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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellee 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 Plaintiff-Appellee v JACOB ALEXANDER WOHL Defendant-Appellant _____/	Supreme Court No. 164639 Court of Appeals No. 356602 Wayne County Circuit Court No. 20-004637-FH

THE PEOPLE'S BRIEF IN OPPOSITION TO DEFENDANTS-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

Defendants-Appellants rely upon MCR 7.305(B) in seeking leave to appeal a decision of the Michigan Court of Appeals. The People agree that this Honorable Court has jurisdiction over the matter under MCL 600.215(3).

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. MCL 168.932(a) provides that 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. Did the trial court err in finding that a false a robo-call message meant to deter Black electors from voting was a "menace" within the statute?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No. The panel split 2 to 1

2. MCL 168.932(a) provides that 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. Did the trial court err in finding that a false a robo-call message meant to deter Black electors from voting was a "corrupt means or device" within the statute?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No. The panel was unanimous

3. Is the false robo-call message that was intended to deter Black electors from voting outside the protection of the First Amendment on the basis that it was speech integral to criminal conduct?

   Appellants' answer: No

   Appellee's answer: Yes

   Trial court's answer: Did not answer

   Court of Appeals' answer: Yes. The panel was unanimous

4. Is the false robo-call message that was intended to deter Black electors from voting outside the protection of the First Amendment on the basis that it constituted a "true threat," even though no physical injury was threatened?

Appellants' answer: No

Appellee's answer: Yes

Trial court's answer: Yes

Court of Appeals' answer: No. The panel was unanimous

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

USCS Const Amend 1 states:

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) 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.

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INTRODUCTION

This case involves a blatant attempt to deter voting in the Black community. John Burkman and Jacob Wohl caused what Wohl termed as "the Black robo-call" to be disseminated to Detroit residents. The message, sent out shortly before the 2020 General Election, stated:

> *Hi. This is Tameka Taylor from Project 1599, the 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 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.*

The Attorney General brought criminal charges arising from this robo-call against Burkman and Wohl under a statute that prohibited the use of "menace" or "other corrupt means or device" in an attempt to deter electors from voting in any election in this state. The central issues in the case are whether the facts establish the use of "menace" or "other corrupt device or means" within the statute, and whether the message itself is protected by the First Amendment.

The Court of Appeals correctly recognized that Burkman and Wohl used both menace and a corrupt means or device in an attempt to achieve their goal of suppressing the vote in a minority community. The Court further correctly held that the outrageous message was not protected by the First Amendment. While the Court declined to follow the rule seen in other jurisdictions and extend the First Amendment exemption for "true threats" to threats of non-physical harm, it

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properly noted that the robo-call was not subject to protection because it involved speech integral to criminal conduct.

There is simply no valid reason for this Court to review the Court of Appeals' decision. It properly reflects the state's high interest in protecting the integrity of the electoral process and ensuring that every voter may exercise the franchise without undue and unfair influence or deterrence, but without intruding on any citizen's constitutional rights. While the case does involve significant legal principles, the Court of Appeals has effectively and correctly recognized and applied the appropriate law. The decision is not clearly erroneous, but will ensure that justice will be done in future cases by protecting the right to vote without improper interference.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The People adopt by reference the Basic Facts and Procedural History extensively set out by the Court of Appeals in its June 2, 2022, Opinion.

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ARGUMENTS

I. A robo-call threatening harm to deter voting is a "menace" within MCL 168.932(a), even when there is no threat to do a physical injury.

A. Standard of Review

A circuit court's ruling regarding a motion to quash an information and the district court's decision to bind over a defendant are reviewed to determine whether the district court abused its discretion in making its decision. *People v Hill,* 269 Mich App 505 (2006). 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. *People v Drake,* 246 Mich App 637 (2001).

B. Analysis

Burkman and Wohl 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 base their argument on an assertion that the common definitions of the term refer to an attempt to commit a common-law assault.

What they fail to recognize is that statutory language should be construed reasonably, keeping in mind the purpose of the statute. *People v Seeburger,* 225 Mich App 385 (1997). In interpreting a statute a court is not at liberty to choose a construction that implements any rational purpose, but must choose the

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construction which implements the legislative purpose perceived from the language and the context in which it is used. *People v TJD,* 329 Mich App 671 (2019).

MCL 168.932(a) can only reasonably be viewed as a voter suppression statute. 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, but permit threats to financial and liberty interests to deter voting would be counter to this purpose.

Furthermore, 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). The Oxford English Dictionary defines "menace" as a "a person or thing that is likely to cause harm." This generally recognized definition of "menace" covers any threat to a person or to society as a whole. A menace is a threat to cause some harm, and to menace someone is to threaten harm to that person. There is no requirement that the threat be to physically injure or do physical violence to the person. A threat to do any type of harm to the individual, be it physical, emotional, financial or otherwise, is sufficient to "menace" a person. Such a broad definition of menace would be consistent with the legislative aim in protecting an elector's right to vote.

The evidence presented at the preliminary examination demonstrates that Burkman and Wohl threatened minority voters that their personal information

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would be shared with "the man", that their personal information would be used by law enforcement to track down old warrants and that their personal information would be used by creditors to collect debts. These threats of potential harm were made in an attempt to deter voting. Irrespective as to whether these threats were true, they constituted a "menace" under the statute.

II. A robo-call using false information to deter voting is a "corrupt means or device" within MCL 168.932(a).

A. Standard of Review

A circuit court's ruling regarding a motion to quash an information and the district court's decision to bind over a defendant are reviewed to determine whether the district court abused its discretion in making its decision. *People v Hill,* 269 Mich App 505 (2006). 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. *People v Drake,* 246 Mich App 637 (2001).

B. Analysis

Burkman and Wohl also assert that the evidence does not demonstrate the use of a"corrupt means or device" to deter electors from voting. In doing so they argue that the robo-call message is not in itself corrupt, but it simply set out an opinion rather than an assertion of fact, and that the assertions made in the message were plausibly true. However, these arguments are simply not persuasive.

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The distinction between a "menace" and a "corrupt means or device" actually involves whether the assertion used as a means to deter an elector from voting was itself false. Even if the personal information would be used by law enforcement and creditors in the manner stated by Defendant, the use of such an assertion would be a "menace" under the statute. But it is the falsity of the assertions made in the robo-call that establish it as "a corrupt means or device" to accomplish the purpose.

In this regard, 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 presented at the preliminary examination, and the reasonable inferences flowing from the testimony, demonstrate the falsity of this assertion of fact.

Examined in the context of a misconduct in office case, it has been recognized that "corrupt behavior" refers to "intentional, purposeful, deliberate and knowingly wrong behavior." *People v Waterstone,* 296 Mich App 121 (2018). Furthermore, the term "corrupt intent" has been described as a "sense of depravity, perversion or taint." *People v Perkins,* 468 Mich 448 (2003). The evidence presented at the preliminary examination was more than sufficient to establish that Burkman and Wohl used a wrongful method with a depraved intent to interfere with voting.

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The use of this false message as a means to deter voting satisfies the statutory requirement of a "corrupt means or device". It is the message itself, andthe audience to which it was directed, and not necessarily the manner in which it was delivered to that targeted audience, that is the "corrupt means or device". A similarly false statement delivered to the targeted audience by radio or television broadcast meant to suppress minority voting would also constitute a "corrupt means or device" under the statute.

III. The robo-call attempting to deter voting is here exempt from First Amendment protection because it involves speech integral to criminal conduct.

A. Standard of Review

Constitutional issues, as questions of law, are reviewed de novo. *Tm v Mz,* 326 Mich App (2018).

B. Analysis

The government may not ordinarily restrict speech on the basis of its content, except in a number of well-recognized areas. *United States v Alvarez,* 567 US 709 (2012). Among the exceptions are speech that is integral to criminal conduct. *Giboney v Empire Storage & Ice Co,* 336 US 490 (1949). The United States Supreme Court therein recognized that freedom of speech did not extend its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. It has never been deemed an abridgement of freedom of speech or press to

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make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

Simply stated, the speech integral to the criminal conduct exception is seen when speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct. 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." *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, 761-62 (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,* 308 US App DC 349 (1994).

Here the Michigan statute criminalizes voter intimidation. It seeks to protect the right of all citizens to exercise his or her right to vote without interference. A state has a compelling interest in ensuring that an individuals' right to vote is not undermined by fraud in the election process. *Burson v Freeman,* 504 US 191 (1992). The robo-call initiated by Defendants is the vehicle by which the crime was

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perpetrated. MCL 168.932(a) punishes the conduct involved when one seeks to deter voting by unlawful means. Here the robo-call message was simply integral speech used as part of the illegal conduct. It is not constitutionally protected.

IV. The robo-call attempting to deter voting is exempt from First Amendment protection because it involves a "true threat," even though no physical harm is threatened.

A. Standard of Review

Constitutional issues, as questions of law, are reviewed de novo. *Tm v Mz,* 326 Mich App (2018).

B. Analysis

Here the Court of Appeals has declined the People's request to follow the lead of other jurisdictions and determine that the "true threat" exemption from constitutional protection may be a threat of harm other than physical assault. The Court noted that the message disseminated by defendants warned of harm to the listener's freedom, financial security, and bodily autonomy, but did not involve a "serious expression of an intent to commit an act of unlawful violence". For that reason, it held that the robo-call message cannot avoid constitutional scrutiny in this case under the true threat exception. This is a matter of that involves a legal principle of major significance to the state's jurisprudence and warrants further consideration.

The First Amendment generally prevents government from proscribing speech based on disapproval of the ideas expressed. *RAV v City of St. Paul,* 505 US

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377 (1992). However, the First Amendment does not provide absolute protection for all forms of expression. *Virginia v Black,* 538 US 343 (2003). Over time, the Supreme Court has defined narrow categories of speech that can be prohibited based on content. Such categories include true threats, *Watts v United States,* 394 US 705 (1969).

The Supreme Court has not squarely addressed whether threats of nonviolent or nonphysical harm can constitute true threats. In *Black,* the 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).

That is, the Court explained that true threats include threats of unlawful violence; the Court did not specify whether only threats of unlawful violence are true threats. With regard to intimidation, the Court explained that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat" that exists "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." *Id.* at 360.

Prohibition of true threats is appropriate, the 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 Supreme Court's analysis in *Black* should not be interpreted to suggest that the government can ban only threats of physical harm.

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The threat of severe nonbodily harm can engender as much fear and disruption as the threat of violence.

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

Other jurisdictions have expressly recognized that threats of harm other than physical violence can be a basis for the "true threat" exception. In *National Coalition On Black Civic Participation, et al. v Jacob Wohl, et al.,* USDC SDNY Case No. 1:20-cv-08668-VM (October 28, 2020), a case involving the very same robo-call here at issue, the federal district judge addressed this issue and noted that the Second Circuit has accepted that the threat of severe nonbodily harm can engender as much fear and disruption as the threat of violence. *United States v Turner,* 720 F3d 411 (CA 2, 2013).

Of course, a decision by the Second Federal Circuit cannot bind a Michigan circuit court in a criminal case. However, the Michigan Supreme Court has recognized 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; 677 NW2d 325 (2004); *Estate of Voutsaras v Bender,* 326 Mich App 667 (2019).

While the Court of Appeals declined to do so, the First Amendment exception for true threats should be extended to threats of harm to the listener's freedom, financial security, and bodily autonomy.

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CONCLUSION AND RELIEF REQUESTED

The Court of Appeals did not err in concluding that the evidence presented at the preliminary examination was sufficient to demonstrate conduct in violation of MCL 168.932(a). An attempt was made to deter voting by means of both "menace" and "corrupt means or device." Likewise, the Court did not err in concluding that the robo-call message was not protected by the First Amendment. For these reasons, the application for leave to appeal should be denied.

In the alternative, this Court should review the decision of the Court of Appeals only as to whether a threat of non-physical harm is sufficient to establish a "true threat" outside of constitutional protection.

Respectfully submitted,

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