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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

APPEAL FROM THE COURT OF APPEALS
LETICA, P.J., AND REDFORD AND RICK, JJ.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MACAULEY BURKMAN,

Defendant-Appellant.

Supreme Court No. 164638

Court of Appeals No. 356600

Circuit Court No. 20-004636 FH

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB ALEXANDER WOHL,

Defendant-Appellant.

Supreme Court No. 164639

Court of Appeals No. 356602

Circuit Court No. 20-004637 FH

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# DEFENDANT-APPELLANTS' REPLY BRIEF

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## ARGUMENT

Most of the prosecution's arguments have already been addressed in the defense's previous brief. A few points, however, warrant this reply.

First, an argument the defense previously made (Def MSC Br, p 14) deserves emphasis. Even accepting the prosecution's argument that *menace* encompasses any kind of threat whatsoever, the robocall here was not threatening. Again, warning someone about potential dangers is not a threat. The amicus brief filed by the American Civil Liberties Union and Promote the Vote makes this point well. (ACLU & PTV Br, p 29-34). "A court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators). Thus, generally, a person who informs someone that he or she is in danger from a third party has not made a threat, even if the statement produces fear." *New York ex rel Spitzer v Operation Rescue Natl*, 273 F3d 184, 196 (CA 2, 2001) (cleaned up). Here, then, this Court need not decide the correct definition of menace as used in MCL 168.932(a) because the robocall does not constitute a menace even under the prosecution's definition. Likewise, because the robocall was not threatening, it cannot constitute a true threat.

* * *

The prosecution posits—echoing the Court of Appeals—that even true statements are criminal under

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MCL 168.932(a) if they were made with a corrupt intent to influence, deter, or interrupt voters. (Pros MSC Br, p 22-24). Although the defense previously addressed this argument (Def MSC Br, p 32-33), its logical extensions merit underscoring. As the ACLU points out, under the prosecution's interpretation, the hypothetical vote-by-mail-to-stop-the-spread-of-COVID-19 robocall—which contains purely truthful information—would be criminal. (ACLU & PTV Br, p 24). Other implications are just as concerning. Imagine a candidate for governor who comes into possession of evidence that his opponent has had an extramarital affair. By releasing that evidence to the press, the candidate would certainly be attempting to influence or deter people from voting for his opponent. But would this attempt be corrupt? From the prosecution's brief, it's difficult to discern whether it believes that *any* attempt to influence or deter voters is corrupt or whether such attempts are corrupt only when made with a "depraved intent." Assuming it's the latter (the former would clearly be unconstitutional), this leaves enormous power in the hands of prosecutors to decide which efforts to influence voters are legitimate versus illegitimate. Did the candidate release the information because he genuinely believes that his opponent's extramarital affair renders the opponent morally unfit to hold office? Or was it character assassination merely for the sake of propping up his own campaign? And is such an intent depraved? To allow prosecutors (elected officials themselves who have nearly unfettered charging

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discretion) to police speech in this way would be an intolerable chill on political discourse.

Next, in service of its even-truthful-statements-can-be-criminal argument, the prosecution attempts to analogize MCL 168.932(a) to Michigan's extortion law, MCL 750.213. (Pros MSC Br, p 24). But the comparison is inapt. Extortion, like bribery, is a paradigmatic example of a verbal act, of conduct carried out by speech. See, e.g., *State v McKiver*, 199 NJ Super 542, 547; 489 A2d 1256 (1985). It is the conduct that is proscribed under MCL 750.213, not the speech. Here, under the prosecution's argument, MCL 168.932(a) reaches pure speech. (Pros MSC Br, p 19).

* * *

Arguing that the robocall is speech integral to criminal conduct, the prosecution gives the hypothetical of a person encouraging another to take property, which would be aiding and abetting a larceny. (Pros MSC Br, p 30). But that's exactly the point—the speech causes *other* illegal conduct. (Def MSC Br, p 58). Here, under the prosecution's argument, it is the speech itself that is criminal. The prosecution attempts to argue that the "other illegal conduct" that the robocall was integral to is "voter intimidation." (Pros MSC Br, p 30). But "intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Virginia v Black*, 538 US 343, 360; 123

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S Ct 1536; 155 L Ed 2d 535 (2003) (cleaned up). Here, as the defense has argued throughout, the robocall did not constitute a true threat.

The prosecution, though, argues 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." (Pros MSC Br, p 31). But this inaccurately portrays the content of the robocall. The call did not say that anyone who voted by mail would be subject to mandatory vaccination. Rather, the call said that the CDC was "pushing" to use mail-in voting records to track people for vaccination. Once more, a warning is not a threat, and conveying that the CDC was "pushing" to use mail-in voting records is even more attenuated.

* * *

The prosecution argues for an expansive broadening of the true-threat exception to include even threats that cause—wait for it—*emotional* harm. (Pros MSC Br, p 31-35). But *Black* slams the door on this argument: " 'True 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." *Black*, 538 US at 359. As the ACLU puts it, "This reference to violence was not an isolated bit of stray dicta." (ACLU & PTV Br, p 34-35). Instead, the *Black* Court repeatedly referred to violence as the hallmark of a true threat. *Id*. at 359-360. The Court did

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not suggest or hint that a true threat could include other kinds of threats. What's more, the Court has said that content-based speech restrictions—like the true-threat exception—should be narrowly construed. *Bose Corp v Consumers Union of US, Inc*, 466 US 485, 505; 104 S Ct 1949, 1962; 80 L Ed 2d 502 (1984). This Court should not expand the true-threat exception beyond its settled bounds to accommodate the prosecution's heedless pursuit of Burkman and Wohl.[1]

* * *

The prosecution assures the Court that MCL 168.932(a) is not vague because "there is nothing vague about Michigan's prohibition on a defendant employing 'corrupt means or device' against voters to deter them from voting." (Pros MSC Br, p 37). But should a reasonable person reading MCL 168.932(a) be on notice that—under the prosecution's interpretation—conveying truthful information to influence voters can be "corrupt?" Should the vote-by-mail-to-stop-the-spread-of-COVID-19 robocallers be aware that they're committing a felony? The defense submits that no reasonable layperson would interpret MCL 168.932(a)'s prohibition on "bribery, menace, or other corrupt means or

[1] As even the Court of Appeals found, the reasoning in the out-of-state cases relied on by the prosecution is dubious. *People v Burkman*, ___ Mich App___, ___; ___ NW2d ___ (2022); slip op at 14 n 11.

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device" to reach the communication of truthful information. So, if anything, the prosecution's own arguments reveal the vagueness of the statute.

* * *

The ACLU answers the constitutional questions in this case correctly, and the defense adopts its analysis on the speech-integral-to-criminal-conduct and true-threat exceptions.[2] The defense also adopts the ACLU's position that if

[2] Another amicus brief from the Protect Democracy Project and Voters Not Politicians peddles the fraud exception. Way back in circuit court, the defense predicted that the prosecution would rely on this exception (and argued that it would not apply). (Def Cir Ct Quash Br, p 15-16). But the prosecution has not relied on the fraud exception. Instead, the prosecution chose the true-threat exception as its proverbial hill to die on. In fact, the prosecution waited until its Court of Appeals merits brief to raise the speech-integral-to-criminal-conduct exception. The prosecution—just like any other litigant—should be held to its choices. In general, arguments raised for the first time in this Court will not be considered. *People v McBurrows*, 504 Mich 308, 328 n 11; 934 NW2d 748 (2019). What's more, the burden is on the prosecution—not amici—to show that speech is unprotected. *Illinois, ex rel Madigan v Telemarketing Assoc, Inc*, 538 US 600, 620 n 9; 123 S Ct 1829; 155 L Ed 2d 793 (2003) ("The Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected."). Finally, the prosecution presumably chose to forgo reliance on the fraud exception because it recognized that the "material gain" element is missing here. See

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MCL 168.932(a) can be interpreted to reach false political speech, it is unconstitutional. (ACLU & PTV Br, p 15-16). Finally, the defense agrees that a statute that proscribes intentionally false speech about the time, place, manner, or legal consequences of voting for the purpose of disenfranchising voters would be constitutional. See *Minnesota Voters Alliance v Mansky*, 138 S Ct 1876, 1889 n 4; 201 L Ed 2d 201 (2018) ("We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures."). The defense disagrees, though, that MCL 168.932(a) can be narrowly interpreted to contain only this proscription. Two reasons support this conclusion.

First, MCL 168.932(a) does not criminalize speech solely because of its falsity. For the reasons argued in the defense's previous brief, "other corrupt means or device" requires speech plus conduct in the same way as bribery and menace. (Def MSC Br, p 17-31). False speech, by itself, is not a corrupt means or device.

Second, even if MCL 168.932(a) does reach pure speech, its plain language does not support the ACLU's time-place-and-manner limitation. True enough, "in the criminal context a state court may adopt a narrow construction of a statute in response to an overbreadth challenge and then

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*United States v Alvarez*, 567 US 709, 723; 132 S Ct 2537; 183 L Ed 2d 574 (2012); *State v Melchert-Dinkel*, 844 NW2d 13, 21 (Minn, 2014).

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apply the statute, as construed, to past conduct." *In re Chmura*, 461 Mich 517, 544; 608 NW2d 31 (2000) (cleaned up). But as the ACLU admits, "this Court's authority to construe vague statutory language is not boundless." (ACLU & PTV Br, p 18). Instead, a narrowing construction must be "fairly possible." See, e.g., *Boos v Barry*, 485 US 312, 331; 108 S Ct 1157; 99 L Ed 2d 333 (1988).

Here, the ACLU's proposed narrowing construction is not fairly possible. Look one more time at the language:

> 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. [MCL 168.932(a).]

By its plain terms, this is not a time-place-and-manner restriction. The inclusion of "influence," especially, shows that the statute concerns not just the act of voting (its requirements and procedures) but whom to vote for. And this fits with the historical context that led to the adoption of MCL 168.932(a)'s antecedents, in which bribery and other schemes were used to induce voters to vote for particular candidates. So if MCL 168.932(a) prohibits false speech, it is not limited to the time, place, manner, and legal consequences of voting.

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What's more, it seems that if MCL 168.932(a) merely polices the requirements and procedures for voting—that is, if "influence" means influencing only the decision whether to vote—it would be illegal to bribe a prospective voter to not vote, but it would not be illegal to bribe someone who intended to vote for candidate X to change their vote to candidate Y. In the latter scenario, you would not be affecting the person's decision to vote, just whom to vote for, a matter that a time-place-and-manner restriction would not reach. Again, the language and history of MCL 168.932(a) cannot abide such an interpretation.

At bottom, then, if false statements, standing alone, are a "corrupt means or device," MCL 168.932(a) reaches core political speech. And, this being so, the statute would be unconstitutional. (ACLU & PTV Br, p 15-16). To avoid this conclusion, this Court should interpret "corrupt means or device" to mean something more than just false speech. So even if the robocall here contained untrue statements, it did not run afoul of MCL 168.932(a).

## RELIEF REQUESTED

Burkman and Wohl are unsympathetic defendants who engaged in "reprehensible" conduct. The defense recognizes and understands the impulse to punish them. But MCL 168.932(a) should not be contorted to scratch that itch. As this case shows, MCL 168.932(a)—a carryover

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from another era—is a poor vehicle for policing today's elections. That said, the prosecution and amici state legitimate concerns about disinformation in our elections. Their concerns, though, should be addressed to the Legislature, which could draft a valid statute proscribing intentionally false statements about the time, place, and manner of elections. But as things stand, the prosecution of Burkman and Wohl under MCL 168.932(a) should end here.

Respectfully submitted,

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