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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Letica, P.J., Redford and Rick JJ

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

SC: 164638
COA: 356600
Wayne CC: 20-004636-01-FH

v

JOHN MACAULEY BURKMAN,

Defendant-Appellant.
_____/

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

SC: 164639
COA: 356602
Wayne CC: 20-004637-01-FH

v

JACOB ALEXANDER WOHL,

Defendant-Appellant.
_____/

AMICI CURIAE THE PROTECT DEMOCRACY PROJECT AND VOTERS NOT POLITICIANS' SUPPLEMENTAL BRIEF

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INTRODUCTION

As this Court is well aware, after briefing in the case was complete, the U.S. Supreme Court issued two First Amendment decisions that shed light on the issues before this Court: *United States v Hansen*, 599 US 762; 143 S Ct 1932; 216 L Ed 2d 692 (2023), and *Counterman v Colorado*, 600 US 66; 143 S Ct 2106; 216 L Ed 2d 775 (2023). Amici Protect Democracy Project and Voters Not Politicians[1] submit this supplemental brief *amici curiae* to respectfully suggest that (I) *Hansen* shows (a) why the fraud categorical exception to the First Amendment precludes Defendants-Appellants' as-applied First Amendment challenge, (b) why this Court should apply ordinary First Amendment scrutiny if it determines that none of the categorical exceptions apply to Defendants-Appellants' conduct, and (c) why this Court should reject Defendants-Appellants' overbreadth challenge. Amici also respectfully submit that (II) *Counterman* does not address the true threats questions pending before the Court.

ARGUMENT

I. *United States v Hansen* supports applying the fraud exception and repudiates Defendants' conflation of their as-applied and facial challenges.

In *Hansen*, the U.S. Supreme Court rejected a First Amendment challenge brought against a federal statute prohibiting "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law." *Id.* at 1938 (quoting 8 USC § 1324(a)(1)(A)(iv)). The *Hansen* defendant violated the statute by fraudulently promising non-citizens, for a fee, a pathway to US citizenship through the process of "adult adoption." *Id.* No such path to citizenship through "adult adoption" exists. *Id.*

[1] Amici certify that no counsel for a party authored this brief in whole or in part, and no person, other than Amici, their members, or their counsel, made a monetary contribution intended to fund preparation of this brief.

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The U.S. Supreme Court swiftly batted away any potential as-applied challenge from the defendant. It explained the defendant "[w]isely . . . d[id] not claim that the First Amendment protects the communications for which he was prosecuted" because the "First Amendment does not shield fraud." *Id.* at 1939. In other words, the *Hansen* defendant would have lost on an as-applied challenge because his conduct constituted fraud, and fraud is not protected by the First Amendment.

The *Hansen* Court then rejected any overbreadth challenge to the statute. It emphasized that overbreadth invalidation is "strong medicine" and found that the statute did not "prohibit a substantial amount of protected speech relative to its plainly legitimate sweep." *Id.* at 1939, 1946 (cleaned up). "To the extent that [the statute] reaches any speech," the *Hansen* Court determined that it also fell within the "speech integral to unlawful conduct" categorical exception to the First Amendment. *Id.* at 1947. Finally, the *Hansen* Court observed that even if the speech at issue in a particular prosecution did not fall into one of the categorical exceptions, it would "not mean it is immune from regulation, but only that ordinary First Amendment scrutiny would apply." *Id.* At 1948.

Amici agree with the State that *Hansen*'s treatment of the speech incidental to criminal conduct exception should similarly bar Defendants' arguments here.[2] As discussed below, *Hansen* has three more implications for this appeal. First, *Hansen* establishes that the fraud exception bars Defendants' as-applied First Amendment exception. Second, *Hansen* reaffirms that ordinary First Amendment scrutiny applies if this Court determines that Defendants' conduct falls outside a categorical First Amendment exception. Third, *Hansen* proves that Defendants' flurry of hypotheticals do not suffice to establish that MCL 168.932 is unconstitutionally overbroad.

[2] *See* State' Supp Br, pp 4–6.

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A. *Hansen* establishes that the fraud exception applies here.

Hansen's quick rejection of any as-applied challenge by a defendant that committed fraud shows how the categorical fraud exception to the First Amendment remains the easiest doctrinal way for this Court to resolve Defendants-Appellants' as-applied First Amendment challenge. In particular, *Hansen* rejected any potential as-applied challenge by a defendant that had violated the criminal statute at issue through fraudulent speech. Indeed, *Hansen* did so in one sentence, noting that the defendant "[w]isely . . . d[id] not claim that the First Amendment protects the [fraudulent] communications for which he was prosecuted." *Id.* at 1939.

This Court should be able to resolve the as-applied challenge here just as quickly: Defendants made a voluntary choice to plead guilty to fraud charges in another jurisdiction related to the same conduct. The prior admission that their conduct was fraudulent should be fatal here because the "First Amendment does not shield fraud." *Id.*

Hansen also rebuts Defendants' claim that "the 'material gain' element" of the First Amendment fraud exception "is missing here." Defs' Reply Br, p 6 n 2. *Hansen* does not limit the fraud exception to the First Amendment to only frauds that secure money or impose pecuniary loss. Instead, *Hansen* explains that "[f]alse claims [that] are made to effect a fraud or secure moneys *or other valuable considerations* are not protected by the First Amendment." *Hansen*, 143 S Ct at 1947 n 4 (cleaned up) (emphasis added). That is, per *Hansen*, the fraud exception to the First Amendment applies to fraudulent conduct committed to "secure . . . other valuable considerations" beyond money. *Id.* As a result, a monetary loss is not a prerequisite for the First Amendment fraud exception to apply here.[3]

[3] Cf *Shaw v United States*, 580 US 63, 67, 72; 137 S Ct 462; 196 L Ed 2d 373 (2016) (explaining that the government need not make a "showing of ultimate financial loss nor a showing of intent to cause financial loss" to show that fraud "deprive[d] [the victim] of something of value").

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Further, in recognizing that the fraud exception includes efforts to secure "other valuable considerations," *id.*, *Hansen* illuminates how the fraud exception could be applied in this case. Forbearance has long been recognized as a form of valuable consideration. See Restatement Contracts, 2d (1981), § 71, comment *d*, p 175 ("Consideration may consist of a . . . specified act of forbearance."). As the Sixth Circuit has explained, forbearance is "something of value" for fraud because it "is a recognizable form of consideration . . . and consideration is something of value." *United States v Hall*, 979 F3d 1107, 1117 (CA 6, 2020).

Likewise here, the common law of torts recognizes that fraudulent deprivations of the right to vote are actionable without showing pecuniary loss[4] and the forbearance Defendants' false claims sought was the victim's forbearance from voting. Defendants' illegal scheme sought to provide the victims with knowingly false information about the collateral consequences of electoral participation that would cause the victims to decide not to vote. Cf *Shaw*, 580 US at 67 (concluding that loss in the context of fraud occurs when someone deprives another of "his chance to bargain with the facts before him."); *Hall*, 979 F3d at 1117 (holding that fraudulent scheme deprived victims of something of value because "[i]nstitutions can suffer losses like . . . a chance to bargain knowing all the facts even if the financial institutions get a quid pro quo of appropriate value or do not suffer unreimbursed loss"). That constitutes fraud because Defendants sought to deprive their victims of the "chance" to decide whether to vote "with [accurate] facts before [them]." *Shaw*, 580 US at 67. Thus, Defendants' conduct is categorically excluded from First

[4] See Restatement Torts, 2d (1979), § 865 ("One who by a consciously wrongful act intentionally deprives another of a right to vote in a public election or to hold public office or seriously interferes with either of these rights is subject to liability to the other."); *id.* comment *a* ("The wrongful conduct includes the use of . . . fraud . . . against either the other or a third person . . . ."); *id.* ("The rule stated in this Section [§ 865] is not dependent upon the existence of pecuniary or other harm.").

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Amendment protection under *Hansen*, see 143 S Ct at 1939, thereby resolving their as-applied challenge.

B. *Hansen* reaffirms the need to apply ordinary First Amendment scrutiny if that this Court determines the conduct at issue falls outside any of the categorical First Amendment exceptions.

The *Hansen* Court also stressed that just because certain "speech is not categorically unprotected does not mean it is immune from regulation, but only that ordinary First Amendment scrutiny would apply." *Id.* at 1948. So per *Hansen*, even if this Court were to determine that none of the categorical exceptions to the First Amendment apply to the Defendants' conduct, that would not mean that Defendants should necessarily win their First Amendment challenge. Instead, the next step would be to apply First Amendment scrutiny, under which MCL 168.932 should survive as both sets of amici agree, even though they take different doctrinal paths to that conclusion. See Protect Democracy & VNP Br, p 19-31; ACLU & PTV Br, pp 15–17.

C. *Hansen* also rejects Defendants' attempt to use hypotheticals to support their overbreadth challenge

Finally, *Hansen* also provides this Court with guidance on what sorts of facts and arguments it should consider when resolving Defendants' as-applied and overbreadth challenges, as well as the high bar Defendants must surmount to prevail on their overbreadth challenge.

The defendant in *Hansen* tried to "offer[] a string of hypotheticals" beyond the scope of that case to show that the statute at issue punished "a substantial amount of protected speech." *Hansen*, 143 S Ct at 1946–1947. But the U.S. Supreme Court did not consider such hypotheticals when determining that the First Amendment did not "protect the communications for which he was prosecuted." *Id.* at 1939. Instead, it only considered them when determining whether the high standard of overbreadth was met, and then properly dismissed them as unrealistic. That is because "a law's unconstitutional applications must be realistic, not fanciful," before a law may be

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invalidated for overbreadth. *Id.* Ultimately, the *Hansen* Court found that "the ratio of unlawful-to-lawful applications [was] not lopsided enough to justify the strong medicine of facial invalidation for overbreadth." *Id.* at 1948 (cleaned up).

That is the right approach, and the Court should follow it here. When considering Defendants' as-applied challenge, this Court should focus only on the exact facts of Defendants' case and not Defendants' hypotheticals that seek to bring the discussion back closer to the First Amendment. See *id.* at 1940 (courts handle as-applied constitutional challenges on a "case-by-case" basis).[5]

That is not to say that *Hansen* precludes Defendants from relying on hypothetical sets of facts altogether. Instead, challenges that rely on outside facts and hypotheticals must meet the standard for facial overbreadth. And *Hansen* emphasizes that is a high bar. The overbreadth doctrine "is strong medicine that is not to be casually employed." *Id.* at 1939. Thus, a "court will hold a statute facially invalid under the overbreadth doctrine" only "if the law prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Id.* at 1934 (cleaned up). "The ratio of unlawful-to-lawful applications" must be "lopsided enough to justify the strong medicine of facial invalidation for overbreadth." *Id.* At 1948 (cleaned up).

Under *Hansen*'s overbreadth analysis, the Defendants fall short. MCL 168.932(a) has a wide breadth of legitimate applications to conduct and speech that fall outside any possible First Amendment protections. It applies when voters are bribed to vote a particular way. It applies when voters are blackmailed to stop them from voting. It applies when voters are threatened with violence if they vote for a particular candidate. Defendants even concede that "there is no

[5] See also *Crego v Coleman*, 463 Mich 248, 269; 615 NW2d 218 (2000) (courts limit their analysis to the facts of the case when resolving as-applied challenges because a party must show that the statute is unconstitutional as applied to them).

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constitutional impediment to criminalizing the bribing or violent threatening of voters." Def Supp Br at 6. Indeed, Defendants also concede that the statute can constitutionally regulate true threats. Def Supp Reply Br at 2 ("[T]he defense has never contended that true threats are not proscribed by MCL 168.932(a)."). So all parties should agree that the list of MCL 168.932(a)'s potential lawful applications is extensive.

By contrast, "[w]hen we turn to the other side of the ledger, we find it pretty much blank." *Hansen*, 143 S Ct at 1946. As in *Hansen*, Defendants fail "to identify a single prosecution for ostensibly protected expression." *Id.* At best, all the Defendants have is a handful of hypotheticals, and Defendants' hypothetical applications are not realistic. *Id.* at 1939 ("[A] law's unconstitutional applications must be realistic, not fanciful," to succeed on facial overbreadth.). Holding someone "guilty of a felony" for saying, "Biden will raise your taxes," Defs' Br on App, pp. 31, is not realistic. And holding someone "liable for a felony and 5 years in prison" for saying, "Don't vote… Voting is a waste of time," Defs' Leave for App. pp. 22, is equally fanciful.

As a result, the right disposition here is the same as *Hansen*. To succeed on overbreadth, Defendants must show that MCL 168.932(a)'s "overbreadth is substantial relative to its plainly legitimate sweep." *Hansen*, 143 S Ct at 1948 (cleaned up). They fail to do so. Here, "the ratio of unlawful-to-lawful applications is not lopsided enough to justify the strong medicine of facial invalidation for overbreadth." *Id.* (cleaned up). Rather, given the breadth of MCL 168.932(a)'s legitimate applications, Defendants ask the court "to throw out too much of the good based on a speculative shot at the bad." *Id.* Accordingly, this case "is not the stuff of overbreadth—as-applied challenges can take it from here." *Id.*

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II. *Counterman v Colorado* does not resolve whether threats of nonviolent conduct can constitute a true threat.

In *Counterman*, the U.S. Supreme Court adopted a recklessness standard for the mens rea required to determine that a defendant's communication constituted a "true threat" falling outside the protections of the First Amendment. *Counterman*, 143 S Ct at 2119. In so doing, the Court took a middle-ground "Goldilocks" approach, rejecting an objective "reasonable person" standard at one end of the mens rea spectrum as well as a subjective "purpose" or "knowledge" standard at the other. *Id.* at 2117, 2119 n 7.

Defendants, however, claim to have found another holding in *Counterman*. They suggest that *Counterman* "makes clear that a 'true threat' must threaten *violence*." Defs' Supp Br, p 7. Not so. Before *Counterman*, there was a split of authority on whether expressions of intent to engage in harmful but nonviolent conduct could constitute a "true threat." See Protect Democracy & VNP Br, pp 17, 18 n 22. And *Counterman* does not definitively resolve that split.

Instead, *Counterman*'s only holding involved setting the outer bounds of the mens rea required for a speaker's threat to fall outside the First Amendment's protection, determining that "a mental state of recklessness is sufficient." *Counterman*, 143 S Ct at 2111. To be sure, there is a lot of talk of violence in *Counterman*.[6] But the key language from the opinion is: "True threats

[6] See *Counterman*, 143 S Ct at 2111 ("True threats of violence are outside the bounds of First Amendment protection and punishable as crimes."); *id.* at 2111–2112 ("The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence."); *id.* at 2113 ("True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection."); *id.* at 2114 ("'True threats' of violence is another historically unprotected category of communications."); *id.* ("The 'true' in that term ['true threats'] distinguishes what is at issue from jests, 'hyperbole,' or other statements that when taken in context do not convey a real possibility that violence will follow (say, 'I am going to kill you for showing up late')."); *id.* ("True threats are serious expressions conveying that a speaker means to commit an act of unlawful violence.") (cleaned up); *id.* ("True threats subject individuals to fear of violence and to the many kinds of disruption that fear engenders.") (cleaned up); *id.* at 2117 ("In the threats context, [recklessness] means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway.") (cleaned up); *id.* ("[The] value [of regulating

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of violence, everyone agrees, lie outside the bounds of the First Amendment's protection." *Id.* at 2113. That is, *Counterman* proceeds on the assumption that all agree that the category of "true threats" *include* expressions of intent to engage in violent conduct. See also *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536, 1548; 155 L Ed 2d 535 (2003) (plurality opinion) (explaining that the "true threats" exception "*encompass[es]*" threats of physical violence (emphasis added)). No one disputes that. But *Counterman* did not go further than that. It did not engage with the issue of whether threats of nonviolent conduct can constitute a "true threat." The *Counterman* Court thus left open the question of what type of conduct can establish a "true threat."

This Court, therefore, may answer that question for itself. And as amici and other courts have explained, including certain threats of harmful but nonviolent conduct–such as Defendants' actions–within the "true threats" exception represents the better view of the doctrine. See Protect Democracy & VNP Br, pp 16–19. The "true threats" exception thus applies to Defendants' conduct, leaving their actions outside the First Amendment's protection.

CONCLUSION

This Court should affirm, or leave to appeal should be dismissed as improvidently granted because of the changed circumstances created by Defendants' guilty pleas to the Ohio fraud charges.

historically unprotected expression] lies in protecting against the profound harms, to both individuals and society, that attend true threats of violence.")

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2023, I electronically filed the foregoing using the MiFile/TrueFiling System which will send notification of this filing to all registered counsel of record.

Date: October 27, 2023

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