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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.

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

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

DEFENDANT-APPELLANTS' SUPPLEMENTAL BRIEF

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STATEMENT OF FACTS

After the parties completed their briefing in this case, the United States Supreme Court issued two important decisions on First Amendment issues: *United States v Hansen*, ___ US ___; 143 S Ct 1932; 216 L Ed 2d 692 (2023), and *Counterman v Colorado*, ___ US ___; 143 S Ct 2106; 216 L Ed 2d 775 (2023). The parties filed a joint motion for supplemental briefing to address the effect of *Hansen* and *Counterman* on this case. This Court granted the motion. *People v Burkman*, ___ Mich ___; 993 NW 248 (2023).

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ARGUMENT

I. Under *Hansen*, this Court should either narrowly construe MCL 168.932(a) or hold that it is overbroad.

Hansen interpreted 8 USC 1324(a)(1)(A)(iv), which makes it a crime to "encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." *Hansen*, 143 S Ct at 1937 (cleaned up). The defendant argued that this prohibition is overbroad. *Id.* at 1938. The Ninth Circuit agreed, finding that the statute criminalized an " 'alarming' amount of protected speech," such as " 'encouraging an undocumented immigrant to take shelter during a natural disaster.' " *Id.* (cleaned up).

The Supreme Court reversed. *Id.* at 1937. The Court first noted the importance of the overbreadth doctrine, which "provides breathing room for free expression":

> Overbroad laws may deter or chill constitutionally protected speech, and if would-be speakers remain silent, society will lose their contributions to the marketplace of ideas. To guard against those harms, the overbreadth doctrine allows a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak. If the challenger demonstrates that the statute prohibits a substantial

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> amount of protected speech relative to its plainly legitimate sweep, then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid. [*Id.* at 1939 (cleaned up).]

Yet the Court cautioned that the overbreadth doctrine is "strong medicine" that cannot be "casually employed." *Id.* (cleaned up). Rather, "to justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *Id.* (cleaned up).

The Court then turned to the proper interpretation of "encourage or induce" as used in 8 USC 1324(a)(1)(A)(iv). *Id.* at 1940. After extensive analysis, the Court concluded that "encourage" equates to criminal solicitation while "induce" equates to aiding and abetting (also referred to as "facilitation"). *Id.* at 1940-1946. In other words, "encourage" and "induce" "have well-established legal meanings" distinct from their ordinary meanings. *Id.* at 1942. The Court added that even if this "reading were not the best one, the interpretation is at least 'fairly possible'—so the canon of constitutional avoidance would still counsel us to adopt it." *Id.*

So understood, the Court found that 8 USC 1324(a)(1)(A)(iv) "does not prohibit a substantial amount of protected speech relative to its plainly legitimate sweep." *Id.* at 1946. Instead, the statute mainly concerns

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"nonexpressive conduct" such as "smuggling noncitizens into the country," "providing counterfeit immigration documents," and "issuing fraudulent Social Security numbers to noncitizens." *Id*. "To the extent that clause (iv) reaches *any* speech," the Court added, "it stretches no further than speech integral to unlawful conduct." *Id*. at 1947. The Court explained, "Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected." *Id*. The Court noted that it had applied this principle to "the promotion of a particular piece of contraband," "solicitation of unlawful employment," and "picketing with the sole, unlawful and immediate objective of inducing a target to violate the law." *Id*. (cleaned up).

While the Court did not banish the possibility that 8 USC 1324(a)(1)(A)(iv) could reach protected speech, *id*. at 1947 n 5, the Court found that "the provision has a wide legitimate reach insofar as it applies to nonexpressive conduct and speech soliciting or facilitating criminal violations of immigration law," *id*. at 1948. In other words, "even assuming that clause (iv) reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth." *Id*. at 1948 (cleaned up).

Hansen reinforces three points the defense has made throughout the litigation in this case. First, the speech-

integral-to-criminal-conduct exception applies to "speech intended to bring about *a particular unlawful act*." *Id.* at 1947 (cleaned up; emphasis added). So speech cannot be integral to criminal conduct simply because a statute prohibits it; the speech must be geared toward causing *conduct* that is *otherwise* illegal. Here, the prosecution has attempted to argue—for the first time in this Court—that the "other illegal conduct" that the robocall was integral to is "voter intimidation." (Pros MSC Br, p 31). 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 S Ct 1536; 155 L Ed 2d 535 (2003) (cleaned up). And as the defense has argued ad nauseam, the robocall did not constitute a true threat (more on this later).

Second, this Court could interpret MCL 168.932(a) narrowly to avoid any constitutional pitfalls; that is, the Court could apply the constitutional avoidance canon. *Hansen*, 143 S Ct at 1946. As the defense has argued, "corrupt means or device" should be interpreted to mean "speech plus conduct" in the same way as bribery and menace. Under this interpretation, false political speech—speech unconnected to any otherwise illegal conduct—is not a "corrupt means or device." So MCL 168.932(a) would not reach the robocall.

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Third, the *Hansen* Court's conception of the overbreadth doctrine favors the defense. At the outset, the Court observed that the doctrine serves important purposes even when wielded by "undeserving" litigants. *Hansen*, 143 S Ct at 1939. These include providing "breathing room for free expression," preventing protected speech from being "chilled," and leaving the "marketplace of ideas" uninhibited. *Id*. But even so, this "strong medicine" should be reserved for cases where potential unconstitutional applications substantially outnumber legitimate ones. *Id*. Such an imbalance exists here.

Start with legitimate applications of MCL 168.932(a). Plainly there is no constitutional impediment to criminalizing the bribing or violent threatening of voters. Yet there is not one reported prosecution under MCL 168.932(a) involving a case of "bribery" or "menace." Such illicit stratagems largely went out with the advent of the secret ballot, as the defense explored in its merits brief. Turning to "corrupt means or device," if the prosecution is correct that this applies to false speech,[1] then its potential applications are nearly boundless. As the defense previously argued, the statute would criminalize the mundane mendacity

[1] The prosecution has not identified what else could qualify as a "corrupt means or device" other than false speech. But a complete ban on false political speech would be unconstitutional. (ACLU & PTV Br, p 15-16).

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inherent in American politics. So the potential unconstitutional applications would far outnumber the legitimate ones.

In sum, under *Hansen*, this Court should either narrowly construe MCL 168.932(a) or hold that it is overbroad.

II. *Counterman* makes clear that a "true threat" must threaten *violence* from *the speaker*.

The Court summarized the disturbing facts of *Counterman* thus:

> From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were utterly prosaic ("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. Others suggested that Counterman might be surveilling C. W. He asked "was that you in the white Jeep?"; referenced "a fine display with your partner"; and noted "a couple of physical sightings." And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently."

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> "Staying in cyber life is going to kill you." "You're not being good for human relations. Die." [*Counterman*, 143 S Ct at 2112 (cleaned up).]

The defendant was charged under a Colorado statute that made it a crime to "repeatedly make any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person to suffer serious emotional distress." *Id*. (cleaned up). The state courts held that the prosecution did not need to prove that the defendant had any intent to threaten C.W. *Id*.at 2112-2113. The Supreme Court reversed, holding that the prosecution was required to establish recklessness, that is, to "show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id*. 2111-2112, 2113-2119.

As pertinent here, *Counterman* is less significant for its ultimate holding than for two points from its discussion of the true-threat doctrine. First, the Court repeatedly refers to true threats as threats of *violence*. *Id*. at 2111 ("True threats of *violence* are outside the bounds of First Amendment protection and punishable as crimes.") (emphasis added); *id*. at 2111-2112 ("The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening *violence*.") (emphasis added); *id*. at 2113 ("True threats of *violence*, everyone agrees, lie outside the bounds of the First

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Amendment's protection.") (emphasis added); *id.* at 2114 (" 'True threats' of *violence* is another historically unprotected category of communications.") (emphasis added); *id.* ("The 'true' in that term distinguishes what is at issue from jests, 'hyperbole,' or other statements that when taken in context do not convey a real possibility that *violence* will follow (say, 'I am going to kill you for showing up late').") (emphasis added); *id.* ("True threats are serious expressions conveying that a speaker means to commit an act of unlawful *violence*.") (cleaned up; emphasis added); *id.* ("True threats subject individuals to fear of *violence* and to the many kinds of disruption that fear engenders.") (cleaned up; emphasis added); *id.* at 2117 ("In the threats context, it means that a speaker is aware that others could regard his statements as threatening *violence* and delivers them anyway.") (cleaned up; emphasis added); *id.* ("Here, as we have noted, that value lies in protecting against the profound harms, to both individuals and society, that attend true threats of *violence*—as evidenced in this case.") (emphasis added). Nowhere does the *Counterman* Court hint or suggest that a true threat can be a threat of something other than violence.

Second, the Court clarified that "true threats are serious expressions conveying that *a speaker* means to commit an act of unlawful violence." *Id.* at 2114 (cleaned up; emphasis added). To be a true threat, then, the communication must convey that the speaker will use violence, not

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that some third party will. So warning a listener about the negative actions of a third party—even violent actions—cannot constitute a true threat.

Applied here, *Counterman* establishes that the robocall cannot be a true threat. First, the robocall did not convey that Burkman and Wohl would take any direct action against any listener, only that third parties could. Second, even if the robocall could be construed as some kind of threat, it was not a threat of *violence*, so it cannot be a true threat for First Amendment purposes. At bottom, then, *Counterman* sounds the death knell for the prosecution's reliance on the true-threat doctrine.

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RELIEF REQUESTED

Aided by *Hansen* and *Counterman*, the defense once more asks this Court to reverse the lower courts and dismiss the charges in this case.

Respectfully submitted,

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STATEMENT OF WORD COUNT

There are 2,275 countable words in this document according to the word count of the word-processing system used to prepare the document. This document uses 12-point Century Schoolbook typeface.

/s/ Timothy A. Doman
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