STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Letica, PJ., Redford and Rick, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs-Appellees, v JOHN MACAULEY BURKMAN, Defendant-Appellant. _____/	Supreme Court No. 164638 Court of Appeals No. 356600 Wayne County Circuit Court No. 20-004636-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiffs-Appellees, v JACOB ALEXANDER WOHL, Defendant-Appellant. _____/	Supreme Court No. 164639 Court of Appeals No. 356602 Wayne County Circuit Court No. 20-004637-FH

CORRECTED BRIEF ON APPEAL OF APPELLEES PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff-Appellee People of the State of Michigan accepts the statement of jurisdiction by Defendants-Appellants John Macauley Burkman and Jacob Alexander Wohl.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

This Court has directed the parties to address two specific questions:

1. Did the Court of Appeals properly interpret MCL 168.932(a)?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

2. Is MCL 168.932(a) unconstitutional on its face or as applied to the defendants-appellants?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment, U.S. Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

MCL 168.932(a) provides:

> A person who violates 1 or more of the following subdivisions is guilty of a felony:
>
> (a) A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

INTRODUCTION

In a blatant attempt to suppress the minority vote during the 2020 Presidential Election, John Burkman and Jacob Wohl sent a robocall message into specific zip codes in cities with high Black populations. The robocall message implicitly threatened the liberty as well as the financial and physical harm of those voting by mail in the election.

Sent during the height of the pandemic, when public gatherings were being discouraged, the call warned recipients not to be finessed into giving their private information to "the man," and to beware of vote by mail. The message asserted that if a person votes by mail his or her personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts. It further asserted that the Center for Disease Control and Prevention (CDC) is pushing to use records from mail-in voting to track people down for mandatory vaccination.

As a result of this robocall message, criminal and civil proceedings were initiated against Burkman and Wohl in several different jurisdictions. Based on this robocall message to Detroit voters, Burkman and Wohl were charged with violating Michigan's voter intimidation statute, MCL 168.932(a). That statutory provision makes it a crime by means of "menace" or "corrupt means or device" to influence an election or to deter someone from voting:

> A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

The issues presented in this interlocutory appeal are (1) whether MCL 168.932(a) applies to the conduct demonstrated in this case, and (2) whether this robocall is constitutionally protected by the First Amendment. The answers are first, yes, the record developed at the preliminary examination is sufficient to establish the elements of the crime, and second, no, the false message by Burkman and Wohl is not constitutionally protected. Michigan's voter intimidation law is constitutional.

The targeting of minority voters, the defendants' stated goal of "hijacking this boring election," and other facts and circumstances surrounding the publishing of the robocall are sufficient to raise a question of fact as to whether Burkman and Wohl unlawfully intended to deter minority electors from voting in this election. Viewed in proper context, the common definitions of those terms establish that "menace" and "a corrupt means or device" were both used as methods to achieve the goal of deterring voting.

The term "menace" is generally defined as a show of an intention to inflict harm. While here there is a subtle threat to do physical violence in the assertion that voting records may be used to track people down for mandatory vaccinations, the threats to financial and liberty interests are also within the accepted definition of the term. "Menace" is not limited to threats of physical assault.

Likewise, the term "corrupt means or device" is generally viewed as intentional, purposeful, deliberate and knowingly wrongful behavior. Here, the record below establishes that the defendants acted with the intent to "hi-jack this

boring election." That alone is sufficient to establish a question of fact as to whether the robocall message was a "corrupt means or device" used as a method to deter voting. The evidence here was more than sufficient to bind them over on this charge.

Furthermore, with regard to the second question, this robocall is outside of constitutional protection. While the First Amendment generally protects speech, there are certain well-established exceptions to its protections. There are at least two exceptions that apply in this case: (1) speech integral to criminal conduct; and (2) true threats. Based on each exception, the speech at issue here is not constitutionally protected. And MCL 168.932(a) is not unconstitutionally vague or overbroad.

For the reasons stated and discussed in this brief, this Court should affirm the decision below and remand the case to the trial court for a trial on the merits.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Defendants John Macauley Burkman and Jacob Alexander Wohl were charged in a complaint and warrant with the offenses of: (1) Election Law– Bribing/Intimidating Voters, in violation of MCL 168.932(a); (2) Conspiracy To Commit Election Law-Bribing/Intimidating Voters, in violation of MCL 750.157a and MCL 168.932(a); (3) Using a Computer to Commit Election Law-Bribing/Intimidating Voters, in violation of MCL 752.796, MCL 752.797(3)(d) and MCL 168.932(a); and (4) Using a Computer to Commit Conspiracy To Commit Election Law-Bribing/Intimidating Voters, in violation of MCL 752.796, MCL 752.797(3)(d), MCL 750.157a and MCL 168.932(a).

The gravamen of the charges is that the defendants attempted to unfairly affect the outcome of the 2020 General Election by suppressing the vote in minority communities. They conspired with each other to send a robocall message into communities with a high minority population. Their message falsely claimed that mail-in voting records would be used by law enforcement to execute outstanding warrants and by creditors to collect on outstanding debts. The caller also falsely implied that the CDC was seeking to use mail-in voting records to ensure mandatory vaccinations. The message warned against being finessed by "the man" into giving personal information. The defendants used computers and computer systems throughout the conspiracy, and as a vehicle to deliver their false and intimidating message to minority voters.

The matter came before a 36th District Court Judge for preliminary examination on October 29, 2020. The People presented three witnesses, one who

received one of these false robocalls from Burkman and Wohl, the officer who investigated the matter and further linked the calls to the defendants (including their admissions in federal court), and an elections official from the Secretary of State, who explained that the information contained in the robocalls was false.

To begin**, Derrick Thomas** testified that he was a 62-year-old retired firefighter who resides in the City of Detroit. (App'x, PE 10/29/20, 11a, 35a). He is a qualified elector who has been voting for many years. (App'x, PE 10/29/20, 11a–12a). He intended to vote in the 2020 General Election. (App'x, PE 10/29/20, 26a). Mr. Thomas testified to receiving and listening to a robocall that was made to his land-line telephone at 11:16 a.m. on August 26, 2020. (App'x, PE 10/29/20, 12a–14a, 23). He stated that he had caller ID on his telephone, and the number appearing on the caller ID was 703-795-5364. (App'x, PE 10/29/20, 18a). Mr. Thomas identified an audio recording as a true and accurate recording of the robocall he received, and the recording was admitted into evidence as Exhibit 1. (App'x, PE 10/29/20, 15a). The content of the recorded robocall is as follows:

> Hi, this is Tamika Taylor from Project 1599, a civil rights organization founded by Jack Burkman and Jacob Wohl. Mail-in voting sounds great, but did you know that if you vote by mail your personal information will be part of a public database that will be used by police departments to track down old warrants and be used by credit card companies to collect outstanding debts? The [Center for Disease Control and Prevention (CDC)] is even pushing to use records from mail-in voting to track people for mandatory vaccines. Don't be finessed into giving your private information to the man. Stay safe and beware of vote by mail. [App'x, Exhibit 1, 192a–193a.]

Jeffrey Campbell testified that he is a Special Agent for the Michigan Department of Attorney General with over 25 years' experience in law enforcement.

(App'x, PE 10/29/20, 43a, 81a). He was assigned to lead the investigation into the robocall that was admitted as Exhibit 1. (App'x, PE 10/29/20, 44a–45a, 79a). After discussing the robocall with Mr. Thomas, he drafted a search warrant to U.S. Telecom, a trade association of the major telecommunication service providers, to trace the origin of the robocall. (App'x, PE 10/29/20, 45a–46a). U.S. Telecom responded to the search warrant with information that caused him to draft a second search warrant for the records of Message Communications, a Los Angeles, California whose president was Robert Mahanian. (App'x, PE 10/29/20, 46a).

Message Communications provides robocall services for paying clients. S/A Campbell described the process:

> The client can sign up for those services by way of online applications. They essentially can provide whatever recording that they wish to upload into the account. They pay for the services, either by check or by electronic transmission through that website. They can schedule the robo calls that they wish to go out. They can use databases as they upload or pick from existing databases by zip code and schedule the robo calls to go out that way, on their own. It, essentially, allows clients to manage their own campaign through the on-line service. [App'x, PE 10/29/20, 89a–90a.]

A search warrant regarding Message Communications was issued by a California judge. (App'x, PE 10/29/20, 46a). S/A Campbell participated in the execution of that search warrant along with another Michigan Attorney General Special Agent and California law enforcement agents. (App'x, PE 10/29/20, 46a–47a). During the execution of the warrant, the officers found electronic communications between Mahanian and JackBurkman2016@gmail.com and JacobWohl@gmail.com. (App'x, PE 10/29/20, 48a). Based on this information S/A

Campbell obtained a search warrant for subscriber information and records from Google. (App'x, PE 10/29/20, 49a).

Google responded to the search warrant by providing records electronically through a portal available only to law enforcement. (App'x, PE 10/29/20, 49a–50a). Along with the records, Google provided a Certificate of Authenticity attesting to the accuracy of the records kept in the normal course of business. (App'x, PE 10/29/20, 50a–52a).

A series of documents was marked as proposed Exhibit 8. S/A Campbell identified this exhibit as some, but not all, of the emails provided by Google in response to the search warrant. (App'x, PE 10/29/20, 52a). The documents in the proposed exhibit were Bates stamped for easy reference. (App'x, PE 10/29/20, 54a). Exhibit 8 was admitted into evidence pursuant to MRE 902(11) as certified records of regularly conducted activity. (App'x, PE 10/29/20, 53a). S/A Campbell then read portions of the exhibit into the record.

S/A Campbell identified Exhibit 8, Bates stamp 11 as an email chain:

> Okay. This email says in subject line regarding Dem dated August 19th, of 2020 at 11:49. It's from Jack Burkman 2016 Gmail, to Jacob Wohl Gmail.com first part of email, yes America needs W.B. This is in response to an email sent by Jacob Wohl email to Jack Burkman, 2061 (sic) at Gmail.com on Wednesday August 19th, that's 11:40 a.m. That message says Bill Clinton . . . dem convention speech viewership on-line stream total viewership, ABC, 727, CBS 424, NBC 196, no, I'm not missing any zeros. Our press conference is literally get [sic] 50 to a hundred times more views, which is why ***we must hi-jack this boring election***. [App'x, PE 10/29/20, 55a–56a (emphasis added).]

S/A Campbell then went on to read into the record other emails that were part of Exhibit 8:

This is an email, it says on the subject line, Robert and it's dated August 22nd, 2020, at 2:48. It's from Jack Burkman, 2016 at Gmail.com to Robert at MessageCommunications.Com and Jacob Wohl@gmail.com. It says want to make sure check arrived. ***We are ready to begin the robo calls.*** [*Id.* at 58a (emphasis added).]

This one also says in the subject line regarding Robert, it's dated August 23rd, 2020 at 332. It's from Robert at Message Communications.com to Jack Burkman 2016@gmail.com and Jacob Wohl@Gmail.com. It says Hi Jack. The check hasn't arrived yet, but I'll check again on Monday morning. Do you have a tracking number for it? As soon as I receive it, I'll send over the paid invoice showing both payments in 2020 for 2000 dollars. Thank you, again and signed by Robert Mahanian. [*Id.* at 58a–59a.]

This email says robo call tape in the subject line. It's dated August 25th, of 2020 and 0010. It's from Jacob Wohl@Gmail.com to Jack Burkman 2016@Gmail.com. It says ***attached is the audio file for the robo call. We should send it to black neighborhoods in Milwaukee, Detroit, Philadelphia, Charlotte, Richmond, Atlanta and Cleveland . . .*** it showed down the bottom of the page, you see there was [sic] indications of attachments at the bottom that said **1599 vote by mail, robo call.wav.** In the Google records provided to me, that is an actual attachment of an audio recording that is the mail in voting recording that went out on August 26th, 2020. [*Id.* at 59a (emphasis added).]

This email message on the subject line ***working on robo now***. It's dated August 25th, of 2020 at 1751. It's from Burkman 2016@Gmail.com to Jacob Wohl@gmail.com. It says ***Cleveland, Philadelphia, Minnesota, Chicago, New York City and Detroit.*** [*Id.* (emphasis added).]

This one says subject line, robo, it's dated August 25th, 2020, 1848 hours from Jack Burkman 2016@gmail.com to Jacob Wohl@gmail.com. The message says ***data all loaded, ready. Many zip codes***. We have two wavs, the 267,000 calls each. If you could do me one favor, just go in and upload the recording. Message Communications.Com account 12013, pass code 5202. Then I will enable, pick days and go in and hit go. [*Id.* at 60a (emphasis added).]

The emal (sic) regarding got call uploaded. It dated ***August 26th, 2020 at 10:47***. It's fromRobert@Messagecommunications.com to Jacob Wohl@Gmail.com and Jack Burkman 2016@Gmail.com. The message

says yes, ***your campaign is currently running and recording***, uploaded about 20 minutes ago, is running. I believe you are all set. It's signed Robert Mahanian and it's in response to the email message on this page just below it. [*Id.* at 60a (emphasis added).]

This one says on of [sic] the subject line regarding the got call uploaded, August 26th, 2020, 10:51 a.m. Jack Burkman2016@Gmail.com to Jacob Wohl@Gmail.com. It says ***great job*** in response to an email from Jacob Wohl at Gmail.com, that says ***I just uploaded the wav file.*** You can successfully update the calls per minute number to the maximum. We should be ready to go now. [*Id.* at 60a–61a (emphasis added).]

In the subject line robo. It's dated August 26th, 1527. It's from Jacob Wohl@Gmail.com to Jack Burkman@2016 Gmail.com. It says robo getting quite a bit of play on Twitter. I think they will have to write. [*Id.* at 61a.]

This one says in the subject line regarding protests dated August 26th, 2020 at 1236, it's from Jack Burkman2016@Gmail.com to Jacob Wohl@Gmail.com, it says let's leave Thursday 6:30 p.m. with Louis Thursday. ***I love these robo calls getting angry black call backs, win or lose, the black robo calls was a great idea.*** This is in response to an email sent by Jacob Wohl@ Gmail.com regarding, it says the writers are starting their mayhem tomorrow at 7 p.m. Black Lives Matter plaza formerly known as Lafayette Square. We should definitely get Louis and bull horns. [*Id.* (emphasis added.]

This one is an email that says in subject line Deny, it's dated August 27th of 2020 at 1234. It's from Jacob Wohl@Gmail.com to Jack Burkman2016@Gmail.com. It says deny to Will, ex cetera, regarding robo. That will make them write. [*Id.* at 61a–62a.]

This is in the subject line email that says regarding robo call to Michigan dated August 27th, 2020 at 1326. It's from Jack Burkman2016@Gmail.com to Tierney Sneed at Talking Points Memo.Com and it says in the message, we have no connection to those robo calls. Thank you. It's in response to an email sent to Jack Burkman2016@gmail, from Tierney Sneed. [*Id.* at 62a.]

This one says on the subject line regarding robo call in Michigan dated August 27th, of 2020 at 1338, it's from Jack Burkman2016@gmail.com to Tierney Sneed at Talking Points Memo.Com. It says couple points, one, no one in their right mind would put their cell on robo call. I bet a

> Soros Group is trying to embarrass us. Thirdly, we have been asked by the Trump Campaign to do robo calls and politely declined. We don't do that stuff. [*Id.* at 62a.]
>
> This is an email that says in the subject line regarding robo call, it's dated August 27th of 2020 at 1718 hours. It's from Jack Burkman2016@gmail.com to G. Edgards at 18.org, it is – it is a message, says no sir, not at all, in response to a question from David Edgards of the AP that says Hi Jack, I'm reaching out about this. Are you or Jacob Wohl involved? Thanks and then it also includes what appears to be a copy of a press release by Secretary of State Benson and Attorney General Nessel. [*Id.* at 62a–63a.]

After reading the emails into the record, S/A Campbell next identified a transcript of a proceeding in the United States District Court for the Southern District of Michigan. It was marked as proposed Exhibit 9. (App'x, PE 10/29/20, 63a). The transcript was certified with the court reporter's signature. (App'x, PE 10/29/20, 63a–64a). It was offered for only limited purposes and was admitted for only those limited purposes. (App'x, PE 10/29/20, 63a–64a, 67a). The transcript contained separate admissions by each defendant. However, the entire transcript was offered into evidence for the sole purpose of giving meaning to the admission. Such was necessary to establish that the proceeding involved the same robocall as that in this case. (App'x, PE 10/29/20, 63a–67a).

S/A Campbell then read into the record that portion of the transcript dealing with the admissions by Defendant Burkman:

> Starting with line 17, the Court says Mr. Burkman, my question was not whether they're true or false right now. My question was whether you, acting alone or with anyone else, prepared that message and caused it to be sent?
>
> Mr. Burkman responded oh, yes, your Honor. Yes, that is our call. Yes, yes.

> The Court asked, you don't deny that you caused this call to be made and that you -- Mr. Burkman interrupts and says no. The Court says don't deny the content of it? Mr. Burkman says no, your Honor, we do not. [App'x, PE 10/29/20, 65a–66a.]

S/A Campbell next read into the record the statements made by Defendant Wohl during the federal court proceeding:

> Beginning line 20, it says let me then ask Mr. Wohl if he wishes to make any statement.
>
> Mr. Wohl answers yes, your Honor. ***I would second everything that Mr. Burkman just pointed out.*** I would also say and I would stress the point that there are no robo calls underway. There have not been any robo calls underway since the beginning of any sort of legal proceedings in Michigan and what we believe that this is not an effort to stop robo calls. No one, least of all the Plaintiffs, and no one else has alleged that any robo calls have taken place since the proceedings began in Michigan. So what this represents is an effort not to stop robo calls, but to stifle our constitutionally protected political speech and as to Miss Narvarro's mention of the bail conditions in Michigan and the like, that was examined by the Court, there was another hearing since the one that she referred – that she referenced and everything is all in good standing as it relates to the bail in Michigan. That's what I would conclude with, your Honor.
>
> The Court says all right. Thank you. Mr. Wohl you indicated that you echo all of what Mr. Burkman said. Does that include acknowledgement that you participated in the preparation of the content of the messages and it's communications to plaintiffs through the entity in California? Mr. Wohl answered yes, your Honor as to Mr. Burkman's specific representations, yes, yes. [App'x, PE 10/29/20, 67a–68a (emphasis added).]

Bowing to the inevitable, defense counsel then made a representative admission under MRE 801(D)(2) by stipulation that Mahanian was employed by the defendant to make a robocall. (App'x, PE 10/29/20, 78a–79a). S/A Campbell subsequently testified that Mahanian's records show that the message was

uploaded with directions that it be sent out to certain postal Zip Codes. (App'x, PE 10/28/20, 106a).

S/A Campbell identified proposed Exhibit 6 as series of emails that were seized during the execution of the search warrant at Mahanian's office. (App'x, PE 10/29/20, 72a–73a). These were identified as emails between Mahanian and the conspirators. (App'x, PE 10/29/20, 73a). Emails in Exhibit 8, which was provided by Google from the defendants' email accounts and shown by the records to have originated in Virginia, were the same emails found during the execution of the search warrant in California. (App'x, PE 10/29/20, 78a). Exhibit 6 was thus offered as evidence that a computer system was used in furthering the conspiracy and carrying out the purpose of publishing the robocall. (App'x, PE 10/29/20, 78a).

Finally, **Khyla Craine** testified she was a deputy to the Secretary of State. She serves as second in command of the Legal Services Administration and provides legal and policy advice to the Secretary. (App'x, PE 10/29/20, 111a). As part of her duties, she serves as the Chief Privacy Officer of the Department. (App'x, PE 10/29/20, 112a). She became aware of the robocall because of an accusation that it was a voter suppression call targeting Black citizens in the City of Detroit. (App'x, PE 10/29/20, 113a). She was offended by the robocall because of her responsibility to ensure that voters are not given misinformation about the accuracy or security of their ballot. She saw the content of the robocall as false information. (App'x, PE 10/29/20, 126a). During the 18 months that she has held her position, she has never

seen law enforcement, credit card companies, or the CDC utilize voter records for the purposes stated in the robocall. (App'x, PE 10/29/20, 142a).

Ms. Craine pointed out certain verbiage in the robocall that appeared to be directed to Black Americans and other people of color. She expressly noted the references to mandatory vaccinations and the warning to not give personal information to "the man." (App'x, PE 10/29/20, pp 141a–142a).

She testified that while the Qualified Voter File (QVF) is a public record, and that some parts of it are subject to disclosure, it would not make any sense for law enforcement, creditors or the CDC to use it for the purposes stated in the robocall. She stressed that telephone numbers and email addresses cannot be disclosed from the QVF. She noted that there are various other databases available to law enforcement, creditors and the CDC that would enable them to get much more information about any individual. (App'x, PE 10/29/20, 111a–115a, 123a, 125a). She had a concern that people who listened to the robocall and got the misinformation might feel that mail-in voting was not safe. (App'x, PE 10/29/20, 120a).

After hearing the evidence, the district court judge bound both defendants over to the Wayne County Circuit Court on all four offenses charged in the complaint and warrant. The matter was ultimately assigned to a circuit court judge. Defendants then challenged the bindover by means of identical motions to quash. The parties submitted briefs on the issues and came before the court for oral argument on February 23, 2021. After considering the briefs and arguments, the trial court denied the motions to quash.

Defendants then sought leave to appeal that non-final order denying the motions to quash. On May 6, 2021, the Court of Appeals issued separate orders on each application denying relief for failure to persuade the Court of the need for immediate appellate review. Defendants then sought relief by method of separate applications for leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the Michigan Supreme Court remanded both cases to the Court of Appeals for consideration as on leave granted. In an order dated November 9, 2021, the Court of Appeals consolidated the two cases to advance the efficient administration of the appellate process.

On November 9, 2021, the parties came back before the trial court for a special pre-trial on the still pending charges. After being apprised of the remand to the Court of Appeals the circuit court judge stayed further proceedings in the trial court pending a decision from the Court of Appeals.

Briefs were submitted and the Court of Appeals heard oral argument. On June 2, 2022, the Court of Appeals issued an opinion that rejected the arguments made by Burkman and Wohl and affirmed the denial of the motion to quash. The Court of Appeals' majority expressly held that the conduct established by the record satisfied the elements of the charged voter intimidation statute, and that the robocall fell within the statutory requirement that the method here used to deter voting fell within the proper definition of both "menace" and "corrupt means or device." In a partial concurrence and dissent, Judge Redford agreed that the

evidence established probable cause of "corrupt means or device," but dissented on the bindover with regard to the "menace" theory of liability.

The Court further determined without dissent that the robocall was outside of constitutional protection because it involved speech integral to criminal conduct. But the Court expressly rejected the People's argument that the robocall was also outside of First Amendment protection because it constituted a "true threat." In this regard, the Court determined that the "true threat" doctrine was limited to threats of physical violence.

The defendants then sought leave to appeal the June 2, 2022 decision by the Court of Appeals. On October 24, 2022, while the application for leave was still pending in the Supreme Court, Burkman and Wohl pled guilty to a felony telecommunications fraud charge in the Cuyahoga County (Ohio) Common Pleas Court. The charge was based on a robocall message sent to minority voters in Cleveland. But that was the exact same robocall message that was sent to Detroit voters in the present case.

On November 2, 2022, between the time of the Ohio plea and sentencing, this Court granted leave and directed the parties to address (1) whether the Court of Appeals properly interpreted MCL 168.932(a) and (2) whether MCL 168.932(a) is unconstitutional on its face or as applied to the defendants.

STANDARD OF REVIEW

The district court's decision to bindover a defendant is reviewed to determine whether the district court abused its discretion in making its decision. *People v Drake*, 246 Mich App 637, 639 (2001). However, where the decision entails a question as to whether the alleged conduct falls within the scope of a penal statute the issue is a question of law that an appellate court reviews de novo. *Id.*

Moreover, constitutional issues, as questions of law, are reviewed de novo. *TM v MZ,* 326 Mich App 227, 236 (2018). A statute is presumed to be constitutional unless its unconstitutionality is plainly apparent. *People v Harris*, 495 Mich 120, 134 (2014). If possible, a statute is to be construed as constitutional. *Id.*

ARGUMENT

I. The Court of Appeals properly interpreted MCL 168.932(a) and found there was adequate evidence to bind Burkman and Wohl over on this criminal charge.

The primary charge addressed in both defendants' motions to quash and their briefs on appeal address the crime of bribing/intimidating voters under MCL 168.932(a). The language of the statute provides:

> A person who violates 1 or more of the following subdivisions is guilty of a felony:
>
> (a) A person shall not attempt, by means of bribery, menace, or other corrupt means or device, either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.

No attack was made on the related conspiracy count or the counts alleging the use of a computer to commit a crime. But it is here conceded that all the counts are dependent upon a finding that the defendants attempted, by means of menace or other corrupt means or device, either directly or indirectly, to deter an elector from giving the elector's vote in any election in this state.

The statute establishes the elements. It requires proof of (1) bribery, menace, or other corrupt means or device, either directly or indirectly (2) to influence, to deter, or to interrupt an elector from voting. MCL 168.932(a). Burkman and Wohl assert that the Court of Appeals erred in concluding that the conduct demonstrated by the evidence at the preliminary examination fell within the scope of this charged offense. The crux of their argument may be digested as follows.

The defendants argue that the evidence (A.1) does not demonstrate the use of another corrupt means or device; (A.2) does not demonstrate the use of any menace; and (B) does not establish an attempt to deter electors from voting. All of their other arguments are really related to these three main assertions, which are questions of statutory construction. All of the defendants' arguments are unavailing.

A. The robocalls were both a "corrupt means or device" used to deter voting and a menacing method to do so.

While the robocalls were both menacing and constituted a corrupt means or device, those statutory terms are distinct and will be discussed in turn. Either satisfies the crime's first element. The distinction between a "menace" and a "corrupt means or device" actually involves whether the assertion was threatening or otherwise wrongful. Where it threatened a harm, it was a "menace." And the invidious, misleading nature of the assertions made in the robocall establishes it as "a corrupt means or device" to accomplish the purpose.

1. The robocall was a "corrupt means or device" used to deter voting.

For the "corrupt means or device" theory, it is important to note that the message asserted that the personal information *will* be used by law enforcement and creditors. It was not simply a warning that such information may be used, or an expression of opinion that there was a risk of it being used. It asserted as fact that it will be used. The testimony at the preliminary examination demonstrates the wrongfulness of the defendants' assertions of fact.

Discussions of corrupt behavior have most generally arisen in the context of misconduct-in-office cases. "Corrupt behavior" has been defined as "intentional, purposeful, deliberate, and knowing wrongful behavior." *People v Waterstone*, 296 Mich App 121, 138 (2012). "Corrupt intent" has been recognized as a sense of depravity, perversion, or taint. *People v Perkins*, 468 Mich 448, 456 (2003).

The use of this message in a manipulative way as a means to deter voting based on a racial classification satisfies the statutory requirement of a "corrupt means or device." It is the nature of the communication, which was deliberately wrongful in nature through false and exaggerated claims and directed to a specific audience to discourage Black citizens from voting, which is the "corrupt means or device." The fact that it was a robocall did not make it wrongful. A similarly ugly, misleading effort directed to the targeted audience done in person to suppress minority voting would also constitute a "corrupt means or device" under the statute. It is the invidious character of the communication that is the corrupt means used to deter voting.

2. The robocall was a "menacing" method used to deter voting.

Defendants also assert that the term "menace" as used in MCL 168.932(a) is limited to threats of physical assault. They argue that since there was no evidence of any threat of physical harm to deter anyone from voting it was error to find a violation of the statute. They further assert that the Court of Appeals erred in applying a lay definition of the term to conclude that it encompasses threats of both physical and nonphysical harm.

First of all, it should be recognized that the facts in this case actually do demonstrate a subtle threat to do physical harm. The blatantly false assertion that the CDC is pushing to use records from mail-in voting to track people for mandatory vaccination, in the context of the other evidence presented at the preliminary examination, is a subtle threat of an unwanted bodily intrusion if you allow yourself to be "finessed" by "the man." (App'x, PE 10/29/20, Exhibit 1, 192a–193a). Even if viewed as unreasonable, vaccination hesitance is real. Here, Burkman and Wohl are playing on the threat of possible unwanted mandatory vaccination to further their purpose of deterring voting in a minority community.

But even without this subtle threat of a possible battery from an unwanted injection, the threats to one's liberty interests and financial interests are sufficient to demonstrate "menacing" conduct. The term "menace" is properly defined as a show of intention to inflict harm, that may be achieved with or without physical contact. See App'x 198a, (COA slip op, p 8) (Letica, J., majority opinion) (" 'Menace' is defined as 'a show of intention to inflict harm'; 'one that represents a threat'; 'to make a show of intention to harm'; or 'to represent or pose a threat to.' *Merriam Webster's Collegiate Dictionary* (11th ed). The term 'menace' as defined in the dictionary does not require an accompanying physical component, but may be established through a threat."). The Court of Appeals got it right.

Whenever judicial construction is warranted, a court may consult dictionary definitions. Words should be given their common, generally accepted meaning, if consistent with the legislative aim in enacting the statute. *People v Spann*, 250

Mich App 527 (2002). This statute has been in place in substance as a felony since at least 1929.[1] Either relying on the dictionaries at the time of this enactment or the time this was reenacted with small revisions, see Public Act 261 of 1995, the answer is the same that "menace" does not require an element of threat of physical harm. For *Webster's International Dictionary* (Ed. 1921), it provides that "menace" as a noun means "[t]he show of an intention to inflict evil; a threat; indication of probable evil or catastrophe to come." *Id.* at 507. In fact, the *Bouvier's Law Dictionary* (Ed. 1926) expressly states that no physical element is necessary:

> A threat; a declaration of an intention to cause evil to happen to another. *The word menace is* ***not*** *restricted to threats of violence* to person and property nor to threats of accusing a person of crime; it includes a threat to accuse one of immoral conduct. [*Id.* at 797 (emphasis added).]

In relation to the time of reenactment, the *Webster's New World Dictionary* (Ed. 1988) provides similarly for "menace" as a noun: "1. a threat or the act of threatening[;] 2. anything threatening harm or evil[.]" *Id.* at 846.

These generally recognized definitions of "menace" cover any threat to a person or to society as a whole. It also fits the purpose of the law. Statutory language should be construed reasonably, keeping in mind the purpose of the

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[1] The precursor to this law in 1929 as a felony likewise prohibited the influencing of an elector by either "menace" or "corrupt means or device":

> If any person shall by bribery, menace, or any other corrupt means or device whatever, either directly or indirectly, attempt to influence any elector in giving his vote, or deter him from, or interrupt him in giving the same at any election or primary election held pursuant to law, such person shall, on conviction, be deemed guilty of a felony. [CL 1929, chapter 57, § 3289.]

statute. *People v Seeburger*, 225 Mich App 385, 391 (1997) (citations omitted). The Court of Appeals expressly recognized in an order denying an application for leave to appeal that MCL 168.932(a) is a voter intimidation statute. *Lambert v Sec'y of State*, COA No. 355266 (October 29, 2020) ("Voter intimidation is—and remains—illegal under current Michigan law. MCL 168.932(a)") (App'x A). Its purpose is to protect the constitutional and statutory rights of a voter to exercise the right to vote without fear or intimidation. To limit the prohibited conduct to threats of physical injury would be counter to this purpose.

Thus, a menace is a threat to cause some harm, and to menace someone is to threaten harm to that person. As noted, there is no requirement that the threat be to physically injure or do physical violence to the person. A threat to do harm to the individual, be it physical, emotional, financial, or otherwise, is sufficient to "menace" a person.

B. Whether or not the statements in the robocall were true, were plausible, were simply opinion, or were not known to be false, the critical point was that Burkman and Wohl acted corruptly, and with menace, to intimidate minority voters.

Burkman and Wohl argue that the robocall message cannot lead to criminal liability under MCL 168.932(a) because the message asserted opinion, plausibly true facts, or untrue facts that they did not know were false. But regardless of whether the threats in the robocall were stated in the form of an opinion, were possibly true, or unknowingly false, the statute would be satisfied if they intended

to influence, deter, or interrupt an elector in giving the elector's vote by means of these assertions where they acted in a corrupt way or with menace.

Here, the truth or falsity of the threats are of no moment where the method was both menacing and corrupt. What then is important is the state of mind with which Burkman and Wohl acted. For this inquiry, the critical question is whether they intended that those assertions made in the call would deter minority members from voting. The testimony developed at the preliminary examination is more than sufficient to demonstrate this intent. In other words, they acted with a corrupt method and with menace by attempting to intimidate by nefarious means a specific audience, Black voters, and discourage them from participating in the 2020 election. The Court of Appeals properly reasoned that the conduct at issue satisfied the statute regardless of whether the statements were "unknowingly false" where there was evidence of a wrongful method used as demonstrated here to deter voting:

> [F]or the robocall to be deemed a corrupt means or device, it must be established that defendants deliberately used ***a wrongful method*** with a depraved intent to interfere with voting. Regardless of whether the message was worded in the form of an opinion, possibly true, or unknowingly false, ***if defendants intended to influence, deter, or interrupt an elector in giving his or her vote, MCL 168.932(a) is satisfied.*** The prosecution presented sufficient evidence to establish probable cause that defendants had the requisite intent, and the trial court did not abuse its discretion by denying defendants' motion to quash the bindover.
>
> [App'x, 201a (COA slip op, p 11) (Letica, J., majority opinion) (footnote omitted; emphasis added).]

This is the correct analysis.

The key concept here is that a statement could be accurate (even though misleading) and still be wrongful or corrupt. This same basic idea is present in Michigan's law prohibiting extortion. See MCL 750.213.[2] As this Court stated more than a century ago in quoting a trial court's ruling, the fact that the threat of extortion may involve a truthful claim about the victim's conduct does not excuse it:

> The malice required by the statute was not a feeling of ill will towards the person threatened, but the willful doing of the act with the illegal intent. If the threat was willfully made with the intent to extort money, *it was a malicious act, and the fact that the charge was true would be immaterial.* [*People v Whittemore*, 102 Mich 519, 526 (1894) (emphasis added).]

See also 3 Gillespie Mich Crim Law & Procedure § 77:1 (2d ed) § 77:1 ("Where threats are made with a wrongful intent as set forth in the statute, the offense is complete regardless of whether the defendant believes the complainant guilty of the commission of the offense threatened to be revealed").

The same reasoning applies here. The act of defendants here would remain pernicious even if in some technical way they could be claimed to be true or that they somehow believed them to be true. The effort to frighten minority voters from exercising their constitutional rights through misleading statements is scurrilous and rightly subject to prosecution.

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[2] MCL 750.213 provides as follows:

> Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony[.]

C. The rule of lenity simply does not apply in this case.

Burkman and Wohl argue that the question as to whether MCL 168.932(a) applies in this case is ambiguous, and thus the rule of lenity should apply. The rule of lenity stands for the proposition that penal laws are to be strictly construed with all doubts resolved in a defendant's favor. *People v Arnold*, 508 Mich 1, 24 n 51 (2021). This rule applies, however, only when the statutory text is ambiguous, such as when it irreconcilably conflicts with another provision of law. *Id.*

Thus, the rule of lenity does not apply here. The crime of voter intimidation, MCL 168.932(a), is not ambiguous, and the Legislature's intent is clear from the statutory language. The purpose is to protect a citizen's right to cast that citizen's vote without improper influence or deterrence. The rule of lenity has no application in this case. Whether Burkman and Wohl intended to deter voting is a question of fact for the jury. In particular, defendants assert that the evidence establishes only the intent to deter electors from a particular form of voting, and not from voting in general. But this argument fails for two different reasons.

First, the statutory language is sufficient to establish the crime when the intent was to deter *any* form of voting. The statutory language prohibits a person from deterring voting. This is a voter intimidation statute designed to ensure that the constitutional right of an elector to cast the elector's vote without threat or intimidation in any lawful manner in which he or she chooses to vote. The language does not limit the type of voting that is being protected. Even if the defendants' intent were simply to deter "mail-in voting," there would be a violation of the law here.

Second, the evidence, and the reasonable inferences naturally flowing from the evidence, here demonstrate the intent to deter *all* forms of voting. There is more than sufficient evidence to demonstrate defendants' actual intent to deter all forms of voting among a minority population. The statements and actions of the conspirators should be viewed in the context of the political situation existing prior to the election. For the first time Michigan electors were eligible to vote by mail in a general election without meeting any specific criteria for doing so. There was much public debate over whether this would increase voter participation in elections. And just when the presidential campaign was beginning, the country was hit with a pandemic that discouraged public gatherings like those inevitable with in-person voting.

Looking at the totality of the circumstances, a fair inference can be drawn that the defendants believed that a large turnout in minority communities would be adverse to their preferred candidate and they believed that many persons in that community would simply not vote if they did not use the convenient method of mail-in voting. By discouraging mail-in voting, they were attempting to deter minority citizens from casting any type of vote in the election.

The evidence presented at the preliminary examination is more than sufficient to enable a juror to determine that Burkman and Wohl intended to deter voting by means of their robocall. The evidence presents a legitimate question of fact. This Court should affirm the sufficiency of the evidence to support the bindover.

II. The crime of intimidating voters, MCL 168.932(a), is not unconstitutional, and the conduct of Burkman and Wohl was not constitutionally protected.

The First Amendment generally prevents government from proscribing speech based on disapproval of the ideas expressed. *RAV v City of St. Paul*, 505 US 377 (1992). But the right of free speech is not absolute at all times and under all circumstances, and certain well-defined and narrowly limited classes of speech are preventable and punishable. See *Estate of Grable v Brown (In re Dudzinski)* 257 Mich App 96, 100 (2003), citing *Chaplinsky v New Hampshire*, 315 US 568, 571–572 (1942).

The robocall message used to deter voting in the present case is outside of First Amendment protection for two separate and distinct reasons. These reasons will be discussed separately. The Court of Appeals correctly determined that the exception for speech integral to criminal conduct was here applicable. But analysis demonstrates that the "true threat" exception also applies in this case.

A. As the Court of Appeals ruled below, the "integral-speech" exception applies here.

Citing *Giboney v Empire Storage & Ice Co*, 336 US 490 (1949), the Court of Appeals concluded that that the exception for speech integral to criminal conduct was here applicable. See App'x 204a, (COA slip op, p 14) (Letica, J., majority opinion). In doing so, it recognized that it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal simply because it was initiated or carried out by means of language. The U.S. Supreme Court rejected "the contention that conduct [that is] otherwise unlawful is always immune

from state regulation because an integral part of that conduct is carried on by" means of speech. *Giboney*, 336 US at 498.

Following *Giboney*, courts repeatedly have held that making a "course of conduct" illegal "has never been deemed an abridgment of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." See *Cox v Louisiana*, 379 US 559, 563 (1965), quoting *Giboney*, 336 US at 502. Thus, "[i]t rarely has been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *New York v Ferber*, 458 US 747, 761–762 (1982), quoting *Giboney*, 336 US at 498. "Put another way, speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *United States v Rowlee*, 899 F2d 1275, 1278 (CA 2, 1990). For example, the fact that aiding and abetting an illegal act "may be carried out through speech" is "no bar to its illegality." *Nat'l Org for Women v Operation Rescue*, 37 F3d 646, 656 (DC Cir, 1994).

Here, the Court of Appeals has adopted a position well-argued by legal scholars. The best understanding of the integral-speech exception is that when speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct (illegal conduct *other than the speech itself),* such as murder, fights, restraint of trade, child sexual abuse, discriminatory refusal to hire, and the like, this opens the door to possible restrictions on such speech. "The Speech Integral to Criminal Conduct Exception," 101 Cornell Law Review 981, 986–987 (2016).

Modern political intimidation embraces a wide and ever-expanding range of coercive tactics, including onsite voter harassment and legally baseless offsite threats of legal harm. While it is true that false statements are not categorically excluded from First Amendment protection, see *United States v Alvarez*, 567 US 709, 722 (2012), even so statements intended to discourage people from exercising the right to vote are exempted from First Amendment protection when they tend to cause, attempt to cause, or make a threat to cause such illegal conduct, i.e., place citizens in fear of voting, through a wrongful method.

Giboney is the seminal case from the U.S. Supreme Court on the "integral speech" exception to the First Amendment. In *Giboney*, the U.S. Supreme Court held that enjoining otherwise lawful picketing activities did not violate the First Amendment where the sole purpose of that picketing was to force a company to enter an unlawful agreement restraining trade, and thus the speech was "an integral part of conduct in violation of a valid criminal statute." 336 US at 498. The courts have relied on *Giboney* in rejecting First Amendment claims to criminal convictions. See, e.g., *United States v Sayer*, 748 F3d 425, 433–434 (CA 1, 2014) (affirming a federal conviction for cyberstalking, stating "[t]o the extent [the defendant's] course of conduct targeting Jane Doe involved speech at all, his speech is not protected. Here, as in *Giboney*, it served only to implement Sayer's criminal purpose.").

That same analysis is applicable here. In fact, in its ruling on this basis, the Court of Appeals expressly relied on *Giboney*:

> To the extent a fact-finder agrees with the prosecution's theory that defendants spread a dishonest message with the depraved intent to discourage voting, defendants' dissemination of the message deterred voting through corrupt means. Like the picketing in *Giboney*, the speech was an integral part of conduct criminalized by MCL 168.932(a) and should not be constitutionally protected merely because the conduct was "carried out by means of language." *Id.* [App'x 205a (COA slip op, p 15) (Letica, J., majority opinion).]

Here, the essence of the crime is a wrongful attempt to deter voting. That is the illegal conduct addressed by the statute. The robocall was simply the method used by Burkman and Wohl to engage in the illegal conduct. It is not the words themselves that are made illegal by the statute. The statute seeks to punish the attempt to intimidate electors from exercising their right to vote, which is the illegal conduct when done in a wrongful manner, and thus the speech used to achieve this end is not entitled to constitutional protection.

This point is more clearly made by the situation where one would be aiding and abetting the crime of larceny by telling another to go ahead and take some identified property because no one is looking. There, the aider and abettor would clearly be speaking words that assist and/or encourage the commission of the crime and would be just as criminally responsible as the person who took the property. Such criminal responsibility would be based upon the conduct that it tends to cause (the larceny) rather than simply the words themselves.

Here, MCL 168.932(a) criminalizes voter intimidation. It seeks to protect the right of all citizens to exercise their right to vote without interference. The robocall initiated by defendants is the vehicle by which the crime was perpetrated. As noted, the Court of Appeals correctly recognized that the robocall message was

simply integral speech that is not constitutionally protected. This Court should affirm the decision below on this ground alone.

B. The "true threat" exception also applies here.

Here, the Court of Appeals directly rejected the "true threat" exception, on the basis that this exception was limited to threats of unlawful violence. See App'x 203a (COA slip op, p 13) (Letica, J., majority opinion). In doing so, the Court of Appeals overlooked the fact that the subtle threat of mandatory vaccination could be viewed as a threat that a battery would be committed on the listener if he or she participated in mail-in voting. Given the historical background and continuing public concerns over the infamous Tuskegee Experiment from American history,[3] the concept of mandatory vaccinations could be a true threat to minority voters—aimed, in this context, at engendering fear and disruption in that particular group of individuals.

But even aside from this point, this Court should adopt a rule recognizing that a "true threat" can arise from a threat of financial, liberty, or other non-violent harm where the threats were, as here, wrongful. The Court of Appeals is correct that Michigan law does not yet recognize that a "true threat" can involve a threat to do non-violent harm. See App'x 204a (COA slip op, p 14) (Letica, J., majority opinion). But there are strong legal reasons for now adopting a different rule in this State.

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[3] The Tuskegee Study of Untreated Syphilis (informally referred to as the Tuskegee Experiment) was a study conducted between 1932 and 1972 by the U.S. Public Health Service and the Centers for Disease Control and Prevention (CDC) on a group of nearly 400 Black American men with syphilis. The purpose of the study was to observe the effects of the disease when untreated, though by the end of the study medical advancements meant it was entirely treatable. The men were not informed of the nature of the experiment, and more than 100 died as a result.

Over time, the U.S. Supreme Court has defined narrow categories of speech that can be prohibited based on content. Such categories include, for example, true threats, *Watts v United States*, 394 US 705 (1969); speech directed at and likely to incite imminent lawless action, *Brandenburg v Ohio*, 395 US 444 (1969) (per curiam); child pornography, *New York v Ferber*, 458 US 747 (1982); obscenity, *Miller v California*, 413 US 15 (1973); and fighting words, *Chaplinsky v New Hampshire*, 315 US 568 (1942).

As noted above, true threats are not entitled to First Amendment protection. See *Watts*, 394 US at 708. In fact, in *Virginia v Black*, 538 US 343 (2003), the U.S. Supreme Court recognized that, interpreted in a broader historical and social context, cross burnings can constitute true threats even though they communicate no explicit message. But the Court recognized there that such conduct involved a serious expression of an intent to commit an act of unlawful violence.

It is important to note that the U.S. Supreme Court has not squarely addressed whether threats of nonviolent or nonphysical harm can constitute true threats. There is a spilt of authority among different jurisdictions on this question. In *Black*, the U.S. Supreme Court explained that "[t]rue threats *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of *unlawful violence* to a particular individual or group of individuals." 538 US at 359 (emphasis added). But *Black* does not state that only threats of unlawful violence can be considered "true threats."

Prohibition of true threats is appropriate, the U.S. Supreme Court reasoned, because it "protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur." *Id.* (citations omitted). Thus, the U.S. Supreme Court's analysis in *Black* should not be interpreted to suggest that the government can ban *only* threats of physical harm. The threat of severe nonbodily harm can engender as much fear and disruption as the threat of violence.

Here, the defendants threatened minority member voters that if they voted by mail-in voting their personal information would be used by police and creditors. The wrongful threat to privacy, financial security, and liberty contained in the robocall at issue here demonstrates it is a "true threat" that is not entitled to constitutional protection.

A few jurisdictions have favorable analysis addressing whether the "true threat" exception applies to non-physical harm. In reviewing the federal statute prohibiting threats of violence against federal officials, 18 USC 115(a) (threatens to assault, kidnap, or murder), the Second Circuit evaluated the nature of a "true threat" and noted that it was not a defense to the crime if "the speaker has no intention of carrying [the threats] out." See *United States v Turner*, 720 F3d 411, 420 (CA 2, 2013). In doing so, the court cited *Virginia v Black*, 538 US at 360, in making that point, but then also cited an article addressing this arena, which stated that the threat of a "substantial emotional disturbance" would be sufficient under the First Amendment:

> "Despite the relevance of freedom of speech, *a legislature could reasonably decide to make it criminal for a person with apparent firmness of purpose to threaten a specific legal wrong grave enough to be likely either to cause* ***substantial emotional disturbance*** in the person threatened or to require the employment of substantial resources for investigation or prevention.". [*Turner,* 720 F3d at 420, quoting Kent Greenawalt, Speech, Crime, and the Uses of Language 91 (1989).]

In addition, the Ninth Circuit concluded that " 'True threats' are not limited to bodily harm only but also include property damage" in its evaluation of the federal law prohibiting the inciting of a riot, 18 USC 2101(a), 2102(a). See *United States v Rundo*, 990 F3d 709, 719 (CA 9, 2021).[4] The Sixth Circuit similarly ruled that certain threats to cause a reputational injury in an effort to extort money were "not protected speech." See *United States v Coss*, 677 F3d 278, 290, n 17 (CA 6, 2012) ("because it is a 'true threat' it is not protected speech . . . . it is the crime of extortion to threaten to injure the reputation [of another]"). Similarly, Michigan law prohibits extortion by punishing "malicious threat[s]" to the "property" of another. See MCL 750.213.

On this point, like extortion based on reputational injury or threats to incite violence against property, the legal reasons supporting the extension of the "true threat" exception to threats of non-physical harm in the circumstances of this case were eloquently stated in a case involving the very same robocall and defendant, Jacob Wohl:

> The right to vote embodies the very essence of democracy. Absent free and fair elections uninfluenced by fear, the underpinnings of democratic rule would crumble. The United States Constitution, as enforced by Congress and the courts, enshrines these principles. . . .

[4] The Ninth Circuit did find the federal law overbroad for prohibiting "advocacy," and severed the unconstitutional language from the statute. *Id.* at 720–721. Unlike that law, however, Michigan's voter intimidation law does not criminalize advocacy, but only punishes the wrongful intimidation of voters.

> Many Plaintiffs in this case assert that they were recipients of robocalls initiated by Defendants conveying messages that placed recipients in reasonable fear of casting their votes in the impending presidential election, in person or by mail. Upon initial factual review, this Court finds that the information Defendants' calls convey is manifestly false and meant to intimidate citizens from exercising voting rights.
>
> Defendants do not contest that they originated the robocalls. In fact, by their own admission in other public statements they reportedly made, they have worked overtly to influence potential voters through disinformation campaigns. Instead, as legal ground for their action, Defendants advance a sinister and pernicious theory. They contend that the expression their robocalls communicated constitutes speech protected by the First Amendment. Defendants' theory implicates a fundamental threat to democracy. This Court thus rejects it as justification for Defendants' baneful conduct. The First Amendment cannot confer on anyone a license to inflict purposeful harm on democratic society or offer refuge for wrongdoers seeking to undermine bedrock constitutional principles. Nor can it serve as a weapon they wield to bring about our democracy's self-destruction. [*National Coalition on Black Civic Participation v Wohl,* 498 F Supp 3d 457, 464 (SDNY 2020).]

Of course, a decision by a New York federal district court judge in a civil case cannot control a Michigan criminal case. This Court has recognized, however, that even when it is not binding, authority from other jurisdictions may be considered for its persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004).[5]

Given the high importance of protecting the right to vote, there are strong legal reasons here to extend the "true threat" exemption to threats of non-violent harm where, as here, the nature of the robocalls was wrongful. This is a second, and independent, basis on which to affirm the decision below.

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[5] The Court of Appeals below rejected this argument as it concluded it was constrained by prior case law. See App'x 204a (COA slip op, p 14 n 11) (Letica, J., majority) (noting that it was bound by prior published decision, MCR 7.215(J)(1), stating that "Michigan has applied the threat of violence to the true threat exception to First Amendment protections," citing *TM v MZ*, 326 Mich App 227, 239 (2018).)

C. The defendants' argument that the statute here is "vague" and "overbroad" is unavailing; Michigan's voter intimidation law is constitutional.

The defendants make two additional arguments about why Michigan's intimidation law is unconstitutional, asserting that it is "vague," see Defs' Br, pp 42–45, and that it is "overbroad," *id.* at 45–52. They are wrong on both points.

As an initial point, the Michigan appellate courts distinguish between facial and as-applied challenges. See, e.g., *People v Wood*, 326 Mich App 561, 576 (2018), reversed on other grounds, 506 Mich 114 (2020). This Court has asked the parties to address each ground.

For a facial challenge, the ordinary rule is that the challenger must show that there are "no set of circumstances exists" under which the law would be valid, and the fact the law "might operate unconstitutionally under some conceivable set of circumstances is insufficient" to render it invalid. *Bonner v City of Brighton*, 495 Mich 209, 223 (2014) (cleaned up). This Court has recognized an exception to this rule for overbreadth challenges, that is a challenger must show a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *In re Chmura*, 461 Mich 517, 531–532 (2000).

For an as-applied challenge, the Court must analyze the statute "as applied" to the particular case. *Crego v Coleman*, 463 Mich 248, 269 (2000). In other words, an as-applied challenge, to be distinguished from a facial challenge, alleges 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Boyenner*, 495 Mich at 223 n 27.

1. MCL 168.932(a) is not vague.

Regarding vagueness, a statute may be challenged for vagueness on three grounds: "(1) that it fails to provide fair notice of the conduct proscribed; (2) that it is so indefinite that it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; or (3) that its coverage is overbroad and impinges on First Amendment protections." *People v. Harris*, 495 Mich 120, 133–134 (2014). The party challenging the constitutionality a statute "bears the burden of proving that the law is unconstitutional" and this Court's "authority to invalidate laws is limited and must be predicated on a clearly apparent demonstration of unconstitutionality." *Id.,* citing *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 (2007).

On the questions of fair notice and the definite nature of the crime, there is nothing vague about Michigan's prohibition of a defendant employing "corrupt means or device" against voters to deter them from voting. The statute has been in place for a hundred years or more. As noted above, the same standard of "corrupt" defines the common-law crime of misconduct of in office, which is a five-year felony under Michigan's catch-all provision, MCL 750.505. That statute has been repeatedly upheld against vagueness challenges. See, e.g., *People v Coutu*, 235 Mich App 695, 705, n 5 (1999) ("This statute [the misconduct-in-office statute] has been upheld as constitutional and has specifically withstood a challenge for vagueness."), citing *People v Pickett*, 339 Mich 294, 309–311 (1954), *People v O'Neal*, 22 Mich App 432, 434–436 (1970).

In fact, earlier this year this Court reinstated a misconduct-in-office charge in a case, see *People v Clark,* 986 NW2d 602 (2023), in which the Court of Appeals in an unpublished opinion rebuffed an as-applied vagueness challenge. See *id.* at slip op, p 6 (majority opinion) ("Michigan courts have upheld the constitutionally of MCL 750.505 in the face of vagueness challenges time and again") (App'x B). The same is true here.

And federal case law in this circuit further supports the conclusion. In evaluating a vagueness challenge to the federal statutes that prohibit the effort to extort money by use of interstate communications and to threaten or injure the reputation of another with an intent to extort money in violation of 18 USC 875(d), the Sixth Circuit ruled that its implicit requirement of wrongfulness was sufficiently clear to withstand a vagueness challenge:

> In short, 18 U.S.C. § 875(d) is sufficiently cabined by its own *wrongful threat* and intent to extort requirements to survive constitutional muster. [*Coss*, 677 F3d at 290 (emphasis added).]

And, as explained earlier, Michigan law's understanding of "corrupt" is defined in terms of wrongfulness as well. And this Court has upheld a challenge on vagueness grounds to Michigan's extortion statute. See *Harris*, 495 Mich at 138 ("any claim that MCL 750.213 fails to provide fair notice of the conduct proscribed is meritless").

2. MCL 168.932(a) is not overbroad.

Regarding the defendants' claim that MCL 168.932(a) is overbroad, this Court employs this doctrine "with hesitation," requiring "substantial overbreadth." See *In re Chmura*, 461 Mich at 531–532. This Michigan law is not overbroad.

As explained earlier, the two exceptions to the First Amendment of integral speech and true threats apply here, which answers their argument. The Michigan voter intimidation law does not limit constitutionally protected speech. The statements used to menace or corruptly frighten citizens from voting are outside the ambit of the First Amendment. That is the summation of these exceptions, i.e., MCL 168.932(a) does not ensnare constitutionally protected speech because it requires not only evidence of attempts to deter voting, but to do so with menace or a corrupt means, i.e., in a wrongful way. In the end, the Constitution does not protect speech that is part of the crime of intimidating voters from voting through wrongful means, such as here threatening Black voters with some physical or financial harm – which are true threats – through misleading statements if they vote by mail. This Court should affirm.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly interpreted MCL 168.932(a), and the district court did not abuse its discretion in binding Burkman and Wohl over to the circuit court. Furthermore, the robocall here at issue is not constitutionally protected. This message falls within the "integral speech" exception, as well as the "true threat" exception to the First Amendment in this case.

Therefore, this Court should remand this case to the Wayne County Circuit Court for a trial on the merits.

Respectfully submitted,

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