STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MACAULEY BURKMAN,

Defendant-Appellant.

Supreme Court No.

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.

Court of Appeals No. 356602

Circuit Court No. 20-004637 FH

DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT OR ORDER APPEALED

John Burkman and Jacob Wohl filed a motion to quash their felony charges in circuit court. The court denied the motion in an order dated February 23, 2021. The Court of Appeals initially denied interlocutory applications for leave to appeal. *People v Burkman*, unpublished order of the Court of Appeals, issued May 6, 2021 (Docket No. 356600); *People v Wohl*, unpublished order of the Court of Appeals, issued May 6, 2021 (Docket No. 356602). But this Court remanded both cases for consideration as on leave granted. *People v Burkman*, 508 Mich 951; 964 NW2d 604 (2021); *People v Wohl*, 508 Mich 951; 964 NW2d 585 (2021). The Court of Appeals consolidated the cases. *People v Burkman*, unpublished order of the Court of Appeals, entered November 9, 2022 (Docket No. 356600); *People v Wohl*, unpublished order of the Court of Appeals, entered November 9, 2022 (Docket No. 356602). In a published opinion released June 2, 2022, the Court of Appeals majority affirmed. *People v Burkman*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket Nos. 356600, 356602). This application is being timely filed within 56 days of that decision. MCR 7.305(C)(2).

As described below, the issues raised in this application involve a substantial question about the validity of a legislative act and involve legal principles of major significance to the state's jurisprudence. MCR 7.305(B)(1), (2). And the

lower courts' decisions are clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a).

QUESTIONS INVOLVED

I. Accepting the evidence presented at the preliminary examination in the light most favorable to the prosecution, does the defendants' conduct fail to make out a violation of the voter suppression statute as that statute is correctly interpreted?

The trial court answered, "No."
The Court of Appeals answered, "No."
The defense answers, "Yes."

II. Is the voter suppression statute unconstitutional on its face and as applied to the defendants?

The trial court answered, "No."
The Court of Appeals answered, "No."
The defense answers, "Yes."

INTRODUCTION

A couple months before the November 2020 election, conservative provocateurs John Burkman and Jacob Wohl disseminated a 30-second "robocall" in the 313-area code. The call said,

> 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 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.

Burkman and Wohl's aim—taking the evidence from the preliminary examination in the light most favorable to the prosecution—was to dissuade Blacks in the Detroit area from voting by mail. "Reprehensible," the district court judge called it. This Court will likely agree.

Reprehensible, though, is different from *criminal*. The Attorney General has charged Burkman and Wohl under MCL 168.932(a), which criminalizes deterring voters

through "bribery, menace, or other corrupt means or device." Square peg, meet round hole.

The defense moved to quash in the circuit court, raising two arguments. First, the defense argued that MCL 168.932(a), correctly interpreted, does not criminalize Burkman and Wohl's conduct. Second, under First Amendment principles, the defense argued that MCL 168.932(a) is unconstitutional on its face and as applied to Burkman and Wohl. The trial court denied the motion, and the Court of Appeals, in a published opinion, affirmed, deploying dubious reasoning.

This Court should reverse. The Attorney General has overreached. Neither the language of MCL 168.932(a) nor our state and federal constitutions can abide the prosecution of Burkman and Wohl. It should end here.

STATEMENT OF FACTS

Burkman and Wohl are charged with four felonies: bribing or menacing voters, MCL 168.932(a); conspiracy to bribe or menace voters, MCL 750.157a; and two attendant counts of using a computer to commit a crime, MCL 750.796.[1] As the prosecution has conceded throughout, the latter three charges are derivative of the first charge of bribing or menacing voters under MCL 168.932(a), which provides:

> 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 charges emanate from a "robocall" that Burkman and Wohl disseminated in the 313-area code. The call said,

> 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

[1] The Court of Appeals gave a gratuitous account of the facts of the case, even venturing outside the record to portray Burkman and Wohl in a negative light. *People v Burkman*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket Nos. 356600, 356602); slip op at 2-6. The defense here offers the essential facts necessary to resolve the legal issues.

> 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.

At the preliminary examination, the only "victim" the prosecution presented was Derrick Thomas, a Detroiter who received the call. (PE Tr, 11, 15). He testified that he was "appalled" and notified "news radio 950" after unsuccessfully trying to contact the Detroit Election Commission. (PE Tr, 16-17). He was later contacted by the Attorney General's office. (PE Tr, 20). Thomas testified that he later voted and that he was not deterred from voting because of the robocall. (PE Tr, 26-27). The Attorney General presented no witnesses who claimed that the call had deterred them from voting. (PE Tr, 85-86).

To be sure, the message was intended to deter mail-in voting. And, as emails between Burkman and Wohl suggest, the robocall was targeted at Blacks. (PE Tr, 55-63). But at the preliminary examination, the prosecution made no showing that Burkman and Wohl *knew* that the representations in the call were in any way false.

Khyla Craine, an attorney with the Secretary of State (PE Tr, 111), admitted that when a person registers to vote, their name and address become publicly available (PE Tr, 114-115, 122-123). But she claimed that there are other databases that the Secretary of State maintains that are more commonly used by law enforcement and creditors. (PE Tr, 115-116). She claimed that the voter database, to her knowledge, had never been used by creditors or law enforcement agencies. (PE Tr, 117-118). Nor had the CDC accessed the database. (PE Tr, 119). Still, Craine admitted that it was possible that law enforcement, creditors, or the CDC could use the database. (PE Tr, 124).

The Information charges that the robocall was an attempt to deter electors by means of menace or "the corrupt means of presenting false and misleading statements about mail-in voting in a telephone message."

After the case was bound over to circuit court, the defense filed a motion to quash. The court denied the motion in an oral opinion.

The defense applied for leave to appeal in the Court of Appeals, which that court denied "for failure to persuade the Court of the need for immediate appellate review." *People v Burkman*, unpublished order of the Court of Appeals, issued May 6, 2021 (Docket No. 356600); *People v Wohl*, unpublished order of the Court of Appeals, issued May 6, 2021 (Docket No. 356602). The defense then filed applications for leave to appeal in this Court. In lieu of granting

leave, the Court remanded the cases to the Court of Appeals "for consideration as on leave granted." *People v Burkman*, 508 Mich 951; 964 NW2d 604 (2021); *People v Wohl*, 508 Mich 951; 964 NW2d 585 (2021).

On remand, the Court of Appeals consolidated the cases. *People v Burkman*, unpublished order of the Court of Appeals, entered November 9, 2022 (Docket No. 356600); *People v Wohl*, unpublished order of the Court of Appeals, entered November 9, 2022 (Docket No. 356602). In a split decision, the Court of Appeals affirmed the trial court's decision. *People v Burkman*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket Nos. 356600, 356602). The opinions will be discussed in detail below.

ARGUMENT

The defense raises two species of argument. First, the defense argues that the statute Burkman and Wohl are charged under does not cover their alleged conduct. Second, the defense argues that if the statute can be interpreted to reach Burkman and Wohl's conduct, it creates a constitutional free speech violation. Consistent with the rule of constitutional avoidance, the defense presents its statutory arguments before turning to its constitutional arguments. *People v McKinley*, 496 Mich 410, 415-416; 852 NW2d 770 (2014).

I. Burkman and Wohl's conduct does not make out a violation of MCL 168.932(a) as that statute is correctly interpreted.

Issue Preservation

This issue was raised before and decided by the trial court, so it is preserved for appellate review. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

Standard of Review

A trial court's decision on a motion to quash is reviewed for an abuse of discretion. *People v March*, 499 Mich 389, 397; 886 NW2d 396 (2016). But where "a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Id.*

Here, the facts are largely undisputed. The question is how the facts interact with MCL 168.932(a). So this Court's review is primarily de novo.

Analysis

This Court's goal when interpreting a statute is to discover and effectuate the intent of the Legislature. *People v Chavis*, 468 Mich 84, 92; 658 NW2d 469 (2003). The Court must begin, of course, by looking to the plain language of the statute. *Id.* If that language is clear, the statute must be enforced as written. *Id.*

The prosecution of Burkman and Wohl under MCL 168.932(a) is unprecedented in Michigan jurisprudence. The Court of Appeals' decision in this case is the first opinion explicating MCL 168.932(a). The defense's arguments rely on general principles of statutory interpretation as well as logic and common sense. At bottom, the plain

language of MCL 168.932(a) does not criminalize the robocall in this case.

A. The robocall was not *menacing*, which requires a threat of physical assault.

Regardless of whether the statements in the robocall should be regarded as fact, fiction, or something else, one thing is clear—they were not "menacing" as that term is defined in the law.

MCL 168.932 was enacted in 1954. The language "bribery, menace, or other corrupt means or device" was apparently borrowed from MCL 4.82 (allowing the legislature to punish contempt), which dates back to 1846.[2] " 'If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.' " Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 73, quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 537 (1947). And where a word or phrase "may have acquired a peculiar and

[2] The earliest reference to "bribery, menace, or any other corrupt means or device"—searchable on Westlaw at least—is from more than 200 years ago. *Lewis v Few*, 5 Johns 1 (NY 1809).

appropriate meaning in the law," that word or phrase "shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. See also *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010).

Menace or *menacing* has a specific meaning in the law. *Black's Law Dictionary* defines *menacing* thus: "An attempt to commit common-law assault." *Black's Law Dictionary* (11th ed). Likewise, *menace* has been defined as "a show of an intention to inflict especially physical harm." *Merriam-Webster's Dictionary of Law*. Michigan caselaw also holds that the term refers to creating a risk of bodily harm. *People v Doud*, 223 Mich 120, 127, 129, 130; 193 NW 884 (1923); *People v Johnson*, 407 Mich 196, 241; 284 NW2d 718 (1979) (LEVIN, J., dissenting).

What's more, as a point of usage, Michigan caselaw has referred to *menace* and *threat* distinctly. See, e.g., *Hamlin v Mack*, 33 Mich 103, 106 (1875) (". . . there must be violent acts or menacing or threatening words."); *People v Plumsted*, 2 Mich 465, 466 (1853) ("Upon attempting to return, she was prevented by force, menaces, and threats of the defendants."). This is not superfluousness. The law recognizes *menace* as a specific kind of threat.

Here, whatever can be said about the robocall, it did not threaten its receivers with any physical harm. So the *menace* theory of liability should be quashed.[3]

The prosecution has advocated for an amorphous definition of *menace* to mean any kind of threat. But comparing MCL 168.932(a) to other states' voter bribery statutes disabuses this misapprehension. Many statutes, along with bribery and menace, also list *threat*. See, e.g., Ariz Rev Stat Ann 16-1006 (referring to "force, threats, menaces, bribery or any corrupt means"); Fla Stat Ann 104.061 (referring to "bribery, menace, threat, or other corruption whatsoever"); Idaho Code Ann 18-2305 (referring to "force, threats,

[3] After the trial court denied the motion to quash, the defense filed a motion for special jury instructions, asking the court to define "menace" as "to show an intent to inflict physical violence." The court denied the motion. The Court of Appeals denied interlocutory applications for leave to appeal. *People v Burkman*, unpublished order of the Court of Appeals, entered July 30, 2021 (Docket No. 357430); *People v Wohl*, unpublished order of the Court of Appeals, entered July 30, 2021 (Docket No. 357429). This Court, in lieu of granting leave, remanded the appeals to the Court of Appeals to be decided after this appeal. *People v Burkman*,508 Mich 966; 965 NW2d 537 (2021); *People v Wohl*, 508 Mich 966; 965 NW2d 539 (2021). After this appeal was decided, the court denied leave in both cases. *People v Burkman*, unpublished order of the Court of Appeals, entered June 21, 2022 (Docket No. 357430); *People v Wohl*, unpublished order of the Court of Appeals, entered June 21, 2022 (Docket No. 357429).

menaces, bribery, or any corrupt means"). Other Michigan statutes have also referred to both threats and menace. See *People v Lyons*, 197 Mich 64, 66; 163 NW 484 (1917) (". . . who takes or detains a female with the intent to compel her by force, threats, menace or duress to marry him . . . ."). By the prosecution's argument, this would be surplusage since *menace* incorporates any kind of nebulous *threat*. But when interpreting a statute, "every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (cleaned up). So the prosecution's wide-ranging interpretation of *menace* is incorrect.

Plus, even accepting a broader definition of *menace*, communicating information about negative consequences for certain actions is not threatening. Take the following sentence: "Don't smoke cigarettes because they will kill you." No one would say that the speaker was threatening the person not to smoke. By the same token, telling voters that their information could be used to vindicate legal rights of creditors and the state cannot be deemed a threat. Nor is telling voters that the CDC is *pushing* to use information for mandatory vaccines a threat.

The trial court, though, coopted the prosecution's definition. At the motion hearing, it said that it was "not convinced" that menace applied to only threats of physical

harm. (M Tr, 24). The court cited no authority for its holding.[4]

The Court of Appeals likewise disagreed that *menace* had acquired a peculiar meaning in the law. *Burkman*, ___ Mich App at ___; slip op at 8.[5] The court found the defense's reliance on criminal cases "not persuasive." *Id.* According to the court, "There is no indication that the Legislature intended to limit the term 'menace' as applied in cases charging criminal assault to this election statute." *Id.* But as Judge REDFORD correctly observed, *menace* has acquired a distinct meaning throughout the law, not just in the "criminal assault" context. *People v Burkman*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket Nos. 356600, 356602) (REDFORD, J., concurring in part and dissenting in part); slip op at 2-3.[6] In other words, there's no indication

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[4] At the hearing on the motion for special jury instructions, the trial court said that *Black's Law Dictionary* defines menace as "threat." It's unclear what edition of *Black's* the trial court was referring to, as the current edition contains a definition only for "menacing," which, as explored above, means an attempt to commit an assault.

[5] The court also consulted a lay dictionary to find that the plain meaning of *menace* is not limited to threats of physical violence. *Id.* This was not an argument the defense had made. See, e.g., Dennis the Menace. Instead, the defense argued that *menace* means something unique in the law.

[6] This was the only portion of the majority opinion from which Judge REDFORD dissented.

that *menace* means one thing in criminal law and something else in election law. What's more, as mentioned above, the phrase "bribery, menace, or other corrupt means or device" was taken from MCL 4.82, which permits the legislature to punish contempt by imprisonment. And MCL 4.83 states that an offense under MCL 4.82 is also a misdemeanor punishable by up to 5 years in state prison. So *menace* as used in MCL 168.932(a) originates from a criminal-law context. Again, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Reading Law*, p 73 (cleaned up).

The Court of Appeals majority also held—parroting an argument from the prosecution—that limiting *menace* to threats of physical violence would undermine the "purpose" of MCL 168.932(a), which is to prevent "the interference with the exercise of the right to vote as well as a breach of the integrity of the process through interference, i.e., the interruption of the elector in giving his vote." *Burkman*, ___ Mich App at ___ (majority opinion); slip op at 8. This is a canard. When interpreting a statute, the text controls, not the legislative "purpose" as divined by the prosecution. *People v Wood*, 506 Mich 114, 127; 954 NW2d 494 (2020). To be sure, purpose can help decide "which of various *textually permissible meanings* should be adopted." *Id.* (emphasis in original), quoting *Reading Law*, p 57. But "no text pursues its purpose at all costs." *Wood*, 506 Mich at 127, quoting

Reading Law, p 57 (cleaned up). And voter interference that does not involve threats of physical violence could still be punished through the *other corrupt means or device* portion of the statute. So restricting *menace* to the defense's proposed definition would not undermine the statutory purpose.

The Court of Appeals also pointed to "directly or indirectly" as used in the statute, saying, "By the Legislature's allowance for the menace to occur in a direct or indirect manner, the menace may be achieved with or without physical contact." *Burkman*, ___ Mich App at ___; slip op at 8. The court observed that *indirectly* can be "defined as 'deviating from a direct line or course'; 'not straightforward and open'; and 'not directly aimed at or achieved.' " *Id.*, quoting *Merriam Webster's Collegiate Dictionary* (11th ed). But *indirectly* has a more appropriate definition in this context: *through an intermediary*. See, e.g., *Labelle Mgt v Treas Dep't*, 315 Mich App 23, 36-37; 888 NW2d 260 (2016). See also *People v Shami*, 501 Mich 243, 254; 912 NW2d 526 (2018) (explaining that when a word in a statute is susceptible to multiple definitions, the "selection of the proper definition must be guided by the statutory context in which the term appears"). Under this definition, "directly or indirectly" would permit, for example, the leader of a crime syndicate who hatches a widespread voter bribery scheme to be punished the same as the underlings who carry it out. Remember, too, that *indirectly* applies to both *other corrupt*

means or device and *bribery*. How could bribery be committed indirectly under the definition endorsed by the Court of Appeals? The defense cannot surmise. *Through an intermediary* is the only definition of *indirectly* that makes sense reading the statute as a whole. So "directly or indirectly" does not support the Court of Appeals' interpretation.

B. A robocall disseminating false information cannot be a "corrupt means or device."

Even if the robocall can be regarded as a knowingly false statement of fact, false statements—standing alone—are not a "corrupt means or device."

"Corrupt means or device" as used in MCL 168.932(a) has not been defined by caselaw. *Corrupt*, in the sense used in the statute, is defined by *Black's* as "having unlawful or depraved motives; given to dishonest practices, such as bribery." *Black's Law Dictionary* (11th ed) (cleaned up). See also *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining *corrupt* in this sense as "characterized by improper conduct (such as bribery or the selling of favors)"). Similarly, Black's defines *corruptly* as "in a corrupt or depraved manner; by means of corruption or bribery" and explains, "As used in criminal-law statutes, *corruptly* usu. indicates a wrongful desire for pecuniary gain or other advantage."

Black's Law Dictionary (11th ed) (cleaned up). Likewise, a model jury instruction says, "An act is committed corruptly when it is done with the knowledge that it is wrong and with the intent to get money or to gain some other advantage." M Crim JI 22.12. This instruction defines "corruptly" as used in other bribery statutes. M Crim JI 37.1-37.2a.

The Court of Appeals gave a broader definition of *corrupt*:

> This Court has previously explained in the context of misconduct in office that "corrupt behavior" refers to "intentional, purposeful, deliberate, and knowing wrongful behavior." *People v Waterstone*, 296 Mich App 121, 138; 818 NW2d 432 (2012). Our Supreme Court has likewise described "corrupt intent" as a "sense of depravity, perversion or taint." *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003). Additionally, both lay and legal dictionaries provide similar definitions of corrupt. See *Merriam Webster's Collegiate Dictionary* (11th ed) ("morally degenerate and perverted," "characterized by improper conduct (as bribery or the selling of favors)"; *Black's Law Dictionary* (11th ed) ("[h]aving unlawful *or* depraved motives; given to dishonest practices, such as bribery") (emphasis added). [*Burkman*, ___ Mich App at ___; slip op at 9.]

The court did explain why *corrupt* as used in the misconduct in office caselaw should be imported to MCL 168.932(a). In fact, the Court of Appeals has distinguished misconduct in office from bribery. *People v Coutu*, 235 Mich App 695, 707; 599 NW2d 556 (1999). But MCL 168.932(a) uses *corrupt* by reference to bribery. So the Court of Appeals reliance on misconduct in office caselaw is unsound.

Also implicated is the associated words or *noscitur a sociis* cannon of statutory interpretation—the "familiar principle of statutory construction that words grouped in a list should be given related meaning." *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421-422; 662 NW2d 710 (2003) (cleaned up). That is, "words in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the act as a whole." *Id*. at 421 (cleaned up). So while "a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." *Id*.

Here, then, "other corrupt means or device" should be interpreted by reference to "bribery" and "menace." Doing so, it becomes clear that a robocall is not a corrupt means or device. Both bribery and menace are criminal acts in

themselves.[7] They involve an overt, targeted interaction between the perpetrator (or an agent) and the specific victim. A robocall, by contrast, involves passive contact between the speaker and the listener. Simply put, a robocall—even one containing knowingly false statements—is not in the same league as bribery and menace.[8] It is not a "corrupt means or device" under the statute as that phrase is correctly understood. See also MCL 168.83 and MCL 168.293 (distinguishing "corrupt conduct" from "other misfeasance or malfeasance").[9]

What's more, the prosecution alleges that the statements in the robocall are the "corrupt means or device," not

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[7] "Menace" is an apprehension-type assault. See *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998).

[8] A *means* is "something that helps to attain an end; an instrument; a cause." *Black's Law Dictionary* (11th ed) (cleaned up). A *device* is "a scheme to trick or deceive; a stratagem or artifice, as in the law relating to fraud." *Id.* (cleaned up). Although both bribery and menace can be accomplished with speech, each contains an illicit stratagem beyond the speech (e.g., money for votes or threats of physical violence to influence votes). In other words, they are verbal acts. False statements, by contrast, are not a means or device in themselves.

[9] What would be "other corrupt means or device?" As just one example, blackmail, it seems, would fit neatly among bribery and menace.

the instrumentality of a robocall.[10] Robocalls, as a medium, are amoral. Although often annoying, they are not inherently corrupt. They can even be good. Imagine a robocall a week before the election saying, "The election is Tuesday, November 3; don't forget to vote." No one would call this a "corrupt means or device" for encouraging people to vote. Necessarily, then, the prosecution is seeking to punish Burkman and Wohl for the statements in the robocall, not the fact that they were made via a robocall.[11]

Another hypothetical further illustrates the point.[12] Imagine an organization that wants to turn the United States

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[10] The prosecution appears to have conceded this point. (Pros Mot Resp, p 18).

[11] Also, the Information charges that the "menace" or "corrupt means or device" here were false statements made in a telephone message. The way it's charged, this could equally apply to a one-to-one telephone call.

[12] The Court of Appeals declined to engage with any of the defense's hypotheticals, saying that it "must focus on the specifics of the case at hand" since "these hypotheticals were raised in the context of a statutory constructions challenge and not First Amendment freedoms." *Burkman*, ___ Mich App at ___; slip op at 9 n 7. The court cited *People v Lockett*, 295 Mich App 165, 176; 814 NW2d 295 (2012), for this proposition. *Id*. But *Lockett* addressed a vagueness challenge to a criminal statute. *Lockett*, 295 Mich App at 173-174. In this context, "the proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the

into a monarchy. Its members disfavor voting altogether because they believe it perpetuates the current democratic system. A week before the election, they release a robocall that says, "Don't vote. Bring monarchy to America. Learn more at AmericansForMonarchy.org." To be sure, the robocall is an attempt to deter people from voting, consistent with the aims of the organization. But would it be a "corrupt means or device?" No. It's a communication of a viewpoint, an opinion. MCL 168.932(a) does not prohibit all deterrents to voting, only corrupt ones. So even a robocall discouraging people from voting is not, in itself, a "corrupt means or device." Instead, what makes a robocall potentially corrupt is its content. It's the content, not the medium, that matters.

From that premise, there's no reason why, under the prosecution's interpretation, "corrupt means or device"—i.e., false statements—couldn't equally apply to one-on-one communication in the privacy of one's home. Imagine two friends, a Republican and a Democrat, having a conversation. The Republican says he's unsure whether he'll vote in the upcoming election. The Democrat, hoping to dissuade

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conduct allegedly proscribed in this case." *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998) (cleaned up). Here, though, the defense is using hypotheticals not as part of a vagueness challenge but to illuminate the meaning behind "other corrupt means or device" as a matter of statutory interpretation.

the Republican from voting, says, "Don't vote. I'm not voting. Voting is a waste of time. They're all crooks." Suppose the Democrat does plan on voting, though. And, as the Democrat knows, while some politicians might be crooks, they're not all crooks. Under the prosecution's reading of the statute, there's no reason why the Democrat's false statement would not be punishable as a "corrupt means or device." In other words, there's no reason why the Democrat would not be liable for a felony and 5 years in prison. MCL 168.935. The statute cannot reasonably be interpreted to reach such quotidian hyperbole and chicanery. False statements, even made knowingly, do not qualify as "bribery, menace, or other corrupt means or device." [13]

Even more acute dangers are posed by the prosecution's interpretation. Again, the statute also prohibits a person from attempting "to *influence* an elector in giving his or her vote." MCL 168.932(a) (emphasis added). Imagine two coworkers who earn minimum wage. They begin to talk about politics. One coworker says to the other, "Don't vote for Joe Biden. He's going to raise your taxes." President Biden, though, has consistently said that he would not raise taxes on people making less than $400,000. See, e.g., Mengle, *Will Joe Biden Raise Your Taxes?*, Kiplinger,

[13] The prosecution may respond that they are only prosecuting Burkman and Wohl because (1) the statements were false and (2) they were widely disseminated via a robocall. But that limiting principle is not self-executing.

November 9, 2020, available at https://www.kiplinger.com/taxes/601524/will-joe-biden-raise-your-taxes. There's no reason why—under the prosecution's interpretation—the coworker could not be charged under MCL 168.932(a). Such an interpretation raises the specter of selective prosecutions and of prosecutors appointing themselves as arbiters of truth. This is not a credible interpretation of the statute.

When politicians or political operatives lie or tell half-truths, we call that dishonest. We don't call it corrupt, a label reserved for specific kinds of wrongdoing. If the Legislature had wanted MCL 168.932(a) to prohibit dishonest conduct of every sort, it could have said so. It didn't.

The Court of Appeals "declined the request to apply *noscitur a sociis* in order to achieve defendants' goal of equating 'corrupt means or device' with menace or bribery." *Burkman*, ___ Mich App at ___; slip op at 9 (cleaned up). But the defense didn't argue that *other corrupt means or device* should be *equated* with menace or bribery. Instead, the defense argued that *other corrupt means or device* needs to be similarly egregious to bribery and menace and that false statements—standing alone—don't fit the bill.

Next, surveying the evidence from the preliminary examination, the Court of Appeals said, "A fact-finder could conclude from this evidence that defendants intentionally disseminated a dishonest message with the depraved motive of deterring voting." *Id.* at ___; slip op at 10. In other

words, dishonest speech that deters or influences voting is a corrupt means or device. The Court of Appeals failed to acknowledge the startling consequences for political discourse that this interpretation of MCL 168.932(a) could wreak. Again, if a false statement is a corrupt means or device, MCL 168.932(a) criminalizes the mundane mendacity inherent in American politics. The man who says, "Biden will raise your taxes" is guilty of a felony. And who gets to decide what's true versus false speech? Prosecutors. Again, this is not a credible interpretation of the statute.

The district court called Burkman and Wohl's actions "reprehensible." (PE Tr, 149). This Court will likely agree. That doesn't make the robocall criminal. The prosecution of Burkman and Wohl under MCL 168.932(a) is the proverbial square peg in a round hole.

C. A robocall disseminating a person's opinion cannot be a "corrupt means or device."

The robocall in this case should be interpreted as a statement of *opinion*, not fact. The call explicitly states at the beginning that it is from an advocacy organization and merely gives predictions of what will happen if a person registers to vote by mail. The call ends by cautioning the listener to "beware of vote by mail." No reasonable person would interpret the call as a statement of absolute truth.

Just like no reasonable person would interpret any political commentary as absolute truth. For example, "Donald Trump will ruin the country" is not a statement of fact, it's an opinion. And conveying an opinion cannot be a corrupt means or device. The prosecution has not suggested otherwise.

According to the prosecution, though, because the robocall used the word "will" it purported to convey facts rather than opinions. (Pros COA App Resp, p 14). The trial court seemed to agree. (M Tr, 28). So, by that logic, saying "Joe Biden will raise your taxes" is a statement of absolute fact rather than opinion. This Court knows better. Self-assured opinions don't lose their quality as such by using modal auxiliary verbs.

The Court of Appeals held that "for 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." *Burkman*, ___ Mich App at __; slip op at 11. According to the court, "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." *Id.* (cleaned up). So conveying opinions to influence voters is criminal according to the Court of Appeals. The implications of this holding are stunning. By the Court of Appeals' logic, someone who truly believes that Joe Biden will raise

taxes (even though Biden has said he won't) and communicates that belief to another person in an attempt to influence that person to not vote for Biden has committed a felony. The Court of Appeals' decision holds the key to radically transforming political discourse in Michigan. Although the panel obviously took a dim view of Burkman and Wohl, it does not appear that they thought through the far-reaching ramifications of their decision.

D. A robocall disseminating plausibly true information cannot be a "corrupt means or device."

If the Court disagrees that the robocall expresses opinion rather than statements of fact, the robocall still cannot be regarded as a corrupt means or device because it communicates information that is plausibly true.

As established at the preliminary examination, it is possible for law enforcement and creditors to use the registered voter database in the manner alleged in the robocall.[14] While, according to Craine, the database had

[14] The prosecution offered no evidence that the CDC was not "pushing to use records from mail-in voting to track people for mandatory vaccines." In other words, there is no evidence that this particular statement was false. The burden is not on the defense to prove that the information in

never been used in these ways, this does not make the statements empirically false. "Joe Biden will raise your taxes" is plausibly true, but it could also turn out to be false. Again, "corrupt" refers to dishonesty used to get money or some other material advantage. Communicating plausibly true information cannot be corrupt.

As explored above, the Court of Appeals held, "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." *Burkman*, ___ Mich App at __; slip op at 11 (cleaned up). For the reasons already discussed, that can't possibly be correct.

E. The robocall did not deter any voter from "giving his or her vote," it only deterred one *method* of voting.

Again, MCL 168.932(a) prohibits—through bribery, menace, or other corrupt means—deterring a person from "giving his or her vote." Here, Burkman and Wohl's purported purpose was not to deter voting in toto, it was to deter *mail-in* voting, one *method* of voting. As all the

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the call was true. And something is not false simply because the prosecution says it is.

prosecution witnesses conceded, the message did not refer at all to in-person voting. (PE Tr, 31; 96, 140). This being so, the robocall does not violate the plain language of the statute.

The prosecution has argued that deterring only mail-in voting still violates the statute. The trial court agreed, saying, "It doesn't have to specify whether it's in person or by mail." (M Tr, 27). But that's incorrect. The statute refers broadly to "giving his or her vote." Here, Burkman and Wohl's purpose was not to deter all voting but only mail-in voting, one *method* of voting.[15] Any voters who received the message still had the traditional option of voting in person.

A hypothetical illustrates why the prosecution's position is incorrect. Imagine that before the 2020 election, an organization worried about the spread of COVID-19 put out a robocall that advised prospective voters to vote by mail rather than in person. The call warns of the dangers of COVID-19 and says that voting by mail is a safe alternative. "Don't vote in person, vote by mail," the robocall concludes. Criminal? By the prosecution's logic, the answer would have to be yes. By discouraging any *method* of voting, the statute is violated according to the prosecution. But common sense says otherwise. The call is not

[15] For example, discouraging someone from, say, eating oranges would not be deterring them from eating fruit, only one variety of fruit.

discouraging voters from casting a ballot in the election; it's only discouraging one *way* of casting a ballot. Here, by the same token, Burkman and Wohl's robocall did not discourage people from voting, only from voting by mail. So the call did not deter any voters "in giving his or her vote."

According to the prosecution, though, the robocall deterred all voting because people were hesitant to vote in person during the COVID-19 pandemic. The trial court agreed, saying, "In the fall of 2020 when these were going out, we had a worldwide pandemic going on, where people were being encouraged to stay in their home and not leave their home if they don't have to." (M Tr, 26). The court added, "And in-person voting, particularly in the city of Detroit—I've been in the precincts in the city of Detroit in the past before I was a judge—those places can be very crowded on election day." (M Tr, 26). The court continued, "And I can see people wanting to avoid those crowds and voting by mail rather than in person." (M Tr, 26). So, according to the court, someone who received the message may have declined to vote both by mail and in person. (M Tr, 26). The Court of Appeals agreed, saying, "Our nation was in the midst of the COVID-19 pandemic, such that in-person voting carried with it a serious risk to a voter's health." *Burkman*, ___ Mich App at ___; slip op at 10.

But such musings—even if true—are not borne out by the record. Cases are decided on facts established on the record. Here, the prosecution presented no evidence that

anyone anywhere declined to vote in person because of fear of catching COVID-19. If this fear were as widespread as the prosecution claims, it should have been easy to find a witness to testify to that effect at the preliminary examination. Instead, the prosecution has preferred to rely on its conception of "the political situation existing prior to the election." (Pros COA App Resp, p 15). What's more, the trial court brazenly ventured outside the record by referring to its experience—several years beforehand—visiting Detroit election precincts. See, e.g., *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989) ("We will not consider references to facts outside the record.") (cleaned up). So the trial court's decision on this ground was also erroneous.

The Court of Appeals held that "whether defendants influenced, deterred, or interrupted electors from giving their votes under these circumstances is a question of fact." *Burkman*, ___ Mich App at ___; slip op at 10. But the undisputed facts show that the message applied only to mail-in voting, not in-person voting. So there is no question of fact to resolve.

F. The prosecution has not provided any evidence that Burkman and Wohl *knew* that the information in the robocall was false.

MCL 168.932(a) does not have an explicit mens rea requirement. Still, it is presumed that criminal statutes require the defendant to have a culpable mental state. *Rehaif v United States*, ___ US ___, ___; 139 S Ct 2191, 2195; 204 L Ed 2d 594 (2019). Also, the acts proscribed by MCL 168.932(a)—bribery, menace, and other corrupt means or devices—by their very nature require knowledge and intent. There's no such thing as negligent bribery or unwitting menace.[16] And, as discussed above, *corrupt* and *corruptly* require dishonest or depraved motives, i.e., knowing and intentional wrongdoing. Here, then, the prosecution must show that Burkman and Wohl *knew* that the statements in the robocall were false.

This the prosecution has not done. Although the prosecution presented sufficient evidence at the preliminary examination to infer that Burkman and Wohl intended to deter mail-in voting, there was zero evidence demonstrating—directly or circumstantially—that they were aware of

[16] Bribery requires a "corrupt intent." *People v Ritholz*, 359 Mich 539, 554; 103 NW2d 481 (1960). And an apprehension-type assault requires the intent to put the victim in fear. *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); M Crim JI 17.1(3) ("An assault cannot happen by accident.").

the purported falsity of the statements. Because the prosecution introduced no evidence on this element, the bindover should be quashed. *Shami*, 501 Mich at 250 (stating that a bindover requires sufficient evidence on each element or evidence from which each element can be inferred).

As explored above, the Court of Appeals held, "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." *Burkman*, ___ Mich App at __; slip op at 11 (cleaned up). Again, this is not a credible interpretation of the statute.

G. At best, whether Burkman and Wohl's conduct falls within the statute is ambiguous, and this Court should apply the rule of lenity.

As the foregoing discussion shows, at a minimum, whether MCL 168.932(a) applies to the robocall here is ambiguous. This being so, the Court should apply the rule of lenity. "The rule of lenity provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997) (cleaned up). The rule applies "in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent." *People v Wakeford*, 418

Mich 95, 113-114; 341 NW2d 68 (1983). The rationale for the rule is deeply rooted in our criminal law jurisprudence: " 'It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment' " *People v Bergevin*, 406 Mich 307, 312; 279 NW2d 528 (1979), quoting *Bell v United States*, 349 US 81, 83; 75 S Ct 620; 99 L Ed 905 (1955).

Again, at the very least, it is unclear whether statements—even knowingly false ones—fit the definition of "other corrupt means or device." Applying the rule of lenity, the charges should be dismissed.[17]

II. MCL 168.932(a) is unconstitutional on its face and as applied to Burkman and Wohl.

Issue Preservation

This issue was raised before and decided by the trial court, so it is preserved for appellate review. *Dupree*, 486 Mich at 703.

[17] Consistent with its analysis as discussed above, the Court of Appeals found MCL 168.932(a) unambiguous.

Standard of Review

A trial court's decision on a motion to quash is reviewed for an abuse of discretion. *March*, 499 Mich at 397. But where "a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Id.*

Here, the facts are largely undisputed. The question is the constitutionality of MCL 168.932(a). So this Court's review is primarily de novo.

Analysis

Under the First Amendment of the United States 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." US Const, Am I. The right to free speech has been incorporated against the states. *Gitlow v New York*, 268 US 652; 45 S Ct 625; 69 L Ed 1138 (1925). The Michigan Constitution likewise protects the freedom of speech: "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const 1963, Art I, § 5.

The defense raises two varieties of constitutional arguments here. First, the defense argues that MCL 168.932(a) is constitutionally invalid on its face. Second, the defense argues that if MCL 168.932(a) can be interpreted to cover the robocall in this case, it is unconstitutional as applied. As with the statutory interpretation arguments, finding caselaw on point has been challenging. The prosecution of Burkman and Wohl is unprecedented in Michigan (if not all of America).

A. FACIAL CHALLENGES

1. MCL 168.932(a) is void for vagueness because "other corrupt means or device" is insufficiently defined.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972). Three rationales justify invalidating vague criminal statutes. First, the law must provide "fair warning": "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id*. Second, vague laws beget "arbitrary and discriminatory enforcement." *Id*. at 108-109.

Third, and specific to the First Amendment context, vague laws can chill free speech. *Id.* at 109. So statutes that criminalize speech must be closely scrutinized. *Reno v ACLU*, 521 US 844, 871-872; 117 S Ct 2329; 138 L Ed 2d 874 (1997). See *id.* at 870-874 (statute criminalizing online transmission of "indecent" and "patently offensive" communications unconstitutionally vague).

Consider *People v Boomer*, 250 Mich App 534, 536; 655 NW2d 255 (2002). There, the defendant "loudly uttered a stream of profanities" while canoeing on a popular river with children present. *Boomer*, 250 Mich App at 535-536. The defendant was prosecuted and convicted under MCL 750.337, which provides, "Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor." *Id.* at 536. The Court of Appeals reversed, saying that "it would be difficult to conceive of a statute that would be more vague than MCL 750.337." *Id.* at 540. The court explained, "There is no restrictive language whatsoever contained in the statute that would limit or guide a prosecution for indecent, immoral, obscene, vulgar, or insulting language." *Id.* The court found that the statute failed to provide fair notice of its prohibitions, encouraged arbitrary and discriminatory enforcement, and impinged on free speech. *Id.* at 540-542.

Here, the phrase "other corrupt means or device," in particular, is vague. The statute gives no definition of the

phrase. See *Reno*, 521 US at 865 (noting that "indecent" was not defined in the statute). And under the prosecution's theory, the statute could apply not only to robocalls but also one-to-one private speech. Should a person of ordinary intelligence know that false statements ("Joe Biden will raise your taxes") uttered to a friend in the privacy of his home are a "corrupt means or device," subjecting the speaker to felony liability and up to 5 years in prison? What about statements that are recklessly false? Or negligently false? Or true but misleading? What about unverifiable but plausibly true statements? Or political hyperbole and puffery? The language of MCL 168.932(a) does not answer these questions. The phrase "corrupt means or device" is simply too vague. There is no restrictive language limiting or guiding prosecutors. *Boomer*, 250 Mich App at 540. It does not provide fair notice of what it entails, invites arbitrary enforcement, and chills free speech.

The Court of Appeals found that the statue is not vague because, based on the accepted definition of *corrupt*, "a person of reasonable intelligence should understand that he or she violates MCL 168.932(a) by using any intentional, purposeful, deliberate, and knowingly wrongful method with the depraved intent to interfere with voting." *Burkman*, ___ Mich App at ___; slip op at 12 (cleaned up). But this is internally inconsistent with the panel's earlier finding that even unknowingly false speech is proscribed by the statute. *Id.* at ___; slip op at 11. That the Court of Appeals—within

the same opinion—interpreted the statute to mean different things at different points is further evidence that the statute is vague.

2. MCL 168.932(a) is overbroad because even false speech is constitutionally protected.

A law is overbroad where it criminalizes "a 'substantial' amount of free speech." *Virginia v Hicks*, 539 US 113, 118; 123 S Ct 2191; 156 L Ed 2d 148 (2003). This inquiry is made without reference to the facts of the specific case at hand. *Id.* In other words, even where a statute may have legitimate applications, if it sweeps too broadly, this "suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* at 119 (cleaned up). The rationale is that overbroad laws chill constitutionally protected speech. See *Ashcroft v Free Speech Coalition*, 535 US 234, 244; 122 S Ct 1389; 152 L Ed 2d 403 (2002).

Here, assuming that "corrupt means or device" applies only to knowingly false speech, it is overbroad. MCL 168.932(a) is "content based," meaning it "requires enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v Coakley*, 573 US 464, 479; 134 S Ct

2518; 189 L Ed 2d 502 (2014) (cleaned up). The United States Supreme Court has permitted content-based restrictions on speech in only a "few historic and traditional categories of expression long familiar to the bar." *United States v Alvarez*, 567 US 709, 717; 132 S Ct 2537; 183 L Ed 2d 574 (2012) (cleaned). These include true threats, obscenity, defamation, and fighting words. *Id.* at 717. Not among these categories is false speech. *Id.* at 718. "Some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id.*

The prosecution relies on the true threat exception. (Pros Mot Resp, p 20-22). " '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." *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536; 155 L Ed 2d 535 (2003). The Court of Appeals readily dispensed with the prosecution's reliance on the true threat exception, explaining that the robocall did not contain a threat of unlawful violence. *Burkman*, ___ Mich App at ___; slip op at 13-14.

Because MCL 168.932(a) criminalizes protected speech, the next question is whether it is narrowly tailored to fulfill a compelling governmental interest. *Alvarez*, 567 US at 724, 725. Here, the defense does not contest that protecting

the integrity of elections—ostensibly the purpose behind MCL 168.932(a)—is a compelling governmental interest. But MCL 168.932(a) is not sufficiently tailored to meet that interest.

"The First Amendment requires that the Government's chosen restriction on the speech at issue be 'actually necessary' to achieve its interest." *Alvarez*, 567 US at 725. Here, MCL 168.932(a) is not actually necessary to protect the integrity of elections for at least two reasons. First, "the Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest." *Id.* at 726 (cleaned up). Here, for example, the robocall was quickly pilloried by the media, and there's nothing in the record to indicate that anyone was actually deterred from voting by mail. Instead, "the outrage and contempt expressed for" the robocall served "to reawaken and reinforce" the integrity of the election. *Id.* at 727.

Second, the government has not shown that imposing criminal liability is actually necessary to protect the integrity of elections. There has been no showing why a civil sanction, as opposed to a criminal one, would not suffice. See *United States v X-Citement Video, Inc*, 513 US 64, 86; 115 S Ct 464; 130 L Ed 2d 372 (1994) (SCALIA, J., dissenting) ("I would find the statute, as so interpreted, to be unconstitutional since, by imposing criminal liability upon those not knowingly dealing in pornography, it establishes a severe deterrent, not narrowly tailored to its purposes,

upon fully protected First Amendment activities."). For example, in *Gertz v Robert Welch, Inc*, 418 US 323, 350; 94 S Ct 2997; 41 L Ed 2d 789 (1974), the Court generally disallowed punitive damages for defamation cases, finding that punitive damages could be used "to punish expressions of unpopular views" and could also chill speech. If punitive damages infringe too far on free speech, so too can criminal penalties in certain cases.

Again, the burden is on the government to show why imposing criminal liability is necessary in this context. *Alvarez*, 567 US at 717-718. Remarkably, the government has not even attempted to argue that MCL 168.932(a) is narrowly tailored. (Pros Mot Resp, p 22-24).

Because MCL 168.932(a) criminalizes protected speech, and because the government has not shown that MCL 168.932(a) is narrowly tailored to protect a compelling governmental purpose, it is overbroad and unconstitutional.

The trial court found—as is undisputed—that protecting the right to vote is a compelling state interest. (M Tr, 27). Moving on to the second part of the test, the trial court said, "[A]nd I believe this statute is narrowly tailored to simply prevent any attempt to influence that vote or deter them from voting." (M Tr, 27). That was the entirety of the trial court's analysis. The court gave no explanation for why a criminal sanction is "actually necessary" instead of, say, a civil penalty.

The trial court also remarked that the robocall "is stating information that is misleading, at the very least, and possibly false." (M Tr, 28). But the trial court apparently failed to recognize that even false speech is constitutionally protected. *Alvarez*, 567 US at 718.

The Court of Appeals declined to address the defense's facial overbreadth challenge, relying on two propositions. First, the court claimed, "Defendants characterize this argument as a facial challenge, but only present arguments regarding the breadth of the statute as applied specifically to the robocall message." *Burkman*, ___ Mich App at ___; slip op at 13. Second, the court said, " 'A facial challenge attacks the statute itself, and requires the challenger to establish that no set of circumstances exist under which the act would be valid. The fact that the act might operate unconstitutionally under some conceivable set of circumstances is insufficient.' " *Id.*, quoting *People v Johnson*, 336 Mich App 688, 692; 971 NW2d 692 (2021) (cleaned up). Neither proposition is correct.

First, the defense did not only present arguments on the scope of the statute as applied to the robocall. The defense very clearly argued that the statute was overbroad without focusing solely on the robocall. (Def COA Brs, p 28-33). The defense even noted that a facial overbreadth challenge considers the statute "without reference to the facts of the specific case at hand." (Def COA Brs, p 28, citing *Hicks*, 539

US at 118). So, respectfully, the defense finds this portion of the Court of Appeals' analysis bewildering.

Second, the Court of Appeals stated the wrong test for facial overbreadth challenges in the First Amendment context. When a defendant argues that a criminal statute is overbroad, the defendant must ordinarily show that the law could not be validly applied under any set of circumstances. *Johnson*, 336 Mich App at 692. This is the test the Court of Appeals relied on here. But a different test is used when First Amendment concerns arise: "The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges." *Hicks*, 539 US at 118. See also *In re Chmura*, 461 Mich 517, 530; 608 NW2d 31 (2000). The doctrine "allows a party to challenge a law written so broadly that it may inhibit the constitutionally protected speech of third parties, even though the party's own conduct may be unprotected." *Chmura*, 461 Mich at 530. So the Court of Appeals' refusal to entertain the defense's facial challenge to MCL 168.932(a) emanates from a fundamental misunderstanding of First Amendment jurisprudence. This error is obvious, and this Court should, if nothing else, remand this case to the Court of Appeals for further consideration of this issue under the correct standard.

B. AS-APPLIED CHALLENGES

1. The robocall contains opinions, and opinions cannot beget criminal liability.

As argued above, the robocall was a statement of opinion and prediction rather than a statement of absolute truth. Conveying an opinion cannot form the basis for criminal liability. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 US at 339-340. So MCL 168.932(a) is being applied unconstitutionally to Burkman and Wohl, and the charges should be quashed.

Recall that the Court of Appeals held that conveying opinions can create liability under MCL 168.932(a). *Id.* Plainly, then, the Court of Appeals has endorsed an unconstitutional interpretation of the statute.

2. The statements in the robocall are plausibly true, and the First Amendment does not countenance prosecutions for conveying plausibly true facts.

As argued above, if the Court disagrees that the robocall expresses opinion rather than statements of fact, the robocall communicates information that is plausibly true.

Under the First Amendment, a speaker cannot be prosecuted for disseminating information that is plausibly true. Only knowing or reckless falsehoods can potentially be proscribed. *Alvarez*, 567 US at 719. And even then, false statements are not categorically unprotected speech. *Id.* at 720. It follows that conveying information that is possibly true but turns out to be false cannot give rise to criminal liability.

Again, the Court of Appeals held that conveying plausibly true facts can be criminal under MCL 168.932(a), which is clearly unconstitutional.

3. Even if the robocall was knowingly false, the statements in the call are still constitutionally protected.

Even if the robocall can be regarded as a knowingly false statement of fact, and even if false statements are a *corrupt means or device* under the statute, the statements in the robocall are still constitutionally protected. Again, the falsity of a statement is generally not enough to make it constitutionally unprotected. *Alvarez*, 567 US at 718. To be unprotected, the statement must otherwise fit within one of the traditional categories of unprotected speech. *Id.* at 717.

Here, the prosecution has relied on the true threat exception. But as explored above, the Court of Appeals correctly held that the true threat exception does not apply because the robocall does not contain threats of unlawful violence.

The Court of Appeals instead relied on the "speech integral to criminal conduct" exception. *Burkman*, ___ Mich App at ___; slip op at 14. The court described this exception thus:

> *Giboney v Empire Storage & Ice Co*, 336 US 490; 69 S Ct 684; 93 L Ed 2d 834 (1949), the authority commonly cited for this exception, involved an injunction against peaceful picketing at an ice distribution facility by members of an ice peddlers union. *Id*. at 491-492. The union members' goal was to compel the ice distributor to stop selling to nonunion peddlers, contrary to a state statute prohibiting participation in any "pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition . . . ." *Id*. at 491 n 2, 492. Had the distributor agreed to stop selling ice to nonunion members, it too would have been in violation of the state antitrade restraint law. *Id*. at 493. The union peddlers argued, in part, that the injunction violated the First Amendment freedom of speech because they were merely publicizing truthful facts in a peaceful manner. *Id*. at 497-498. But the Supreme Court disagreed, reasoning that the "sole immediate object of the publicizing adjacent to the premises of

> [the distributor] . . . was to compel [the distributor] to agree to stop selling ice to nonunion peddlers," contrary to state law. *Id.* at 498. The Court concluded 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." *Id.* "[I]t has never been deemed an abridgement of freedom of speech or press to 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." *Id.* at 502. [*Burkman*, ___ Mich App at ___; slip op at 14-15.]

Relying on this understanding of the speech integral to criminal conduct exception, the Court of Appeals said, "Here, the purpose of MCL 168.932(a) is to preserve and protect the right to vote, a compelling state interest." *Id.* at ___; slip op at 15. "The statute carries out this goal," the court continued, "by prohibiting influencing, deterring, or interrupting an elector from giving his or her vote by way of bribery, menace, or other corrupt means or device." *Id.* "Like the picketing in *Giboney*," the court concluded, "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.*

Giboney and the speech integral to criminal conduct exception are controversial. See, e.g., Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 Cornell L Rev

981 (2016). " 'Under the broadest interpretation, 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). As Professor Volokh has explained:

> The *Giboney* doctrine can't justify treating speech as "integral to illegal conduct" simply because the speech is illegal under the law that is being challenged. That should be obvious, since the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal. Yet many lower courts have indeed cited *Giboney* for the proposition that speech loses its protection just because it is made illegal. *Giboney* has thus become, at times, a tool for avoiding serious First Amendment analysis—a way to uphold speech restrictions as supposedly fitting within an established exception, without a real explanation of how the upheld restrictions differ from other restrictions that would be struck down. [*The Speech Integral to Criminal Conduct Exception*, 101 Cornell L Rev at 987-988 (cleaned up).]

This is precisely what happened here. Boiled down, the Court of Appeals' analysis goes like this: MCL 168.932(a) criminalizes false speech used to deter voting, so the

robocall was integral to the criminal conduct proscribed by the statute. *Burkman*, ___ Mich App at ___; slip op at 15. But again, speech cannot be integral to criminal conduct simply because a statute prohibits it. Instead, the speech "must help cause or threaten *other* illegal conduct." *The Speech Integral to Criminal Conduct Exception*, 101 Cornell L Rev at 1011 (cleaned up). So the Court of Appeals' reliance on the speech integral to criminal conduct exception was misplaced.

RELIEF REQUESTED

The Court of Appeals' interpretation of MCL 168.932(a) opens a Pandora's box for criminalizing political discourse in Michigan. This Court should grant this application to consider whether conveying false speech—without more—constitutes a *menace* or *other corrupt means or device*. The Court of Appeals' opinion also has obvious deficiencies that require this Court's oversight. Perhaps most glaringly, the Court of Appeals failed to address the defense's facial overbreadth challenge because the court relied on the incorrect standard. If this Court declines further review, it will leave in place a published decision with a blatant analytical error. At a minimum, this Court should remand this case to the Court of Appeals for reconsideration of the defense's facial overbreadth challenge under the correct standard.

The issues raised in this application involve a substantial question about the validity of a legislative act and involve legal principles of major significant to the state's jurisprudence. MCR 7.305(B)(1), (2). The lower courts' decisions are also clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a). The defense asks the Court to grant this application, reverse the lower courts, and quash the charges. The defense also asks for any different or further relief the Court deems appropriate.

Respectfully submitted,

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