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Justices Get Schooled in Rap

Amicus briefs emerge in First Amendment case.

Tony Mauro, The National Law Journal

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The musical tastes of several U.S. Supreme Court justices run toward opera. But as the start of its fall term approaches, the court is getting an intense education in another genre: the rhythmic, slangy — sometimes violent — poetry of rap music.

One brief in a case before the court recites the lyrics from Eminem's 2000 song, "I'm Back": "I take seven (kids) from (Columbine), stand 'em all in line. Add an AK-47, a revolver, a nine a MAC-11 and it oughta solve the problem of mine and that's a whole school of bullies shot up all at one time."

Another notes ominous words from the rap group Wu-Tang Clan: "I'll hang your ass with this microphone" and "I come sharp as a blade and I cut you slow."

That same brief offers a prediction by a music scholar that could raise interesting debate: "In 20 years' time, Tupac Shakur will be ranked with Walt Whitman as a great American poet."

The modern musicology lesson is a key part of one of the more interesting cases on the high court's fall docket: *Elonis v. United States*, set for argument on Dec. 1. It asks whether the online posting of threatening language like that found in rap lyrics violates a federal law against transmitting "any threat to injure the person of another" across state lines.

Anthony Elonis of Pennsylvania began posting angry prose on Facebook in 2010 after his wife left him. He often stated his messages were in jest, and sometimes they sounded as much like legal analysis as threats. "Did you know that it's illegal to say I want to kill my wife?" he wrote.

After his wife obtained a protection order, Elonis' postings became darker. "Hell hath no fury like a crazy man in a kindergarten class," he wrote, more than two years before the Sandy Hook shootings. After an FBI agent visited his home, Elonis mimicked a rap song in a Facebook post that said she "stood so close, took all my strength not to turn the bitch ghost." He was arrested and convicted on charges of violating the federal law against threats. He has been in prison for more than three years.

Lawyers for Elonis claim he was convicted under the wrong legal standard. All the government was required to prove in his case was that his words could be viewed by a "reasonable person" as a true threat — regardless of whether Elonis actually intended them that way. John Elwood of Vinson & Elkins, who will argue on Elonis' behalf, hopes to convince the high court that the law — and the

First Amendment — require the government to satisfy a higher hurdle of proving the speaker's intent to threaten. That higher standard would prevent punishing legitimate speakers solely for "failing to foresee" how others might react to their speech, Elwood said.

That's where the rap music lesson comes in. "It's what amicus briefs should be — bringing knowledge to the court about a genre they are probably not that familiar with," said Clay Calvert, a lawyer and professor of mass communications and director of the Marion B. Brechner First Amendment Project at the University of Florida. "The law clerks probably are, but maybe not the justices."

TECHNICAL KNOWLEDGE

The law clerks' role in educating their justices about technology is behind the scenes, but important. For *Reno v. ACLU*, the first Internet case in 1997, clerks wheeled computers into justices' chambers. More recently, clerks helped justices understand video games for *Brown v. Entertainment Merchants Association*, the 2011 ruling that struck down restrictions on the sale of violent video games. "The justices are not necessarily the most technologically sophisticated people," Justice Elena Kagan said afterward.

Calvert wrote the brief on behalf of rap music scholars Erik Nielson of the University of Richmond and Charis Kubrin, who teaches criminology at the School of Social Ecology at the University of California, Irvine. Calvert's brief emphasizes the hyperbole, even the intentional ambiguity, of rap, even as it delivers potent messages about culture and politics. "Meaning gets lost in rap music," Calvert said. "It is not meant to be taken literally."

If violent video games are protected by the First Amendment, Elwood said, giving the same protection to rap lyrics should be "a lighter lift."

Justices also may need some schooling about social media, said David Greene of the Electronic Frontier Foundation. They need to know that a Facebook post aimed at a handful of "friends" can be quickly shared with thousands of unknown people, without the context that might make its peaceful intentions clear. "All the things that make the Internet a wonderful, democratizing force end up decontextualizing the message," Greene said.

A brief filed on behalf of the Student Press Law Center, joined by the Electronic Frontier Foundation and others, offered illustrations. In 2013, Justin Carter of Texas responded online to a gaming friend who said he was "crazy" by replying sarcastically, "Oh yeah ... I'm going to shoot up a school full of kids." His friends knew it was a joke, but another reader alerted police. Carter was arrested for making a terroristic threat.

One voice that has not been heard in *Elonis* is that of Facebook itself. Elwood said he had contact with Facebook officials when he took on the case this year, but "I got the impression they seemed to think they did not have a dog in this fight." Greene said, "They certainly have an interest" in the case and he wishes Facebook had weighed in. Facebook officials did not respond to requests for comment.

Whatever the justices think about rap music, their interest in other kinds of music is well-established. Justices Ruth Bader Ginsburg and Antonin Scalia have made cameo appearances as supernumeraries in opera performances. And Ginsburg presides over an annual musicale at the court, a program heavy with opera stars and classical musicians.

Yet none of the *Elonis* briefs mention the violence — love-triangle murders and suicides galore — found in many operas and their lyrics. "Operas can get pretty gory," Elwood acknowledged. "I should have put that in my brief."

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