

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 169039
Plaintiff-Appellee, Court of Appeals No. 371542
v Wayne Circuit Court
No. 24-001354-FH

MICHAEL JOSEPH KVASNICKA,
Defendant-Appellant.

**AMICUS BRIEF OF ATTORNEY GENERAL DANA NESSEL AND
THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN (PAAM)
IN SUPPORT OF THE PEOPLE**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

On December 29, 2025, this Court ordered argument on application, and asked the parties to brief the following three questions:

1. Whether the plain language of MCL 750.543m(1)(a) includes a scienter requirement that is consistent with *Counterman v Colorado*, 600 US 66, 69 (2023) (holding that, under the First Amendment, threatening speech may not be punished unless the prosecution proves “that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence”).

Kvasnicka’s answer: No.

Wayne County’s answer: Yes.

Trial court’s answer: Yes.

Court of Appeals’ answer: No.

AG and PAAM as amicus: Yes.

2. Whether the constitutional-doubt canon permits a court to deviate from ordinary principles of statutory interpretation when assessing “whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided[.]” *Sole v Mich Econ Dev Corp*, 509 Mich 406, 419 (2022).

Kvasnicka’s answer: No.

Wayne County’s answer: Yes.

Trial court’s answer: Did not answer.

Court of Appeals’ answer: Yes.

AG and PAAM as amicus: This Court need not reach this issue.

3. Whether it is appropriate to adopt a limiting construction of MCL 750.543m(1)(a) to remedy any remaining constitutional deficiency, see *People v Burkman*, 513 Mich 300, 340 (2024); see also *Osborne v Ohio*, 495 US 103, 115 (1990).

Kvasnicka's answer: No.

Wayne County's answer: This Court need not reach this issue.

Trial court's answer: Did not answer.

Court of Appeals' answer: Did not answer.

AG and PAAM as amicus: This Court need not reach this issue.

STATUTES INVOLVED

MCL 750.543m provides as follows:

- (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:
 - (a) *Threatens to commit an **act of terrorism*** and communicates the threat to any other person.
 - (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.
- (2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

[Emphasis added.]

MCL 750.543b(a) further provides a definition of “act of terrorism,” which requires proof of a specific blameworthy state of mind:

- (a) “Act of terrorism” means a *willful and deliberate* act that is ***all of the following***:
 - (i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
 - (ii) An act that *the person **knows or has reason to know*** is dangerous to human life.
 - (iii) An act that ***is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.***

[Emphasis added.]

MCL 750.543z provides in full:

Notwithstanding any provision in this chapter, a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Attorney General is the chief law enforcement officer for the State of Michigan. *Fieger v Cox*, 274 Mich App 449, 451 (2007). She also provides supervisory authority for the prosecutors in Michigan. MCL 14.30. See also *People v Monaco*, 475 Mich 1222 (2006) (describing role of Attorney General in the appellate courts, citing MCL 14.28); *People v Foster*, 377 Mich 233, 235 n 1 (1966).

The Michigan Attorney General also is invested in the role of defending the constitutionality of Michigan law. For this reason, in the federal courts she is informed when the constitutionality of law is drawn into question so that she may intervene to defend the law. See 28 USC 2403(B). See also FR App P 44(B) (“The clerk must then certify that fact to the attorney general of the State.”); FR Civ P 5.1(a)(2) (notice to the Attorney General if “a state statute is questioned”). The state court appellate rules provide for the same opportunity. See MCR 7.204(D)(3)(c) (notification to the Attorney General).

The Prosecuting Attorneys Association of Michigan (PAAM) is a voluntary association of the 83 county prosecutors, the Attorney General, and the U.S. Attorneys serving in Michigan. PAAM was founded in 1928. Its mission is as follows:

It shall be the duty of the prosecuting attorneys’ association to keep the prosecuting attorneys of the state informed of all changes in legislation, law and matters pertaining to their office through the department of the attorney general of the state of Michigan, to the end that a uniform system of conduct, duty and procedure be established in each county of the state. [MCL 49.62.]

PAAM is governed by a Board of Directors consisting of five officers, fourteen elected directors, past presidents, the NDAA State Director, and the Attorney General.

INTRODUCTION

While the plain language of Michigan’s anti-threat-of-terrorism statute is unambiguous in requiring a wrongful intent, any doubt about this interpretation of this construction is removed by Michigan’s canons of statutory construction. Michigan law requires that “unless otherwise stated in a statute, a Legislature intends to require a defendant to possess *a culpable mental state regarding each of the statutory elements.*” *People v Magnant*, 508 Mich 151, 182 (2021) (emphasis added; cleaned up). That principle makes this a straightforward case.

There are two options here, either of which results in a constitutionally valid statute for MCL 750.543m(1)(a).

Under the first option, which is the more persuasive approach, this Court should rely on the plain language in MCL 750.543m(1) and its use of “threatens,” as well as the plain language in MCL 750.543b(a), which provides a definition for the “act of terrorism” employed in § 543m and is replete with requirements of proof of a *mens rea* (“willful,” “deliberate,” “knows or has reason to know,” and “is intended to intimidate”). This Court would then conclude that § 543m(1)(a) requires proof of an intent to intimidate to prove the crime here. Thus, in order to be guilty when one “[t]hreatens to commit an **act of terrorism** and communicates the threat to any other person,” the People would have a duty to prove an intent to intimidate. The Attorney General and PAAM recommend this Court to adopt this option based on the plain text. Kvasnicka fails to grapple with this argument in earnest because he only reviews § 543m, but he overlooks the controlling language in MCL 750.543b(a).

Under the second option, this Court may rely on the silence of MCL 750.543m and conclude based on the canons of construction that the Legislature intends to require a defendant to possess a culpable mental state, i.e., recklessness. This was how the Court of Appeals ruled, and this is the position advanced by the Wayne County Prosecutor. In his supplemental brief, Kvasnicka again fails to address this argument in earnest because he does not start with the presumption in Michigan case law against strict liability statutes. And significantly, Kvasnicka draws the exact wrong lesson from the U.S. Supreme Court's decision in *Counterman*. Kvasnicka mistakenly contends that the U.S. Supreme Court there could merely have adopted "a criminal recklessness standard" but "did not do that." Kvasnicka Supp, p 19. But that is exactly what the Colorado Court of Appeals did on remand, and that court – which as a state court provides for the proper construction of Colorado law – sent Mr. Counterman back for trial on that standard. Thus, *Counterman* provides on-point support for the decision of the Court of Appeals here.

Regarding these two options, while both result in affirming the constitutionality of the anti-threat-of-terrorism statute, MCL 750.543m, each yields a slightly different standard. Under the first, the People must prove an intent to intimidate, and under the second, must prove that the defendant recklessly made the threat conscious that the communication would be viewed as threatening violence. The Attorney General and PAAM press the first option based on the plain language of § 543b(a). But if this Court is not persuaded, then this Court should merely affirm the decision of the Court of Appeals. Either way, the law is valid.

ARGUMENT

- I. The plain text of Michigan’s anti-terrorism-threat law, MCL 750.543m, requires proof of a threat to commit a violent felony (that the defendant knows or has reason to know would be dangerous to human life) made *with an intent to intimidate*, through the definition of “threaten” § MCL 543(1)(a) and “act of terrorism” in § 543b(a).**

The statutory language at issue here is clear in requiring proof of a culpable state of mind, i.e., the wrongful intent to intimidate by making a threat about a violent felony that the person knew or had reason to know would be dangerous to human life. The *mens rea* requirement is present in the meaning of “threaten” and is express in the statutory definition of the “act of terrorism” in MCL 750.543b(a), which is made a crime as a threat in MCL 750.543m(1)(a). The original opinion of the Court of Appeals erred in ruling otherwise, and is repeated on remand, and Kvasnicka’s argument to the contrary here is unavailing.

- A. The statutory language at issue here requires proof of a guilty state of mind consistent with constitutional standards as articulated by the U.S. Supreme Court in *Counterman*.**

As noted above, the crime charged here is making a terrorist threat, which is a 20-year felony:

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) *Threatens to commit an **act of terrorism*** and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

[MCL 750.543m (emphasis added).]

While the crime of false report of terrorism in § (1)(b) requires proof of “knowingly” making a false report, the definition section of this Act provides a definition of “act of terrorism,” which supplies the requirements of proof of the scienter requirements in “threaten[ing]” to commit an act of terrorism (as does the meaning of “threaten”):

(a) “Act of terrorism” means a *willful* and *deliberate* act that is ***all of the following***:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that *the person knows or has reason to know* is dangerous to human life.

(iii) An act that ***is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.***

[MCL 750.543b(a) (emphasis added).]

In other words, the People are required to prove the underlying elements of an “act of terrorism” in proving that a person “threaten[ed]” to commit such an act, which is required by the definition of “threaten” itself. Indeed, for a statute enacted in 2002, see Public Act 113 of 2002, a definition from a dictionary printed in 2001 is appropriate and makes clear that “threaten” includes an intent element:

threat•en v. [*trans*] express one’s intention to harm or kill (someone): *the men threatened the customers with a handgun.* [*The New Oxford American Dictionary*, Oxford University Press, 2001, p 1766.]

In that way, a person who threatens an act of terrorism must express an intent to commit an act, which is defined as a “willful” and “deliberate” act in which the person “intended” to do either of the following:

- (1) “to intimidate or coerce a civilian population,” or
- (2) “influence or affect the conduct of government or a unit of government through intimidation or coercion,” MCL 750.543b(a)(iii).

And the act must threaten to commit a violent felony, which the person “knows or has reason to know” is dangerous to human life. § 543b(a)(ii). Thus, the threat itself requires proof of intending to place others in fear of the terrorist act.

Given the use of “threaten” and the interplay between § 543m(1)(a) and § 543b(a), the Court of Appeals has already explained that reading § 543m(1)(a) in “conjunction” with § 543b(a) demonstrates that “the statutes [including § 543m(1)(a)] require the existence of an intent to ‘intimidate or coerce,’ ” and thus did not run afoul of the First Amendment. See *People v Osantowski*, 274 Mich App 593, 603 (2007), reversed in part on other grounds, 481 Mich 103 (2008); see also *id.* at 604 (“the meaning of the term ‘threat’ can be understood to encompass only true threats, i.e., a communication of a serious expression of intent to commit an act of unlawful violence.”). In particular, while the Court of Appeals explained that this interplay of statutes does not require proof of “an intent for direct intimidation of a specific victim,” it does require proof of a “general intent” to communicate a true threat, i.e., “communicating to any other person a **serious** expression of intent to commit an act of terrorism.” *Id.* at 605, 606 (emphasis added). See also *People v Byczek*, 337 Mich App 173, 186 (2021), citing *Osantowski*, 274 Mich App at 603, 605; *People v Gerhard*, 337 Mich App 680, 687 (2021). This is a culpable intent standard that complies with the U.S. Supreme Court’s decision in *Counterman v Colorado*, 600 US 66 (2023).

As is true in Michigan, *Counterman* identified three possible subjective culpable criminal intents – purpose, knowledge, and recklessness – that would be sufficient to sustain the constitutionality of a law that punished a true threat:

The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices.

[1] **Purpose** is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he “consciously desires” a result—so here, when he wants his words to be received as threats.

[2] Next down, though not often distinguished from purpose, is **knowledge**. A person acts knowingly when “he is aware that [a] result is practically certain to follow”—so here, when *he knows to a practical certainty that others will take his words as threats*.

[3] A greater gap separates those two from recklessness. A person acts **recklessly**, in the most common formulation, when he “consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.” That standard involves insufficient concern with risk, rather than awareness of impending harm. But still, recklessness is morally culpable conduct, involving a “deliberate decision to endanger another.” *In the threats context, it means that a speaker is aware “that others could regard his statements as” threatening violence and “delivers them anyway.”*

[*Counterman*, 600 US at 78–79 (numbered brackets and paragraph breaks added; emphasis added; citations omitted).]

Thus, the three possible subjective standards the People must prove are “purpose,” “knowledge,” or “reckless[ness],” i.e., “aware that others could regard his statements” as a threat and the perpetrator delivers them nonetheless.¹

In applying *Counterman* here, the plain text of the law requires proof of an intent to intimidate: a person “threaten[ed] to commit an act of terrorism,” see MCL 750.543m(1)(a), i.e., the People must prove that the person threatened to commit an act that was “willful” and “deliberate,” and that through the threat of a violent act that the person “knows or has reason to know” would be dangerous to human life, the person “intended to intimidate” or “intended” to “influence” “through intimidation or coercion.” MCL 750.543b(a). To digest, it requires proof of an intent to intimidate.

¹ Cf. *People v Tadgerson*, ___ Mich ___, 2025 WL 2045515, at *8 (2025) (citing MCL 8.9 and identifying “three” “culpable [mental] states: intent, knowledge, or recklessness”).

Accord *Osantowski*, 274 Mich App at 603 (“the statutes [i.e., MCL 750.543m(1)(a) and MCL 750.543b(a)] require the existence of an intent to ‘intimidate or coerce’”).

These requirements that the threat be “deliberate” and that the person making the threat have a blameworthy “intent” are traditional hallmarks of subjective criminal intent. Indeed, this Court explained that the “proof of an intent to injure in order to establish an assault and battery” is a *mens rea* requirement that is “subjective” because it was “an intent to do ‘wrong.’” *People v Datema*, 448 Mich 585, 599 (1995).

That principle applies equally here, where the People must prove a wrongful intent in threatening the act, i.e., the intent to intimidate or the intent to influence through the use of intimidation. And the People must prove that the act the person threatened to commit must be a violent felony, which the person “knows or has reason to know” would be dangerous to human life. MCL 750.543b(a)(ii). This likewise is consistent with the standards from *Counterman*, which notes for proof of knowledge that the person “*knows* to a practical certainty that others will take his words as threats.” *Counterman*, 600 US at 79 (emphasis added).

The contrast to the statute in *Counterman* is notable. There, the U.S. Supreme Court explained that the prosecution would have to show that “a reasonable person would have viewed” the communication as “threatening.” *Counterman*, 600 US at 71. But the prosecution “had no need to prove that Counterman had any kind of ‘subjective intent to threaten.’” *Id.* (cleaned up). Notably, that is exactly what the People need to prove under Michigan law.

Given the importance of this central point, it is worth reiterating that the Court of Appeals again ruled five years ago in relying on *Osantowski* that the prosecution is required to prove “an intent to intimidate” in making a threat of violence under MCL 750.543m(1)(a). See *Byczek*, 337 Mich App at 190 (“[T]he prosecution also was required to demonstrate that ***defendant’s statement was*** a true threat, meaning that it was the ‘communication of *a serious expression of an intent to commit an act* of unlawful violence to a particular individual or group of individuals’ ***made with ‘an intent to intimidate or coerce.’***”) (Emphasis added; footnote omitted), citing *Osantowski*, 274 Mich App at 603, 605. And that is because this Court in *Osantowski* reached this conclusion based on the definition of “threaten” and the fact that the crime of threatening terrorism criminalized the communication of an act that “encompassed” the requirements of an act of terrorism. See *id.* at 604.

B. The Court of Appeals on remand erred in ruling that the plain language of MCL 750.543m(1)(a) contained “no scienter requirement,” repeating the error from its first opinion.

On remand, the Court of Appeals reviewed the statutory language at issue and determined that it did not include a scienter requirement:

Unlike a charge of making a false report of terrorism, which requires that the defendant “[k]nowingly makes a false report of an act of terrorism and communicates the false report to another person, *knowing* it is false,” MCL 750.543m(1)(b) (emphasis added), ***there is no scienter requirement expressly stated in the plain language*** of MCL 750.543m(1)(a). Rather, based upon the plain statutory language, a defendant is guilty of making a terrorist threat if he or she threatens to commit an act of terrorism and communicates that threat to another.

[Slip op, p 6 (emphasis added).]

While the Court of Appeals went on to rule correctly that there was a *mens rea* requirement if the statute is “otherwise silent,” slip op, p 8, the Court of Appeals did not need to reach this question if it had interpreted the relevant statutory language correctly. Rather, its review reflected three distinct errors.

First, the Court of Appeals did not conduct a full review of the text’s plain language. As noted by the Court of Appeals almost 20 years ago in *Osantowski*, the term “threat” is “a communication of a serious expression of intent to commit an act of unlawful violence.” *Osantowski*, 274 Mich App at 604. This is consonant with the dictionary definition cited above, see p 5 above, and as pressed by the supplemental brief of the Wayne County Prosecutor, see Wayne’s Br, pp 21–22 (“an expression of an intention to inflict evil, injury, or damage”). But the Court of Appeals here never examined the meaning of “threaten” in § 543m(1)(a) by itself as containing the requisite *mens rea*. See slip op, p 6. Moreover, while the Court of Appeals on remand quoted the language of § 543b(a), *id.*, that Court never examined whether the express statements of guilty knowledge as contained in definition of “act of terrorism” were relevant for the requirements as a matter of plain language in proving a threat of an act of terrorism. As noted earlier, the Court of Appeals in *Osantowski* ruled that § 543m(1)(a) “encompassed” the requirement to prove an intent. See *id.*, 274 Mich App at 604 (“It is absolutely clear from the context in which the term ‘threat’ appears that the Legislature sought to prevent the communication of an intent to engage in behavior that constituted or **encompassed** an ‘act of terrorism’ as defined by MCL 750.543b.”) (emphasis added). In short, the plain language included proof of a wrongful intent.

Second, the Court of Appeals relied on the statute’s use of “knowingly” in § 543m(1)(b) as indicative of the fact that the Legislature did not intend to add an express scienter requirement in (1)(a). Slip op, p 6. But this is a misreading of § 543m(1). The Legislature did not need “knowingly” in (1)(a) because the scienter was already included in “threaten” and in the definition of “act of terrorism,” i.e., to prove that the threat was “made with an intent to intimidate or coerce.” See *Byczek*, 337 Mich App at 190 (cleaned up). Not so for the making of a false report, which is not defined in the statute.

Third, the Court of Appeals also incorrectly distinguished the prior decisions of the Court of Appeals. It ruled that *Osantowski*, *Byczek*, and *Gerhard* had not ruled on this issue, but had left open whether the threat might be viewed “objective[ly],” *Kvasnicka (On Remand)*, slip op, p 5, which is that the person making the statement may not have intended it be a threat. But the analysis of the prior decisions rejected this view, requiring the People to prove that the person intended the threat to be a “serious expression” of an intent to commit a violent act, i.e., to prove an intent to intimidate. See *Osantowski*, 274 Mich App at 603 (the statement requires a “serious expression of an intent to commit an act of unlawful violence,” and the law “require[s] the existence of an intent to ‘intimidate or coerce.’ ”); *Byczek*, 337 Mich App 173, 184–185 (same); *Gerhard*, 337 Mich App at 688 (“the definition of ‘act of terrorism’ under MCL 750.543b(a) and the requirements of MCL 750.543m encompass the elements identified in the definition of a ‘true threat’ expressed in [*Virginia v*] *Black*, 538 U.S. [343,] 359–360 [(2003)]”).

The explanation in those prior decisions of the Court of Appeals that the statement must require proof of a “serious” expression requires proof of a subjective intent. The one making the threat cannot have meant the listener to think the threat was just a joke. And the requirement to prove an “intent to intimidate” is a classic intent proof requirement. The requirement to prove a culpable “intent” is the gold standard of requirements to prove a *mens rea*. It requires a *higher* showing than recklessness. See *Counterterman*, 600 US at 79 (for proof of knowledge: “he knows to a practical certainty that others will take his words as threats”); *id.* (for proof of recklessness: “a speaker is aware that others could regard his statements as threatening violence and delivers them anyway.”) (cleaned up). See also *People v Tadgerson*, ___Mich ___, 2025 WL 2045515, at *8 n 7 (2025) (“‘recklessness’ is the least burdensome [of the three culpable mental states] to establish”). The statute also confirms the Legislature’s design to prosecute only unprotected speech. See MCL 750.543z (“a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision”).

The opinion of the Court of Appeals on remand did not apply the statute’s express language, either “threaten” or “act of terrorism,” both of which required proof of an intent to intimidate in making a threat to commit a violent act that the person knows or has reason to know would be dangerous to human life. This Court of Appeals did not need to reach its alternative analysis. Nor does this Court.

C. The arguments of Kvasnicka in his supplement to the contrary are unavailing.

In his supplemental brief, Kvasnicka raises several arguments regarding the statute's plain language, two of which merit a response.

First, Kvasnicka's supplemental brief echoes the same analysis as the decision of the Court of Appeals on remand. Like the opinion, Kvasnicka's supplemental brief provides no definition of "threaten" and does not grapple with the textual scienter in the definition of "act of terrorism" in § 543b(a), which is encompassed by § 543m(1). See Kvasnicka's Supp, pp 4–8. And also like the opinion on remand, the supplemental brief leans heavily on the inclusion of "knowingly" in § 543m(1)(b). *Id.* at 5. But as explained above, see p 11, such a scienter was not necessary where the meaning of "threaten" and the definition of "act of terrorism" already included an intent requirement.

Second, apart from the definition of "threaten," Kvasnicka's supplemental brief suggests that the wrongful intent that is provided in the definition of "act of terrorism," cannot be imported into the definition of the crime of making a terrorist threat in MCL 750.543m given the provision in § 543m(2): "It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism." In particular, Kvasnicka argues that "[t]he Legislature went on to ensure that prosecutions under the statute required no criminal scienter on the part of the Defendant speaker[.]" Kvasnicka Supp, p 6, citing MCL 750.543m(2).

But this argument misunderstands the point of the statute, which criminalizes not only the making of a threat of an act of terrorism in § 543m(1)(a) but also the carrying out of an act of terrorism in § 543f(1) (“A person is guilty of terrorism when that person knowingly and with premeditation commits an act of terrorism.”). The threat of committing an act of terrorism and committing an act of terrorism are punished separately. See *Osantowski*, 481 Mich 103, 110 (2008) (“an offender may threaten to commit an act of terrorism . . . without committing an act of terrorism”). Each requires a wrongful intent.

In this way, the statute clarifies in § 543m(1) that unlike committing the act, in criminalizing the making of a threat of an act of terrorism, there is no requirement that the speaker “actually intend to carry out the threat.” *Osantowski*, 274 Mich App at 605, quoting *Virginia v Black*, 538 US 343, 359 (2003). But the threat itself must include a serious “intent to intimidate” the listener. See *Osantowski*, 274 Mich App at 603. Kvasnicka’s analysis fails to distinguish between the crime of making a threat of an act of terrorism and the crime of *actually committing* an act of terrorism, as § 543m(1)(a) criminalizes only the former, not the latter.

Based on this mistake, Kvasnicka then asserts that “the Legislature was punishing the act of speaking or writing the words to another person. Beyond that, no more proof of intent . . . is necessary.” Kvasnicka Supp, p 7. But that is wrong. The People are required to prove an intent to intimidate in bringing a charge of threatening an act of terrorism.

This Court should rule that the People must prove this wrongful intent based on the statute’s plain language.

II./III. Even if the text was silent, the canons of construction would require a construction of the law that requires proof of a *mens rea*, here recklessness, as the Court of Appeals ruled on remand.

As noted, the question whether the plain language requires proof of a wrongful intent to intimidate or is silent, is an important one. If the latter, the correct construction would require proof of recklessness, just as the Court of Appeals ruled here on remand. See slip pp 7–9 (requiring proof that “the defendant *recklessly* threatened”) (emphasis in original). It is also the requested relief sought by the Wayne County Prosecutor as well. See Wayne Br, p 26 (“safest course . . . use of the recklessness language of *Counterman* in the instruction”).

If reached, this would be the correct outcome under Michigan’s traditional canons of construction regarding criminal statutes silent on a mens rea, which are consistent – but distinct – from the doctrine of constitutional avoidance. Compare *Sole v Mich Econ Dev Corp*, 509 Mich 406, 419–420 (2022) (“courts reasonably presume that the Legislature did not intend to enact a statute that ‘raises serious constitutional doubts’”) with *People v Tadgerson*, ___ Mich ___, 2025 WL 2045515, at *4 (2025) (“there is a presumption that unless otherwise stated in a statute, a Legislature intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.”), citing *Magnant*, 508 Mich at 167. The traditional canon from *Tadgerson* would apply here if this Court did not agree with the analysis of the amicus on the plain language. And there would be no need for this Court to reach the question whether it is appropriate to adopt a limiting construction. See *People v Burkman*, 513 Mich 300, 340 (2024). Whichever the approach, Michigan’s law here is constitutionally valid.

- A. Under Michigan’s presumption of a mens rea for criminal statutes, if this Court concludes that there is no scienter expressly provided in MCL 750.543m(1)(a), the Court of Appeals’ analysis is then correct, requiring a finding of proof of recklessly making a threat of an act of terrorism.**

As noted, the well-established case law in Michigan disfavors strict liability statutes, and instead asks the reviewing court to interpret the criminal law as requiring proof of a guilty state of mind in order to commit a crime, unless clearly provided otherwise. Thus, even where “the text of the statute provides no express criminal-intent provision,” the courts will interpret the law as to require a “wrongful state of mind” to commit the crime unless the Legislature clearly directed to the contrary. See *Magnant*, 508 Mich at 182. See also *Tadgerson*, 2025 WL 2045515, at *4, quoting from *People v Tombs*, 472 Mich 446, 456–457 (2005) (Kelly, Marilyn, J., plurality opinion) (“some form of scienter is to be implied in a criminal statute even if not expressed”); *id.* (“Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence [of a *mens rea* requirement] suggests the Legislature’s intent not to eliminate *mens rea*[.]”) (cleaned up). This canon operates in tandem with the doctrine of constitutional avoidance.

In applying the principle of presuming the requirement of proof of a criminal intent here,² the fact that § 543m(1)(a) is silent supports the ruling of the Court of Appeals on remand here, construing the law as requiring proof of recklessness.

² As noted, this presumption is unnecessary. The plain meaning of “threaten” and the definition of “act of terrorism” in § 543b(a) identify elements that expressly require proof of a guilty state of mind, i.e., “is intended” to “intimidate,” and thus this doctrine is unnecessary here.

Kvasnicka, slip op, pp 7–8 (“the statute should be broadly interpreted to include a *mens rea* requirement even the statute is otherwise silent”) (footnote omitted).

There was no clear indication to the contrary.

Significantly, the Court of Appeals previously did something similar in *People v Johnson*, 340 Mich App 531 (2022). There, that Court noted the preference for a law to require a criminal intent, rather than one that imposes strict liability. *Id.* at 546 (“we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, ***even if it was left unstated***”) (emphasis added), quoting *Tombs*, 472 Mich at 459 (Kelly, Marilyn, J., plurality opinion). The Court of Appeals then went on to “read[] a ‘criminal intent’ element into the offense of witness retaliation” and modify the standard jury instruction, similar to the remedy Wayne County has proposed here: “To satisfy the ‘true threat’ exception to the Free Speech Clause, the jury needed to be instructed that the prosecution was required to prove beyond a reasonable doubt that *defendant meant to express a serious intent to kill or injure BP*, although the prosecutor did not have to prove that defendant actually intended to kill or injure BP. . . . In any new trial held on remand, the court shall instruct the jury on witness retaliation consistently with this opinion.” *Johnson*, 340 Mich App at 547 (emphasis added).

This Court construed similar language in *Tadgerson* in ruling that Michigan’s prison contraband statute was not one that imposed strict liability. The statute at issue, MCL 800.281(4), provided that “a prisoner shall not possess any alcoholic liquor, prescription drug, poison, or controlled substance.” *Tadgerson*, 2025 WL 2045515, at *3. This Court there confronted an argument like the one pressed here:

“The Legislature expressly included a *mens rea* requirement in [MCL 800.281(2)] . . . but wholly omitted a *mens rea* requirement in [MCL 800.281(4)],” the omission “plainly demonstrated that the Legislature intended MCL 800.281(4) to be a strict-liability offense.”

[*Tadgerson*, 2025 WL 2045515, at *5, quoting the analysis of the Court of Appeals, *People v Tadgerson*, 346 Mich App 104, 116 (2023).]

In other words, this Court was addressing an analogous circumstance to the argument that Kvasnicka claims here, one in which the Legislature included an express scienter requirement in one provision, but not in another (assuming that the Court does not agree with the arguments made by the amicus in issue D).

On this point, this Court rejected the analysis on two grounds. To begin, this Court relied on the statute MCL 8.9 (governing non-penal code statutes and thus not applicable here), which provides that “[t]he *mere absence* of a specified state of mind for an element of a covered offense shall *not* be construed to mean that the legislature affirmatively intended not to require the prosecution to prove any state of mind.” See *Tadgerson*, 2025 WL 2045515, at *6, citing MCL 8.9(9) (emphasis added by this Court in *Tadgerson*.) On that ground, it ruled that the “mere absence” of the culpable mental state in MCL 800.281(4) was “insufficient to construe [the law] as a strict-liability offense.” *Id.* Moreover, as relevant to this question, this Court noted that this conclusion was “consistent with this Court’s longstanding recognition” under the canons of statutory construction that “[a]bsent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature’s intent not to eliminate [a] *mens rea*.” *Tadgerson*, 2025 WL 204515, *6, citing *Tombs*, 472 Mich at 456–457 (opinion by Kelly, Marilyn, J.).

While this Court acknowledged that MCL 8.9 did not merely codify the prior canons of statutory construction and it meant to change the outcomes for a good number of statutes, nonetheless its ruling that the statute at issue there did not “plainly impose[] strict liability,” *id.* at *7, would seem to provide further support for the decision of the Court of Appeals here.

B. If the plain language did not affirmatively resolve this issue, the analysis of the Court of Appeals on remand is correct in its ruling that if MCL 750.543m is otherwise silent then Michigan law contains a recklessness *mens rea*.

As noted above, the amicus contends that the plain language of MCL 750.543m and MCL 750.543b(a) require proof of intent to intimidate. If this Court determines otherwise, then the Court of Appeals’ ruling that MCL 750.543m(1)(a) requires the People to prove that the defendant made the threat “recklessly” is correct:

We, therefore, construe MCL 750.543m(1)(a) as requiring that the prosecution prove (1) that the defendant *recklessly* threatened (2) to commit an act of terrorism and (3) that the threat was communicated to another person. The term “recklessly” means that the defendant “consciously disregarded a substantial risk that his [or her] communications would be viewed as threatening violence.” See *Counterman*, 600 US at 69.

[*Kvasnicka (On Remand)*, slip op, p 8 (emphasis added).]

The Wayne County Prosecutor has endorsed this resolution as well. See Wayne’s Br, pp 23–24 (“to instruct the jury on the mens rea requirement of recklessness to comport with the First Amendment”).

The basis for this resolution of the Court of Appeals is its analysis both of the U.S. Supreme Court's decision in *Elonis v United States*, 575 US 723, 734 (2015) and its analysis of the constitutional-doubt canon of statutory construction in *Sole*, 509 Mich at 421. *Kvasnicka (On Remand)*, slip op, pp 6–8. From these authorities, the Court of Appeals reached the conclusion that “the statute should be broadly interpreted to include a *mens rea* requirement even though the statute is otherwise silent.” *Id.* at 7–8. This is the right conclusion, but strictly speaking, it follows from this Court's doctrine on interpreting criminal statutes generally. See, e.g., *Tadgerson*, 2025 WL 2045515, at *4 (“presumption” of a “culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct”), quoting *Magnant*, 508 Mich at 167.

One further point. In its footnote 2 page 8 of the slip opinion, the Court of Appeals expresses “reluctance” in reaching this conclusion because it contends that it is contradicting the “ordinary” statutory interpretation of relying on a statute's plain language. See slip op, p 8 n 2. But this analysis overlooks the fact that the true gravamen of this construction is the presumption that exists in Michigan law: a Legislature that leaves a criminal statute silent with regard to the *mens rea* is credited in law for having known of this presumption and legislated in light of that background principle. This statutory framework was enacted in 2002, see 2002 PA 113, and the origin of this doctrine runs back to Justice Cooley himself. See, e.g., *Tombs*, 472 Mich at 466 (Taylor, J., concurring) (“As a general rule there can be no crime without a criminal intent. *People v Roby*, 52 Mich 577 [](1884) (Cooley, C.J.).”)

C. The arguments of Kvasnicka in his supplement to the contrary are unavailing.

As above, the arguments the Kvasnicka advances to avoid the application of Michigan's statutory presumption reflect several critical legal errors.

First, and foremost Kvasnicka rejects the argument that the law may be subject to a construction that incorporates a *mens rea* because he argues that MCL is “not ambiguous, vague, or subject to more than one ‘fairly plausible’ interpretation.” See Kvasnicka Supp, p 10. On this point, the amicus agrees with that argument. But that is because the statute unambiguously *includes* a requirement that the People prove a wrongful intent to intimidate, which both follows from the ordinary meaning of “threat” and is encompassed by the definition of “act of terrorism” in § 543b(a). As already argued, Kvasnicka overlooks these points. See p 13 above.

And on this point, Kvasnicka argues that the MCL 750.543m is a strict liability statute. See Kvasnicka Supp, p 15 (“The language clearly and plainly punishes the act of transmitting a threat to commit [an] act of terrorism to another person as a strict liability offense.”) But the Court of Appeals apparently already eschewed this argument in *Osantowski* that MCL 750.543m(1)(a) imposes strict liability, when it determined that it requires proof of an intent to intimidate. See *Osantowski*, 274 Mich App at 603, 606–607 (rebutting “Defendant[’s] argu[ment] that the Legislature made threatening to commit an act of terrorism into a strict liability crime”). The same basic argument pressed by Kvasnicka was present in *Tadgerson*, which as noted would appear to support the decision of the Court of Appeals here. See pp 17–19 above. Kvasnicka does not address this Court’s decision in *Tadgerson*.

Second, related to this first point, Kvasnicka leans heavily on the decision in *Counterman* to support his argument that the statute is facially invalid. See Kvasnicka Supp, pp 17–20 (“[T]he Court in *Counterman* could simply have indicated that it was adopting the holding in *Elonis* and required that all true threats could simply have a criminal recklessness standard read into them and prosecutions could proceed in that manner without further consideration.”) But this argument is predicated on a critical misunderstanding of the ruling in *Counterman*.

The U.S. Supreme Court did *not* invalidate the Colorado statute, as noted by Wayne County. See Wayne Br, 23–26. Instead, it ruled that the jury instructions that allowed a conviction without a finding of a *mens rea* violated the First Amendment, and it merely vacated the judgment of the Colorado Court of Appeals. *Counterman*, 600 US at 82–83. Then, on remand, the Colorado appellate court vacated the conviction and further “remand[ed] the case for a new trial,” with a specific direction about how the instructions should be given to the jury (quoted here in full):

In the wake of *Counterman II*, the Model Criminal Jury Instructions Committee promulgated the following “special instruction” for the charge of stalking (serious emotional distress) when the charged conduct involves repeated communications, as it did here:

For purposes of the crime of stalking (serious emotional distress), in order to find that the defendant made any form of communication with another person that would cause a reasonable person to suffer serious emotional distress, ***you must find that the defendant consciously disregarded a substantial risk that [his] [her] communications would be viewed as threatening violence.***

COLJI-Crim. 3-6:04.5.SP (2023).

[*Counterman*, 2024 WL 3783589, at *3 n 4 (Colo App, June 13, 2024) (emphasis added).]

Thus, Kvasnicka's reliance on *Counterman* cuts exactly the other way. The U.S. Supreme Court did not adopt a narrowing construction of the state statute there because that is a matter for the state courts, not the federal ones. See, e.g., *United States v Taylor*, 596 US 845, 859 (2022) ("state courts [are] the final arbiters of state law in our federal system"). Thus, it makes perfect sense that the Colorado courts would rule in this fashion on remand. Accordingly, *Counterman* **confirms** the constitutional validity of the law at issue here.

The Wayne County Prosecutor is asking for the same relief that the intermediate appellate court in Colorado provided based on its statute. See Wayne Br, pp 26–27 (asking this Court to revise the standard jury instruction for M Crim JI 38.4, adding the phrase "where the defendant was aware that others could regard the statement[s] as threatening harm or injury and delivered it/them anyway").

D. Kvasnicka's policy arguments do not support his position; rather they support the decision of the Court of Appeals below.

Finally, Kvasnicka argues that even though his construction of the law would cause "hundreds of other cases that are presently in active litigation" to be possibly compromised by the ruling he requests, it is required by law and supported by public policy. Kvasnicka Supp, pp 20–23. Not so.

The policy arguments strongly support the People's position here. With some important exceptions, Michigan law has long supported the presumption against strict liability in Michigan. See, e.g., *People v Quinn*, 440 Mich 178, 187 (1992)

(“Statutes creating strict liability regarding all their elements are not favored.”) In fact, the Legislature in 2015 adopted an even stronger principle, requiring a *mens rea* for statutes outside of the penal code and few others in MCL 8.9(3), (7), unless the law “plainly imposes strict liability.” See *Tadgerson*, 2025 WL 2045515, at *7 (“the Legislature intended to significantly restrict the imposition of strict criminal liability, outside of certain specifically defined exceptions.”).

In the end, the People are not asking this Court to perform “textual alchemy,” Kvasnicka’s Supp, p 14, but to apply longstanding principles of statutory construction. This statute has, for almost 20 years, been interpreted not to impose strict liability but to require proof of an “intent to intimidate.” See *Osantowski*, 274 Mich App at 603. Any ruling otherwise would be a break from this Court’s precedent and the way Michigan courts have been interpreting this statute since the time that it was first enacted.

* * *

Michigan’s anti-threat of terrorism law is an important statute for the protection of the community. With the increasing acts of violence and threats of terrorism in Michigan, this Court should not depart from traditional principles of statutory construction. Whether this Court relies on the plain language of MCL 750.543m and MCL 750.543b(a) and find it requires proof of an intent to intimidate or is silent on that issue and requires proof of recklessness, either way the law is constitutionally firm. This Court should either rule the law requires proof of an intent to intimidate or otherwise affirm the Court of Appeals.

CONCLUSION

This Court should affirm the constitutionality of Michigan's anti-terrorism-threat provision, MCL 750.543m(1)(a).

Respectfully submitted,

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