**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MACAULEY BURKMAN,

Defendant-Appellant.
_____/

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB ALEXANDER WOHL,

Defendant-Appellant.
_____/

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

# AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AND PROMOTE THE VOTE

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## QUESTIONS PRESENTED

1. Did the Court of Appeals properly interpret MCL 168.932(a)?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Court of Appeals answer: Yes.

   Amici's answer: Partly. MCL 168.932(a) needs to be construed more narrowly than the Court of Appeals did in order to ensure that it does not criminalize constitutionally protected speech. But the statute can and should be construed in a narrow and constitutional fashion, while still prohibiting the defendants' conduct and allowing the prosecutions in this case to proceed.

2. Is MCL168.932(a) unconstitutional on its face or as applied to the defendants?

   Appellants' answer: Yes.

   Appellee's answer: No.

   Court of Appeals answer: No.

   Amici's answer: No, so long as MCL 168.932(a) is narrowly construed.

## STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union of Michigan (ACLU) is the Michigan affiliate of a nationwide nonpartisan organization of approximately 1.6 million members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU of Michigan regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of people in Michigan.

The ACLU has long been committed to protecting both the right to vote free from unlawful intimidation and the right to freedom of speech, particularly political speech. The ACLU provides direct representation and files amicus curiae briefs in cases involving voting rights and ballot access. See, e.g., *US Student Ass'n Found v Land*, 546 F3d 373 (CA 6, 2008); *League of Women Voters of Michigan v Secretary of State*, 333 Mich App 1 (2020); *Stand Up for Democracy v Secretary of State*, 492 Mich 588 (2012). It similarly provides direct representation and files amicus briefs in cases involving the free speech rights of all people, including those whose speech is alleged to be potentially threatening, see, e.g., Amicus Curiae Brief of American Civil Liberties Union and American Civil Liberties Union of Michigan, *Detroit Will Breathe v City of Detroit*, Eastern District of Michigan Case No. 20-cv-12363, ECF No. 48 (November 6, 2020), or whose speech the ACLU finds distasteful or even repugnant, see, e.g., Amicus Curiae Brief of the American Civil Liberties Union of Michigan, *Gerber v Herskovitz*, Eastern District of Michigan Case No. 19-cv-13726, ECF No. 36 (March 17, 2020).

Promote the Vote ("PTV") is a statewide nonpartisan coalition committed to increasing the power of the people in our Michigan democracy through public education, ballot proposals,

[1] Pursuant to MCR 7.312(H)(5), amici state that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amici curiae, their members, or their counsel made any such monetary contribution.

legislative advocacy, and litigation. PTV's members include, among others, the Arab Community Center for Economic and Social Services (ACCESS), Asian and Pacific Islander Vote Michigan (APIA Vote), Detroit Disability Power, Detroit Hispanic Development Corporation, League of Women Voters of Michigan, Miigwech, Inc., and the NAACP Michigan State Conference. Many of the organizations that make up PTV have a rich history of public education and advocacy around the need for protecting voting rights, and some have also played a principal role in advocacy, education, and litigation. PTV believes we can increase the power of people by ensuring Michigan has a voting system that works for all of us.

In 2018, PTV wrote a ballot proposal amending the Michigan Constitution to ensure Michigan has a voting system that works for all of us, which became Proposal 3 of 2018. PTV led the successful campaign to pass Proposal 3. PTV also worked to support the passage of Proposal 2 of 2018, the proposal that created Michigan's Independent Citizen Redistricting Commission. In 2022, PTV wrote and led the fight to pass Proposal 2, which built on Proposal 3 of 2018 by adding more voting rights to the Michigan Constitution. PTV also litigates on behalf of voting rights, including by the filing of amicus curiae briefs. See, e.g., Amicus Curiae Brief of Promote the Vote, et al, *Graziano v Brater,* Michigan Supreme Court Case No. 164763 (April 26, 2023) (constitutionality of 180-day limit on validity of ballot proposal signatures). PTV believes that preventing dissemination of misinformation to voters about their rights is a vital part of the election laws which must be written and applied consistent with the right of free speech.

## INTRODUCTION

The risk that voters will be disenfranchised by knowingly false communications designed to deceive them about how or when to vote is on the rise, and is rapidly accelerating thanks to modern technology. Congresspeople have "worried specifically about a bad actor suppressing the vote [in 2024] by releasing [AI] invented audio or video of a trusted voice in a particular county announcing a change or closure of polling sites." Berman, *Political Campaigns May Never Be the Same: How AI Could Save Politics—If It Doesn't Destroy It First*, The Atlantic (May 2023).

The law at issue in this case, MCL 168.932(a), has been an important bulwark for decades against deceiving Michigan voters with false election information in order to disenfranchise them. It is vitally important that it remain in place and be enforceable against such threats through traditional means such as mail and phone calls as well as through new and evolving technologies such as social media and generative artificial intelligence.

Just as this Court should not eschew MCL 168.932(a)'s vital protections against voter disenfranchisement at a critical time for our democracy, so too must it avoid eschewing the First Amendment's vital protections for political speech. This case offers the Court the opportunity not only to ensure that MCL 168.932(a) continues to do its job of protecting voters but to do so in a way that prosecutions under MCL 168.932(a) are appropriately limited and, in turn, protected from constitutional attack. Amici provide this Court with a path for this and future prosecutions under MCL 168.932(a) to proceed in a constitutional fashion.

## BACKGROUND AND FACTS

Voter suppression in the United States has a long and sordid history. Traditionally, it has taken many forms that often prevented voters from voting through the force of law or violence—restrictions on who can vote, literacy tests, poll taxes, changing election procedures, and the like.

But disenfranchisement can equally be effected through slightly subtler means. One of the most insidious means of suppressing the vote is the type at issue in this case—the intentional spreading of false information about the voting process. As detailed in a report from Common Cause in 2008:

> In the past, the worst practices involved flyers distributed in predominantly minority communities. The 2004 presidential election cycle provides some particularly vivid examples. In Milwaukee, Wisconsin, fliers purportedly from the "Milwaukee Black Voters League" were distributed in minority neighborhoods claiming "If you've already voted in any election this year, you can't vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can't vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you." In Pennsylvania, a letter with the McCandless Township seal on it falsely informed voters that, to cut down on long lines, Republicans would vote on November 2 and Democrats would vote on November 3—the day after the election. Similar fliers were distributed at Ross Park Mall in Allegheny County. In Ohio, a so-called "Urgent Advisory" memo on phony Board of Elections letterhead warned voters that if they were registered by the NAACP, America Coming Together, the Kerry campaign, or their local Congressional campaign, they were disqualified and would not be able to vote until the next election.
>
> More recently, automated calls, known as robocalls in the world of political campaigns, have been the weapon of choice. In 2006, the Secretary of State of Missouri, Robin Carnahan, reported that in one county, "robo-calls reportedly warned voters to bring photo ID to the polls or they would not be allowed to vote. There were also reports on the radio in Kansas City of automated telephone calls telling voters their polling places had been changed and giving incorrect polling place information." According to the National Network for Election Reform, "Registered voters in Virginia, Colorado, and New Mexico reported receiving phone calls in the days before the election claiming that their registrations were cancelled and that if they tried to vote they would be arrested. In Virginia, "Voters in Arlington, Accomack, Augusta, and Northampton counties in Virginia received phone calls on November 6 saying voters would be arrested if they attempted to vote on Election Day. Some of the phone calls also told voters that their polling locations had been moved, although none of the

> locations had changed." [Common Cause, Lawyers Committee for Civil Rights Under Law, and Century Foundation, *Deceptive Practices 2.0: Legal and Policy Responses* (2008), p 3 <https://www.commoncause.org/resource/deceptive-practices-2-0-legal-and-policy-responses/>.]

A follow-up report in 2012 from the same groups detailed how new technologies were being used to distribute false election information:

> • **Deceptive online messages.** In 2008, an email falsely claiming to be from the University Provost was circulated at 1:16 am on Election Day to students and staff at George Mason University. The email advised recipients that the election had been postponed until Wednesday. Later, the Provost sent an email stating that his account had been hacked and informing students the election would take place that day as planned.
>
> • **Robocalls with false information.** During Election Day in 2010, robocalls targeted minority households in Maryland. The calls told voters: "Hello. I'm calling to let everyone know that Governor O'Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We're okay. Relax. Everything's fine. The only thing left is to watch it on TV tonight. Congratulations, and thank you." . . .
>
> • **Facebook messages.** A pastor at a church in Walnut, Mississippi posted false information on his Facebook page in 2011 stating, "I just heard a public service announcement. Because of amendment 26 and the anticipation of a record [turnout], the [Secretary of State's] office has had to devise a plan as to how to handle the record numbers. The [Secretary of State's] office just announced that if you are voting YES on Ms26, then you are to vote on Tuesday [November eighth]. If you are voting NO on Ms26, then they ask that you wait until Wednesday [November ninth] to cast your vote." [Common Cause, Century Foundation, & Lawyers' Committee for Civil Rights Under Law, *Deceptive Election Practices and Voter Intimidation* (2012), p 5 <https://lawyerscommittee.org/wp-content/uploads/2015/07/DeceptivePracticesReportJuly2012FINALpdf.pdf>.]

The report went on to detail dozens of examples of the dissemination of misleading election information in several states.

In an October 2021 report, the Common Cause Education Fund summarized the alarming growth and spread of election disinformation to new platforms:

> Election disinformation is not a new phenomenon. Indeed, for nearly two decades Common Cause has been monitoring and working to stop election disinformation as a part of the national Election Protection coalition. As explained in our 2008 report *Deceptive Practices 2.0*, co-authored with the Lawyers' Committee for Civil Rights Under Law and the Century Foundation, false or misleading information about the voting process, often targeting Black communities and intended to suppress votes, has historically been disseminated via flyers and "robocalls." But by 2008, disinformation was beginning to move to email and websites. And as explained in our 2012 report *Deceptive Election Practices and Voter Intimidation*, disinformation tactics continued to evolve: "Over time, they have become more sophisticated, nuanced, and begun to use modern technology to target certain voters more effectively." The volume and sophistication of online disinformation, particularly via social media platforms, continued to rise in 2016 and 2018 preceding a veritable explosion of election disinformation throughout the 2020 election cycle. [Common Cause Education Fund, *As a Matter of Fact: The Harms Caused by Election Disinformation* (2021), p 5 (footnotes omitted) <https://www.commoncause.org/resource/as-a-matter-of-fact-the-harms-caused-by-election-disinformation-report/>.]

This case follows the rising pattern of using technology and disinformation to attempt to disenfranchise minority voters. Here, the defendant-appellants ("the Robocallers") arranged for disturbing robocalls ("the Robocalls") to be made throughout the nation just prior to the 2020 general election that falsely told recipients of the calls that if they voted by mail they would be subject to warrant checks, harassment by creditors, and potential forced vaccination. Worse yet, the Robocalls deliberately targeted Black communities—communities that bear the brunt of centuries of state and private violence and efforts to disenfranchise them. The repugnant intent of these calls was to disenfranchise voters of color by scaring them into not voting by mail in the

worst months of the COVID-19 pandemic when many voters who did not vote by mail were likely not to vote at all.

## SUMMARY OF ARGUMENT

The state has an extremely compelling interest in stopping voter suppression and intimidation, and amici agree with the Attorney General that prosecuting the Robocallers under MCL 168.932(a)—a vitally important bulwark against an ever-growing practice of voter suppression by distribution of false election information—is permissible. The prosecution, however, must proceed consistent with the First Amendment's robust protections for freedom of speech and with the particular importance of protecting political speech during elections. Amici write to urge a legal and doctrinal path by which this Court should allow these prosecutions to go forward, while still safeguarding the First Amendment rights of others who engage in legitimate election-related political speech that our Constitution protects.

The Attorney General and some other amici seek to deal with the First Amendment issues by arguing that the Robocalls fit within one or more categories of speech largely exempt from First Amendment protection, either because the Robocalls were "true threats" or because they were "speech integral to criminal conduct." Both approaches present serious First Amendment problems. Any holding that the Robocalls are in a category of speech that is largely exempt from First Amendment protection will be hard to cabin to the facts of this case and risks chilling and criminalizing core political speech that must be protected in order for a democracy to thrive.

The Attorney General's expansive invocation of the "true threats" doctrine invites this Court to accept the dangerous proposition that the doctrine should be broadened to reach speech in which the speaker warns a listener of possible scary consequences of their actions, even though the speaker in no way threatens or even implies that they or any co-conspirator will bring about those consequences. No court has ever accepted such an argument, given its capacity to

criminalize huge swaths of speech, and several have expressly rejected it. This alone easily suffices to show that the true threats doctrine does not apply here. But a holding that the Robocalls were true threats would also require this Court to also accept a *second* expansion of the true threats doctrine, by holding that speech that does not threaten *violence* can be criminalized as a true threat. As the Court of Appeals below held, this argument is contrary to the United States Supreme Court's express statement that true threats arise "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 (2003) (emphasis added). Therefore, amici urge the Court not to hold that the Robocallers' speech is exempt from First Amendment protection under the "true threats" doctrine for either of the two independent reasons just described.

The Attorney General's next argument, that the Robocalls are largely exempt from First Amendment protection because they are "speech integral to criminal conduct," is also problematic. The First Amendment exemption for speech that is integral to criminal conduct has been rarely used, has been subject to significant judicial and academic criticism, is difficult to cabin, and can be dangerously circular. The doctrine risks allowing the government to criminalize entire categories of speech that it does not like. It is unclear how the doctrine could be applied here without such dangerous consequences for other cases, and as such amici respectfully urge the Court to avoid invoking it.

Amici propose a path that allows the Court to do just that. Rather than holding that prosecuting the Robocallers is categorically exempt from any First Amendment scrutiny under the two doctrines discussed above, this Court should instead hold that even though strict scrutiny under the First Amendment applies, the prosecutions here and in similar circumstances may

proceed. That is so because a prohibition on intentionally false speech about the time, place, manner, or legal consequences of voting that is uttered for the purpose of disenfranchising voters *survives* strict scrutiny under the First Amendment. Amici therefore urge the Court to construe MCL 168.932(a) narrowly to prohibit such speech—and *only* such speech. That is enough to decide this case, and does so in a way that does not jeopardize protected speech or unnecessarily (and perilously) expand any of the traditionally narrow categories of speech largely exempt from First Amendment protection.

## ARGUMENT

The First Amendment to the United States Constitution provides that the government shall "make no law . . . abridging the freedom of speech . . . ." US Const, Am I. In applying the First Amendment, the general rule is that content-based restrictions on speech "are presumptively unconstitutional" unless they can survive strict scrutiny. *Reed v Town of Gilbert*, 576 US 155, 163 (2015). However, there are a "few" types of speech that "are 'well-defined and narrowly limited . . . the prevention and punishment of which have never been thought to raise any Constitutional problems.'" *United States v Stevens*, 559 US 460, 468–469 (2010), quoting *Chaplinsky v New Hampshire*, 315 US 568, 571–572 (1942). As relevant here, these historic categories, largely exempt from First Amendment protection, include "speech integral to criminal conduct" and "true threats." See *id.*; *Black*, 538 US at 360. When one of these exemptions applies, a content-based restriction on the speech in question is not subject to heightened judicial scrutiny.

Thus, MCL 168.932(a) can be constitutional, as applied here, only if the statutory language can be interpreted to cover the Robocallers' conduct and *either* (1) prohibition of speech such as the Robocalls survives strict scrutiny *or* (2) the Robocalls fall into an exempt category of speech. For the reasons explained in Section I.A., a criminal prohibition against

intentionally false speech about the time, place, manner, or legal consequences of voting that is uttered for the purpose of disenfranchising voters is one of the few restrictions on speech that can survive strict scrutiny. Critically, interpreting MCL 168.932(a) to *only* prohibit such speech also avoids the constitutional problems that would arise if the statute were read more broadly to prohibit two forms of constitutionally protected political speech: *true* speech about the time, place, manner, or legal consequences of voting, or "false" political speech. Restrictions on each of these two forms of speech would not survive strict scrutiny. But because this case involves intentionally false speech about the legal consequences of voting made for the purpose of disenfranchising voters, MCL 168.932(a) survives strict scrutiny as applied to the facts alleged here.

In turn, in Section I.B., amici explain why this Court can adopt a narrow construction of MCL 168.932(a) that renders it constitutional by prohibiting the conduct at issue here, which the state has a compelling interest in prohibiting, while not threatening constitutionally protected speech. Such an interpretation also resolves any potential constitutional issues relating to overbreadth or vagueness.

By contrast, for the reasons stated in Sections II and III, attempting to place the Robocalls into a category of speech wholly exempt from First Amendment protection is quite problematic. As explained in Section II, the exemption for speech integral to criminal conduct is an unstable and potentially dangerous doctrine that courts have had difficulty cabining and, as such, is best avoided if possible. This doctrine can be avoided here by following the narrower path suggested in Section I: apply strict scrutiny, and hold that MCL 168.932(a), as applied, survives.

Similarly, as explained in Section III, this Court should not accept the Attorney General's suggestion that the "true threats" doctrine applies here. The true threats doctrine, which holds

that there is no constitutional right for a speaker to make a threat implying that they (or a co-conspirator) will inflict physical violence on someone, does not apply here for two reasons. First, the Robocallers here did not threaten or even imply that *they themselves* (or any co-conspirator) would do anything to the call recipients. Second, the calls did not threaten *violence* against the call recipients. Either of these reasons independently shows that the Robocalls were not true threats. Again, the Robocalls can and should be prohibited for the reasons set forth in Section I, but not under the true threats doctrine.

## I. MCL 168.932(a) Can and Should Be Narrowly Construed to Prohibit False Speech About the Time, Place, Manner, or Consequences of Voting While Not Prohibiting Constitutionally Protected Political Speech.

### A. A Narrow Prohibition on Intentionally False Communications About the Time, Place, Manner, or Consequences of Voting Made for the Purpose of Disenfranchising Voters Survives Strict Scrutiny.

As a general rule, content-based restrictions on speech "are presumptively unconstitutional" and must withstand strict scrutiny to survive, meaning that they "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 US at 163. A "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.*

This holds true as long as the regulated speech is not one of the "historic and traditional categories" of speech that the government is generally able to regulate so long as it does not also engage in viewpoint discrimination in doing so. *United States v Alvarez*, 567 US 709, 717 (2012) (plurality opinion), quoting *Stevens*, 559 US at 470; see *RAV v City of St Paul*, 505 US 377, 382–384 (1992). In turn, the United States Supreme Court has "reject[ed] the notion that false speech should be in a general category that is presumptively unprotected." *Alvarez*, 567 US at 722. These principles "comport[] with the common understanding that 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.* at 718. However, "[s]ome false speech may be prohibited even if analogous true speech could not be," and such situations are most likely to arise where there is "evidence that the speech was used to gain a material advantage." *Id.* at 721, 723; see *id.* at 736 (Breyer, J., concurring) (recognizing that limitations on false speech have been upheld "where specific harm is more likely to occur"); *Illinois ex rel Madigan v Telemarketing Assoc*, *Inc*, 538 US 600, 612 (2003) (fraudulent solicitation of charitable donations not protected by First Amendment). As these principles make clear, it is very rare for a court to uphold a content-based restriction on speech under a strict scrutiny analysis, but certain restrictions on particular kinds of false speech can survive strict scrutiny.

One of the few areas where courts have found strict scrutiny to be satisfied is when confronted with "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Burson v Freeman*, 504 US 191, 199 (1992) (plurality opinion), quoting *Anderson v Celebrezze*, 460 US 780, 788 n 9 (1983) (collecting cases). *Burson* upheld a restriction on soliciting votes or displaying campaign materials within 100 feet of a polling place. *Id.* at 193. In doing so, the Court first examined whether the regulation on speech served a compelling state interest. *Burson* recognized that the government has "obviously" compelling interests in (1) "protecting the right of its citizens to vote freely for the candidates of their choice" and (2) ensuring that "an election [is] conducted with integrity and reliability." *Id.* at 198–199.

The Court then proceeded to examine whether the regulation in question survived strict scrutiny by being narrowly tailored to serve those compelling interests. In doing so, it examined the lengthy history of attempts to combat "two evils" in our democracy, "voter intimidation and

election fraud." *Id.* at 206. In light of this history, it held that restrictions on campaigning in the immediate vicinity of the polling place were narrowly tailored to ensure election integrity, even though the government could not empirically demonstrate the precise effects of the restrictions. *Id.* at 208. *Burson* explained that while strict scrutiny *typically* requires empirical evidence to sustain a restriction on speech, there is a "modified 'burden of proof'" in the very limited range of cases in which the asserted "First Amendment right threatens to interfere with the act of voting itself." *Id.* at 209 n 11, citing *Munro v Socialist Workers Party*, 479 US 189 (1986). By contrast, the government must meet a much higher bar to sustain restrictions on speech that are directed at attempts to "influence" how voters vote with respect to a candidate or issue. *Id.* Thus, *Burson* stands for the proposition that narrow restrictions on speech that protect against "interfere[nce] with the act of voting itself," *id.*, can be sustained without the government being required to specifically demonstrate that the restriction on speech is empirically necessary. But broader restrictions on election-related speech must be empirically justified.

The Supreme Court considered *Burson*'s application recently in *Minnesota Voters Alliance v Mansky*, 138 S Ct 1876 (2018). *Mansky* concerned a Minnesota ban on voters' wearing "political" apparel in the polling place. *Mansky* held that while a state may prohibit certain electioneering communications inside the polling station, it "must draw a reasonable line" and held that a prohibition on any "political" apparel did not suffice because it was prone to "haphazard interpretation[]" and could "encompass anything 'of or relating to government, a government, or the conduct of governmental affairs.'" *Id.* at 1888 (citing Webster's Third New International Dictionary's definition of "political").

Of particular relevance to this case, in *Mansky*, Minnesota had sought to use the ban on "political" apparel to prohibit voters from, among other things, wearing buttons that said "Please

I.D. Me." *Id.* at 1889. The Court rejected the argument that such buttons could be banned as "political" for the reasons stated above. However, Minnesota made an additional argument in favor of banning this particular button, arguing that the button was misleading because Minnesota does not require voters to show identification when voting. *Id.* n 4. The Court rejected this argument on the grounds that Minnesota's ban on "political" buttons reached *all* political buttons, not merely buttons that were false or misleading. *Id.* Critically, however, the Court clarified that the result would be different if *all* that Minnesota had done was to try to prohibit apparel containing false or misleading speech about voting requirements intended to deceive voters: "We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures." *Id.* Thus, *Mansky* makes clear that *if* Minnesota had sought to ban speech intended to mislead voters about voting requirements or procedures (and *if* the button was in fact intended to mislead in this regard, a question the Court did not address), then such a law could survive constitutional strict scrutiny. See also *In re Chmura*, 461 Mich 517, 534 (2000) ("States have an interest in preserving the integrity of the election process. This interest extends to protecting the process from distortions caused by false statements."), citing *Brown v Hartlage*, 456 US 45, 52 (1982).

The *Mansky* footnote makes perfect sense in light of *Burson*. Intentionally false or misleading speech that states false information about how or where to vote or the legal consequences of voting directly undermines the government's compelling interests in "protecting the right of its citizens to vote freely for the candidates of their choice" and "to vote in an election conducted with integrity and reliability." *Burson*, 504 US at 198–199. And because such false communications directly "threaten[] to interfere with the act of voting itself," the

government need not present empirical evidence showing that regulating them is necessary.[2] Thus, to the extent MCL 168.932(a) is interpreted to prohibit intentionally false speech about where, when, or how to vote or the legal consequences of voting made for the purpose of disenfranchising voters, it constitutes a narrowly tailored restriction on speech that survives strict scrutiny.

Conversely, if MCL 168.932(a) were interpreted more broadly to regulate "core" political speech, such as exchanges of views about candidate positions or political debate, *McIntrye v Ohio Election Comm'n*, 514 US 334, 346 (1995), it would not survive strict scrutiny. See *Susan B Anthony List v Driehaus*, 814 F3d 466, 476 (CA 6, 2016) (holding unconstitutional an Ohio law prohibiting false speech about political candidates); *281 Care Committee v Arenson*, 766 F3d 774, 793–794 (CA 8, 2014) (holding unconstitutional a criminal prohibition on knowingly false political speech about ballot proposals); *Commonwealth v Lucas*, 472 Mass 387 (2015) (similar). "The First Amendment affords the broadest protection to [core] political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v Valeo*, 424 US 1, 14 (1976) (per curiam), quoting *Roth v United States*, 354 US 476, 484 (1957). *True* speech about how, when, where, or the legal consequences of voting does not threaten the integrity and reliability of the vote. And when it comes to core political speech, even much false speech must still be protected. *Susan B Anthony List*, 814 F3d at 474–476. "Urgent, important, and effective [political] speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." *McIntyre*, 514 US at 347; see *State ex rel Public Disclosure Comm'n v Vote No!*

[2] Nonetheless, as described in the Background and Facts section of this brief, it bears noting that the risks associated with knowingly false communications about voting *are*, empirically, on the rise and represent an alarming and accelerating next phase in our nation's long and sordid history of voter suppression.

*Committee*, 135 Wash 2d 618, 631–632 (1998) (noting that attempts to insulate voters from false core political speech is "patronizing and paternalistic" and "assumes the people of this state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate").

Leading academic commentators of all ideological stripes agree that prohibiting false speech about the time, place, and manner of voting is on firmer constitutional footing than prohibiting other false political speech. For example, Professor Richard Hasen, summarizing the legal landscape, has explained that "[t]he strongest case for constitutionality [of a prohibition on false election-related speech] is a narrow law targeted at false election speech aimed at disenfranchising voters." Hasen, *A Constitutional Right to Lie in Campaigns and Election Speech?*, 74 Mont L Rev 53, 71 (2013); see also Hasen, *Cheap Speech* (New Haven: Yale University Press, 2022), pp 110–115 (expanding on the analysis). By contrast, "there are substantial arguments that state laws barring or punishing false malicious campaign speech even by candidates violates the First Amendment after *Alvarez*." Hasen, 74 Mont L Rev at 75. Professor Eugene Volokh similarly concludes that the most likely speech restrictions to survive scrutiny in the electoral context are laws prohibiting "lies about the when, where, how, and who of elections: For instance, lies about when polls close, where one can vote, whether one can vote online, by mail, and the like, and who is eligible to vote." Volokh, *When Are Lies Constitutionally Protected*, The Knight First Amendment Institute at Columbia University (October 19, 2022) <https://knightcolumbia.org/content/when-are-lies-constitutionally-protected>.

In sum, to the extent MCL 168.932(a) prohibits intentionally false speech about the time, place, manner, or legal consequences of voting made for the purpose of disenfranchising voters,

it represents one of the few content-based restrictions on speech that can survive strict scrutiny. However, if it were interpreted to also prohibit *true* speech or false speech about core political disputes, such restrictions would be unconstitutional. In this case, the Robocalls are precisely the kind of speech that the state has a compelling interest in restricting through a narrowly tailored statute.[3] Accordingly, amici urge the Court to construe MCL 168.932(a) as prohibiting such false speech and hold that, as applied, it survives strict scrutiny.[4]

### B. MCL 168.932(a) Can Be Construed Narrowly, and Doing So Addresses Any Overbreadth or Vagueness Concerns.

For all of the reasons described in the prior subsection, MCL 168.932(a) is constitutional to the extent that it prohibits intentionally false speech that is made for the purpose of deceiving voters as to the time, place, manner, or legal consequences of voting. By contrast, it would be unconstitutional to the extent it prohibited truthful (but scary) speech or core political speech containing falsehoods (even if such speech might deter some people from voting). This invites the question of whether MCL 168.932(a) can be construed in a manner that prohibits speech that *can* constitutionally be regulated while avoiding criminalizing protected speech.

It can. As this Court has explained, "in the criminal context . . . a state court may adopt a narrow construction of a statute in response to an overbreadth challenge and then apply the statute, as construed, to past conduct." *Chmura*, 461 Mich at 544, citing *Osborne v Ohio*, 495 US 103, 115–122 (1990); see also *Skilling v United States*, 561 US 358, 403 (2010). In order to

[3] Michigan's compelling interest in protecting the right of its citizens to vote is strengthened by the adoption of 2022 Proposal 2. That proposal enshrined a fundamental right to vote in the text of the Michigan Constitution. See Const 1963, art 2, § 4(1)(a). That section also prohibits any person—public or private—from doing anything which has the "intent or effect of denying, abridging, interfering with, or unreasonably burdening that right to vote." *Id*.

[4] Amici note that their argument about strict scrutiny largely aligns with a similar argument made by Protect Democracy and Voters Not Politicians in their own amicus brief. Protect Democracy Amicus Br, pp 23–32.

do so, however, the defendant must have "fair warning" that their conduct was classified as criminal when they acted, *id.*, meaning that the interpretation that renders the defendant's conduct criminal must flow reasonably from the text and not be contrary to prior interpretations of the same statute. See *Osborne*, 495 US at 115–117.

In addition, in the context of a post-conviction appeal, it must be evident that the defendant was "convicted under the statute as it was subsequently construed, not as it was originally written." *Chmura*, 461 Mich at 544. This case arises on interlocutory appeal in a pre-conviction context. Thus, this Court's holding will guide the necessary jury instructions and will ensure that any possible conviction arises only under whatever authoritative construction this Court gives to MCL 168.932(a).

With that said, this Court's authority to construe vague statutory language is not boundless. If the language in question is so "inherently vague" as to encourage "standardless" enforcement by law enforcement officials, then the act is unconstitutional and an "abdicat[ion]" of the legislature's responsibility to define criminal offenses. *Smith v Goguen*, 415 US 566, 575–576 (1974). Such legislation must be struck down rather than being narrowly construed to cure its unconstitutionality. See *id.*

Here, amici's proposed construction of MCL 168.932(a)—that it prohibits intentionally false speech made for the purpose of disenfranchising voters by deceiving them as to the time, place, manner, or legal consequences of voting—fits comfortably with the statutory language prohibiting the use of a "corrupt means or device" to influence, deter, or interrupt a voter in giving their vote. As explained by the Court of Appeals below, "corrupt means or device" can easily be construed to apply to "improper conduct (as bribery or the selling of favors)" and "having unlawful or depraved motives; given to dishonest practices . . . ." *People v Burkman*, __

Mich App __, __ (2022) (Docket Nos. 356600, 356602); slip op at 9 (Appendix 199a), quoting *Merriam Webster's Collegiate Dictionary* (11th ed) and *Black's Law Dictionary* (11th ed). This definition of "corrupt," as applied to speech, allows a reasonable narrowing limitation of MCL 168.932(a) to intentionally false speech about subjects such as the time, place, or legal consequences of an election (a "dishonest practice") made for the purpose of disenfranchising voters (a "depraved motive").[5]

The Robocallers are in no position to complain that such a construction did not put them on notice that their actions were unlawful. Amici's proposed construction is, if anything, *narrowing*. It does not expand the statutory language, and, with or without a legal dictionary or legal opinion in hand, someone who targets minority communities with false information about the legal consequences of voting in attempt to disenfranchise voters in those communities ought to be on notice that their conduct is corrupt. Furthermore, there are objective factual bases by which to judge whether speech at issue here is factually dishonest. And, unlike core political speech about political issues or predictions about the consequences of electing a particular candidate, in which misleading speech may sometimes serve various lawful purposes, false speech about the time, place, manner, or legal consequences of voting serves no purpose *other* than the dishonest and corrupt purpose of tricking voters into not voting—essentially, defrauding voters of the franchise. In turn, because amici's proposed narrowing construction of MCL 168.932(a) is perfectly clear, follows reasonably from the statutory text, and puts the public on

[5] By contrast, MCL 168.932(a)'s prohibition on "menacing" speech is not a good statutory basis upon which to prohibit false speech about the time, place, manner, or legal consequences of voting. The hypothetical described below, see *infra*, p 22, in which someone purchases a television ad urging voters to vote by mail rather than risk COVID by going to the polls may be scary ("menacing"), but the arguable truth of the call certainly renders it constitutionally protected. See also Section III, *infra* (explaining why the Robocalls cannot be prohibited as "true threats").

notice as to what kind of speech is prohibited, such an interpretation alleviates any vagueness or overbreadth concerns that may stem from the statutory language as drafted.

## II. The "Speech Integral to Criminal Conduct" Doctrine, As Applied by the Court of Appeals and Advanced by the Attorney General, Is Constitutionally Perilous and Best Avoided Here.

The Court of Appeals did not consider whether MCL 168.932(a) could survive strict scrutiny. Instead, it held that the Robocalls were categorically exempt from First Amendment consideration because they were speech integral to criminal conduct. *Burkman*, __ Mich App at __; slip op at 14–15 (Appendix 204a–205a). This theory differs from the strict scrutiny approach discussed in Section I in that, if it is adopted, it means that the government may prohibit speech such as that at issue here without the need to justify its restriction as being narrowly tailored to advance a compelling state interest.

The "speech integral to criminal conduct" doctrine stems from *Giboney v Empire Storage & Ice Co*, 336 US 490 (1949). In *Giboney*, a Missouri antitrust law made it a criminal offense to conspire to restrain trade or competition in the purchase or sale of any product. *Id.* at 491 & n 1. A labor union of ice peddlers tried to pressure non-unionized peddlers to join the union by persuading wholesale ice vendors to refuse to sell to the non-union peddlers. *Id.* at 492. Most wholesale vendors in the state yielded to the union's campaign. But one resisted and was subject both to a strike, in which unionized peddlers refused to purchase ice from the wholesaler, and to a picket by the unionized peddlers. *Id.* A lower court held that the exclusive sales arrangements the labor unions were trying to obtain violated Missouri's anti-trust law, rendering the strike illegal. *Id.* at 494. Then the court also enjoined the picket. *Id.*

*Giboney* first held that Missouri was well within its powers to apply its anti-trust laws to prohibit collusion between unionized peddlers and ice wholesalers. *Id.* at 495. *Giboney* then analyzed the lower court's injunction against the picket. The unions argued that the injunction

violated their First Amendment right to speak "truthful facts about a labor dispute." *Id.* at 498. The Supreme Court disagreed, explaining that the union's speech could not be "treated in isolation." *Id.* Instead, it had to be understood that "the sole immediate object of the [speech] . . . as well as the other activities of the appellants and their allies, was to compel [the ice wholesaler] to agree to [illegally] stop selling ice to nonunion peddlers." *Id.* In this context, *Giboney* "rejected the contention" that "the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* In doing so, it contrasted the speech at issue in *Giboney*, whose "sole immediate purpose" was to promote an illegal anti-trust scheme, *id.* at 501, with an unconstitutional law that simply banned all pickets. *Id.* at 498–499, comparing *Thornhill v Alabama*, 310 US 88, 103–104 (1940).

Thus, *Giboney* stands for the proposition that when a state can lawfully impose criminal liability for some kind of conduct that is not speech based, such as an anti-trust conspiracy, it can also penalize speech that is uttered in direct connection with the underlying conduct. Courts have applied this reasoning in a number of intuitive situations. See, e.g., *Ford Motor Co v Texas Dep't of Transp*, 264 F3d 493, 506 (CA 5, 2001) (holding that a requirement that used-car sellers have a state-issued business license was sufficient to restrict unlicensed sellers from running car advertisements in the state, since selling the cars they advertised would be unlawful); *State v Washington-Davis*, 881 NW2d 531, 538 (Minn, 2016) (holding that because a state could prohibit sex work, it could also prohibit solicitation to commit sex work). Such straightforward and unproblematic applications of *Giboney* involve speech that is used to support or promote an activity that is independently illegal, with or without the speech, and that is plainly within the power of the state to criminalize.

However, despite the fact that there are some straightforward applications of *Giboney*, the doctrine is subject to circularity and risks imperiling core protected speech if not carefully cabined. *Giboney* "has been and remains controversial; its boundaries and underlying rationale have not been clearly defined, leaving the precise scope of the exception unsettled." *United States v Osinger*, 753 F3d 939, 950 (CA 9, 2014) (Watford, J., concurring), citing Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation–Altering Utterances,*" *and the Uncharted Zones*, 90 Cornell L Rev 1277, 1311–1326 (2005); see also Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 Cornell L Rev 981, 987–988 (2016). The limited case law in this area "leaves us wanting an adequate definition of integral speech." Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U Pa J Const L 865, 901 (2013); see *id.* at 901–903 (grappling with various explanations or difficult limits for the doctrine). Accordingly, "courts and scholars have cautioned against applying *Giboney*'s speech-integral-to-criminal-conduct exception too broadly, particularly in the context of harassment provisions." *Buchanan v Crisler*, 323 Mich App 163, 186 (2018). "Under the broadest interpretation [of the doctrine], 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." *Id.*, quoting *United States v Matusiewicz*, 84 F Supp 3d 363, 369 (D Del, 2015).

The best way to understand the limits of *Giboney* is to interpret it as applying only "when the defendant commits an offense by engaging in both speech and non-speech conduct, and the sole objective of the speech is to facilitate the defendant's criminal behavior." *Osinger*, 753 F3d at 950. As *Giboney* itself held, the government could not enact a criminal prohibition on pickets and then convict a speaker on the grounds that their picket was a necessary component of the

criminal conduct. 336 US at 498–499, discussing *Thornhill*, 310 US at 103–104. In other words, *Giboney* ensures that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." *California Motor Transp Co v Trucking Unlimited*, 404 US 508, 515 (1972), quoting *NAACP v Button*, 371 US 415, 444 (1963). But by the same token, the government cannot use *Giboney* as a means or pretext for banning speech that it otherwise lacks the power to prohibit by classifying the act of speech as criminal and then relying on the *Giboney* doctrine to exempt the ban from First Amendment scrutiny.

Applying this type of reasoning here, amici Protect Democracy and Voters Not Politicians argue that because the government may proscribe tricking, scaring, or intimidating a voter through *non-speech means* into not voting, so too can the state prohibit, under the *Giboney* doctrine and thus without constitutional scrutiny, otherwise protected speech designed to trick, scare, or intimidate a voter. See Protect Democracy Amicus Br, pp 10–13. But that puts the cart before the horse—there must be some independent pre-existing conduct (in *Giboney*, an anti-trust conspiracy) which the speech is facilitating before *Giboney* applies. There's no such conduct here, only speech.

Searching for some "conduct" to justify invocation of the *Giboney* doctrine, those amici argue that defendants did not simply speak dishonestly about the legal consequences of voting, they engaged in a non-speech course of conduct by taking the additional steps of engaging in a financial transaction by purchasing and arranging for the Robocalls to be made and then deciding to specifically target communities of color. This argument raises very difficult questions about how to cabin *Giboney* and ensure that government efforts to restrict constitutionally protected speech do not escape meaningful First Amendment scrutiny. The "non-speech" conduct engaged

in by the Robocallers here is all speech-like or speech-adjacent. They simply facilitated the speech by paying for it and deciding who should hear it, unlike the commercial conspiracy entered into between ice peddlers and vendors in *Giboney*. Purchasing the Robocalls is, to be sure, a financial transaction. But some kind of financial transaction, from the purchase of paper or internet service to the purchase of a million-dollar Super Bowl ad, is involved in most any kind of speech, particularly when one is speaking to a large audience. The state cannot bootstrap speech-facilitating conduct into the predicate for *Giboney* because steps taken to create or disseminate speech are also protected as speech by the First Amendment. See, e.g., *American Civil Liberties Union of Ill v Alvarez*, 679 F3d 583, 595 (CA 7, 2012). Conflating the conduct and speech components of *Giboney* in this way will make it extremely difficult to distinguish the "non-speech" component of a course of conduct in the future from one in which the speech at issue is actually deserving of First Amendment protection.

Consider, for example, someone who purchased a television advertisement during the 2020 campaign that said, "COVID-19 is deadly, and voting in person can expose you to the deadly virus. But thanks to Proposition 2, enacted by Michigan's voters in 2018, you can vote safely at home. Request your absentee ballot today and vote from home to keep your loved ones safe." This is protected speech, but like the speech at issue in this case, such an advertisement could deter voters from one method of voting, and could do so in a way that plays upon their fears by raising the very threatening prospect that the voter might die as the result of voting in person. A broad reading of the *Giboney* doctrine would allow the government to criminalize this speech by prohibiting the act of persuading a voter not to vote through fear and then argue that by purchasing airtime for the advertisement, the speaker has also engaged in a financial transaction, thus satisfying the conduct prong of *Giboney*.

Or consider the famous "Daisy Ad" that Lyndon B. Johnson ran in his campaign against Barry Goldwater—an ad that suggested Goldwater was "a genocidal maniac who threatened the world's future" and whose election would result in nuclear holocaust. Mann, *How the 'Daisy' Ad Changed Everything About Political Advertising*, Smithsonian (April 13, 2016) <https://www.smithsonianmag.com/history/how-daisy-ad-changed-everything-about-political-advertising-180958741/>. It relied heavily on fear to deter voters from voting for Goldwater and involved a (huge) financial transaction to be run on televisions across the nation. Such free speech could potentially be criminalized through a broad use of the *Giboney* doctrine.

The Attorney General's more casual deployment of the doctrine underscores these concerns and further demonstrates the difficulties with drawing a clear line regarding the proper limits of the *Giboney* doctrine. The Attorney General seems to argue that pure acts of speech that scare voters can be punished as a felony under the speech integral to criminal conduct doctrine, regardless of whether the scary information is true or false. The Attorney General's brief contends that under *Giboney* the First Amendment provides no protection to any "statements intended to discourage people from exercising the right to vote . . . when they tend to cause, attempt to cause, or make a threat to . . . place citizens in fear of voting, through a wrongful method." Appellee Br, p 29. And elsewhere it attempts to define expansively what constitutes such a wrongful method, saying that "the truth or falsity of the threats are of no moment where the method was both menacing and corrupt[6]. . . . For this inquiry, the critical question is whether [defendants] intended that those assertions made in the call would deter minority members from voting." Appellee Br, p 23. On the Attorney General's theory, it would be permissible to charge the Robocallers with a felony if they had instead transmitted Malcolm

[6] Presumably, the Attorney General really means menacing *or* corrupt since MCL 168.932(a) requires only one of the two in order to apply.

X's landmark 1964 speeches that discussed, in menacing terms, the evils of white supremacy infecting both political parties in America at the time and argued: "You don't throw your ballots until you see a target, and if that target is not within your reach, keep your ballot in your pocket." Malcom X, *The Bullet or the Ballot* (April 3, 1964) <http://www.edchange.org/multicultural/speeches/malcolm_x_ballot.html>; see also Malcolm X, *The Bullet or the Ballot* (April 12, 1964) <https://americanradioworks.publicradio.org/features/blackspeech/mx.html> ("So . . . it's the ballot or the bullet. . . . This government has failed us. . . . Any kind of act that's designed to delay or deprive you and me, right now, of getting full rights, that's the government that's responsible. And anytime you find the government involved in a conspiracy to violate the citizenship or the civil rights of a people in 1964, then you are wasting your time going to that government expecting redress. Instead you have to take that government to the world court and accuse it of genocide and all of the other crimes that it is guilty of today.").

As these examples illustrate, reflexively resorting to the "speech integral to criminal conduct" doctrine can put the criminal conduct cart before the First Amendment horse, because it is often difficult to know whether the government can validly criminalize the speech in question without first subjecting the prohibition to some form of First Amendment scrutiny. What really distinguishes protected speech like Malcolm X's speech, the Daisy ad, or an ad discouraging in-person voting during COVID from the Robocalls here is that *here* a jury could conclude that the Robocallers' message states facts that are obviously, demonstrably, and intentionally false; relates to election procedures and their legal consequences; *and* was intended to disenfranchise voters. That is what is so offensive and so problematic about the Robocalls, and it is what drives the natural instinct that departure from the normal protections of the First Amendment for

political speech is appropriate here. The only doctrine that empowers courts to grapple with those distinctions in a meaningful way is the strict scrutiny analysis discussed in Section I of this brief. For that reason, amici urge this Court to avoid the murky doctrinal complexity inherent in *Giboney* and hold instead that MCL 168.932(a) is constitutional insofar as it is interpreted to prohibit intentionally false speech whose purpose is to disenfranchise voters by deceiving them about the time, place, manner, or legal consequences of voting, because prohibiting such speech is narrowly tailored to advancing a compelling state interest.

If this Court were to render a broader holding under the *Giboney* doctrine, it would risk placing beyond judicial scrutiny prohibitions on a wide array of speech, some of it core political speech, that the government labels as being integral to criminal conduct. A broad, uncabined holding of this type would be dangerous not only because of the speech it would ultimately allow the state to criminalize, but also because of the speech it would deter by casting such speech into a constitutional danger zone. Take, for example, the facts of *Lucas*. In that case, Massachusetts had a law prohibiting false political speech that was not limited to lies about the time, place, manner, or legal consequences of voting. One candidate accused the other of lying and was "able to use th[e arguably false] statements as the basis for an application for a criminal complaint (and ultimately for its issuance)." 472 Mass at 391. The complaining "candidate then used the application as a political tool not only to discredit the statements but also to persuade [a] PAC to refrain from airing a political advertisement shortly before the election." *Id.* By the time the accused candidate had filed a motion to dismiss and secured a hearing on the motion, his opponent "already had won the election by a narrow margin." *Id.* This sequence of events, and the risk of their repetition, was central to the *Lucas* Court's reasoning in striking down the Massachusetts law as unconstitutional.

To avoid a similar situation in Michigan, amici urge this Court to avoid applying the speech integral to criminal conduct doctrine. As discussed in Section I, the Court should hold instead that the prosecutions in this case are subject to, but survive, First Amendment scrutiny.

## III. This Court Should Not Apply the "True Threats" Doctrine Here.

In addition to relying upon the speech integral to criminal conduct exemption, the Attorney General also argues that the Robocalls are generally exempt from First Amendment protection on the grounds that the calls contained "true threats." The true threats doctrine represents another categorical "exemption" from most First Amendment scrutiny, so speech that constitutes a "true threat" may often be regulated by the government without subjecting the government to heightened scrutiny. *RAV*, 505 US at 386–388. The United States Supreme Court has explained that "true threats" are "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." *Black*, 538 US at 359 (emphasis added).

As demonstrated by the italicized language in the quotation from *Black*, and as detailed below, the Robocalls at issue here do not rise to the level of true threats for two reasons, either of which would be sufficient, on its own, for this Court to hold that the true threats doctrine does not apply to the facts of this case. First, the Robocalls did not purport to threaten that the Robocallers, or anyone they controlled or conspired with, intended to commit any act whatsoever or do anything to people who received the calls. Second, as the Court of Appeals held below,[7] to the extent the Robocalls do not threaten any act of unlawful *violence*, they cannot be true threats. Thus, the Robocalls were not true threats.

[7] The Court of Appeals did not address amici's first argument about the inapplicability of the true threats doctrine, possibly because that theory was not presented to it. This Court should nonetheless address the argument, as it represents a critical limitation on the true threats doctrine as described in Section III.A.

### A. The Robocalls Did Not Threaten or Even Imply that the Robocallers or Someone Conspiring With Them Would Harm the Listener.

Precisely because categorical exemptions to the First Amendment open up the possibility of censoring protected speech, the exemptions must be "well-defined and narrowly limited." *Stevens*, 559 US at 468–469, quoting *Chaplinsky*, 315 US at 571–572. The United States Supreme Court has followed this admonition by providing a well-defined and narrow definition of "true threat" as speech expressing "an intent to commit an act of unlawful violence." *Black*, 538 US at 359 (emphasis added). This requirement means that the speaker must not only convey a message that scares the listener, but also that the nature of the threat must be that the speaker has stated or implied that they *intend* (or a co-conspirator intends) to act upon the threat themselves through unlawful violence.

Case law reflects the distinction between threats in which the speaker expresses an intent to cause harm and statements that express warnings or predictions that a third party, over whom the speaker has no control, might cause harm. With respect to the true threats category, "a court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators)." *New York ex rel Spitzer v Operation Rescue Nat'l,* 273 F3d 184, 196 (CA 2, 2001) (emphasis in original). There is "no doubt that [a threat] must be a threat of injury brought about—rather than merely predicted—by the defendant. Indeed, the First Amendment requires as much." *United States v Cassel*, 408 F3d 622, 636–637 (CA 9, 2005);[8] see also *United States v Dillard*, 795 F3d 1191, 1201 (CA 10, 2015) (true threats must be made "by the defendant or by someone acting under her direction or in conspiracy with her"); *United*

[8] *Cassel* involved an interpretation of the federal statute prohibiting interference with federal land sales, but as the quote above makes clear, its holding regarding the need for a speaker to have threatened action themselves (or through a confederate) is directly tied to the First Amendment.

*States v Alaboud*, 347 F3d 1293, 1296 (CA 11, 2003) (defining a true threat as arising "when in its context it would have a reasonable tendency to create apprehension *that its originator* will act according to its tenor" (emphasis added)), overruled on other grounds by *United States v Martinez*, 800 F3d 1293, 1295 (CA 11, 2015). As such, "a person who informs someone that he or she is in danger from a third party has not made a threat, even if the statement produces fear." *Spitzer*, 273 F3d at 196.[9]

Were it otherwise, countless acts of speech that scare listeners by warning them of grim consequences could be susceptible to governmental restriction without First Amendment scrutiny: "Don't go swimming, the water is full of sharks and jellyfish!"; "If we don't reduce carbon emissions, this city will be underwater in ten years and our children will face extinction on a scorched planet"; "If you vote for Goldwater, you are voting for a nuclear apocalypse"; "If you travel to Russia, you may get kidnapped and held for political ransom"; "If you listen to that rock 'n roll record, you're going to hell"; "If you have premarital sex, you will contract an STI"; "The government is going to take our guns and allow the United Nations to police us"; and so on; and so on. Such statements may terrify the listener (and might influence how or whether they vote), but they are protected speech and are not true threats for First Amendment purposes. See, e.g., *Spitzer*, 273 F3d at 197 (recognizing that an anti-abortion protester's statement to a doctor that "killing babies is no different than killing doctors" was an "expression of political opinion" that was "entitled to First Amendment protection"—not a true threat); *United States v Landham*, 251 F3d 1072, 1083–1084 (CA 6, 2001) (holding that a defendant did not truly

[9] This does not mean that the speaker must *actually* intend to carry out the threat themselves or by way of a confederate. *Black*, 538 US at 359. It is enough that the speaker's statement, when reasonably interpreted, inspires in the listener a fear that the speaker intends to harm them. The important point here is that it must be the *speaker or a confederate* who the threat indicates will inflict the harm.

threaten his ex-wife by telling her that a *court* would take her children away); *Cassel*, 408 F3d at 637 (a speaker's warnings that an area where a house was for sale "was inhabited by devil worshippers and producers of illegal drugs" could put a "reasonable person in fear or apprehension" but was not a threat because it did not involve a threat of any action "*by the defendant*" (emphasis in original)).

This does not mean that someone can automatically avoid liability for a true threat merely by avoiding mention of themselves or their co-conspirators. "A defendant cannot escape potential liability simply by using the passive voice or couching a threat in terms of 'someone' committing an act of violence . . . ." *Dillard*, 795 F3d at 1201. At the margins, this distinction can make for complicated cases. So, while an abortion protestor does not utter a true threat by implying that an abortion doctor deserves to die, *Spitzer*, 273 F3d at 197, courts have held that it *is* a true threat, in context, for a group of protestors to display "wanted" posters depicting abortion doctors' faces when identical posters had been produced previously portraying other doctors shortly before those other doctors were murdered, thus suggesting that the protesters "would make good on the threat." *Planned Parenthood of Columbia/Willamette, Inc v American Coalition of Life Activists*, 290 F3d 1058, 1085 (CA 9, 2002).

While the line between when a speaker has uttered an implied true threat and when the speaker is merely predicting what a third party beyond their control might do may be fuzzy in some circumstances, the facts of this case come nowhere close to that fuzzy line. There is no possibility whatsoever, and certainly nothing in the record, suggesting that anyone who received the Robocalls could or did think that the Robocallers were implying that they or a co-conspirator intended to procure lists of absentee voters and use them to perform warrant checks, debt collection, or mandatory vaccination. The calls purported to be from a (fake) individual who

warned that such scary actions would be taken by police departments, debt collectors, and the Centers for Disease Control, respectively. While there is no question that the calls were meant to motivate callers not to vote by mail (and thus, in some cases, not to vote), there is also no question that the calls did *not* indicate, or in any way imply, that the fictitious Ms. Taylor (nor Mr. Wohl, nor Mr. Burkman) had any "intent to commit," *Black*, 538 US at 359, any of these actions.

Critically, the true threats doctrine applies equally regardless of whether the threat being made is true or false. When a speaker has conveyed a serious enough threat that they will inflict harm on the listener, they have uttered a true threat; "[i]t is well-established that the government is not required to prove that the defendant in a threat case intended or was able to *carry out* his threats." *United States v Parr*, 545 F3d 491, 498 (CA 7, 2008). By the same logic, mere warnings that are *not* threats cannot become true threats simply because the speaker knows that they are warning of a consequence that will not come about. The *true* threats doctrine is a poor fit for addressing the unique problems that flow from certain types of demonstrably *false* (but scary) speech such as the Robocalls, in which the falsity of the speech is the aspect of the speech that makes it uniquely offensive and susceptible to governmental regulation. Accordingly, a court seeking to discern the constitutional reasons why the government can prohibit some false speech about voting would do best to examine doctrines other than true threats.

The Attorney General does not address the issue of whether a true threat must include an implication that the speaker or a co-conspirator will act upon the threat, which underscores the alarming casualness with which the Attorney General deploys the doctrine. And the only case cited by the Attorney General that even involves a court holding that an act of speech was a true threat, when the speech was merely a warning of what a third party unconnected with the speaker

might do, is *Nat'l Coalition on Black Civic Participation v Wohl*, ___ F Supp 3d ___, 2023 WL 2403012, at *24–25 (SDNY, 2023).[10] That case involved the same Robocallers, and the same Robocalls, that are at issue here. However, the court in *National Coalition* did not consider the question of whether the speech in question could be a true threat despite no indication that the speaker or a co-conspirator would inflict the threatened harm. Rather, the *National Coalition* court addressed two arguments with respect to the applicability of the true threats doctrine: (1) whether the doctrine is limited to threats of physical violence, see *id.* at *24, and (2) whether the speech in question was a political opinion rather than a (false) statement of fact, *id.* at *25. *National Coalition* rejected both of these arguments, but never discussed whether the true threat doctrine requires that the speaker convey an intent that they or a co-conspirator will act upon the threat. Quite the contrary, *National Coalition* silently elides the question by reformulating the requirements of what must be shown to establish a true threat into the passive voice. See *id.* at *25 ("The Robocall . . . put a reasonable recipient familiar with the context of the Robocall in fear that an injury of a legal (arrest), economic (debt collection), or physical (mandatory

[10] Other amici, Protect Democracy and Voters Not Politicians, also cite *United States v Nguyen*, 673 F3d 1259 (CA 9, 2012), a case which could be (mis)read as suggesting that sending letters to voters warning them about legal consequences of voting could be a true threat. However, in *Nguyen*, the defendant was not charged with violating the law prohibiting voter intimidation but, rather, was charged with a federal crime for obstructing justice by misleading investigators who had been investigating *whether* the defendant had committed voter intimidation by sending the letters in question. In order to sustain the conviction for obstructing justice, the Ninth Circuit merely needed to find that investigators had not wrongfully initiated the investigation, meaning that the investigators had to have had cause to believe that there was a "fair probability" that a violation of the underlying voter intimidation statute had occurred. *Id.* at 1266. Thus, *Nguyen* did not definitively address the question of whether the letters in question *actually were* true threats; it merely suggested, at most, a fair probability that they might be. It is likely that the question of whether the letters could be true threats when the letter writer was not threatening to do anything himself (or through a co-conspirator) was not presented to the court at all, and the court's decision does not suggest otherwise. If it had been, the court would have been bound by its prior holding in *Cassel* that "[t]here is no doubt that [a threat] must be a threat of injury brought about—rather than merely predicted—by the defendant. Indeed, the First Amendment requires as much." 408 F3d at 636–637.

vaccination) nature *would occur* if the recipient voted by mail." (emphasis added)). But, again, the true threat doctrine does not apply to speech in which the listener becomes fearful that something harmful *could occur* to them; it applies when the speaker makes the listener "fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators)." *Spitzer*, 273 F3d at 196 (emphasis in original).

The speech here, while repugnant, and while proscribable for reasons detailed in Section I, simply does not constitute a "true threat." Amici condemn and abhor the Robocallers' speech, and especially the fact that they targeted the Black community. But the true threats doctrine is the wrong doctrinal basis for authorizing punishment of the Robocalls. A holding that the Robocalls were true threats would represent a dangerous extension of the true threats doctrine. It would be nearly impossible to limit such a holding only to *false* warnings about what a third party might do and would risk denying First Amendment protection to a staggering array of speech in which the speaker truly or reasonably predicts scary outcomes. In a scary world, that's a scary prospect. The Court should decline the Attorney General's invitation to extend the true threats doctrine to the facts of this case.

### B. Alternatively, the Robocalls Cannot Qualify as True Threats to the Extent That They Did Not Threaten Physical Violence.

Again, the United States Supreme Court has emphasized that the categories of speech that are exempt from most First Amendment protection must be "well-defined and narrowly limited." *Stevens*, 559 US 468–469, quoting *Chaplinsky*, 315 US at 571–572. And again, with respect to the true threats exemption, the Court has done exactly that, stating in no uncertain terms, that for a true threat to occur the speaker must "mean[] to communicate a serious expression of an intent to commit an act of unlawful *violence* to a particular individual or group of individuals." *Black*, 538 US at 359 (emphasis added). This reference to violence was not an isolated bit of stray

dicta. *Black* repeats it again and again, explaining that the reasoning for the true threats exemption is that it "protect[s] individuals from the fear of *violence*" and "from the possibility that the threatened *violence* will occur." *Id.*, citing *RAV*, 505 US at 388. *Black* further explained the precise type of fear that the true threats doctrine protects against: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of *bodily harm or death*." *Id.* at 360 (emphasis added).

It is imperative that exemptions to the First Amendment be restricted within their narrow and limited confines. Every bright line that is crossed or blurred when it comes to free speech opens up the specter of censorship and chills expression. The First Amendment demands that the range of speech that is presumptively free from governmental restrictions remain as wide as possible, even when the speech is troubling. "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v Barry*, 485 US 312, 322 (1988).

The dangers of expanding the true threats doctrine beyond threats of physical violence are real. Even with the doctrine being limited to physical violence, borderline true threats cases can lead to chilling of speech. And such chilling often comes at the expense of historically marginalized or vulnerable groups whose speech may be less understood (or deliberately targeted) by powerful governmental actors such as prosecutors and elected officials. See, e.g., Stoner, *What You Rhyme Could Be Used Against You: A Call for Review of the True Threat Standard*, 44 Nova L Rev 225, 225–229, 242–249 (2020) (documenting how the doctrine has been used to punish and stifle speech by hip hop artists); Gilbert, *Mocking George: Political*

*Satire as 'True Threat' in the Age of Global Terrorism*, 58 U Miami L Rev 843 (2004) (documenting numerous federal investigations relating to satirical political cartoonists about President George W. Bush at the outset of the so-called war on terror).

Limiting the true threats doctrine to threats of physical violence makes practical sense as well. In general, most acts of unconsented-to physical violence against another person are criminal absent a specific defense such as self-defense. So as applied to threats of physical violence, the true threats doctrine at least prohibits only threats relating to conduct that, if acted upon, would usually be clearly criminal. By contrast, there are countless "threats" that occur on a daily basis that can place people in fear of non-physical harm, but which are perfectly lawful: threats of foreclosure or debt collection, the filing of a lawsuit or sending of a demand letter, threats to bring a situation to the attention of the media, threats to terminate someone's employment, threats to report someone to Child Protective Services, threats to call the police, or a child's threat to break their friend's toy if they won't share with them. If courts expand the true threats doctrine to threats that make listeners scared of suffering non-violent harms, they risk chilling a much wider range of speech, much of which arises in quotidian intemperate moments of interpersonal conflict. Of course, when such threats are attached to demands for cash or other favors, they may be criminally punishable as extortion or blackmail. But the Attorney General invites this Court to find *any* utterance of this nature to be susceptible to being criminalized, even when it falls well short of extortion or blackmail. According to the Attorney General, this Court should "adopt a rule recognizing that a 'true threat' can arise from a threat of financial, liberty, or other non-violent harm where the threats were, as here, wrongful." Appellee Br, p 31. Such a rule would allow the government to punish anyone who has ever told another person in anger "I'm going to call the police on you!"—or the child who threatens to break a friend's toy—so

long as (in the government's opinion) the threat is "wrongful." This would be a dangerous expansion of the true threats doctrine that would be highly susceptible to selective enforcement and prosecution, and that would, almost inevitably, be weaponized against some of society's most vulnerable and least polished speakers or communities.

The cases cited by the Attorney General in support of this proposed expansion of the true threats doctrine are either unconvincing or irrelevant. First, the Attorney General relies upon *United States v Turner*, 720 F3d 411, 420 (CA 2, 2013). But *Turner* involved archetypically violent threats; "Turner[] . . . was convicted of . . . threatening the lives of three judges . . . ." *Id.* at 421. The passage from *Turner* quoted by the Attorney General is not even dicta; it is a stray parenthetical citation to a law review article that does not address whether the true threats doctrine is limited to violent threats and, in any event, was cited by *Turner* only in support of the following innocuous sentence: "Prohibitions on true threats—even where the speaker has no intention of carrying them out—'protect individuals from the fear of *violence'* and 'from the disruption that fear engenders." *Id.* at 420 (emphasis added; alterations omitted), quoting *Black*, 538 US at 360.

Second, the Attorney General relies on *United States v Coss*, 677 F3d 278, 290 n 17 (CA 6, 2012), and *United States v Rundo*, 990 F3d 709, 719 (CA 9, 2021). But the (dicta) footnote in *Coss* upon which the Attorney General relies stands for nothing more remarkable than that a threatening statement is exempt from First Amendment scrutiny when it rises to the level of extortion. 677 F3d at 290 n 17. Although the *Coss* dicta describes this conclusion as flowing from the true threats doctrine, there is no discussion of the traditional limits of the doctrine to violent threats, and no discussion of *Black* anywhere in *Coss*. This is far too slender a reed upon

which to base the Attorney General's dramatic proposed restriction on the First Amendment, which would extend the true threats doctrine far beyond situations involving criminal extortion.

As to *Rundo*, it involves the federal criminal prohibition on rioting, which prohibits "a threat or threats of the commission of an act or acts *of violence* by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts *of violence* would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual." 18 USC 2102(a)(2) (emphasis added). *Rundo* and the cases it cites do not seriously grapple with the concerns raised above about expanding the true threats doctrine beyond threats of physical violence, but in any event, *Rundo* is at least limited to a statute involving threats of *violence* against property. The Attorney General, by contrast, seeks to expand the true threats doctrine to *any* threat of harm a speaker might fear—regardless of whether the speaker threatens to use violence or not. *Rundo* does not support the Attorney General's expansive interpretation of the true threats doctrine and, to the extent it does, it is wrongly decided, contrary to *Black*, and not binding on this Court.

Finally, the Attorney General relies upon the federal district court's opinion in *National Coalition*, the civil case involving these same Robocalls at issue here. That decision does indeed say that the Robocalls constitute a "true threat" even to the extent they do not threaten physical violence. But *National Coalition* is an outlier, and its analysis is flawed for the same reasons described above. This Court should not follow *National Coalition*'s lead with respect to the true

threats issue, and there is no need to do so in order to uphold the constitutionality of MCL 168.932(a) as applied to the Robocallers.[11]

As explained above in Section I, the Robocallers can be prosecuted on the narrow basis that a prohibition on intentionally false speech about the time, place, manner, or legal consequences of voting can be criminalized when the speaker intends to disenfranchise the listener. There is no need for this Court to venture further afield and expand the true threats doctrine in search of an alternative basis that would justify proscribing the Robocallers' repugnant speech.

## CONCLUSION

By any measure, the Robocallers deserve to be held accountable for their misconduct, and the First Amendment permits the government to prohibit speech such as the Robocalls and proceed with the prosecutions here. However, the justifiable desire to prohibit and punish harmful voter suppression tactics should not cause this Court to overlook the significant First Amendment issues associated with the arguments advanced by the Attorney General and other amici, particularly when doing so could inadvertently harm individuals and groups engaged in legitimate, constitutionally protected activity central to a thriving democracy. The ACLU of Michigan and Promote the Vote urge this Court to rule narrowly here, by construing MCL 168.932(a) to prohibit intentionally dishonest speech about the time, place, manner, or legal consequences of voting that is uttered with the corrupt intent of disenfranchising voters, and to hold that such a prohibition survives strict scrutiny. Such a construction simultaneously protects

[11] As noted in the prior section, *National Coalition* also does not address the argument that true threats must be threats in which *the speaker or a co-conspirator* is the one threatening to commit the harm. That reason alone is sufficient for this Court to hold that the Robocallers did not issue a true threat, and if this Court so holds, it does not need to expressly disagree with *National Coalition*'s analysis of whether true threats also encompass non-violent threats.

the voters of Michigan *and* the First Amendment, which itself undergirds all of our other rights, not least among them the right to vote in a free and fair election.

Respectfully submitted,

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