worker preparing for a Halloween Haunt hosted by their employer where Mr. Elonis held a toy knife to his co-worker's throat.¹² Accompanying the photograph was the caption, "I wish."¹³ The co-worker pictured with Mr. Elonis previously made sexual harassment complaints against Mr. Elonis to their company's human resources department.¹⁴ Although Mr. Elonis was not Facebook friends with the co-worker in the picture and did not tag her in the photograph, his employer's chief of security supervisor saw the photograph and immediately terminated Mr. Elonis' employment.¹⁵ Following his termination, Mr. Elonis wrote a Facebook post directed at the safety of the patrons and staff of his former employer.¹⁶ This Facebook post served as the basis for Count I of Mr. Elonis' indictment under 18 U.S.C. § 875(c).¹⁷

Mr. Elonis later posted to his Facebook wall the lyrics of a satirical sketch about the legality of discussing a plan to kill the President of the United States rewritten to explain the legality of discussing a plan to kill his estranged wife.¹⁸ His post included a link to the original satirical sketch, but also included an accurate diagram of the home where his estranged wife and children were residing.¹⁹ In addition, Mr. Elonis posted a response to a Facebook post by his estranged wife's sister when she shared she was shopping for Halloween costumes with Mr. Elonis' estranged wife and their son.²⁰ Mr. Elonis suggested their son dress up as matricide for Halloween stating, "I don't know what his costume would entail though. Maybe [Tara Elonis's] head on a

¹⁰ *Id.* at 1-2.

¹¹ *Id.* at 2.

¹² *Id.*

¹³ *Id.*

¹⁴ 2014 U.S. S. Ct. Briefs LEXUS 1593 Appellee-Respondent's Brief on Petition for Writ of Cert at 6

¹⁵ *Elonis*, 575 U.S. ___ at 2.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ *Id.* at 4.

²⁰ *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013).

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stick?”²¹ These Facebook posts directed toward his estranged wife served as the basis for Count II of Mr. Elonis’ indictment under 18 U.S.C. § 875(c).

After learning of this Facebook post, Mr. Elonis’ estranged wife feared for her safety and the safety of her children, forcing her to petition a court for a protection-from-abuse order from her husband.²² Mrs. Elonis was granted a three-year protection-from-abuse order following her petition.²³ After the protection-from-abuse order was granted to Mrs. Elonis, Mr. Elonis again posted to his Facebook wall about his estranged wife, questioning whether a protection-from-abuse order realistically provided her with any protection.²⁴ The content of this Facebook post also served as part of the basis for Count II of Mr. Elonis’ indictment under 18 U.S.C. § 875(c).

In the same Facebook post where Mr. Elonis mocked his estranged wife’s protection-from-abuse order, he referenced possessing enough explosives “to take care of the State Police and the Sheriff’s Department.”²⁵ Mr. Elonis posted a link to the Wikipedia page regarding Freedom of Speech at the conclusion of this Facebook post.²⁶ The statements in Mr. Elonis’ Facebook post directed at the State Police and Sheriff’s Department served as the basis for Count III against Mr. Elonis under 18 U.S.C. § 875(c).²⁷

Mr. Elonis continued posting to Facebook and later that month discussed shooting an undisclosed kindergarten classroom.²⁸ The content of this post served as the basis for Count IV of Mr. Elonis’ indictment under 18 U.S.C. § 875(c).²⁹

Following Mr. Elonis post to Facebook about a plan to shoot a kindergarten classroom, FBI Agents Denise Stevens and her partner visited Mr. Elonis at his father’s home where he resided.³⁰ Mr. Elonis asked the agents whether he was free to

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Elonis*, 730 F.3d. at 324.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 5.

²⁹ *Id.* at 4.

³⁰ *Id.*

leave and immediately ended their conversation.³¹ Subsequently, Mr. Elonis wrote a Facebook post suggesting he could kill Agent Stevens.³² The content of this Facebook post served as the basis for Count V of Mr. Elonis' indictment under 18 U.S.C. § 875(c).³³

Following his indictment, Mr. Elonis filed a motion to dismiss all five counts against him, arguing that his Facebook posts were protected speech under the First Amendment and that 18 U.S.C. § 875(c) is vague, making it unconstitutional.³⁴ The U.S. District Court for the Eastern District of Pennsylvania denied Mr. Elonis' motion to dismiss.³⁵ The court decided that whether statements, such as Mr. Elonis' Facebook posts, should be considered true threats, making them unprotected speech under the First Amendment, was a question of fact for the jury, and that this would need to be determined by applying an objective standard.³⁶ In regards to Mr. Elonis' second argument supporting his motion to dismiss, the court held that 18 U.S.C. § 875(c) is constitutional.³⁷ The court interpreted U.S. Supreme Court precedent regarding true threats as unprotected speech under the First Amendment to require a "knowing, communication of what is an objectively serious threat," thus making the subjective intent of the defendant non-controlling.³⁸ Moreover, the court stated that 18 U.S.C. § 875(c) is not vague based on the wealth of precedent explaining the definition of a threat under the statute.³⁹ At trial, Mr. Elonis was convicted by a jury on Counts II through V of violating 18 U.S.C. § 875(c).⁴⁰

³¹ 2014 U.S. S. Ct. Briefs LEXUS 1593 Appellee-Respondent's Brief on Petition for Writ of Cert at 6.

³² *Elonis*, 575 U.S. ___ at 5.

³³ *Id.* at 5.

³⁴ *See* *United States v. Elonis*, 2011 E.D. Pa. LEXIS 121401 1, 1-3 (Oct. 20, 2011) (defendant's motion to dismiss denied).

³⁵ *Id.* at 1.

³⁶ *Id.* at 9-10.

³⁷ *Id.* at 16.

³⁸ *Id.* at 14.

³⁹ *Id.* at 14-16.

⁴⁰ *United States v. Elonis*, 897 F. Supp. 2d 335, 338 (E.D. Pa. 2012) (defendant's post-conviction motions denied).

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Mr. Elonis raised three post-conviction motions, all of which were denied by the federal district court.⁴¹ First, Mr. Elonis alleged the government did not sufficiently state an offense in the indictment because it failed to include the specific threatening language posted on his Facebook wall.⁴² Referencing *United States v. Kistler*, the court denied Mr. Elonis' first post-conviction motion because in *Kistler* an indictment under 18 U.S.C. § 875(c) was sufficient since it stated the dates of the statements, that the communication was made in interstate commerce, and the victims of each statement placing the defendant on notice of the offense.⁴³ The second and third post-conviction motions filed by Mr. Elonis requested "a new trial and arrest of judgment under Rules 33(a) and 34(b) of the Federal Rules of Criminal Procedure, respectively, claiming that the court incorrectly charged the jury on the element of 'willfulness' of § 875(c)."⁴⁴ The court denied both of these motions citing the definition of willfully applied in *United States v. Kosma*.⁴⁵ There the Third Circuit iterated the objective reasonable speaker test as requiring, "the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm."⁴⁶ The court found the jury's decision to be consistent with the weight of the evidence presented and that willfulness as required by the statute only necessitated "the defendant intentionally make a statement in a context wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm."⁴⁷ Mr. Elonis also argued the jury instruction stating a communication over the Internet travels in interstate commerce was incorrect.⁴⁸ Since Mr. Elonis did not object to this instruction during the trial, the court

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 339-40 (citing *United States v. Kistler*, 558 F. Supp. 2d 655 (W. Va. 2008)).

⁴⁴ *Id.* at 340.

⁴⁵ *Id.* at 342.

⁴⁶ *Id.* (quoting *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991)).

⁴⁷ *Id.* at 342-43.

⁴⁸ *Id.* at 343.

reviewed it for plain error.⁴⁹ According to the Third Circuit, if a communication is made via the Internet, it is involved in interstate commerce.⁵⁰ The court held the instruction was a correct statement of the law; therefore, there was no plain error in administering this instruction.⁵¹

On direct appeal to the Third Circuit, the issue presented was “whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats.”⁵² Mr. Elonis cited the Supreme Court case *Virginia v. Black* as requiring a subjective intent standard to convict a defendant of making a true threat; this interpretation would necessitate overturning the Third Circuit’s objective reasonable person standard detailed in *United States v. Kosma*.⁵³ The statute at issue in *Virginia v. Black* made it illegal to burn a cross “with the ‘intent of intimidating’ and provided ‘[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.’”⁵⁴ There, the Supreme Court defined true threats, which included a “‘protect[ion] [of] individuals from the fear of violence’” and “‘from the disruption that fear engenders.’”⁵⁵ Mr. Elonis contended this definition of true threats required a subjective intent from the speaker.⁵⁶ The Third Circuit stated that the U.S. Supreme Court did not decide that issue in *Virginia v. Black* because the statute at issue there contained specific subjective intent language whereas the statute in the *Elonis* case lacks such language.⁵⁷ Moreover, the Third Circuit discussed the approach taken by the majority of the circuits in addressing the intent required for conviction under 18 U.S.C. § 875(c) as one of the objective reasonable person, not subjective intent of the communicator.⁵⁸ Therefore, the Third

⁴⁹ *Id.*

⁵⁰ See generally *United States v. McEwan*, 445 F.3d 237, 244 (3d Cir. 2006).

⁵¹ *Elonis*, 897 F. Supp. 2d. at 343.

⁵² *United States v. Elonis*, 730 F.3d 321, 323 (3d Cir. 2013).

⁵³ *Id.* at 327.

⁵⁴ 538 U.S. 343, 348 (2008).

⁵⁵ *Id.* at 359-60.

⁵⁶ *Elonis*, 730 F.3d at 329.

⁵⁷ *Id.*

⁵⁸ *Id.* at 330.

Circuit held that *Virginia v. Black* did not require a change in its precedent of an objective reasonable person standard permitting the use of this standard in Mr. Elonis' case, negating any error in the district court's jury instructions.⁵⁹

Before the Third Circuit, Mr. Elonis also argued the indictment was insufficient because it failed to state the exact language of the allegedly threatening statements.⁶⁰ The Third Circuit agreed with the lower court that the indictment was sufficient since it described "the elements of the violation, the nature of the threat, the subject of the threat, and the time period of the alleged violation."⁶¹

Mr. Elonis also contended before the Third Circuit that there was insufficient evidence that Counts III and V of the indictment were true threats.⁶² He argued that the Facebook post forming the basis of Count III of the indictment was conditional; therefore, it could not be a true threat.⁶³ The Third Circuit held that although Mr. Elonis' Facebook post serving as the basis for Count III of the indictment did not designate a particular time or place for the alleged threat to occur, a jury considering all of the circumstances and context could find the Facebook post was a true threat.⁶⁴ Mr. Elonis argued that Count V of the indictment was based on past conduct and true threats must relate to a future intent to cause harm.⁶⁵ The Third Circuit held that a reasonable jury could interpret Mr. Elonis' Facebook post serving as the basis for Count V to reference the future because it contained the phrase "next time," which made the statement a true threat.⁶⁶

The final point Mr. Elonis raised on appeal to the Third Circuit was that the trial court erred in giving a jury instruction stating communications sent over the Internet are involved in interstate commerce.⁶⁷ The Third Circuit reiterated its rule from *United States v. MacEwan* where it had held that "because of the very nature of the Internet, once a user submits a connection re-

⁵⁹ *Id.* at 332.

⁶⁰ *Id.* at 333.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 334.

⁶⁵ *Id.*

⁶⁶ *Id.* at 334-35.

⁶⁷ *Id.* at 335.

quest to a website server or an image is transmitted from the website server back to [the] user; the data has traveled in interstate commerce.”⁶⁸ Therefore, the lower court was correct in giving such a jury instruction in this case.

After the Third Circuit Court of Appeals denied all of his points on appeal, Mr. Elonis filed a petition for a writ of certiorari from the U.S. Supreme Court.⁶⁹ The Court granted cert, asking both parties to brief whether true threats as unprotected speech under the First Amendment require an objective reasonable person standard or a subjective speaker standard.⁷⁰

Mr. Elonis argued that 18 U.S.C. § 875(c) requires a subjective speaker standard.⁷¹ He focused on the text of 18 U.S.C. § 875(c) requiring proof of specific intent to threaten, the legislative history, and case law of 18 U.S.C. § 875(c) supporting a specific intent standard, and how the Third Circuit’s use of a negligence standard under 18 U.S.C. § 875(c) is in opposition to the Court’s fundamental principles of statutory interpretation.⁷² In regards to the Third Circuit’s negligence standard, Mr. Elonis argued that history and tradition oppose criminal liability for negligent speech. In addition Mr. Elonis stated that threat prosecutions require specific intent standards. He also argued that *Virginia v. Black* imposed a subjective intent standard for true threats. Finally, Mr. Elonis asserted that a negligence standard would chill free speech.⁷³

Mr. Elonis’ argument that the plain meaning of 18 U.S.C. § 875(c) requires a proof of specific intent to threaten is based on the canon of statutory interpretation that when a term is not defined in a statute, it takes on its common meaning.⁷⁴ Therefore, according to Mr. Elonis, threat involves an intent component because all definitions of a threat impose one.⁷⁵ Mr. Elonis also

⁶⁸ *Id.*

⁶⁹ See generally *Elonis v. United States*, 2014 U.S. S. Ct. Briefs LEXIS 599 (Feb. 14, 2014) (petitioner’s brief for petition of writ of certiorari).

⁷⁰ *Elonis v. United States*, No. 13-983, 2014 U.S. LEXIS 4183 (June 16, 2014) (granting cert.).

⁷¹ *Elonis v. United States*, 2014 U.S. S. Ct. Briefs LEXIS 2899 33, 34 (Aug. 15, 2014).

⁷² See generally *id.* at 38-56.

⁷³ See generally *id.* at 56-81.

⁷⁴ *Id.* at 38-39.

⁷⁵ *Id.* at 39.

focuses on the legislative history and early case law of 18 U.S.C. § 875(c) to support his argument that the statute requires a subjective speaker standard.⁷⁶ He points to the first federal statute addressing threats, the Patterson Act, which required intent to extort.⁷⁷ This statute later expanded to include the current language of § 875(c) without Congress explaining whether the subjective speaker standard should remain.⁷⁸

Mr. Elonis' argument that the Third Circuit's negligence standard conflicts with fundamental principles of statutory interpretation is based in the idea that for a crime to be committed there must be a "vicious will."⁷⁹ Therefore, courts interpret criminal statutes to have some form of intent even if it is not expressly stated in the statute.⁸⁰

Mr. Elonis argued that without a subjective intent mens rea, 18 U.S.C. § 875(c) will criminalize negligent speech, which violates the First Amendment.⁸¹ He pointed out that case law that up until the twentieth century required a subjective speaker intent standard for conviction under § 875(c).⁸² Mr. Elonis then turned his argument to the Supreme Court's decision in *Virginia v. Black*, arguing the Court's decision imposed a subjective speaker intent standard for true threats.⁸³

Mr. Elonis' final argument focused on the idea that a negligence standard for true threats would chill protected speech.⁸⁴ He argued that a negligence standard would criminalize misunderstandings, which are not true threats, since social media platforms make it difficult to discern "the tone and mannerisms of the speaker."⁸⁵ Rounding out his argument, Mr. Elonis contended that since a negligence standard is inappropriate and that is the result of an objective reasonable person standard for evaluating whether a statement is a true threat, his Facebook posts

⁷⁶ *Id.* at 40.

⁷⁷ *Id.* at 40-41.

⁷⁸ *Id.* at 41-42.

⁷⁹ *Morissette v. United States*, 342 U.S. 246, 250 (1952).

⁸⁰ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994).

⁸¹ *Elonis*, 2014 U.S. S. Ct. Briefs LEXIS 2899 at 56.

⁸² *Id.* at 59-62.

⁸³ *Id.* at 69.

⁸⁴ *Id.* at 73.

⁸⁵ *Id.* at 78.

were not true threats.⁸⁶ Therefore, his speech was protected by the First Amendment and not a violation of 18 U.S.C. § 875(c).⁸⁷

The government's argument in briefs to the U.S. Supreme Court focused on the lack of a subjective intent to threaten requirement in 18 U.S.C. § 875(c). It also argued that the First Amendment does not require a subjective intent to threaten, and that the lack of a subjective intent to threaten does not chill expression.⁸⁸ Initially, the government focused on the language in § 875(c), which does not contain an explicit or implicit subjective intent to threaten as an element of the statute.⁸⁹ The government argued that § 875(c) only reaches true threats, which only exist "if the jury finds beyond a reasonable doubt that a reasonable person 'would' understand the statement to convey 'a serious expression of an intention to inflict bodily injury to take the life of an individual.'"⁹⁰ This requires a jury to consider all of the circumstances and context including any information offered by the defendant as to why a particular communication was made.⁹¹

The government then addressed the lack of an express mens rea in § 875(c).⁹² The absence of an express mens rea requirement, according to the government, insinuates a general intent requirement per background principles of criminal law.⁹³ Citing *United States v. X-Citement Video, Inc.*, the government asserted that the only mens rea requirement of a statute is that which will separate wrongful from innocent conduct.⁹⁴ According to the government, a general intent mens rea will separate wrongful from innocent conduct because a defendant will only be convicted under § 875(c) if an objective reasonable person, considering all of the circumstance and context, believes beyond a reasonable doubt "the defendant knew that he transmitted a communication and that he comprehended its contents and con-

⁸⁶ *See id.* at 81-86.

⁸⁷ *See id.*

⁸⁸ *See generally* *Elonis v. United States*, No. 13-983, 2014 U.S. S.Ct. Briefs LEXIS 3414 3, 32-76 (Sept. 29, 2014).

⁸⁹ *Id.* at 32.

⁹⁰ *Id.* at 32.

⁹¹ *Id.* at 34-35.

⁹² *Id.* at 36.

⁹³ *Id.*

⁹⁴ 513 U.S. at 70.

text” as a true threat.⁹⁵ Moreover, the government argued the presence of a specific subjective intent to threaten standard in surrounding statutes illuminates the intention of Congress to require a general intent standard in § 875(c) otherwise it would have included an express subjective intent to threaten standard in the statute.⁹⁶ The government further enhanced its point by referencing legislative history of 18 U.S.C. § 875(c), which was created when a statute against knowingly and willfully making threats against the President existed but did not require a subjective intent to threaten standard.⁹⁷ According to the government, the absence of knowingly and willfully in § 875(c) further supports its argument that Congress did not intend to have a subjective intent to threaten standard within this statute if it did not place such a standard in a statute with even more precise language.⁹⁸

Finally, the government discussed how an objective reasonable person standard for true threats does not chill protected speech under the First Amendment.⁹⁹ The government supported this contention with the fact that the majority of circuits use an objective reasonable person standard to evaluate true threats without harm to protected speech under the First Amendment.¹⁰⁰ Concluding its argument, the government analogized true threats to other forms of unprotected speech under the First Amendment such as fighting words and obscenity, which do not require a subjective intent standard; therefore, the government argued, neither should true threats.¹⁰¹

Part II

Chief Justice Roberts wrote the majority opinion for the U.S. Supreme Court in *Elonis v. United States*.¹⁰² The Court first addressed whether the word “threat” itself in 18 U.S.C. § 875(c)

⁹⁵ *Elonis*, No. 13-983, 2014 U.S. S. Ct. Briefs LEXIS 3414 at 46-47.

⁹⁶ *Id.* at 37.

⁹⁷ *Id.* at 38.

⁹⁸ *Id.* at 39.

⁹⁹ *Id.* at 56.

¹⁰⁰ *Id.* at 56-57.

¹⁰¹ *Id.* at 75-81.

¹⁰² *Elonis*, 575 U.S. ___ at 1.

requires a subjective intent to threaten standard.¹⁰³ The majority found neither the government nor *Elonis* showed a specific intent requirement within § 875(c).¹⁰⁴ This does not mean there is no mens rea requirement within the statute.¹⁰⁵ According to principles of statutory interpretation, if a statute is silent as to the required mens rea, the Court applies only the mens rea necessary to differentiate between wrongful and innocent conduct.¹⁰⁶ In applying this to 18 U.S.C. § 875(c), the Court stated there is a “presumption in favor of a scienter requirement [that] should apply to each of the statutory elements that criminalizes otherwise innocent conduct.”¹⁰⁷ In this case, the Court recognized agreement between the parties that the defendant “must know that he is transmitting a communication.”¹⁰⁸ Emphasizing the importance of the communication at issue, the Court held that the mental state requirement must be applied to the communication containing a threat.¹⁰⁹

To determine whether an objective or subjective intent to threaten standard should be applied to the communication containing a threat in § 875(c), the Court evaluated the potential outcomes of applying each standard.¹¹⁰ If an objective reasonable person standard is applied to determine whether a communication is a threat, the Court stated that culpability will be reduced to negligence, because what the defendant thinks about the communication will not be considered.¹¹¹ This presents a problem because the Court prefers not to have a negligence standard in criminal statutes.¹¹² The Court rejected the government’s argument that a defendant knowing the facts and circumstances surrounding a communication rejects the negligence standard because negligence standards often consider this very information.¹¹³ Therefore, the Court held that Mr. *Elonis*’ conviction

¹⁰³ *Id.* at 8.

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 12.

¹⁰⁷ *Id.* at 13 (quoting *X-Citement Video*, 513 U.S. at 72).

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 14.

could not stand because the jury instruction required only an objective standard of whether a reasonable person would view the Facebook posts as true threats, which is an insufficient standard because it only requires a mens rea of negligence.¹¹⁴ The Court emphasized the necessity of considering the defendant's mental state under statutes such as 18 U.S.C. § 875(c) as being deeply rooted in American history.¹¹⁵ Moreover, the Court stated that Congress did not change that tradition in developing 18 U.S.C. § 875(c); therefore, a mens rea of negligence is insufficient for conviction under the statute.¹¹⁶ Since Mr. Elonis was convicted under a mens rea requirement of negligence, the Court overturned his conviction.¹¹⁷

Although Mr. Elonis raised the idea that a mens rea of recklessness would also be insufficient for conviction under 18 U.S.C. § 875(c), the Court did not consider this possibility since neither party briefed the issue.¹¹⁸ The Court cited its preference for issues to be addressed by lower courts before considering an issue itself as a reason for not addressing whether a recklessness mens rea is sufficient.¹¹⁹ The Court also declined to address whether conviction for true threats under the statute violated any First Amendment protections since it overturned Mr. Elonis' conviction.¹²⁰

Justice Alito authored a concurrence to the majority opinion.¹²¹ The focus of Justice Alito's concurrence was the confusion lower courts will experience in attempting to apply the majority's holding.¹²² He asserted this confusion will exist since the majority rejected a mens rea of negligence but failed to express exactly what mens rea is required for conviction under 18 U.S.C. § 875(c).¹²³ Justice Alito continued on to say the majority also failed to provide a clear meaning of a threat and posited under 18 U.S.C. § 875(c) that a threat "can fairly be defined as a

¹¹⁴ *See id.* at 16.

¹¹⁵ *Id.*

¹¹⁶ *See id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 17.

¹²⁰ *Id.* at 16.

¹²¹ *Id.* at 18 (Alito, J., concurring).

¹²² *Id.* (Alito, J., concurring).

¹²³ *Id.* (Alito, J., concurring).

statement that is reasonably interpreted as ‘an expression of an intention to inflict evil, injury, or damage, on another.’”¹²⁴ By this definition, Justice Alito asserted that a mens rea of recklessness is sufficient because when a statute is silent regarding the required mens rea there is no need for the Court to require a more stringent mens rea than recklessness if there is no justification for doing so.¹²⁵ Justice Alito further emphasized the adequacy of a mens rea of recklessness under § 875(c) stating, “recklessness exists ‘when a person disregards a risk of harm of which he is aware.’”¹²⁶ Therefore, if a defendant knows a communication will be considered a true threat to the recipient of the communication but sends the communication anyway, the defendant can be convicted under § 875(c).¹²⁷

Finally, Justice Alito addressed whether allowing a mens rea of recklessness under 18 U.S.C. § 875(c) would result in violations of the First Amendment.¹²⁸ He disagreed with Mr. Elonis’ argument that his Facebook posts were protected speech because Justice Alito viewed the Facebook posts as true threats.¹²⁹ Justice Alito reiterated the well-established precedent that true threats are not protected speech and rejected Mr. Elonis’ arguments that his statements were therapeutic, not intending to cause harm or that they were protected as works of art.¹³⁰ Emphasizing the evidence presented by Mr. Elonis’ estranged wife at trial, Justice Alito stated there was sufficient evidence Mr. Elonis’ Facebook posts qualified as true threats.¹³¹ Justice Alito cited Mr. Elonis’ estranged wife’s testimony she was fearful for her life and the lives of her children.¹³² Furthermore, Justice Alito acknowledged the use of threats in domestic violence and how the creation of social media platforms will only make these types of threats more common.¹³³ Ultimately, Justice Alito

¹²⁴ *Id.* at 20 (Alito, J., concurring).

¹²⁵ *Id.* at 21 (Alito, J., concurring).

¹²⁶ *Id.* at 21 (Alito, J., concurring) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); MODEL PENAL CODE § 2.02(2)(c)).

¹²⁷ *See id.* at 22 (Alito, J., concurring).

¹²⁸ *Id.* (Alito, J., concurring).

¹²⁹ *Id.* at 23 (Alito, J., concurring).

¹³⁰ *Id.* at 24. (Alito, J., concurring).

¹³¹ *See id.* at 25 (Alito, J., concurring).

¹³² *See id.* (Alito, J., concurring).

¹³³ *Id.* (Alito, J., concurring).

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thought the case should be remanded to the Third Circuit Court of Appeals to determine whether Mr. Elonis' failure to oppose a recklessness standard under 18 U.S.C. § 875(c) prevents his conviction from being overturned.¹³⁴

Justice Thomas authored a dissent to the majority opinion.¹³⁵ Like Justice Alito, Justice Thomas criticized the majority for leaving more questions at the end of its opinion than it answered by not instructing lower courts on what mens rea standard is necessary for conviction under 18 U.S.C. § 875(c).¹³⁶ Justice Thomas stated that the lack of clarity for lower courts could have been avoided if the majority applied "the background rule of the common law favoring general intent."¹³⁷ Since the communications by Mr. Elonis were true threats, Justice Thomas stated that if a general intent standard was employed, Mr. Elonis would be convicted under 18 U.S.C. § 875(c).¹³⁸

Part III

The U.S. Supreme Court's holding in *Elonis v. United States* is flawed because, as pointed out by Justices Alito and Thomas, the majority provides more questions than answers in its opinion. While lower courts are now aware that a mens rea of negligence is insufficient for conviction under 18 U.S.C. § 875(c), they are unaware of what mens rea standard is sufficient for conviction under the statute. Prior to this decision, the circuits were inconsistent on whether an objective or subjective intent to threaten standard was necessary for conviction under § 875(c). After this decision, the circuits will continue to be inconsistent but in another way. The circuits will now be inconsistent in the required mens rea for conviction under the statute with some circuits applying a mens rea of recklessness and others requiring something more. The Court is likely to encounter this issue again since it failed to fully address it in this case.

The major consequence of this decision is its effect on domestic violence cases. The use of social media platforms is likely

¹³⁴ *Id.* at 27 (Alito, J., concurring).

¹³⁵ *Id.* at 28 (Thomas, J., dissenting).

¹³⁶ *Id.* at 28 (Thomas, J., dissenting).

¹³⁷ *Id.* at 29 (Thomas, J., dissenting).

¹³⁸ *Id.* (Thomas, J., dissenting).

only to increase in the future, which means progressively more statements will be made on these platforms. As stated by Justice Alito, threats are a common occurrence in domestic violence situations.¹³⁹ Social media provides additional platforms for abusers to make threats toward their victims. This method will be particularly effective once a victim leaves her abuser and the abuser makes threats on social media toward her, similar to what happened to Mrs. *Elonis* in this case. If the abuser's state of mind must be considered, that is if the subjective intent to threaten standard under 18 U.S.C. § 875(c) is applied, the abuser can easily avoid prosecution. All he will have to say is that the statement was a joke, a work of art (such as rap lyrics), or otherwise non-serious threat toward the intended recipient. Criminal prosecution of abusers in domestic violence cases is already slim; limiting another area where abusers can be prosecuted will only further isolate victims of domestic violence from the criminal justice system.

A better standard for 18 U.S.C. § 875(c) is whether an objective reasonable person would view the communication as a true threat by considering the totality of the circumstances. This would entail considering the view of the victim and the maker of the communication to determine whether, knowing all of the circumstances and context, a reasonable person would view the communication to be intended as a true threat. This approach provides protection for the victim because the communicator cannot avoid responsibility by simply stating the communication was not intended as a threat. At the same time, the communicator is protected because his or her intent is considered along with all of the circumstances and context to avoid convictions when the communications are mere misunderstandings, not true threats. This approach addresses the practical issues unanswered by the Supreme Court's holding.

Conclusion

Elonis v. United States addressed whether convictions under 18 U.S.C. § 875(c) require an objective reasonable person or a subjective intent to threaten standard. However, the impact of the Supreme Court's decision exacerbates a deeply rooted issue

¹³⁹ *Id.* at 25 (Alito, J., concurring).

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in American society – domestic violence. Judges and attorneys are left without proper guidance regarding prosecutions under 18 U.S.C. § 875(c) because the Court rejected a mens rea of negligence but failed to address the proper mens rea for this offense. In addition, the Court advocated for a subjective intent to threaten standard to determine whether the communication was a true threat but failed to consider the multitude of ways defendants will take advantage of this approach. Since the holding in *Elonis v. United States* leaves more questions unanswered than it addresses, it is likely the Court will need to address the proper mens rea and standard under 18 U.S.C. § 875(c) again. As stated by Chief Justice Roberts in the majority opinion, the Court will wait until the appropriate case arises to address these issues.¹⁴⁰ The problem is, for victims of domestic violence, this case might arrive too late.

Madison Peak

¹⁴⁰ *Id.* at 21.