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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

Circuit Court No. 20-004636 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB ALEXANDER WOHL,

Defendant-Appellant.

Supreme Court No. 164639

Court of Appeals No. 356602

Circuit Court No. 20-004637 FH

DEFENDANT-APPELLANTS' REPLY ON THE APPLICATION

GRABEL & ASSOCIATES
Scott A. Grabel (P53310)
Timothy A. Doman (P77811)
Attorneys for John Burkman
124 W. Allegan, Ste. 636
Lansing, MI 48933
(800) 342-7896

MCMANUS & AMADEO PLLC
William Amadeo (P76194)
Attorney for Jacob Wohl
2500 Packard, Ste. 106
Ann Arbor, MI 48104
(800) 392-7311

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ARGUMENT

The prosecution's answer to Burkman and Wohl's application is as notable for what it says as for what it doesn't. As most of the prosecution's specific contentions were already addressed in the application, the defense will not belabor its arguments. This reply focuses on the most salient reasons this Court should grant the application.

I. The prosecution's and Court of Appeals' interpretations of MCL 168.932(a) radically expand criminal liability for political speech in Michigan.

According to the prosecution, conveying *true* information can be criminal under MCL 168.932(a):

> 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. [Pros MSC App Ans, p 7.]

To repeat: the prosecution believes that conveying true information in the political arena can be a menace. This is a

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startling interpretation of the statute. Consider a hypothetical. Would "Don't vote for Candidate X because he will raise your taxes"—assuming that Candidate X has promised to raise taxes—be a *financial* menace[1] designed "to influence an elector" in not voting for Candidate X? MCL 168.932(a). It would seem difficult for the prosecution to argue otherwise. This is not a credible interpretation of the statute, and, respectfully, it does not appear that the prosecution has thought through the implications—constitutional and otherwise—of its position.

The Court of Appeals, meanwhile, held that conveying opinions or "possibly true" information can be criminal. *People v Burkman*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 356600); slip op at 11. Although nominally less radical than the prosecution's position, the prospect of punishing people for expressing opinions is still inimical to free speech. "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 v Robert Welch, Inc*, 418 US 323, 339-340; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

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[1] Under the prosecution's argument, *menace* encompasses any amorphous *threat*, including threats of financial harm. (Pros MSC App Ans, p 5). The prosecution fails to account for the caselaw and statutes that refer to *menace* and *threat* distinctly. (Def MSC App, p 10-12).

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The prosecution fails to respond to the defense's argument that discouraging one *method* of voting—by mail but not in person—does not violate MCL 168.932(a). (Def MSC App, p 27-30). Again, by the prosecution's logic, encouraging someone in 2020 to vote by mail rather than in person to stop the spread of COVID-19 would have violated the statute. (Def MSC App, p 28-29). The prosecution fails to account for this absurd result of its interpretation. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) (explaining that statutes should be interpreted to avoid absurd results).

Although the Court of Appeals found Burkman and Wohl's conduct reprehensible, the plain language of MCL 168.932(a) cannot be stretched beyond its plain meaning. This Court should grant this application to consider whether pure speech—true, false, or somewhere in between—can be criminalized under MCL 168.932(a).

II. The Court of Appeals' misconceptions about free speech doctrine require this Court's oversight.

The prosecution's answer ignores the most glaring shortcomings of the Court of Appeals' opinion as identified in the defense's application. For example, the Court of Appeals held that a reasonable person should understand that MCL 168.932(a) requires *knowingly* wrongful conduct, but elsewhere the court held that *unknowingly* false

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statements can be prosecuted. (Def MSC App Ans, p 37-38). The response from the prosecution? Crickets. What about the Court of Appeals' failure to address the defense's facial overbreadth challenge because it relied on the wrong test? (Def MSC App, p 43). No answer from the prosecution. This silence is telling. The Court of Appeals' published decision contains obvious errors, and the prosecution has not even tried to argue otherwise.

Instead, the prosecution continues to argue that the true-threat exception should be expanded to encompass threats to "the listener's freedom, financial security, and bodily autonomy." (Pros MSC App Ans, p 13). The prosecution's efforts are misguided. In *Virginia v Black*, 538 US 343; 123 S Ct 1536; 155 L Ed 2d 535 (2003), the seminal case explaining the true-threat exception, the United States Supreme Court held that true threats are statements expressing an intent to commit an act of unlawful violence. *Black*, 538 US at 359-360. The Court focused on the prospect of violence as the hallmark of a true threat. *Id*. The Court did not suggest or hint that a true threat could include other kinds of threats. What's more, the Court has said that content-based speech restrictions—like the true-threat exception—should be narrowly construed. *Bose Corp v Consumers Union of US, Inc*, 466 US 485, 505; 104 S Ct 1949, 1962; 80 L Ed 2d 502 (1984). Here, the prosecution has not provided a compelling reason why this Court should expand the true-threat exception beyond its

settled bounds.[2] Free speech should not be restricted to accommodate the prosecution's heedless pursuit of Burkman and Wohl.

[2] As even the Court of Appeals found, the reasoning in the out-of-state cases relied on by the prosecution is dubious. *Burkman*, ___ Mich App at ___; slip op at 14 n 11.

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RELIEF REQUESTED

The Court of Appeals' published opinion contains clear errors and will allow prosecutors to punish pure speech. It is a jurisprudential weed that this Court should pull before it sets seed. The defense again asks this Court to grant this application or order any different or further relief the Court deems appropriate.

Respectfully submitted,

/s/ Timothy A. Doman
/s/ Scott A. Grabel
GRABEL & ASSOCIATES
Scott A. Grabel (P53310)
Timothy A. Doman (P77811)
Attorneys for John Burkman
124 W. Allegan, Ste. 636
Lansing, MI 48933
(800) 342-7896

/s/ William Amadeo
MCMANUS & AMADEO PLLC
William Amadeo (P76194)
Attorney for Jacob Wohl
2500 Packard, Ste. 106
Ann Arbor, MI 48104
(800) 392-7311

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STATEMENT OF WORD COUNT

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/s/ Timothy A. Doman
Timothy A. Doman (P77811)