***For Attorney Coaches and Judge:*** *Possible Student Arguments*

***Elonis v. United States* Applied to Memes Scenario**

*Talking Points*

**Judge: The issue before us today is – Does the First Amendment require proof that a defendant is serious about following through on a threat before the defendant may be convicted of threatening another person?**

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| **Judge: We will start with Question #1.****Does the First Amendment protect Mr. Andy Jackson’s meme and comments, even though they may be potentially upsetting? Because Mr. Andy Jackson is the Petitioner bringing this case, his attorney will go first.** | **Judge: Now we will hear from the Respondent. Does the First Amendment protect Mr. Andy Jackson’s meme and comments, even though they may be potentially upsetting?** |
| **Andy’s Attorney #1** | **Government’s Attorney #1** |
| **YES*** The First Amendment protects unpopular and offensive speech. A bedrock principle of the First Amendment is that speech cannot be prohibited simply because it is uncomfortable or offensive.
* Andy’s speech is no different from other speech that has been recognized as constitutionally protected. Angry and even offensive lyrics are constitutionally protected artistic expression.
* Andy was simply expressing his anger in an artistic, therapeutic, and constitutionally protected manner. His comments were based on the lyrics of his favorite artist. He also put out a disclaimer that he was not threatening anyone.

**The Judge asks follow-up questions.**Examples of the kinds of follow-up questions the Judge may ask:* Should the First Amendment protect all forms of artistic expression? Why/Why not?
* What artistic expression should not be protected?
* Should there be limits on First Amendment protections of emotional expressions?
* What emotional expressions should be limited?
* Should it matter if someone uses a disclaimer saying the expression is not a threat?
* Does it matter that the statement is anonymous?
 | **NO*** Not all speech is protected by the First Amendment. The First Amendment protects political discourse and the free flow of ideas. However, the courts have determined that obscenity, fighting words, and true threats are not protected speech.
* Andy’s online statements are unprotected true threats. Among other things, he tells Sarah that she will “regret this day.” He says Sam should watch himself because “The Gunner is locked and loaded” -- a reference to shooting a firearm.
* Andy cannot avoid criminal liability for his threats simply by imitating the lyrics of a musical artist. He can’t avoid responsibility for threats just by putting a disclaimer on them. Defendants who issue true threats can’t get off the hook by simply by saying they didn’t mean it or by adding ambiguous emojis.

**The Judge asks follow-up questions.**  |
| **Judge: Let’s turn our attention to Question 2****Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?**  | **Judge: Same question for the Government.****Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?** |
| **Andy’s Attorney #2** | **Government’s Attorney #2** |
| **YES*** When a threat is judged by a subjective standard, the idea is to determine if the speaker means what is said. When a threat is judged by an objective standard, the question is asked: “How would a reasonable person interpret it?” That standard is too vague because reasonable people can disagree.
* An objective or “reasonable person” standard allows the majority to silence dissenting or minority views. It also has a chilling effect that might silence offensive, unpopular, or controversial statements to avoid the risk of criminal prosecution. The posts include a skull and winking smiley face emoji. They clearly convey that the sender is just kidding.
* The objective standard, based on what a “reasonable person” would think, is too ambiguous. What is meant by “a reasonable person?” Would the standard be based on a reasonable adult? A reasonable teenager? A reasonable person with average knowledge of pop culture? This standard simply leaves too much ambiguity to adequately protect freedom of speech.

**The Judge asks follow-up questions:**Examples of the kinds of follow-up questions the Judge may ask:* What impact should the skull and winking emojis have on our understanding of Mr. Jackson’s intent?
* How would a “reasonable person” interpret the skull in this post?
* Does it make a difference that the skull is paired with the winking smiley face?
 | **NO*** Laws are frequently passed to prohibit conduct regardless of the intent of the defendant. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether or not he actually intended to carry out the threat.
* Even if the individual makes the threat as some sort of warped joke with no intention of doing damage, he could still be prosecuted. Anti-bomb threat laws are meant, in part, to protect the public from the fear that such threats cause, regardless of whether the threat turns out to be credible. Andy’s posts include a skull emoji and winking smiley face emoji. The skull is a recognized symbol of death. The wink indicates that the sender gets pleasure from issuing the threat.
* When a threatening statement is made, the damage is done when the victim hears the statement and takes it seriously. A perceived threat can be just as emotionally damaging as a real threat. In light of that, the Government may legitimately prohibit such threatening statements.
* Employing an objective standard would not automatically subject every unpopular or offensive utterance to criminal prosecution. The context of the statement would help the finder of fact determine whether or not a statement is a true threat.

**The Judge asks follow-up questions:** |