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.
_____/

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

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Should this appeal be dismissed as improvidently granted after Defendants' voluntary decision to plead guilty to charges of telecommunications fraud in Ohio given that the "punishment of" fraud has "never been thought to raise any Constitutional problem," *United States v Stevens*, 559 US 460, 468; 130 S Ct 1577; 176 L Ed 2d 435 (2010)?

   Amici answer: Yes.[1]

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

   Amici answer: Take no position.

3. Is MCL 168.932(a) unconstitutional on its face or as applied to Defendants-appellants?

   Amici answer: No.

[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.

STATEMENT OF INTEREST OF AMICI CURIAE

The Protect Democracy Project ("Protect Democracy") is a nonpartisan, nonprofit organization dedicated to preventing our democracy from declining into a more authoritarian form of government. It believes that in a democratic republic built on the idea that legitimate government derives from the consent of the governed, it is vital that "the officers" chosen to govern represent "the free and *uncorrupted* choice of those who have the right to take part in that choice." *Ex Parte Yarbrough*, 110 US 651, 662; 4 S Ct 152; 28 L Ed 274 (1884) (emphasis added). As a result, Protect Democracy has engaged in litigation and other advocacy to prevent voter intimidation, and has brought several actions with claims under federal laws prohibiting voter intimidation. See, e.g., *League of United Latin American Citizens - Richmond Region Council 4614 v Public Interest Legal Foundation*, No. 1:18-CV-00423, 2018 WL 3848404, at *1 (ED Va Aug. 13, 2018) (LULAC) (counsel for plaintiffs) (Ex. 5); *Arizona Alliance for Retired Am v Clean Elections USA*, No. 22-1823, 2022 WL 17088041, at *2 (D Ariz Nov. 1, 2022) (*Clean Elections USA*) (counsel for plaintiff League of Women Voters Arizona) (Ex. 2). It therefore has a significant interest in helping the Court resolve the intersection of laws, like MCL 168.932, that prohibit voter intimidation and constitutional challenges brought under the First Amendment and the Due Process Clause.[2]

Count MI Vote d/b/a Voters Not Politicians ("VNP" and, with Protect Democracy, "Amici") is a nonpartisan advocacy organization that works to strengthen democracy by engaging people across the State of Michigan in effective citizen action. Among the issues for which VNP advocates are those related to ensuring inclusive, impartial, and fair elections, including wide

[2] Amici neither take a position on the proper interpretation of MCL 168.932 nor the underlying factual issues in the case, except to note that Defendants did, in fact, plead guilty to telecommunications fraud charges in Ohio for violating Ohio Rev Code Ann § 2913.05.

accessibility to vote by mail for all citizens; furthering direct democratic action by protecting the right to citizen initiatives and referenda; and promoting transparency and accountability in government and political campaigns. The issues at the heart of this case are entirely consistent with those about which VNP and its volunteers are most passionate. As such, VNP has a significant interest in these cases.

I. INTRODUCTION

The defense claims that the "the prosecution of Burkman and Wohl is unprecedented in Michigan and is seemingly without any analogue throughout the country." (Defs' Br, p 42.)

That is wrong. These Defendants have already been prosecuted in Ohio for fraud for sending the robocall at issue. And they pleaded guilty to that fraud charge mere days before this Court granted their application for leave to appeal. So there is nothing novel here. In fact, they have already consented to being punished for their robocalls.

Nor, for that matter, is there anything new about punishing individuals for using false information in a way that deters electoral participation. The use of false information to deter electoral participation is a tactic of voter intimidation and suppression that recalls some of the ugliest moments in our nation's history. See *Nat'l Coalition on Black Civic Participation v Wohl*, 498 F Supp 3d 457, 464 (SD NY 2020) (*Wohl TRO*). Such tactics have long been illegal under federal and state law.[3] As a result, a federal judge already enjoined Defendants' unlawful scheme and Defendants have found themselves called to account for their conduct in courtrooms across the country.

What is somewhat new, however, is the suggestion that Defendants' illegal scheme somehow has the imprimatur of constitutional protection. But to ask that question—*does the Constitution protect Defendants' knowing fraudulent falsehoods*—is to answer it. The First Amendment "does not shield fraud." *Illinois v Telemarketing Assocs, Inc*, 538 US 600, 612; 123

[3] See *LULAC*, 2018 WL 3848404, at *1, *4 (Ex. 5); *United States v Tan Duc Nguyen*, 673 F3d 1259, 1261, 1265 (CA 9, 2012). See also *Clean Elections USA*, 2022 WL 17088041, at *1-2 (entering TRO to enforce federal voter intimidation law against continued promulgation of false information about voter eligibility) (Ex. 2); *United States v NC Republican Party*, No. 92-161-CIV-5-F (ED NC Feb. 26, 1992), Dkt. No. 1 (describing scheme to send postcards to voters falsely warning them that they were not eligible to vote in upcoming election) (Ex. 8).

S Ct 1829; 155 L Ed 2d 793 (2003). Nor is there a constitutional right to promulgate "messages intended to mislead voters about voting requirements and procedures." *Minn Voters Alliance v Mansky*, 138 S Ct 1876, 1889 n 4; 201 L Ed 2d 201 (2018).

That should be the end of the matter: Defendants' guilty pleas to fraud charges for the exact conduct at issue dooms their as-applied constitutional challenge. In short, Defendants have no right under either federal or Michigan law to spread false information that is calculated to scare their fellow citizens out of exercising their constitutional rights and contributes nothing other falsehoods and fear to the marketplace of ideas.

Any attempt to recast the First Amendment challenge as one of overbreadth would be likewise futile. As the U.S. Supreme Court has explained, "rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Virginia v Hicks*, 539 US 113, 119-20; 123 S Ct 2191; 156 L Ed 2d 148 (2003). And MCL 168.932(a) has a wide breadth of legitimate applications to conduct that is not "necessarily associated with speech," *Hicks*, 539 US at 120, such as preventing political violence, blackmail, and murder.

That leaves only Defendants' due process void-for-vagueness challenge. But that challenge fails too. Vagueness challenges "fail" when "statutory terms are clear in their application to" the challenged conduct. *Holder v Humanitarian Law Project*, 561 US 1, 21; 130 S Ct 2705; 177 L Ed 2d 355 (2010). And here Defendants' brief appears to concede that acts of fraud are corrupt devices. See Defs' Br, p 25 ("A device is a scheme to trick or deceive; a stratagem or artifice, *as in the law relating to fraud*." (cleaned up) (emphasis added)). Thus, Defendants' guilty plea to fraud charges should be fatal to their vagueness challenge as well. Moreover, the term "corrupt" is widely used in Michigan law, so both the settled body of law

interpreting the term and the mens rea requirement it imparts should solve any lingering vagueness concerns.

Given the major change in factual circumstances created by the guilty pleas to the Ohio fraud charge, this appeal should be dismissed as improvidently granted. Once Defendants have conceded under oath that they've committed fraud both their First Amendment and their vagueness challenges become impossible to maintain. But should this Court reach the merits, the Court of Appeals should be affirmed and this matter should proceed to trial.

II. STANDARD OF REVIEW

Amici agree with the statement of the standard of review in the Plaintiffs-Appellees' brief.

III. SUMMARY OF ARGUMENT

A. Defendants' as-applied First Amendment challenge fails because there is neither a First Amendment right to commit fraud nor one to deceive voters with disinformation about voting requirements and procedures[4]

In an Ohio courtroom just six days before this Court granted review, Defendants pleaded guilty to one charge of telecommunications fraud. That concession—namely, the admission that the robocalls were part of a fraudulent course of conduct—should make it impossible for them to prevail on a First Amendment challenge in this Court. Fraudulent speech is categorically excluded from the protections of the First Amendment, and the "punishment of" fraud has "never been

[4] Though the free speech guarantees in the United States Constitution and the Michigan Constitution are not textually identical, they have thus far been interpreted to be coterminous. See *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 202; 378 NW2d 337 (1985) ("The Michigan Constitution has been interpreted as affording broader protection of some individual rights also guaranteed by the federal constitution's Bill of Rights. The Michigan Constitution has never been so interpreted in the free expression and petition context." (cleaned up)). And Defendants do not argue otherwise. So Amici will treat the provisions as coterminous in this brief. Cf *League of Women Voters of Michigan v Secretary of State*, 508 Mich 520, 609, 975 NW2d 840 n 83 (2022) (Zahra, J., concurring in part, dissenting in part) (explaining that; "it is appropriate to review the free-speech rights at issue under both the United States and Michigan Constitutions as coterminous" when parties do not raise a contention otherwise).

thought to raise any Constitutional problem." *United States v Stevens*, 559 US 460, 468; 130 S Ct 1577; 176 L Ed 2d 435 (2010). As a result, even before this Court considers the applicability of the speech integral to criminal conduct and true threats doctrines (which both also exclude Defendants' activities from First Amendment protection[5]), Defendants' First Amendment defense necessarily fails after their guilty plea to telecommunications fraud.

Moreover, even if Defendants' conduct wasn't categorically excluded from First Amendment protection, the United States Supreme Court has also made it clear that there is no constitutional problem with states imposing consequences for "messages intended to mislead voters about voting requirements and procedures." *Minn Voters Alliance v Mansky*, 138 S Ct at 1876, 1889 n 4 (2018). So even if Defendants' First Amendment challenge somehow manages to survive to the application of First Amendment scrutiny despite the apparent applicability of multiple categorical exclusions from First Amendment protection (each one of which provides an independent basis to affirm), Defendants still cannot prevail because the State has an adequate constitutional justification for any burden that this prosecution may have on Defendants' speech. As a result, any as-applied challenges from Defendants that they had a constitutional right to send fraudulent messages that mislead voters about voting procedures should fail under well-established law.

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[5] To be clear, Defendants' conduct also falls outside the scope of First Amendment protection under these doctrines. There is neither (1) a First Amendment right to engage in speech that is integral to a course of illegal (or tortious) conduct, see *Stevens*, 559 US at 468; *Rumsfeld v Forum for Academic & Institutional Rights, Inc*, 547 US 47, 62; 126 S Ct 1297; 164 L Ed 2d 156 (2006) *("FAIR")*; *Giboney v Empire Storage & Ice Co*, 336 US 490, 498-503; 69 S Ct 684; 93 L Ed 834 (1949); nor (2) a First Amendment right to threaten someone with harm to their bodily integrity and personal finances, see *National Coalition on Black Civil Participation v Wohl*, ___ F Supp 3d ___, 2023 WL 2403012, at *24-25 (SD NY 2023) (*Wohl MSJ*) ("Despite Defendants' protestations that their conduct is not 'unprotected speech,' the undisputed evidence shows that their communication constitutes a 'true threat.'").

B. Defendants' First Amendment overbreadth challenge fails because MCL 168.932(a) has a wide scope of legitimate applications

That means Defendants can only prevail on a First Amendment challenge if they can invoke the overbreadth doctrine. But the overbreadth doctrine is "strong medicine" meant to be "sparingly" applied and "only as a last resort." *Broadrick v Oklahoma*, 413 US 601, 613; 93 S Ct 2908; 37 L Ed 2d 830 (1973). A "law's application to protected speech" must "be substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications" before it may be invalidated for overbreadth. *Hicks*, 539 US at 119-20 (cleaned up).

MCL 168.932(a) survives overbreadth analysis under the *Hicks* test. The statute promotes the government's interest in preventing voter intimidation and preventing the corruption of the political process—an interest that the Supreme Court has described as both "compelling,"[6] and "essential to the successful working of this government."[7] And the statute has a wide variety of plainly legitimate applications such as preventing political violence, blackmail, and murder. So even if we assume for the sake of arguments that Defendants can hypothesize some potential applications of the statute to protected speech, that still wouldn't result in the statute being overbroad. Instead, the proper course would be to address any alleged unconstitutional application of the statute in future as-applied challenges.

[6] *Burson v Freeman*, 504 US 191, 206; 112 S Ct 1846; 119 L Ed 2d 5 (1992) (plurality opinion).

[7] *Ex Parte Yarbrough*, 110 US at 666-67.

C. Defendants' void-for-vagueness challenge fails because there is at least a jury question that MCL 168.932(a) precludes their conduct—*even under their interpretation of the statute*—and because well-established Michigan case law interpreting the term "corrupt" a sufficiently precise definition to avoid any constitutional problems

Any vagueness in MCL 168.932(a) does not rise to a violation of due process for at least three reasons:

First, there is at least a jury question on whether Defendants' conduct constituted "menace" even under their own definition of the term. Defendants concede there is no constitutional vagueness problem with MCL 168.932(a) if menace is narrowly defined to just include "physical assault." Defs' Br, p 10; see Defs' Br, p 44 n 16 (noting that Defendants are raising a vagueness challenge in the alternative). But Defendants' argument overlooks just what exactly was threatening about their robocall.

At least implicit in the looming threat of vaccinations and warrant checks in the robocall is the specter of unconsented-to vaccinations and wrongful arrests executed with excessive force. Those both constitute battery under well-established tort law principles. See, e.g., *Cruzan v Mo Dep't of Health*, 497 US 261, 269; 110 S Ct 2841; 111 L Ed 2d 224 (1990) (medical procedures without informed consent constitute battery); Restatement of Torts (Second) §§ 117-118 (use of force by officer is a battery unless privileged). As a result, there is at least a colorable case that Defendants should have been on fair notice that their conduct was illegal because it was suggesting that anyone who voted by mail—regardless of whom they voted for in any race—would be risking potential assaults.

Second, even if Defendants can establish that they did not menace the recipients of the robocall, their subsequent guilty pleas to a fraud charge defeat their vagueness challenge. As noted, Defendants' own brief concedes that fraud constitutes a corrupt device. See Defs' Br, p 25 ("A device is a scheme to trick or deceive; a stratagem or artifice, *as in the law relating to fraud*."

(cleaned up) (emphasis added)). As a result, Defendants' vagueness challenge fails because their conduct is proscribed by the statute at issue. See *Scales v United States*, 367 US 203, 223; 81 S Ct 1469; 6 L Ed 2d 782 (1961) (rejecting vagueness challenge when "whatever abstract doubts might exist on the matter, this case presents no such problem").

Finally, even if Defendants do not lose under even their own interpretation of the statute, there is still no constitutional vagueness problem with the "corrupt means or device" theory of liability. The term "corrupt" appears widely in Michigan law, and as the Court of Appeals recognized, prior Michigan cases have given the term a reasonably precise definition. See *Burkman*, ___ Mich App ___, at ___; slip op at 12 (Appellant's Appendix 202a; hereafter, Appx __a). Those established interpretations should avoid any vagueness issues, insofar as the case law can provide fair notice of what is prohibited and the mens rea requirement can minimize any remaining vagueness concerns. See *Grayned v City of Rockford*, 408 US 104, 111-13; 92 S Ct 2294; 33 L Ed 2d 222 (1972) (case law interpreting the terms at issue sufficiently mitigated any due process concerns); *Gonzales v Carhart*, 550 US 124, 149; 127 S Ct 1610; 167 L Ed 2d 480 (2007) ("The Court has made clear that scienter requirements alleviate vagueness concerns.").

The Court of Appeals should be affirmed (or this appeal should be dismissed as improvidently granted), and this case should be returned for trial.

IV. ARGUMENT

A. This prosecution does not violate the First Amendment as-applied

Defendants raise both as-applied and facial challenges to MCL 168.932. Because the better practice is to consider as-applied challenges before facial challenges, see *Bd of Tr v Fox*, 492 US 469, 484-485; 109 S Ct 3028; 106 L Ed 2d 388 (1989), Amici start with Defendants' as-applied challenge.

This Court should apply a two-part test to resolve Defendants' as-applied challenge. At *step one*, this Court should examine whether Defendants' conduct fits within any of the categorically recognized exceptions to First Amendment protection, such as fraud, defamation, true threats, and conduct incidental to criminal and tortious conduct. See *Stevens*, 559 US at 468-69. If so, then that is the end of the analysis. The "prevention and punishment" of speech falling into the categorical exceptions has "never been thought to raise any Constitutional problems." *Id.* at 469 (cleaned up).[8]

If the speech does not fall into any of the categorical exceptions, the Court should move onto *step two*: application of the appropriate level of constitutional scrutiny. And if the regulation survives under the appropriate level of constitutional scrutiny (which varies based on the type of regulation at issue[9]), the law is constitutional even if it burdens First Amendment freedoms. See

[8] There is a limited exception to this rule not applicable here. Even within the categorical exceptions to the First Amendment, the government cannot impose content-based restrictions that are "*unrelated* to their distinctly proscribable conduct." *RAV v St. Paul*, 505 US 377, 384; 112 S Ct 2538; 120 L Ed 2d 305 (1992) (emphasis added). So, for example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government." *Id.* at 384. That exception is not presented here even though MCL 168.932 only regulates menace, bribery, and corrupt devices when they are targeted at *voters*. Just as the federal government "can regulate threats against the president . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President," *id.* at 389, the government can regulate menacing voters and corrupt devices directed at those voters because those actions have a special and unique corrupting effect on democratic governance when they occur in the elections context, cf. *RAV*, 505 US at 388 (noting that the government can regulate fraud only in certain advertising markets where risk of and damage from fraud is greater); *United States v Wood*, 295 F2d 772, 784-785 (CA 5, 1961) (preventing voter intimidation "is necessary to prevent irreparable damage to our Government").

[9] E.g., *Williams-Yulee v Florida Bar*, 575 US 433, 444; 135 S Ct 1656; 191 L Ed 2d 570 (2015) (strict scrutiny); *McCutcheon v FEC*, 572 US 185, 196-197; 134 S Ct 1434; 188 L Ed 2d 468 (2014) ("exacting" and "rigorous" levels of scrutiny applicable in campaign finance cases); *United States v O'Brien*, 391 US 367, 376-377; 88 S Ct 1673; 20 L Ed 2d 672 (1968) (intermediate scrutiny test for content-neutral restrictions on conduct that incidentally burden speech); *Ward v Rock Against Racism*, 491 US 781, 790-791; 109 S Ct 2746; 105 L Ed 2d 661 (1989) (intermediate scrutiny test for time-place-manner restrictions).

Burson, 504 US at 198 (1992) (plurality) (upholding electioneering ban as narrowly tailored to advancing government's compelling interest in preventing voter intimidation).

Here, Defendants' *admittedly-fraudulent* conduct fits within multiple categorical exceptions to the First Amendment, so this Court can and should end its analysis there. But should this Court proceed to the second step, then the MCL 168.932 can survive any conceivable level of constitutional scrutiny.

1. Defendants' First Amendment challenge fails because their conduct is categorically excluded from First Amendment protection as fraud, speech integral to a course of criminal conduct, and a true threat

Defendants' conduct in purchasing and disseminating the robocall fits within three separate categorical exclusions to the First Amendment: (a) it was fraudulent, (b) it was incidental to a course of unlawful conduct, and (c) it constituted a true threat. If Defendants' conduct falls into *any* of these categorical exclusions—and it falls into all three—their as-applied First Amendment challenge necessarily fails. Cf. *United States v Williams*, 553 US 285, 299; 128 S Ct 1830; 170 L Ed 2d 650 (2008) (activities that fit within two categorical exclusions are "doubly excluded from the First Amendment").

a. **Fraud:** Defendants have pleaded guilty to a charge of telecommunications fraud in Cuyahoga County, Ohio for the same course of conduct at issue here, save for the fact that they were targeting Black voters in Ohio rather than Michigan. See *Ohio v Burkman*, No. CR-20-654013-A (Cuyahoga Cty., Ohio C.P. Oct. 24, 2022) (Exs. 9, 11); *Ohio v Wohl*, No. CR-20-654013-B (Cuyahoga Cty., Ohio C.P. Oct. 24, 2022 (Ex. 11). Accordingly, they already admitted *on-the-record* and *under-oath* that their conduct was fraudulent.[10] And in the sentencing

[10] A federal court recently also granted summary judgment against Defendants on a fraud claim related to the robocalls under New York law. See *Wohl MSJ*, ___ F Supp 3d at ___; 2023 WL 2403012, at *35-36.

proceedings following that guilty plea, Defendants—far from claiming that their remarks were constitutionally privileged as they do now—expressed contrition, regret, and shame. See Def Tr of Proceedings, 23:20-24:2, 25:18-25 (Cuyahoga Cty., Ohio C.P. Nov. 29, 2022) (statements of Wohl and Wohl's counsel) (Ex. 12); *id.* at 24:9-25:9, 26:2-4 (statements of Burkman and Burkman's counsel). That knowingly, voluntarily, and intelligently made plea to a fraud charge should doom any motion to quash.

"[T]he First Amendment does not shield fraud." *Telemarketing Assocs, Inc*, 538 US 600 (2003). Indeed, fraud is *categorically* excluded from First Amendment protection, and the punishment of fraud has "never been thought to raise any Constitutional problem." *Stevens*, 559 US at 469. Thus, Defendants' fraudulent robocalls about the mechanics of voting by mail are categorically excluded from First Amendment protections. See *United States v Mackey*, 21-CR-80, 2023 WL 363595, at *25 (ED NY 2023) (fraudulent tweets targeted at Black voters falsely suggesting they could vote by text message categorically excluded from First Amendment protection). (Ex. 7)

Defendants may, of course, try to back away from their Ohio pleas at trial and try to convince a Michigan jury that their conduct was not fraudulent in any way. But when they've already pleaded guilty to a fraud charge related to the same conduct, there's no basis to grant a motion to quash on First Amendment grounds.

b. **Speech integral to a course of criminal conduct:** The Court of Appeals determined that Defendants' "speech" was integral to a course of criminal conduct and therefore categorically excluded from First Amendment protection. *People v Burkman*, ___ Mich App ___, at ___; slip op at 14-15 (Appx 204a-205a). That decision was correct and should be affirmed.

As the Court of Appeals recognized, the First Amendment categorically excludes speech that is integral to a course of independently proscribable illegal (or tortious) conduct. See *Stevens*, 559 US at 468; *FAIR*, 547 US at 62. In other words, a defendant cannot use speech to violate an otherwise constitutionally valid criminal statute or commit a constitutionally valid tort and then seek shelter within the First Amendment.

That is why, for example, employers do not have a First Amendment defense to a Title VII claim if they hang a "White Applicants Only" sign outside their business;[11] antitrust conspirators do not have a First Amendment defense even if they use speech to enter into the conspiracy;[12] spies do not have a First Amendment defense if they tell hostile powers our defense secrets;[13] tax cheats and drug bosses do not have a First Amendment defense if they aid and abet unlawful conduct by instructing others how to break the law;[14] and terrorists do not have a First Amendment defense to engage in seditious conspiracy even if the conspiracy is designed to further an otherwise protected political or religious agenda.[15] It is also why there is not a First Amendment right to solicit unlawful conduct[16] or engage in an unlawful transaction.[17]

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[11] See *FAIR*, 547 US at 62.

[12] See *Giboney*, 336 US at 498-503.

[13] See *RAV*, 505 US at 390.

[14] See *United States v Rowlee*, 899 F2d 1275, 1278-1280 (CA 2, 1990); *United States v Barnett*, 667 F2d 835, 841-843 (CA 9, 1982).

[15] See *United States v Rahman*, 189 F3d 88, 114-18 (CA 2, 1999).

[16] See *Pitt Press Co v Pitt Comm'n on Human Rights*, 413 US 376, 388; 93 S Ct 2553; 37 L Ed 2d 669 (1973).

[17] See *United States v Williams*, 553 US 285, 297; 128 S Ct 1830; 170 L Ed 2d 650 (2008).

That same principle should also categorically exclude the conduct here. While Defendants place primary emphasis on what was said on the robocalls to categorize their activities as speech, they ignore all the *other activities* they undertook with criminal intent for which there is no First Amendment protection. For example, they engaged in a financial transaction to purchase the illegal and fraudulent robocall, see Pls' Br, p 7-10, and there is no First Amendment right to engage in an unlawful transaction. See *Williams*, 553 US at 297. They also allegedly—as reflected by the conspiracy charge—agreed among themselves to make the unlawful purchase and specifically target the call at Black neighborhoods.

So the actual (false) speech at issue is "merely a single element within a course of criminal conduct" where the "core unlawful act . . . is the formation of an unlawful conspiracy" aimed at "prevent[ing] individuals from exercising their right to vote." *Mackey*, 2023 WL 363595, at *24. (Ex. 7) Thus, that "criminalizing that conspiracy has, in this circumstance, the collateral effect of prohibiting certain false utterances does not change the fact that those false utterances are merely an element within a broader course of criminal conduct," *id.*—namely one to use menace and corrupt devices to deter electoral participation. It therefore also properly falls outside First Amendment protection.

Defendants counter—relying on Professor Volokh—that the Supreme Court's decision in *Giboney* setting out the speech integral to criminal conduct exception is "controversial." Defs' Br, p 56. That may well be, but academic criticism—even from an esteemed professor—does not overturn, reverse, or otherwise limit Supreme Court precedent. And even more importantly, though Defendants assert "what happened here" was exactly that Professor Volokh decries in his article, Defs' Br, p 57, that is not necessarily correct.

Amici agree with Professor Volokh that the speech incidental to criminal conduct doctrine shouldn't allow the government to *directly* make particular speech illegal and then use the integral to criminal conduct exception to escape First Amendment scrutiny. After all, "the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal." Eugene Volokh, *The Speech Integral to Criminal Conduct* Exception, 101 Cornell L Rev 981, 987-88 (2016). So, for example, the government could not make all political speech criminal, and then escape First Amendment scrutiny under the grounds that any political speech is criminal speech that falls outside the First Amendment.

But that is not what happened here: because Defendants were engaged in an unlawful conspiracy, their actions were unlawful once they took an overt act in furtherance of the unlawful agreement. As a result, their scheme was already unlawful before a single robocall reached a single voter, and they should not be permitted to point to speech that occurred after their conspiracy was launched to retroactively immunize their already unlawful conduct. Moreover, unlike the law at issue in the "political-speech-is-now-criminal" hypothetical, MCL 168.932(a) is not a direct restriction on speech. One can both menace or otherwise use a corrupt means or device to deter electoral participation without using words or political speech at all. One could, for example, attack voters with pepper spray, see *Allen v Graham*, No. 20-997, 2021 WL 2223772, at *7-8 (MD NC June 2, 2021) (Ex. 1), or otherwise blockade access to the polls. So application of the integral to a course of criminal conduct here fits well within the bounds of the doctrine: MCL 168.932(a) sets forth a valid criminal statute proscribing a course of independently proscribable conduct that can be incidentally violated through speech, and Defendants' conduct happened to violate that provision in a course of conduct including (but not limited to) speech.

c. **True threats:** As of this writing, at least two courts have considered whether Defendants' robocalls were excluded from First Amendment protection because they constituted "true threats."[18]

The Southern District of New York concluded that Defendants' conduct constituted a true threat and was therefore excluded from the First Amendment protection. See *Wohl MSJ*, ___ F Supp 3d at ___; 2023 WL 2403012, at *24; *Wohl TRO*, 498 F Supp 3d at 478-80, 82-86. The Court of Appeals below, however, held that the robocall was not a true threat because it "warned of harm to the listener's freedom, financial security, and bodily autonomy, but did not involve a serious expression of an intent to commit an act of unlawful violence." *Burkman*, ___ Mich App ___, at ___; slip op at 14 (Appx 204a) (cleaned up). The Court of Appeals based that determination on its reading of the U.S. Supreme Court's decision in *Virginia v Black*, 538 US 343; 123 S Ct 1536; 155 L Ed 2d 535 (2003), which the Court of Appeals interpreted to be strictly limited to threats of violence. *Burkman*, ___ Mich App ___, at ___; slip op at 13-14 (Appx 203a-204a).

Amici submit that the State has the better argument on true threats two reasons. First, Defendants' motion to quash has a factual challenge—namely that the robocall could be understood by a reasonable jury as threatening the recipient with battery if they voted by mail—so even if Defendants are right about the breadth of the true threats exception, the motion to quash should still be denied so that the true threats question can properly go to a jury. Second, the true threats exception is not limited to threats of violence.

[18] The U.S. Supreme Court heard argument in April to consider the mental state necessary to make a constitutional true threat. See *Counterman v Colorado*, 143 S Ct 644 (2023). The question presented in *Counterman* is "Whether, to establish that a statement is a 'true threat' unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective 'reasonable person' would regard the statement as a threat of violence." Pet For Writ of Certiorari, *Counterman v Colorado*, No. 22-138, 2022 WL 3335946, at *I (US Aug. 1, 2022) (Ex. 3).

First, to prevail on the motion to quash on the grounds that their conduct was not a true threat, Defendants must show—as the Court of Appeals admittedly concluded—that the robocall did not threaten assault or battery. But that conclusion should be left to a jury, and not this Court or the Court of Appeals.

Whether a statement is a true threat "is typically a question of fact for a jury to determine." *People v Gerhard*, 337 Mich App 680, 690 976 NW2d 907 (2021). And given the broader context of the 2020 call, a jury could reasonably conclude that the robocalls implicitly threatened the recipients with battery if they voted by mail. That is so for two reasons:

- **The call's mention of warrant checks**. Arrests executed with unlawful or excessive force constitute a battery under blackletter law, see Restatement of Torts (Second) §§ 117-118, and robocalls at issue were placed mere months after George Floyd's murder by Minneapolis police. That murder focused national attention on the risks of unlawful police brutality for Black Americans. So—particularly in a call that was specifically targeted by Defendants at Black neighborhoods—the threat of warrant checks may have been understood by a reasonable listener in 2020 (and by extension a reasonable juror now) as an implicit threat that voting-by-mail could be subject to a battery.

- **The call's mention of the CDC "list" for "mandatory vaccinations"**. Vaccines delivered without informed consent are batteries.[19] And—as the Southern District of New York pointed out in its opinion concluding that the robocalls were true threats—there's a long and sordid history of public authorities administering public health programs in a discriminatory fashion, including the infamous Tuskegee syphilis study (where study participants were enrolled—without informed consent—into a study where they were denied syphilis treatment, even after it was widely available). See *Wohl TRO*, 498 F Supp 3d 483 n 23; Pls' Br, p 31 n 3. So a reasonable listener could also understand the call to be implicitly threatening that voting-by-mail could lead to the call recipient being subject to a battery at the hands of the public health authorities.

As a result, when the evidence is considered "in the light most favorable to the prosecution," Defs' Br, p 1, the motion to quash comes too soon because a reasonable jury that

[19] See *Cruzan v Mo Dep't of Health*, 497 US 261, 269; 110 S Ct 2841; 111 L Ed 2d 224 (1990); *Schloendorff v Soc'y of NY Hosp*, 211 NY 125; 105 NE 92, 130 (NY 1914) (Cardozo, J) (medical procedures performed without consent constitute assault), *overruled on other grounds in Bing v Thunig*, 2 NY2d 656; 143 NE2d 3 (NY 1957).

was fully apprised of the factual context[20] of the statements could reasonably conclude that the robocall was implicitly threatening listeners with battery.[21] In turn, then this Court need not reach the legal question on the breadth of the true threats exception to conclude that the Court of Appeals had the wrong approach when it concluded that Defendants' conduct did not implicate the true threats doctrine. The factual question of whether this was a true threat—no matter if true threats are limited to threats of violence—should not be taken from the jury.

Second, the better view is that true threats exception extends beyond threats of violence. Here, the Court of Appeals concluded that threats of nonviolent harm could not constitute true threats under U.S. Supreme Court case law. The Court of Appeals based that determination on the

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[20] That context matters when analyzing whether something is a true threat can narrow as well as broaden the exception by ensuring that statements that might sound like threats when detached from context are not captured when, in context, they could not have been perceived as such. For example, depending on context, the statement, "I'll kill you for this," can be a threat or a joke.

[21] Defendants' attempted distinction between warnings and threats—namely, that "[a] *warning* is not a *threat*," Defs' Br, p 14—doesn't hold up. To be sure, not all warnings are threats. But some are. See *New York ex rel. Spitzer*, 418 F Supp 2d 457, 476 (SD NY, 2006) (noting that defendants' "repeated warnings to [clinic] escorts that harm would befall them if they got in his way again . . . are also true threats").

Nor—taking the evidence in the light most favorable to the prosecution—should Defendants be able to argue that their conduct did not constitute a true threat on the grounds that the robocalls only implied that voters would be assaulted by the CDC and the police (and not Defendants themselves). Where a defendant uses bad faith intentional lies to conjure a threat of third-party inflicted harm, it strains credulity to suggest that a plaintiff must show active conspiracy or association with a threat that was conjured by the defendants' own conduct, not least because in such cases there is no one to conspire or associate with. And that should be particularly true in the voter intimidation context given that the creation of wholly false threats conjured in the mind of someone looking to deter political participation is a well-established (and unlawful) tactic of political intimidation. See, e.g., *United States v Tan Duc Nguyen*, 673 F3d 1259, 1261, 1265 (CA 9, 2012) (recognizing anonymous letter targeted at potential immigrant communities falsely suggesting that voting data would be provided to anti-immigration groups) *United States v NC Republican Party*, No. 92-161-CIV-5-F (ED NC Feb. 26, 1992), Dkt. No. 1 (describing scheme to send postcards to voters falsely warning them that they were not eligible to vote in upcoming election to use fear of arrest to deter electoral participation) (Ex. 8).

statement in *Virginia v Black* that "true threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," *Burkman,* __ Mich App __, at ___; slip op at 13 (Appx 203a) (quoting *Black*, 538 US at 359-60 (cleaned up).

That approach over reads *Black*. *Black* held only that the First Amendment exception "encompass[es]" such threats, see 538 US at 359, but "the Court *did not* specify whether *only* threats of unlawful violence are true threats," *Wohl TRO*, 498 F Supp 3d at 479 (emphasis added). See also *Wohl MSJ*, ___ F Supp 3d at ___; 2023 WL 2403012, at *24 (*Black* "did not expressly restrict true threats to only threats of physical harm."). As a result, other courts—as the Court of Appeals recognized (*Burkman,* ___ Mich App ___, at ___; slip op at 14 n 11 (Appx 204a))—have concluded that sufficiently serious threats of non-violent conduct (like Defendants' actions here) can constitute a true threat. For example, the Southern District of New York has already held that the Defendants' robocalls constituted true threats. See *Wohl TRO*, 498 F Supp 3d 457, 478-80, 82-86 (SD NY 2020); *Wohl MSJ*, ___ F Supp 3d at ___; 2023 WL 2403012, at *24. Likewise, the Ninth Circuit has held that a letter telling would-be voters that their information could be obtained by hostile groups or used against them in deportation proceedings falls within the true-threats exception. See *Nguyen*, 673 F3d at 1266. And the Northern District of Georgia—relying, in part, on the Southern District of New York's opinion regarding Defendants' robocalls—recently concluded that some threats of nonviolent conduct can constitute true threats. See *Fair Fight Inc v True the Vote*, No. 2:20-CV-302-SCJ, Dkt. 222, at 72-75 (ND Ga Mar. 9, 2023) (Ex. 4).

And though not all courts agree with that approach,[22] it is the right one. In justifying the true threats exception, *Black* explained that the constitutional true threats exception protects individuals both from the "fear of violence" and as well as "from the disruption that fear engenders." *Black*, 538 US at 360 (cleaned up). Thus, *Black* concluded "[i]ntimidation 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.* (cleaned up). But, of course, non-violent threats—such as evictions, firings, and deportations[23]—are also able to cause great harm and thereby distort the marketplace of ideas through fear rather than persuasion. After all, histories of the Civil Rights Era—where Black Americans that went to register to vote were regularly the target of economic reprisals[24]—amply demonstrates how such tactics can effectively deter electoral participation among targeted communities. So there's no reason even under the Supreme Court's own explanation of the true threats doctrine that true threats should be strictly limited only to threats of violence, provided that the underlying threat is sufficiently serious that it prompts "substantial emotional disturbance in the person threatened" or otherwise requires "the employment of substantial resources for

[22] See *Aubin v Columbia Cas Co*, 272 F Supp 3d 828, 834 (MD La 2017) (threatening to take non-violent action does not constitute a 'true threat.'"); *Seals V McBee*, No. 16-14837, 2017 WL 3252673, at *4 (ED La July 31, 2017) (Ex. 6), *aff'd*, 898 F3d 587 (CA 5, 2018).

[23] Even Defendants' chosen First Amendment scholar, Defs' Br, p 57, thinks that threats of evictions and firings can be a true threat. See Volokh, *supra*, 101 Cornell L Rev at 1004-1005 (suggesting that landlords threating to evict tenants and employers threatening to discriminate against employees constitute true threats).

[24] See U.S. Comm'n on Civil Rights Report, *Voting in Mississippi*, 31-39, 56-57 (1965), available at https://www.google.com/books/edition/Voting_in_Mississippi/uXjjvQEACAAJ (accessed May 15, 2023).

investigation or prevention." *United States v Turner*, 720 F3d 411, 420 (CA 2, 2013) (quoting Kent Greenawalt, *Speech, Crime, and the Uses of Language* 91 (1989))

Thus, for both that reason and the reason that there should at least be a jury question on whether the Defendants' robocall threatened the recipients with battery, the motion to quash should be denied.

2. In the alternative, Defendants' First Amendment challenge fails because MCL 168.932 survives the application of constitutional scrutiny

Defendants' guilty plea to a fraud charge should be conclusive of their as-applied challenge. If so, then this Court need not reach the second step of the First Amendment analysis: the application of constitutional scrutiny. But should this Court reach that step, it should conclude that MCL 168.932 withstands constitutional scrutiny. That is so for two independently sufficient reasons: (a) the Supreme Court has already said a state may prohibit messages that mislead voters about voting requirements and procedures, and (b) the prohibition on using "menace" or other tactics of voter intimidation can withstand any level of constitutional scrutiny, including strict scrutiny.

a. **States may regulate intentional disinformation about the voting process even after *Alvarez*:** Defendants suggest that *United States v Alvarez*, 567 US 709; 132 S Ct 2537; 183 L Ed 2d 574 (2012), establishes that it is unlawful for the State to use MCL 168.932 to "criminaliz[e] false speech." (Defs' Br, p 49.) But after *Alvarez*, the U.S. Supreme Court clarified "that the State may prohibit messages intended to mislead voters about voting requirements and procedures." *Minn Voters Alliance*, 138 S Ct at 1889 n 4. As a result, the Supreme Court has already said that the constitutional balancing should come out in the State's favor here if Defendants are alleged to have violated the statute through intentional misinformation calculated to mislead voters about voting-by-mail procedures. Thus, while Defendants are correct that *Alvarez* complicates the

proper constitutional treatment of intentional disinformation, Defs' Br, p 46-54, it is equally clear—as shown by the Supreme Court's subsequent opinion in *Minnesota Voters Alliance*—that *Alvarez* does not change the *ultimate result in this case.*

The reason *Alvarez* complicates the First Amendment analysis is that it cabined some of the U.S. Supreme Court's prior pronouncements on the constitutionality of regulating intentional falsehoods. Before *Alvarez*, the Court's prior view had been that there "is no constitutional value in false statements of fact,"—and particularly intentional lies—because such lies do not "advance[] society's interest in uninhibited, robust, and wide-open debate on public issues." *Gertz v Robert Welch*, 418 US 323, 340; 94 S Ct 2997; 41 L Ed 2d 789 (1974) (cleaned up).

Thus, pre-*Alvarez*, Defendants' First Amendment challenge would have failed. Defendants' statements would have fit into a "category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* Thus, Defendants' "knowingly false statement[s]" would "not enjoy constitutional protection." *Garrison v Louisiana*, 379 US 64, 75; 85 S Ct 209; 13 L Ed 2d 125 (1964).

But then *Alvarez* cabined *Gertz*. *Alvarez* considered a First Amendment challenge to the constitutionality of the Stolen Valor Act. The Act made it illegal to falsely claim to have received the Medal of Honor. See 18 USC 704(b). The defendant in *Alvarez* falsely claimed to have won the Medal of Honor. So there was no question that the defendant had violated the Stolen Valor Act with an intentional lie. Yet six Justices concluded that the Stolen Valor Act was

unconstitutional.[25] They split, however, over the proper analysis and could not agree on a majority opinion.

Justice Kennedy, writing for himself, Chief Justice Roberts, and Justices Ginsburg and Sotomayor, distinguished *Gertz* (and similar cases), as being limited to the context in which they arose—namely "cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation." *Alvarez*, 567 US at 719 (Kennedy, J.). By contrast, the Stolen Valor Act was different to Justice Kennedy because it "targets falsity and nothing more," *id.*, and therefore offended fundamental First Amendment principles by giving the "government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." *Id.* at 723.

Such a regulation, in Justice Kennedy's view, could be constitutional only if it withstood "exacting scrutiny," which would require showing both (i) a compelling interest and (ii) that the government's "chosen restriction on the speech at issue be 'actually necessary' to achieve its interest." *Id.* at 725. And Justice Kennedy concluded that the United States could not make the latter showing because the government neither had any "evidence to support its claim that the public's general perception of military awards is diluted by false claims" and had "not shown, and cannot show, why counterspeech would not suffice to achieve its interest." *Id.* at 726.

Justice Breyer, writing for himself and Justice Kagan, agreed that the Stolen Valor Act was unconstitutional but disagreed with Justice Kennedy as to the reasoning. Rather than applying exacting scrutiny, Justice Breyer applied intermediate scrutiny because the Stolen Valor Act did not restrict false statements about "philosophy, religion, history, the social sciences, [or] the arts"

[25] Justices Scalia, Thomas, and Alito dissented. See *Alvarez*, 567 US at 739-54 (Alito, J., dissenting).

for which "any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 731 (Breyer, J., concurring in the judgment). Instead, the Act restricted only "false statements about easily verifiable facts" that "are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas." *Id.* at 732. Even so, Justice Breyer concluded that the statute failed intermediate scrutiny because it was "possible substantially to achieve the Government's objective" in the Stolen Valor Act "in less burdensome ways." *Id.* at 737-39.

Normally, then, this Court would have to find the "position taken by those" Justices "who concurred in the judgments on the narrowest grounds," as there was no majority opinion in *Alvarez*. *Marks v United States*, 430 US 188, 193; 97 S Ct 990; 51 L Ed 2d 260 (1977). And in this case—contrary to Defendants' suggestion that strict scrutiny necessarily applies, Defs' Br, p 46-47—that would likely be Justice Breyer's view that intermediate scrutiny applies. See *United States v Mackey*, No. 21-CR-80, 2023 WL 363595, at *21 (ED NY Jan. 23, 2023) (Ex. 7).

But the otherwise required need to parse the dueling opinions is obviated here by the "genuine agreement" between both Justice Kennedy's opinion and Justice Breyer's opinion on the question at issue in this appeal. *Mackey*, 2023 WL 363595, at *21 (Ex. 7). Both opinions recognize "that statutes" like MCL 168.932(a) "that prohibit falsities in order to protect the integrity of government processes . . . are properly within the government's regulatory authority." *Mackey*, 2023 WL 363595, at *21. See also *Wohl MSJ*, ___ F Supp 3d at ___; 2023 WL 2403012, at *25 ("[T]he plurality and Justice Breyer's concurrence agree that false factual statements that cause legally cognizable harm tend not to offend the Constitution." (cleaned up)). And when that agreement is combined with *Minnesota Voters Alliance*'s recognition that a State may prohibit messages "intended to mislead voters about voting requirements and procedures," 138 S Ct at 1889

n 4, it is clear that *Alvarez* did not prohibit states from regulating disinformation—as here—about voting requirements and procedures.

That makes sense. In a democratic republic built on the idea that legitimate government derives from the consent of the governed, it is vital that "the officers" chosen to govern represent "the free and uncorrupted choice of those who have the right to take part in that choice." *Ex Parte Yarbrough*, 110 US at 662. Thus, fraud as well as intentional or reckless falsehoods about voter eligibility, processes, and procedures may be regulated because such speech poses similar risks to our system of government as perjury and impersonations of government officials—namely, undermining the functioning and integrity of government processes, elections, and the law. See Richard L. Hasen, *Drawing the Line Between False Election Speech and False Campaign Speech*, Knight First Amendment Institute (Oct. 12, 2021) ("In this age of hyperpolarization and disinformation, assuring that voters have accurate information about when, where, and how to vote is indeed a compelling interest, as compelling as the interest in truthtelling during judicial proceedings that led the Court to endorse anti-perjury laws in *Alvarez*.").[26] See also *Alvarez*, 567 US at 721 (opinion of Kennedy, J.) (explaining why prohibitions on perjury and lying to or impersonating government officials are consistent with the First Amendment). Accordingly, the clear permissibility of regulating "messages intended to mislead voters about voting requirements and procedures," *Minn Voters Alliance*, 138 S Ct at 1889 n 4, gives this Court a narrow ground to affirm the constitutionality of this prosecution under the First Amendment.

b. **Prohibitions on voter intimidation can survive any potentially applicable level of constitutional scrutiny:** Should this Court wish to take a broader approach to affirm the

[26] *Available at* https://knightcolumbia.org/blog/drawing-the-line-between-false-election-speech-and-false-campaign-speech (accessed April 10, 2023).

constitutionality of this statute, then it can also conclude that MCL 168.932(a) survives strict scrutiny.[27]

After all, even direct restrictions on speech can still be constitutional if they survive review under the relevant level of constitutional scrutiny. See *Burson*, 504 US at 198-99 (plurality opinion) (upholding direct regulation on political speech under strict scrutiny). And restrictions aimed at safeguarding elections and the right to vote can survive even strict scrutiny. See *Williams-Yulee*, 575 US at 457. That includes regulations—like MCL 168.932—that guard against voter intimidation. See *Burson*, 504 US at 198-99, 206; *Citizens for Police Accountability Pol Comm v Browning*, 572 F3d 1213, 1219 (CA 11, 2009) (upholding law restricting solicitation about non-ballot issue in proximity to polling locations); *Wohl MSJ*, ___ F Supp 3d at ___; 2023 WL 2403012, at *27 (Section 11(b) of the Voting Rights Act withstands strict scrutiny, *as applied to these statements by these Defendants*); *Wohl TRO*, 498 F Supp 3d at 486 n 29 (same).

To survive strict scrutiny, MCL 168.932(a) must be "narrowly tailored to advance compelling government interests." *Wohl TRO*, 498 F Supp 3d at 486 n 29. But the narrow tailoring requirement means just that: a law must "be narrowly tailored, not . . . perfectly tailored" to achieve the government's compelling objective. *Williams-Yulee*, 575 US at 454 (cleaned up). Moreover, the Supreme Court "never has held" the government "'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question."

[27] To be clear, this is no concession that MCL 168.932(a) is a content-based restriction on speech. Indeed, MCL 168.932 arguably constitutes a content-neutral regulation on conduct that incidentally burdens speech to protect the integrity of state elections. Cf. *Am Life League, Inc v Reno*, 47 F3d 642, 650 & n 2 (CA 4, 1995) (observing that voter-intimidation ban was a viewpoint- and content-neutral regulation of conduct). But Amici respectfully suggests that the Court need not address the issue—which sits on complex and potentially shifting jurisprudential ground—given the clear case that MCL 168.932(a) would survive even strict scrutiny.

Burson, 504 US at 208 (quoting *Munro v Socialist Workers Party*, 479 US 189, 195; 107 S Ct 533; 93 L Ed 2d 499 (1986)).

It has long been established that preventing voter intimidation is a compelling state interest, see *Burson*, 504 US at 206, that is "essential to the successful working of this government," *Ex Parte Yarbrough*, 110 US at 666-67. Defendants do not argue otherwise. Defs Br, p 49 ("[T]here's no question that protecting the integrity of elections is a compelling governmental interest.").

Thus, were strict scrutiny to apply, the constitutionality of MCL 168.932(a) would turn on the tailoring analysis. And amici submit that a review of federal anti-voter intimidation law suggests that—if anything—MCL 168.932(a) is *more* narrowly tailored than the First Amendment otherwise requires. That is because at least one federal anti-voter intimidation law (Section 11(b) of the Voting Rights Act of 1965) sweeps more broadly than MCL 168.932(a), and has already been upheld against a First Amendment challenge by these exact Defendants. See *Wohl MSJ*, ___ F Supp 3d at ___; 2023 WL 2403012, at *27 n 29 ("The statute, as applied to Defendants' utterances, is constitutional as it serves a compelling government interest in preventing voter intimidation and protecting election processes, and is the least restrictive means in serving that interests . . . .").

Congress has passed at least three federal statutes banning voter intimidation, each more sweeping than the last after prior enactments had failed to prevent voter intimidation:

- *First*, Congress passed the Ku Klux Act of 1871, which banned *conspiring* to intimidate or injure voters for providing support or advocacy in a federal election. See 42 USC § 1985(3). See also Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, 89 Fordham L Rev 145 (2020); Note, *The Support or Advocacy Clause of § 1985(3)*, 133 Harv L Rev 1382 (2020).

- *Second*, Congress passed Section 131(b) of the Civil Rights Act of 1957, which banned *intentional* voter intimidation in federal elections. See 71 Stat 634, 637 (1957), *codified at* 52 USC § 10101(B). See also *United States v McLeod*, 385 F2d 734, 740 (CA 5, 1967)

(requiring showing of subjective intent to intimidate to bring Section 131(b) claim); *United States v Beaty*, 288 F2d 653, 655-56 (CA 6, 1961) (same).

- *Third*, Congress passed Section 11(b) of the Voting Rights Act of 1965, which banned voter intimidation in federal and state elections, even if the defendant acted with *no intent to intimidate*. See 79 Stat 437, 443 (1965), *codified at* 52 USC § 10307(b). See also H.R. Rep. No. 89-439, at 30 (1965) (Section 11(b) does not require "subjective purpose or intent"); *LULAC*, 2018 WL 3848404, at *3-4 ("[I]n the absence of plain statutory text, statutory history, or binding case law to the contrary, the Court does not find that a showing of specific intent or racial animus is required under § 11(b).").

That history disproves the implicit contention at the heart of Defendants' brief, see Defs' Br, p 48-49, that the narrowest possible legal enactment will be enough to achieve the government's compelling interest in preventing voter intimidation. Instead, it shows just the opposite: after Congress banned subjective attempts to intimidate voters in Section 131(b) of the Civil Rights Act of 1957, voter intimidation remained rampant across the country precisely because Section 131(b)'s subjective intent requirement thwarted effective enforcement.[28] Indeed, Section 131(b) was so ineffective as a result of the subjective intent requirement that the United States could not even protect its *own witnesses* in voting rights suits from voter intimidation.[29]

As a result, voter registration numbers remained dismally low throughout the South even after the passage of Section 131(b).[30] That failure was largely traced to the ineffectiveness of then-

[28] Voting Rights Act of 1965: Hearing Before the H. Comm. on the Judiciary, 89th Cong. 12 (1965) (statement of Nicholas deB. Katzenbach, Att'y Gen. of the U.S.) ("The litigated cases amply demonstrate the inadequacy of present statutes prohibiting voter intimidation. . . . [P]erhaps the most serious inadequacy results from the practice of . . . courts to require the Government to carry a very onerous burden of proof of 'purpose.' Since many types of intimidation . . . involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective."), available at https://perma.cc/N9S4-KH2P (accessed May 15, 2023).

[29] See *United States v Bd of Educ of Greene Cnty*, 332 F2d 40, 44-46 (CA 5, 1964); *id.* at 46-47 (Rives, J., specially concurring).

[30] See Voting Rights Act of 1965: Hearing Before the H. Comm. on the Judiciary, 89th Cong. 3-4 (1965) (statement of Nicholas deB. Katzenbach, Att'y Gen. of the U.S.)

current law to prevent voter intimidation.[31] And it wasn't until Congress passed Section 11(b)—which has unfortunately seen a resurgence of use because of a new wave of voter intimidation across the country[32]—that voter intimidation started to recede.

Congress's 1965 choice to prohibit objectively intimidating activities that intimidate voters regardless of intent—which extends to prohibitions on circulating electoral disinformation[33]—was constitutional, not because it was the narrowest possible ban on voter intimidation that could be conceived, but because it was narrowly tailored to achieve Congress's goal of preventing voter intimidation. See *Williams-Yulee*, 575 US at 454 (a law must "be narrowly tailored, not . . .

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[31] See *Voting in Mississippi*, *supra*, at 56-57 ("[I]t is not surprising that the existence of [Section 131(b)] has failed to allay fears of . . . reprisal for attempted registration or voting . . . . Experience over the past eight years. . . has demonstrated that judicial remedies have not proved effective in eliminating . . . the effects of intimidation . . . ."); U.S. Comm'n on Civil Rights Report, *Civil Rights '63*, 26 (1963) ("The conclusion is inevitable that present legal remedies for voter discrimination are inadequate. . . . [P]rivate intimidation—both before and after registration—frustrates the ultimate exercise of the right."), available at https://www.crmvet.org/docs/ccr_63_civil_rights.pdf (accessed May 15, 2023). See also *id.* at 15 (noting relationship between intimidation and low rate of increase in Black registration despite efforts of federal government).

[32] See *Clean Elections USA*, 2022 WL 17088041, at *1-2 (Ex. 2); *Allen v Graham*, No. 20-997, 2021 WL 2223772, at *7-8 (MD NC 2021) (Ex. 1); *Wohl TRO*, 498 F Supp 3d at 482-85; *Council on Am-Islamic Rels-Minn v Atlas Aegis, LLC*, 497 F Supp 3d 371, 379, 381 (D Minn 2020); *LULAC*, 2018 WL 3848404, at *3-4; (Ex. 5) *Daschle v Thune*, No. 04-cv-4177, Dkt. 6, at 2 (D SD Nov. 2, 2004) (Ex. 10).

[33] *Clean Elections USA*, 2022 WL 17088041, at *1-2 (temporary restraining order against circulating information falsely suggesting lawful voters were unlawfully voting) (Ex. 2); *Wohl TRO*, 498 F Supp 3d at 482-85 (robocall here violates Section 11(b)); *LULAC*, 2018 WL 3848404, at *3-4 (plausible allegations that defendants were defaming lawful voters states good claim under Section 11(b)) (Ex. 5). See also Compl. ¶¶ 29-31, *United States v NC Republican Party*, No. 92-161-CIV-5-F, Dkt. No. 1 (United States alleging that the North Carolina Republican Party violated Section 11(b) when they sent postcards to voters falsely warning them that they were not eligible to vote in an upcoming election) (Ex. 8); cf. *Katzenbach v Original Knights of the KKK*, 250 F Supp 330, 342 (ED La. 1965) (Wisdom, J.) (noting, of the Klan's intimidation tactics in the 1960s, "sometimes the attempted intimidation is by threat of violence, sometimes by character assassination").

perfectly tailored"). See also *Wohl TRO*, 498 F Supp 3d at 486 n 29 (Section 11(b) is "narrowly tailored to advance compelling government interests."); *Wohl MSJ*, ___ F Supp 3d at ___; 2023 WL 2403012, at *27 n 29 (similar). In other words, Congress's choice in Section 11(b) to eliminate the subjective intent requirement and pass a broad ban on voter intimidation after watching Section 131(b)'s narrower prohibition on voter intimidation fail was an appropriately tailored response to its continued failure to protect the right to vote. Indeed, enduring nearly a decade of failure was far more than Congress had to do to survive strict scrutiny. See *Burson*, 504 US at 209 (courts should not require a "political system" to "sustain some level of damage before the legislature could take corrective action" under strict scrutiny analysis).

Why does this extended discussion of federal voter intimidation law matter for the analysis of the constitutionality of MCL 168.932(a)? Well Section 11(b) and (c) of the Voting Rights Act sweep more broadly than MCL 168.932(a) because Section 11(b) bans voter intimidation with no intent requirement at all and Section 11(c) bans vote buying (thereby encompassing MCL 168.932(a)'s prohibition on bribery). See 52 USC 10307(b)-(c).[34] So if Section 11(b)'s ban on voter intimidation is constitutional, then MCL 168.932(a) should be constitutional as well.

Defendants attempt two contrary arguments: first, they suggest that no sanction is necessary because counterspeech is supposedly enough to prevent voter intimidation. Defs' Br, p 49. Second, they suggest that civil sanctions should be enough to deter voter intimidation and therefore criminal sanctions are unnecessary. Defs' Br, p 50. Neither argument is persuasive.

[34] Likely because Section 11(b) does not have a mens rea requirement, violations of Section 11(b)—unlike many other sections of the Voting Rights Act—do not support criminal liability. See 52 USC 10308(a)-(c). Other federal criminal laws, however, ban voter intimidation. See Richard C. Pilger, *Federal Prosecution of Election Offenses* 49-55 (8th ed. 2017); *e.g.*, 18 USC 241-42, 245(b), 594, 610; 52 USC § 20511(1).

Counterspeech: Counterspeech isn't an effective response to false speech about the mechanics of elections that intimidates voters—particularly when that speech occurs close to the election. See *Mackey*, 2023 WL 363595, at *24 ("Counter speech, a typical mode of countering false speech, is unlikely to be of much use in the context of tweets spread across the far reaches of the internet in the days and hours immediately preceding an election.") (Ex. 7). And the mere fact that voting rights organizations and state governments (buttressed by a temporary restraining order) were able to seemingly prevent the worst of the damage here, Defs' Br, pp 49-50, should not help the defense either: the government can punish unlawful attempts to sow disinformation and is not limited to only punishing successful disinformation campaigns.

And though Defendants try to analogize the false speech here (false speech about election processes) with the false speech at issue in *Alvarez* (false speech from a public official about his qualifications for office), the analogy doesn't work. Unlike the situation with false speech about a candidate for office—where reporters, the opposing candidate, and supporters all have an interest in disproving the false speech—false speech about the mechanics of an election remains a much harder counterspeech challenge. The newsworthiness of the information can be lower (particularly for precisely targeted disinformation); the message to convey is harder, technical, and able to be drowned out by the issue of the day; and there's the ever-present risk that repeating certain disinformation will instead reinforce the original harm (telling individuals *not* to think about something frightening can be the surest way to make them think of precisely that).

Criminal sanctions: The government has a "compelling interest" in "making sure voters have accurate information about how, when, and where to vote." *Mackey*, 2023 WL 363595, at*24. (Ex. 7). And criminal sanctions against intentional misinformation efforts serve a critical governmental purpose because they "are one of the few tools at the Government's disposal for"

deterring intentional misinformation. *Id.* After all, civil cases can face justiciability challenges after the passage of an election,[35] and there's rarely—if ever—do-overs with elections, so monetary damages and injunctions may well be seen as a small price to pay for obtaining political power through disenfranchisement by disinformation and intimidation. So criminal sanctions play a critical role in ensuring that Americans' constitutional right remains sacrosanct regardless of a Defendants' willingness to pay and that our elections are not "poisoned by corruption or controlled by violence and outrage, without legal restraint." *Ex Parte Yarbrough*, 110 US at 667.

Moreover, Defendants' cases, Defs' Br, p 50, for the supposed proposition that criminal remedies are permissible only when civil sanctions are ineffective don't say that.[36] The *dissent* from *X-Citement Video* simply states that the imposition of criminal penalties on speech can be overbroad if the statute lacks a sufficient mens rea element. *United States v X-Citement Video, Inc*, 513 US 64, 86; 115 S Ct 464; 130 L Ed 2d 372 (1994) (Scalia, J., dissenting). The solution to that problem is reading the statute to impose an appropriate mens rea element (as the majority did *X-Citement Video*). See *id.* at 78 (majority opinion of Rehnquist, C.J.). And *Gertz* is even more inapt: leaving aside for that moment that *Gertz* suggests that Defendants' activities aren't entitled to any First Amendment protection at all,[37] *Gertz* licenses punitive damages for knowing falsehoods, see 418 US at 349 (rejecting punitive damages in defamation cases "when liability *is not based* on a showing of knowledge of falsity or reckless disregard for the truth" (emphasis

[35] Cf. *City of LA v Lyons*, 461 US 95; 103 S Ct 1660; 75 L Ed 2d 675 (1983).

[36] Amici also note that the assumption underlying Defendants' argument—that criminal sanctions necessarily chill more speech than civil sanctions—runs contrary to the way the Court saw the issue in *New York Times Co v Sullivan*. See 376 US 254, 278; 84 S Ct 710; 11 L Ed 2d 686 (1964) ("Plainly the Alabama law of civil libel is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." (cleaned up)).

[37] See *Gertz*, 418 US at 340 ("[T]here is no constitutional value in false statements of fact.").

added)). So again, so long as Defendants acted with a sufficient mens rea to menace or use corrupt means or device to deter electoral participation, the First Amendment should be no obstacle to imposing consequences for their attempted corruption of the 2020 election.

3. Even if Defendants can show that the robocalls contained their opinions, that does not otherwise establish an as-applied First Amendment defense

Defendants—relying on a single passage from *Gertz*—contend that their robocalls "cannot beget criminal liability" supposedly because the robocalls "contain[] opinion," Defs' Br, p 53 (citing *Gertz,* 418 US at 339-40). Defendants' argument reflects a misreading of *Gertz* that has been rejected by the U.S. Supreme Court and does not provide an alternative basis for a First Amendment defense here.

As the U.S. Supreme Court explained in *Milkovich v Lorain Journal Co,* Defendants' arguments from *Gertz* misread "dictum," and are "contrary to the tenor and context of the passage," and "ignore[s] the fact that expressions of 'opinion' may often imply an assertion of objective fact." 497 US 1, 18; 110 S Ct 2695; 111 L Ed 2d 1 (1990) (Rehnquist, C.J.). Indeed, *Milkovich* rejects the "artificial dichotomy between opinion and fact" that Defendants urge here, 497 US at 19, and refuses to create "a wholesale" constitutional protection "for anything that might be labeled 'opinion,'" *id.* at 18. As a result, there is no "additional separate constitutional privilege for 'opinion,'" and Defendants can properly be held liable here so long as "a reasonable factfinder could conclude that the statements in the" robocalls "imply an assertion," *id.* at 21, of false information meant to deter electoral participation.

* * *

First Amendment theory can be complicated but the answer in this case—particularly given Defendants' guilty plea—is clear. There's no First Amendment right to commit fraud, nor is there one to engage in illegal transactions pursuant to a course of criminal conduct, nor is there one to

implicitly threaten voters with tortious conduct for exercising their constitutional right to vote. And even if such activities were entitled to some modicum of First Amendment—and they're not—Defendants' as-applied constitutional challenge would still fail both because the "the State may prohibit messages intended to mislead voters about voting requirements and procedures," *Minn Voters Alliance*, 138 S Ct at 1889 n 4, and because MCL 168.932(a) can survive strict scrutiny.

B. Any overbreadth challenge to MCL 168.932(a) should fail because of the scope of the law's legitimate applications

Because Defendants' as-applied First Amendment challenge fails for multiple independently sufficient reasons, their ability to prevail on a First Amendment challenge turns on their ability to succeed on an overbreadth challenge. An overbreadth challenge allows a statute to be invalidated on First Amendment grounds when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash State Grange v Wash State Republican Party*, 552 US 442, 449 n 6; 128 S Ct 1184; 170 L Ed 2d 151 (2008).

Even so, the overbreadth doctrine is "strong medicine" meant to be "sparingly" applied and "only as a last resort." *Broadrick*, 413 US at 613. Thus, "a law's application to protected speech" must "be substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications" before it may be invalidated for overbreadth. *Hicks*, 539 US at 119-20 (cleaned up). Finally, "rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)," *id.*, because "the overbreadth doctrine's concern with chilling protected speech attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct," *id.* at 124 (cleaned up).

That standard should doom any overbreadth challenge here. MCL 168.932(a) has a wide breadth of legitimate applications to conduct that is not "necessarily associated with speech," *Hicks*, 539 US at 120, such as preventing political violence and murder. And the government interest in preventing such conduct isn't just legitimate, it is "compelling," *Burson*, 504 US at 206, and "essential to the successful working of this government," *Ex Parte Yarbrough*, 110 US at 666-67.

Moreover, even where MCL 168.932(a) is applied to speech alone, disinformation is only one way speech can be used to unlawfully deter electoral participation and corrupt elections. For example, there is plenty of other ways that voter intimidation tactics have deterred electoral participation, including defamation;[38] publication of lists of registered voters;[39] and threats of eviction, violence, property damage, and murder.[40] And in many of those situations, the offending speech is entitled to little-to-no constitutional protection,[41] and counterspeech is not seen as the only permissible constitutional remedy (*e.g.*, we don't, for example, limit defamation plaintiffs to counterspeech alone.) Nor, in such circumstances, is truth inevitably a defense either: for example, while truth can be a defense in a defamation case, it is not one in a true threats case because, if

[38] See *LULAC*, 2018 WL 3848404 (Ex. 5); cf. *Katzenbach*, 250 F Supp at 342 (noting Klan's use of "character assassination" as a tool of intimidation).

[39] See U.S. Comm'n on Civil Rights Report, *Voting in Mississippi*, 61 (1965) (explaining how Mississippi law intimidates voters by requiring the publication of the name and address of any applicant to vote). See also *King v Cook*, 298 F Supp 584, 587 (ND Miss. 1969) (noting how Mississippi law deterred voter registration efforts).

[40] See *United States v Robinson*, 813 F3d 251, 258 (CA 6, 2016); *Paynes v Lee*, 377 F2d 61, 63 (CA 5, 1967); *United States v Butler*, 25 F Cas 213, 220 (CC D SC 1877).

[41] See *Stevens*, 559 US at 468 (defamation excluded from First Amendment protections); *Virginia v Black*, 538 US 343, 360 (2003) (true threats excluded from First Amendment protections); cf. *Williams*, 553 US at 297 ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection.").

anything, the truth of a speaker's willingness and ability to carry out a death threat makes it *more* frightening.[42]

Thus, Defendants' overbreadth challenge should fail. Defendants' shotgunning of hypothetical cases, Defs' Br, pp 27-31, does not provide a basis for invalidating the statute on overbreadth grounds, where—as is here—the statute has a wide scope of legitimate applications to speech and non-speech conduct alike, see *Hicks*, 539 US at 119-20, 124. See also *Wash State Grange*, 552 US at 449-450 ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary case . . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." (cleaned up)).

C. Vagueness

Defendants also challenge MCL 168.932(a) on due process grounds for being void-for-vagueness. Amici will first explain the nuances of the void-for-vagueness doctrine. Then Amici will explain why Defendants' void-for-vagueness challenge fails.

1. The void-for-vagueness doctrine is more art than science

A law is unconstitutionally vague if it either (i) "fails to provide a person of ordinary intelligence fair notice of what is prohibited" or (ii) "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 US at 304. The void-for-vagueness doctrine protects individual rights and polices the separation-of-powers by prohibiting the government from "leaving the people in the dark about what the law demands and allowing

[42] This is not unusual in First Amendment law. Contrary to Defendants' suggestions, Defs' Br, p 53-54, the First Amendment permits punishment for true statements in some cases: for example, the truth of an insider stock tip is not a defense in an insider trading case nor is the truth of a statement agreeing to rig prices a defense in an antitrust case.

prosecutors and courts to make it up." *Sessions v Dimaya*, 138 S Ct 1204, 1224; 200 L Ed 2d 549 (2018) (Gorsuch, J., concurring in part and in the judgment).

So far, so good. But in practice, the actual contours of the void-for-vagueness doctrine are anything but clear for at least three reasons.

First, the United States Supreme Court has recognized that perfect precision is neither required by the void-for-vagueness doctrine nor even possible as "we can never expect mathematical certainty from our language." *Grayned*, 408 US at 110. Thus, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Williams*, 553 US at 304 (cleaned up).[43] Instead, the void-for-vagueness doctrine only demands a "reasonable degree of certainty" as to the prohibited conduct, *Boyce Motor Lines v United States*, 342 US 337, 340; 72 S Ct 329; 96 L Ed 367 (1952), and a law should not be invalidated simply because a court can imagine close cases as "close cases can be imagined under virtually any statute," *Williams*, 553 US at 305-306.[44] Of course, distinguishing between "perfect" and "reasonable" certainty is hardly a scientific inquiry.

Second, while some decisions of the U.S. Supreme Court imply that the trigger for vagueness comes when a statute incorporates terms like "annoying" or "indecent" that have "wholly subjective judgments without statutory definitions, narrowing context, or settled legal

[43] See also *Ward v Rock Against Racism*, 491 US 781, 795; 109 S Ct 2746; 105 L Ed 2d 661 (1989) (rejecting vagueness challenge even though language used was "undoubtedly flexible and the officials implementing the[] [rules] will exercise considerable discretion"); cf. *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489, 503; 102 S Ct 1186; 71 L Ed 2d 362 (1982) (upholding law against vagueness challenge, even though "we do not suggest that the risk of discriminatory enforcement is insignificant here").

[44] See also *Hill v Colorado*, 530 US 703, 733; 120 S Ct 2480; 14 L Ed 2d 597 (2000) (recognizing that "imagination can conjure up hypothetical cases," but noting that more is needed to establish unconstitutional vagueness).

meanings," *Williams*, 553 US at 306, in practice it is rarely a single word or phrase that pushes a law over into the realm of unconstitutional vagueness. For example:

- In *Johnson* and *Dimaya*, the Court made clear that its vagueness determination rested on *multiple, overlapping* elements of the statutory schemes providing for increased penalties after the commission of violent crimes. In particular, the Court looked to the statutory text and noted that the statutes' requirements that "a court . . . picture the kind of conduct that the crime involves in the ordinary case," and then "judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk" of violence meant that courts had to perform multiple overlapping vague inquiries–the combination of which threatened to inject substantial vagueness into the statutory scheme. *Dimaya*, 138 S Ct at 1216 (majority opinion). But that alone might not have been enough, as the Court then went beyond that textual inquiry and looked to the courts' "years of experience" of trying—but failing—to articulate a manageable standard for applying both the statutes before concluding they were unconstitutionally vague. *Johnson v United States*, 576 US 591, 602; 135 S Ct 2551; 192 L Ed 2d 569 (2015); *Dimaya*, 138 S Ct at 1218 (noting "confusion and division among lower courts").[45]

- In *FCC v Fox*, the Court determined that the Federal Communications Commission's indecency standard was vague—not necessarily because of the inherent vagueness of the term "indecent"—but due to notice problems created by FCC's shifting understanding of when a "fleeting" moment of indecency could be actionable. *FCC v Fox Television Stations, Inc*, 567 US 239, 254-55; 132 S Ct 2307; 183 L Ed 2d 234 (2012). Thus, while the Court has suggested that the term "indecent" may be unconstitutionally vague, see *Williams*, 553 US at 306, in practice, the Court took notice of surrounding external factors before making that determination.[46]

- And while in *FCC v Fox* the circumstances helped push an ambiguous provision into the realm of unconstitutional vagueness, the opposite situation (circumstances obviating a potential vagueness problem) has occurred as well. In *Grayned*, for example, the Court explained that while it was concerned with the textual vagueness in the ordinance—noting that "[w]ere we just left with the words of the ordinance, we might be troubled by the imprecision," 408 US at 110—the surrounding context of the ordinance as well as case law

[45] As another example of this phenomenon, in *City of Chicago v Morales*, it wasn't just the word "loitering" that produced the vagueness problem: it was that the potentially vague term lacked an appropriate limiting principle or otherwise limited to loitering with a harmful purpose. *Chicago v Morales*, 527 US 41; 119 S Ct 1849; 144 L Ed 2d 67 (1999)

[46] The same can be said of *People v Boomer*. See 250 Mich App 534, 655 NW2d 255 (2002). See also Defs' Br, p 43-44. While that statute at issue—which allowed for prosecutions for using "insulting" language—was so broad as to "subject a vast percentage of the populace to a misdemeanor conviction," 250 Mich App at 540, the court also considered whether there was sufficient "legislative guidance" to cure any vagueness resulting from otherwise vague language before concluding that the statute was unconstitutional, *id* at 540-541.

interpreting the terms at issue sufficiently mitigated any due process concerns with the ordinance, *id.* at 111-113.

In short, when evaluating vagueness, it is generally not one word that dooms a statute to unconstitutionality. Instead, it is only when multiple vague and potentially problematic textual provisions are stacked on top of each other that unconstitutional vagueness begins to emerge. And even then, the Court also tends to look to the statutory text and consider context and history before making a final determination.

Third, while the Court has explained that the void-for-vagueness doctrine "should not . . . be mechanically applied" and that "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment," *Hoffman Estates*, 455 US at 498, the importance of the type and structure of enactment can (again) vary.

For example, the Court has suggested that strict liability criminal statutes should be subject to a heightened vagueness standard. See *Colautti v Franklin*, 439 US 379; 99 S Ct 675; 58 L Ed 2d 596 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. . . . [T]he absence of a scienter requirement" can make a "statute . . . little more than a trap for those who act in good faith." (cleaned up)), *overruled on other grounds in Dobbs v Jackson Women's Health Org*, 142 S Ct 2228; 213 L Ed 2d 545 (2022). The converse is also true: the inclusion of a mens rea requirement can "alleviate vagueness concerns." *Gonzales v Carhart*, 550 US 124, 149; 127 S Ct 1610; 167 L Ed 2d 480 (2007); see also *Posters 'N' Things, Ltd v United States*, 511 US 513, 526; 114 S Ct 1747; 128 L Ed 2d 539 (1994). But that merely *can* be true; a mens rea element doesn't guarantee constitutionality. See *Screws v United States*, 325 US 91, 105; 65 S Ct 1031;

89 L Ed 1495 (1945) ("The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain.").

Likewise, the Court has suggested that a "more stringent vagueness test" applies when a statute implicates constitutional rights such as "the right of free speech or of association." *Hoffman Estates*, 455 US at 499. But again, the Court has cautioned that the heightened standard only goes so far, and that "perfect clarity and precise guidance have *never* been required even of regulations that restrict expressive activity," *Williams*, 553 US at 304 (emphasis added).[47]

The result of these doctrinal twists and turns is that it is very hard to speak definitely about the boundaries of the void-for-vagueness doctrine. In the end, the void-for-vagueness doctrine is a reasonableness test, not meant to be mechanically applied, that considers a wide range of aggravating and mitigating factors, with little guidance on when any potential vagueness crosses the threshold of unconstitutional vagueness. And perhaps that is by design—and maybe even a perk—because it helps minimize collateral damage to other statutory provisions when a particular provision is found to be unconstitutionally vague.

2. Nonetheless, the statutory language at issue should not violate due process—either as-applied or facially

Despite the inherent vagueness in the void-for-vagueness inquiry, any vagueness in the statutory language here does not rise to a violation of due process. That is so for at least three reasons:

First, Defendants should likely still lose when the facts are evaluated "in the light most favorable to the prosecution, Defs' Br, p 1, under their definition of "menace." Indeed, much of Defendants' vagueness arguments are premised on the idea that menace should be narrowly

[47] See also *Humanitarian Law Project*, 561 US at 19.

defined to just threats "of physical assault," Defs' Br, p 10, to avoid potential vagueness problems, Defs' Br, p 44 n16 ("If this Court disagrees [with Defendants' interpretation of menace], then *menace* is also vague.").

The problem with that approach for Defendants, however, is that if their conduct falls under their narrow definition of "menace," then they lose both their statutory interpretation argument and their vagueness challenge. And, as argued earlier, the argument that Defendants didn't threaten the recipients with a potential assault overlooks just what exactly was threatening about their robocall. See *supra* Subsection I.A.1.

At least implicit in the looming threat of vaccinations and warrant checks in the robocall is the specter of unconsented-to vaccinations and wrongful arrests executed with excessive force. Both of those are batteries under well-established tort law principles. *Id.* Accordingly, there's at least a colorable case that Defendants should have been on notice that their conduct was illegal because it was suggesting that anyone who voted by mail—regardless of whom they voted for in any race—would be risking potential batteries, and therefore that such conduct would be prohibited even under Defendants' preferred interpretation of the statute.

Second, even if Defendants can establish that they didn't menace the recipients of the robocall, their subsequent guilty pleas to a fraud charge present yet another obstacle to their vagueness arguments. Defendants' own brief seemingly concedes that fraud constitutes a corrupt device. See Defs' Br, p 25 ("A device is a scheme to trick or deceive; a stratagem or artifice, *as in the law relating to fraud*." (cleaned up) (emphasis added)). As a result, Defendants' vagueness challenge should fail because their conduct is proscribed by the statute at issue. See *Scales*, 367 US at 223 (rejecting vagueness challenge when "whatever abstract doubts might exist on the matter, this case presents no such problem"). See also *Humanitarian Law Project*, 561 US at 21

("[T]he dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail."); *id.* at 23 (rejecting idea that attorney "could escape discipline on vagueness grounds if his own speech were plainly prohibited").[48]

Finally, even if Defendants do not lose under their own interpretation of the statute, there's still no constitutional vagueness problem with the "corrupt means or device" theory of liability. The term "corrupt" appears widely in Michigan law,[49] and as the Court of Appeals properly recognized prior Michigan cases have given the term a reasonably precise definition:

> "Corrupt behavior" refers to "intentional, purposeful, deliberate, and knowing wrongful behavior," *Waterstone*, 296 Mich App. at 138, while "corrupt intent" means a "sense of depravity, perversion or taint," *Perkins*, 468 Mich. at 456. A person of reasonable intelligence should therefore understand that he or she violates MCL 168.932(a) by using any intentional, purposeful, deliberate, and knowingly wrongful method with the depraved intent to interfere with voting.

Burkman, ___ Mich App ___, at ___; slip op at 12 (Appx 202a).

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[48] Defendants may try to argue in response that their device was not corrupt because it was not designed to obtain a benefit. *Cf.* Defs' Br, p 18 ("An act is committed corruptly when it is done with the knowledge that it is wrong and with the intent to get money or to gain some other advantage."). But even if the Court requires the State to show that Defendants sought to obtain a benefit, that argument should still fail because "the beneficiary of an unlawful benefit need not be the defendant or his friends" and "Defendants' conduct may have been an attempt to help Donald Trump unlawfully secure a professional advantage—the presidency." *United States v Fischer*, 64 F4th 329, 341, n 5 (CA DC, 2023) (Walker, J., concurring in part and in the judgment). After all, "[f]ew would doubt that" a defendant "could be convicted of corruptly bribing a presidential elector if he paid the elector to cast a vote in favor of a preferred candidate—even if the defendant had never met the candidate and was not associated with him." *Id.*

[49] See, e.g., Const 1963, art. 5, § 10; Const 1963, art. 11, § 7; MCL 4.82; MCL 6.1; MCL 18.1551(3); MCL 110.28; MCL 141.1365(6); MCL 257.309(7); MCL 257.312b(6); MCL 380.415(1); MCL 380.619(1); MCL 600.1349; MCL 750.119(1). Other Michigan laws use the term "corruptly". See, e.g., MCL 32.1131; MCL 38.422; MCL 38.515; MCL 51.363; MCL 600.4313; MCL 600.6470; MCL 750.117; MCL 750.118; MCL 750.120.

Those established interpretations should avoid any vagueness issues, see *Grayned*, 408 US at 111-113, both because the inclusion of a mens rea term helps minimize any vagueness concerns[50] and because there's a wide body of case law recognizing that laws prohibiting corrupt behavior are–at least in most instances–not unconstitutionally vague.[51]

Nor is the Court of Appeals' opinion "internally inconsistent" about MCL 168.932's mens rea element because the Court of Appeals suggested that "unknowingly false speech is proscribed by the statute." Defs' Br, p 45. That's because while false and fraudulent statements about the mechanisms of voting are one corrupt means or device prohibited by the statute—and in such instances the State would have to show knowing falsehoods to establish that Defendants' acted

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[50] See, e.g., *Carhart*, 550 US at 149 ("The Court has made clear that scienter requirements alleviate vagueness concerns.").

[51] See, e.g., *United States v Caldwell*, 581 F Supp 3d 1, 16-20 (D DC 2021) (engaging in an extensive review of prior case law on issue and concluding that term "corruptly" in primary federal obstruction statute is not unconstitutionally vague). The primary case finding that the term "corrupt" may be unconstitutionally vague at times is *United States v Poindexter*, 951 F2d 369, 377-86 (CA DC, 1991).

That said, since *Poindexter*, "other courts have cabined [*Poindexter*'s] vagueness holding to its unusual circumstances." *United States v Edwards*, 869 F3d 490, 502 (CA 7 2017). Regardless, however, *Poindexter*'s "unusual circumstances" do not apply here. In *Poindexter*, the D.C. Circuit held a criminal obstruction statute unconstitutionally vague *only as applied to the defendant's conduct in that case*, on the ground that "'corruptly influencing' a congressional inquiry does not at all clearly encompass lying to the Congress." 951 F2d at 378, 386. The court specifically left open the possibility that the statute might constitutionally be applied to certain "core" behavior, including, "for the purpose of influencing an inquiry, influenc[ing] another person (through bribery or otherwise) to violate a legal duty." *Id.* at 385. The instant case involves core behavior that a person of "common intelligence," *id.* at 378, would understand to violate the criminal statute at issue here. MCL 168.932 prohibits, among other things, any "attempt" to "deter" voting "by means of bribery, menace, or other corrupt means or device." MCL 168.932. Here, the words, "bribery" and "menace" provide a helpful gloss on the meaning of "corrupt means or device," clarifying that "corrupt" instrumentalities include both improper inducements such as bribery, and improper deterrents such as "menace." A person of common intelligence should have no trouble surmising that fraudulent robocalls putting voters in fear of disclosure of their personal information to police, debt collectors, and the CDC are an improper deterrent, similar to "menace," amounting to a "corrupt means or device" under the meaning of MCL 168.132.

with a sufficient mens rea to violate the criminal statute—false and fraudulent statements are not the only corrupt means or device by which a defendant could violate the statute, and in at least some of those circumstances the statute could fairly proscribe unknowingly false speech.

For example, Defendants concede that "blackmail . . . would fit neatly among bribery and menace" in MCL 168.932. Defs' Br, p 25. But a blackmailer who threatened a prospective voter if they voted (by for example, threatening to release hacked nude photos from the prospective voter's smartphone if they voted) wouldn't have a defense to a MCL 168.932 charge if the blackmailer was unknowingly wrong about being in possession of the material that serves as the basis for the blackmail threat (in this instance, let's assume that blackmailer was simply mistaken that they were in possession the prospective voter's nude photos). The same should also be true of threats that didn't rise to the level of physical assaults (assuming, for the moment, that Defendants are correct in their interpretation of menace); a defendant intending to threaten a prospective voter with eviction if that person voted, wouldn't have a defense to a MCL 168.932 charge if the defendant was simply mistaken that they could carry out their eviction threat (say because there was an eviction moratorium). Thus, the Court of Appeals was right when it noted that, in at least some instances, an unknowing falsehood wouldn't necessarily preclude a defendant for being prosecuted for using a corrupt means or device to deter electoral participation under MCL 168.932.

* * *

MCL 168.932 is not unconstitutionally vague. Not only is Defendants' conduct prohibited under their own interpretation of the statute after their guilty pleas to the Ohio fraud charges (thereby eliminating any concerns that Defendants lacked fair notice that their conduct was illegal), but also the mens rea element required by the term "corrupt" when combined with established

Michigan case law interpreting the term in other contexts provide sufficient notice of what it prohibited as well as sufficient guidelines to prevent arbitrary enforcement.

Finally, any facial overbreadth challenge to MCL 168.932 should fail for the same reason the First Amendment overbreadth challenge fails: speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute that has a legitimate sweep. "Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Williams*, 553 US at 304, and therefore a statute that is valid "in the vast majority of its intended applications" should not be invalidated under a facial vagueness challenge, *Hill*, 530 US at 733. Indeed, in the unlikely event that Michigan breaks its nearly 75-year history of not using MCL 168.932 against campaign speech for or against the merits of particular candidates (assuming for the sake of argument such an interpretation is even possible), see Defs' Br, p 30 (raising hypothetical about prosecutions for misrepresenting candidate's tax proposals), and starts bringing such prosecutions, then as-applied challenges should be more than enough to safeguard constitutional rights. See *Hoffman Estates*, 455 US at 504 ("Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise."). See also *Fox Television Stations, Inc*, 567 US at 254-55 (applying vagueness doctrine where shift in understanding of regulation denied fair notice of what was prohibited).

V. CONCLUSION

The Court of Appeals should be affirmed, or leave to appeal should be dismissed as improvidently granted because of the changed factual circumstances created by Defendants' guilty pleas to the Ohio fraud charge.

Dated: May 30, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023, I electronically filed the foregoing using the TrueFiling System which will send notification of this filing to all registered counsel of record.

Date: May 30, 2023

Respectfully submitted,

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