STATE OF MAINE
ANDROSCOGGIN, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO: AND-22-317

STATE OF MAINE,
Appellee

v.

JACOB R. LABBE, SR.,
Appellant

ON APPEAL FROM THE SUPERIOR COURT

BRIEF OF AMICUS CURIAE OFFICE OF ATTORNEY GENERAL

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II. ***State v. Labbe* is not a "true threats" case; Maine's stalking statute is constitutional as applied to Jacob R. Labbe, Sr.**

III. **The Law Court should not use the instant case to render an opinion on the constitutionality of Maine's stalking statute as it might be applied in "true threats" cases not before the Court.**

SUMMARY OF THE ARGUMENT

Because *State v. Labbe* is still pending on direct appeal, this Court can consider whether the Supreme Court's holding affects Labbe's conviction. However, the specific challenge considered by the Supreme Court in *Counterman v. Colorado,* 600 U.S. 66, 143 S.Ct. 2106 (2023), was not raised or addressed in any manner below. Accordingly, this Court's review, even for unpreserved error that may implicate constitutional rights, must be for obvious error.

The State pursued a different theory of stalking than the Supreme Court majority considered in the context of its analysis of the Colorado statute in *Counterman.* Labbe's conviction was based on his repeated contact with the

victim, not any specific threat expressed in his communications. Because Labbe's conviction for stalking was not premised on an assertion that the content of his communications was threatening, this is not a "true threats" case calling for the analysis created by the *Counterman* majority. *Labbe* is legally and factually distinguishable from *Counterman*, and Labbe's prosecution does not implicate the First Amendment.

Should this Court determine that Labbe was prosecuted as a "true threats" case, it would be necessary to construe the stalking statute to determine the Legislature's intent with respect to defendant's subjective understanding of the effect of his conduct. *State v. Labbe* is not the case to articulate such a holding. Doing so in a case involving conduct not protected by the First Amendment, rather than in the context of a prosecution for content-based threatening communication that placed the issue was squarely before the trial court, would be to render an advisory opinion that risks extending *Counterman's* newly articulated *mens rea* standard beyond what is constitutionally required, in an area of law and human behavior in which the Legislature has articulated its policy and intention to protect stalking victims.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Office of Attorney General submits this brief in response to the invitation of the Maine Supreme Judicial Court, sitting as the Law Court, for briefs of amici curiae in the matter of *State of Maine v. Jacob R. Labbe Sr.*, Law Court Docket Number AND-22-317.

Labbe was convicted of domestic violence stalking (Class C), 17-A M.R.S. § 210-C(1)(B)(3), and two counts of violating a protection from abuse order (Class D), 19-A M.R.S. § 4011(1). Labbe's appeal included a challenge to the constitutionality of Maine's stalking statutes, 17-A M.R.S. §§ 210-A, 210-C (2022)[1], on vagueness grounds. Labbe did not articulate any other constitutional argument as part of his challenge to the statute.

After the Law Court heard oral argument on May 9, 2023, but before the Court issued its written decision, the United States Supreme Court issued its decision in *Counterman v. Colorado*, 600 U.S. 66, 143 S.Ct. 2106 (2023). In *Counterman*, the Supreme Court vacated a conviction under Colorado's stalking statute on First Amendment grounds. U.S. Const. amend. I. The Law Court has invited amici to address the following questions:

[1] Labbe was indicted for and convicted of violating 17-A M.R.S. § 210-C(1)(B)(3), a form of domestic violence stalking, which incorporates the elements of 17-A M.R.S. § 210-A, stalking. Section 210-A sets out the operable language for purposes of this appeal. Labbe's conduct occurred in 2019. Non-substantive changes to the stalking statutes made by P.L. 2021, c. 647, §§ B-24, B-27 (eff. Jan. 1, 2023), are not relevant to this appeal.

1. What effect, if any, does the U.S. Supreme Court's holding in *Counterman* have on Labbe's case and especially on the State's burden of proof, if any, with respect to the defendant's subjective awareness that his conduct could cause one of the effects enumerated in 17-A M.R.S. § 210-A?

2. In light of principles of issue preservation and retroactivity as set forth in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and similar cases, can and should the Law Court address in this appeal the issues raised by *Counterman*?

Except as specifically noted, Amicus relies on the parties' summaries of the procedural history and facts as set out in their initial briefs to the Law Court. Amicus first addresses the retroactivity question propounded by the Law Court.

ARGUMENT

I. The Law Court can consider the holding of *Counterman v. Colorado* in the context of this pending direct appeal, but because the issue has not been preserved, it must be reviewed for obvious error.

Supreme Court, First Circuit, and Law Court decisions all support the conclusion that *Counterman*'s holding can be applied to pending cases, including those, such as Labbe's, which is pending in the Law Court. *Griffith v. Kentucky*, 479 U.S. 314 (1987) (retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986) (implicating jury trial rights); *United States v Lopez-Pena,* 912 F.2d 1542 (1st Cir. 1989) (discussing *Griffith*; retroactive application of

United States v Gomez, 490 U.S. 858 (1989), to defendants' challenge to magistrates' empanelment of juries); *State v. Barnes*, 2004 ME 105, 854 A.2d 208 (retroactive application, on motion to reconsider in Law Court, of Confrontation Clause holding of *Crawford v. Washington*, 541 U.S. 36 (2004)[2]). Thus the additional layer of First Amendment protection created by the Supreme Court for stalking defendants alleged to have made "true threats" can be applied retroactively to prosecutions and convictions that are not yet final.

Because the specific error was not raised or litigated in the trial court, however, review must be for obvious error. "Even when a claim of error implicates a criminal defendant's constitutional rights, if the defendant failed to object at trial, the issue is unpreserved and we will upset the trial court's decision only if the error was obvious." *Barnes*, 2004 ME 105, ¶ 5 (citing *State v. Knox*, 2003 ME 39, ¶ 5, 819 A.2d 1011). This Court will find that an error is obvious "if it worked a substantial injustice or affected the defendant's substantial rights." *Id.* See also *In re Anthony R.*, 2010 ME 4,

[2] In *Barnes*, the Law Court applied *Crawford* retroactively, without discussing *Griffth*, *Lopez-Pena*, or the fact that it was doing so. The first *Barnes* decision was submitted on the briefs February 26, 2004, and the decision issued March 26, 2004. *Crawford* was issued March 8, 2004. The Law Court did not initially address *Crawford*'s Confrontation Clause holding. *State v. Barnes*, 2004 ME 38, 845 A.2d 575. Barnes moved for reconsideration within 14 days of the Law Court's first decision, as required by the Appellate Rules. The Law Court reviewed Barnes's motion for reconsideration in light of *Crawford*, and ultimately denied the motion. *State v. Barnes*, 2004 ME 105, ¶¶ 4, 12, 854 A.2d 208.

¶¶ 9-10, 987 A.2d 532 (citing *Barnes*, 2004 ME 105 ¶5, 854 A.2d 208; considering the argument that the statutory standard of proof in effect at the time of trial was unconstitutional in light of subsequent statutory change, and finding no obvious error).

The Law Court has further defined the standard as follows: " 'To prevail under the obvious error standard, [a defendant] must demonstrate that (1) there is an error, (2) that is plain, (3) that affects substantial rights, and, if so, (4) that it is error that seriously affects the integrity, fairness, or public reputation of judicial proceedings.' " The Court seeks "to determine whether the defendant received a fair trial." *State v. Athayde*, 2022 ME 41, ¶ 45, 277 A.3d 387 (review of jury instructions) (citing *State v. Lajoie*, 2017 ME 8, ¶¶ 13,15, 154 A.3d 132).

II. *State v. Labbe* is not a "true threats" case; Maine's stalking statute is constitutional as applied to Jacob R. Labbe, Sr.

When the procedural posture of a case necessitates obvious error review, the standard can present a challenge for the reviewing court. In the absence of the issue being raised, litigated or considered by the trial court below, the record is not designed to inform the appellate court's consideration of the applicability, in particular, of a new rule of law. See, *e.g., United States v. Lopez-Pena*, 912 A.2d at 1546-47 (discussing the difficulty of assessing plain

error—the "conspicuity of error must be gauged in hindsight"); *Berg v. Bragdon,* 1997 ME 129, ¶¶ 9-10, 695 A.2d 1212 (noting difficulty of review of unpreserved error absent development of facts and trial court findings). For purposes of this Court's review, however, the facts and arguments adduced at trial below do demonstrate that this matter is not one in which to consider whether Maine's stalking statute violates the First Amendment, because the conduct that provides the basis for Labbe's conviction is not premised on speech protected by the First Amendment.

The theory argued by the State below is that Labbe's continued contact, especially (though not limited to) that after the service of the order for protection from abuse, constituted the basis of the stalking charge. (Transcript ["T. "] 249) (prosecutor's response to motion for judgment of acquittal, referencing "PFA violations alone" as sufficient basis to support stalking); (T. 328-333) (rebuttal by prosecutor arguing that post-PFA contacts constitute course of conduct). The texts (State's Exhibit 3) and calls were in some cases devoid of any meaningful content at all. (T. 160, "breathing," "dead air"); (T. 179, "X, Y"); (T. 157-61, 182, repeated calls and texts, some unanswered). The State's closing focused on repeated contacts. (T. 302-06). The State specifically argued to the jury in rebuttal that there was no need to find any threatening conduct or behavior (T. 328) ("…you can put all that

aside…[defendant is arguing it's not threatening]…threatening is not the only element of the stalking statute.").

Defendant repeatedly argued at trial and in his brief on appeal that his conduct was non-threatening (and de minimis): "At no point was his behavior threatening or intimidating…"; "Again, at no time was there any threatening behavior…"; "texting non-threatening messages to see his son and get his clothing." (Blue Brief at 1, 2, 9, 13-14; T. 309-310, 312-16). Defendant's counsel did not equivocate: "You'll see he never gets angry, he never threatens her." (T. 319). The State's first brief on appeal, in reciting the facts, described repeated contact, often devoid of content, but does not describe threats, with the exception of one comment possibly directed at the victim's boyfriend. (Red Brief at 2, 4-8). Because the State's case was not premised on the "threatens" language in Maine's stalking statute,[3] it should not be affected by the holding of *Counterman.* In fact, the *Labbe* case is more akin to the scenario described by Justice Sotomayor in her concurrence, whereby the course of conduct consists of repeated contacts and intrusions, not the content of the

[3] Although this is not a "threats" case, one statement stands out—Labbe's comment that he "should break his legs" (T. 165) was "overheard" (as understood by the court, T. 190) by the victim when she and her boyfriend were delivering Labbe's belongings. (T. 165-66, 189-91). This content is irrelevant where the gist of the violation is repeated contact, not content. It simply did not matter whether he was texting Italian phrases (T. 179) or saying he wanted his Patriots gear. (T. 217). In the alternative, if it were argued that this comment is part of the stalking conduct, it is speech "integral to criminal conduct" that should be unprotected. *Counterman*, 600 U.S. at __, 143 S. Ct. at 2120 (Sotomayor, J., and Gorsuch, J., concurring in part and in the judgment).

communications. *Counterman*, 600 U.S. at __, 143 S. Ct. at 2120-21 (Sotomayor, J., and Gorsuch, J., concurring in part and in the judgment).

Unlike Labbe, *Counterman*, according to the Supreme Court majority, was a "true threats" case.[4] The majority's holding in *Counterman* was that the "state must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as *threatening violence*." *Counterman v. Colorado*, 600 U.S. at __, 143 S. Ct. at 2111–12 (emphasis supplied).

Justice Sotomayor did not view Counterman's stalking conduct as either pure speech or true threat. Her analysis is particularly relevant in light of the nature of Labbe's contacts with the victim:

> This is not such a case, however. Petitioner was convicted for "stalking [causing] serious emotional distress" for a combination of threatening statements and repeated, unwanted , direct contact with C.W. 497 P.3d 1039, 1043 (Colo. App. 2021). This kind of prosecution raises fewer First Amendment concerns for a variety of reasons. Stalking can be carried out through speech but need not be, which requires less First Amendment scrutiny when speech is swept in. See, *e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 62 (2006). *The content of the*

[4] Justice Sotomayor noted, however, "True threats doctrine came up below only because of the lower courts' doubtful assumption that petitioner could be prosecuted only if his actions fell under the true-threats exception." *Counterman*, 600 U.S. at __, 143 S.Ct. at 2121 (Sotomayor, J., and Gorsuch, J., concurring in part and in the judgment). The Supreme Court's majority rested on the lower courts' characterization of Counterman's messages as "true threats," even though Counterman was prosecuted under a provision of the Colorado statute describing repeated communications, and not threats. Colo.Rev.Stat. 18-3-602(1)(c)(2022); *Counterman*, 600 U.S. at ___ , 143 S. Ct. at 2112-2113. There is no similar finding or characterization in Labbe's prosecution.

> *repeated communications can sometimes be irrelevant, such as persistently calling someone and hanging up, or a stream of "utterly prosaic" communications. Ante, at 1. Repeatedly forcing intrusive communications directly into the personal life of "an unwilling recipient" also enjoys less protection. Rowan v. Post Office Dept.,* 397 U.S. 728, 738, 90 S.Ct.1484, 25 L.Ed.2d 736 (1970).

Counterman, 600 U.S. at __, 143 S.Ct. at 2121 (Sotomayor, J., and Gorsuch, J., concurring in part and in the judgment)(italicized emphasis provided). Justice Sotomayor noted further, "…stalking prosecutions that do not rely on the content of communications would raise even fewer First Amendment concerns." *Id*., n. 2.

The Supreme Court majority in *Counterman* did not find Colorado's statute facially unconstitutional. There was no holding that Colorado's stalking statute could not be used to prosecute stalking conduct under any set of circumstances. Instead, the Supreme Court determined that the prosecution of Billy Counterman was constitutionally deficient because there was no proof that he had "some subjective understanding of the threatening nature of his statements…[Colorado did not] show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman*, 600 U.S. at __, 143 S. Ct. at 2111-12. In contrast, because Labbe's conviction was premised on repeated

contacts, the stalking statute as applied to Labbe did not implicate his First Amendment rights.[5]

In her rebuttal argument below, the prosecutor suggested to the jury that they need not resolve conflicting characterizations concerning the nature of the parties' contacts prior to the service of the protective order, and that they could limit their view of Labbe's conduct to that following service of the order: "[…T]he defendant's conduct following service of that protective order on November 27 is more than enough evidence to find the defendant guilty of all of the charges." (T. 329). While there is nothing in the record to indicate which of the many contacts between the parties formed the basis for the jury's finding of a course of conduct underlying the stalking charge, the Court can note that this highlighted portion of the evidence is even further removed from the protection of the First Amendment, given the intervening order. See *Childs v. Ballou*, 2016 ME 142, ¶ 20, 148 A.3d 291, 297 (noting the authority of courts to constitutionally enjoin future conduct where past conduct has

[5] At least one court has arrived at a similar conclusion: "[*Counterman*] examined whether the First Amendment required proof of a defendant's subjective state of mind in a prosecution involving true threats, and if so, what standard of *mens rea* was sufficient in such a prosecution. *Id*. at ––––, 143 S.Ct. 2106. *Counterman* did not specifically examine whether the sending of repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another was noncommunicative, as the Court of Criminal Appeals held in *Barton* and *Sanders*. Accordingly, *Counterman* does not change our analysis." *Ex parte Ordonez*, No. 14-19-01005-CR, __S.W.3d__, 2023 WL 4711526, at *4 (Tex. App. July 25, 2023) (case italics supplied).

previously been " 'adjudicated illegal, tortious, or otherwise lacking in constitutional protection' ") (citations omitted).

Application of Maine's stalking statute to convict Jacob R. Labbe Sr. of stalking, where the course of conduct underlying the charge consisted of repeated contact, not threats or content, does not implicate the First Amendment, and thus is not obvious error.

III. The Law Court should not use the instant case to render an opinion on the constitutionality of Maine's stalking statute as it might be applied in "true threats" cases not before the Court.

The Law Court exercises judicial restraint to " 'avoid expressing opinions on constitutional law whenever a nonconstitutional resolution of the issues renders a constitutional ruling unnecessary.' " *State v. Bassford,* 440 A.2d 1059, 1061 (Me.1982) (quoting *Your Home, Inc. v. City of Portland,* 432 A.2d 1250, 1257 (Me.1981)). This Court should not rule on the constitutionality of the stalking statute as it may be applied to other defendants.[6] There is no need to conduct that analysis in this case, as Labbe's

[6] The stalking statute is clearly not facially unconstitutional. To find that a statute is unconstitutional on its face, this Court "would need to conclude that there are no circumstances in which it would be valid." *Conlogue v. Conlogue*, 2006 ME 12, ¶ 5, 890 A.2d 691 (citations omitted). Such challenges may be considered in limited First Amendment circumstances. See *State v. Maine State Troopers Ass'n*, 491 A.2d 538, 543 (Me. 1985) (First Amendment overbreadth doctrine is an exception applied as "last resort"; overbreadth must be "substantial" to declare a statute facially invalid) (internal citations omitted). In *State v. Maine State Troopers Ass'n*, the Law Court "decline[d] to speculate on possible application of the statute to hypothetical transactions," an approach that demonstrates the Court's recognition of the importance of case-specific facts to an as

conduct and the basis for his conviction do not implicate the First Amendment. A conscientious First Amendment analysis of Maine's stalking statute should be conducted in the context of its application to a particular defendant. "Moreover, in ruling on an as applied constitutional challenge, a trial court's factual findings and ultimate legal conclusion depend on its determinations regarding the credibility of the witnesses." *Berg v. Bragdon*, 1997 ME 129, ¶ 10, 695 A.2d 1212.

Such a review could also require consideration of the Law Court's previous holdings in this area. The Law Court has rejected attempts to use constitutional arguments as shields against liability for stalking conduct. See, *e.g., State v. Elliott,* 2010 ME 3, ¶ 20, 987 A.2d 513, 519 ("Simply put, stalking another person is not constitutionally protected behavior."); *State v. Williams*, 2020 ME 17, ¶ 24, n. 7, 225 A.3d 751(rejecting appellant's assertion of error for refusal to give First Amendment instruction). Absent legislative action, a case that rests on facts bringing it within *Counterman* may provide this Court with a future opportunity to reexamine these holdings. However, given that Labbe's non-speech conduct provides sufficient basis to uphold the

applied challenge. *Id*., n. 1. Notably, the stalking statute explicitly contemplates course of conduct activity unrelated to expression ("follows, monitors, tracks, observes, surveils,…gaining unauthorized access to personal, medical, financial or other identifying or confidential information.") 17-A M.R.S. § 210-A(2)(A).

constitutional application of the stalking statute to him, this is not the case to delve into this policy area.

The Maine Legislature has explicitly articulated its concerns about stalking conduct and associated lethal consequences:

> Sec. 3. Legislative intent. The Legislature finds that stalking is a serious problem in Maine and nationwide. Stalking can lead to death, sexual assault, physical assault and property damage. Stalking can involve persons who have had an intimate relationship as well as persons who have had no past relationship. Stalking can result in great stress and fear in the victim and often involves severe intrusions on the victim's personal privacy and autonomy. Stalking can have immediate and long-lasting impact on the quality of life and safety of the victim and persons close to the victim.
>
> By enacting these amendments, the Legislature intends to better protect victims from being intentionally harassed, terrified, threatened or intimidated by individuals who use a wide variety of methods to track, threaten and harass their victims.[7] The goal is to authorize effective criminal intervention before stalking behavior results in serious physical and emotional harm and to increase penalties for escalating stalking behavior. One amendment is intended to make clear that stalking is criminal whether or not the victim knows about the stalking conduct.
>
> The new provisions are drafted broadly to capture all stalking activity, including a stalker's use of new technologies. Presently, some stalkers use Global Positioning Satellite technology to monitor actions, disposable cell phones to make untraceable calls and keyloggers to capture private information from computers. In the future, new technologies not currently imagined will be used

[7] This does not appear to be a reference to the culpable mental state definition in 17-A M.R.S. § 35, but an acknowledgement that some stalkers target and seek to frighten their victims.

> to the same ends. The Legislature intends that the use of such new technology be covered by this legislation.

P.L. 2007, c. 685 §3 (unallocated language). Particularly in light of this express legislative intent, the Law Court should not go beyond the facts of the case before it and risk imposing a new standard beyond that which is constitutionally required.

CONCLUSION

Maine's stalking statute is constitutional as applied to Jacob R. Labbe, Sr. The Law Court should affirm the judgment of conviction.

Respectfully submitted,

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DATED: October 6, 2023

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CERTIFICATE OF SERVICE

I, Laura A. Yustak, Assistant Attorney General, certify that I have mailed two copies of the foregoing Brief of Amicus Curiae to the parties' attorneys of record, Katherine M. Hudson-MacRae, Esq., and Verne E. Paradie, Jr., Esq.

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