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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' SUPPLEMENTAL REPLY BRIEF

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## ARGUMENT

### I. Speech itself cannot be the criminal conduct for the speech-integral-to-criminal-conduct exception.

According to the prosecution, MCL 168.932(a) criminalizes misleading speech about elections and therefore misleading speech is integral to the crime. (Pros MSC Supp Br, p 6). This is the ouroboros that other courts have warned about—"if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense." *Buchanan v Crisler*, 323 Mich App 163, 186; 922 NW2d 886 (2018), quoting *United States v Matusiewicz*, 84 F Supp 3d 363, 369 (2015). And as the Court in *United States v Hansen*, 599 US 762; 143 S Ct 1932; 216 L Ed 2d 692 (2023), made clear, the speech-integral-to-criminal-conduct exception only applies when the speech is intended to bring about some *other* unlawful act, something other than the speech itself. (Def MSC Supp Br, p 4-5).

Here, the prosecution has suggested that "voter intimidation" is that other unlawful act.[1] But, again, "voter intimidation" in the constitutionally proscribable sense is

[1] Contrary to its argument (Pros MSC Supp Br, p 8), it is the prosecution who has argued that the conduct at issue is voter intimidation. (Pros MSC Br, p 30).

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limited to true threats. *Virginia v Black*, 538 US 343, 360; 123 S Ct 1536; 155 L Ed 2d 535 (2003).[2] And contrary to the prosecution's straw man argument (Pros MSC Supp Br, p 9), the defense has never contended that true threats are not proscribed by MCL 168.932(a). Instead, the defense has contended that true threats would fit under *menace*. But as the defense has argued throughout, the robocall here did not contain any true threats.

The prosecution claims that under its reading of MCL 168.932(a), all false political speech is not criminal, only "wrongful" speech. (Pros MSC Supp Br, p 9). What's wrongful? According to the prosecution, it includes speech that may "frighten" voters or speech that "wrongfully threatens voters." (Pros MSC Supp Br, p 9). So, as the ACLU posited (ACLU & PTV Br, p 25), would Lyndon B. Johnson's "Daisy" ad be proscribable since it preyed on fear to dissuade voters from electing Barry Goldwater?[3] Similar questions abound. What threats count as wrongful? What

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[2] The prosecution is correct that the true-threat and speech-integral-to-criminal-conduct exceptions are distinct (Pros MSC Supp Br, p 8), but in the context of this case, they are essentially intertwined under the prosecution's argument.

[3] The prosecution refers exclusively to speech that *deters* voting (Pros MSC Supp Br, p 9-10), but remember that the statute also reaches *influencing* voters, that is, influencing voters *whom* to vote for. MCL 168.932(a).

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false speech is wrongful? How are deliberate lies not wrongful? The ultimate answer—although unspoken—seems to be "we'll know it when we see it," which leaves enormous discretion in the hands of prosecutors. At bottom, the amorphousness of the prosecution's "wrongful" test only serves to highlight the vagueness and chilling-effect concerns voiced by the defense.

One last point. The prosecution complains that the defense can cite no other cases where MCL 168.932(a) has been used to prosecute possibly protected speech. (Pros MSC Supp Br, p 7). But rather than validating the prosecution's position, this suggests that the prosecution's interpretation is novel. In other words, that MCL 168.932(a) has never been used to police pure speech suggests that this was never the statute's intended ambit. The history behind MCL 168.932(a) (Def MSC Br, p 23-24) confirms this. So the prosecution is essentially asking this Court to retrofit MCL 168.932(a) to allow prosecutors to criminalize speech they deem "wrongful." The Court should leave this Pandora's box firmly shut.

## II. Under *Counterman*, "unlawful violence" is the hallmark of a true threat.

The prosecution strains to argue that *Counterman v Colorado*, 600 US 66, 75; 143 S Ct 2106; 216 L Ed 2d 775 (2023), does not foreclose its proposed expansion of the

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true-threat doctrine to encompass, among other things, threats of emotional harm. (Pros MSC Supp Br, p 12; Pros MSC Br, p 33). But *Counterman*'s repeated references to "violence"—without hinting at anything broader—betoken otherwise. Likewise, this Court should be unpersuaded by the prosecution's attempt to circumvent *Counterman*'s holding that a true threat must be an expression that *the speaker* intends to commit an act of unlawful violence. (Pros MSC Supp Br, p 15). It is not the defense's position that traditional principal-agent concepts do not apply in the true-threat setting. For example, if someone says, "Vote for Candidate X or I'll have my brother kill you," the speaker has issued a true threat—that the speaker (principal) intends to inflict unlawful violence on the listener by way of his brother (agent).

Finally, the prosecution once more argues that only "wrongful" statements are covered by MCL 168.932(a) and that "genuine" warnings are not proscribed. (Pros MSC Supp Br, p 15-16). Again, though, what distinguishes wrongful from genuine warnings, and who gets to decide? The prosecution does not adequately broach these significant questions. What's more, elsewhere the prosecution has argued that Burkman and Wohl would violate MCL 168.932(a) even if they truly believed the information in the robocall. (Pros MSC Br, p 24). This would seem to contradict the prosecution's new "genuine" limitation. Regardless, the point is that nebulous notions of "wrongful"

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or "genuine" that give expansive discretion to prosecutors will chill free speech. As the Court in *Counterman* explained:

> Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is self-censorship of speech that could not be proscribed—a cautious and restrictive exercise of First Amendment freedoms. [*Counterman*, 600 US at 75.]

This would be the result under the prosecution's interpretation of MCL 168.932(a), and this is why this Court should reject that interpretation.

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## RELIEF REQUESTED

The defense again asks this Court to reverse the lower courts and dismiss the charges in this case.

Respectfully submitted,

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