MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. AND-22-317

STATE OF MAINE,

Appellee,

v.

JACOB R. LABBE SR.,

Defendant-Appellant.

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF AMICUS CURIAE MAINE PROSECUTORS ASSOCIATION

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Maine Prosecutors' Association (MPA) is a statewide non-profit corporation that promotes and improves criminal prosecution and the criminal justice system in Maine through public education, professional training, legislation and sharing of information. MPA's membership includes any person holding the position of the Attorney General, District Attorney, Deputy or Assistant District Attorney or Deputy or Assistant Attorney General assigned to the Criminal Division or the Financial Crimes Division of the Office of the Attorney General. This brief is only submitted on behalf of the District Attorneys, Deputy and Assistant District Attorneys that are part of the MPA. Additionally, Prosecutorial District III has filed its own brief and does not join the MPA's brief.

The MPA has an interest in seeing Maine's stalking statutes[1] upheld as constitutional to protect Maine's public and the hundreds of named victims. It also has an interest in the efficient adjudication of stalking cases. Prosecutors are one of the most experienced groups of individuals that are familiar with Maine's stalking laws.

[1] 17-A M.R.S. § 210-A, 210-B

SUMMARY OF THE ARGUMENT

Counterman v. Colorado merely narrowed the definition of what constitutes a true threat and, consequently, what speech is not protected under the First Amendment. This narrowing of unprotected speech necessarily broadens protected speech.

However, in order for a statute to be facially unconstitutional, it must be either unconstitutionally vague or overbroad. The vagueness analysis is unaffected by *Counterman* so will not be addressed.

The overbreadth doctrine states that a statute is only constitutionally overbroad if it is substantially overbroad in relation to the statute's legitimate purpose. It stretches one's imagination to create a fact-pattern of conduct which is both (1) is criminalized by Maine's stalking statute *and* (2) the speaker does not have even a reckless mens rea as to the threatening nature of their speech. If such a fact pattern could be imagined, it is surely not substantially overbroad in comparison to the statute's obviously legitimate purpose.

Additionally, this Court should clarify how courts in Maine should address pending stalking statutes after *Counterman*.

ARGUMENT

II. Maine's Stalking Statute is Facially Constitutional post-Counterman.

a. Counterman narrowed what type of speech qualifies as a "true threat," and, consequently, expanded the boundaries of protected speech.

In *Counterman v. Colorado*, No. 22-138, 600 U.S. __, 2023 U.S. LEXIS 2788 (June 27, 2023), the Supreme Court held that, in order for speech to fall under the "true threat" exception to the First Amendment, the defendant must have, at least, been reckless in regards to the threatening nature of the speech. *Id.* at *17-18 Counterman had been convicted as a result of sending a substantial number of messages to the victim, causing her emotional distress. *Id.* at *6. The victim would block the defendant and the defendant would merely create a new profile and message the victim again. *Id.* The defendant sent messages such as: "was that you in the white jeep?"; "a fine display with your partner"; "fuck off permanently."; "Staying in cyber life is going to kill you."; "You're not being good for human relations. Die." *Id.* At the end of a jury trial, Counterman moved to dismiss the case, asserting that his conduct was protected by the First Amendment and did not fall under the true threat exception. *Id.* at *7. The Colorado trial court, consistent with applicable precedent at the time, utilized an objective "reasonable person" standard. *Id.* "Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to

prove that Counterman had any kind of subjective intent to threaten." *Id.* (internal quotations omitted). The majority rejected this analysis and, instead, held that the proper test was to require the State to show that the defendant was, at least, reckless in causing the proscribed result. *Id.* at *17. The Court reasoned that requiring a mens rea brings the true threat exception in line with other exceptions such as defamation and obscenity. *Id.* at *16.

Importantly, the Supreme Court did not order that a new trial was necessary nor that the Counterman's speech was protected under the First Amendment. Instead, the Court merely reversed the lower court's determination of whether Counterman's conduct was protected under the First Amendment. From the facts describe by the Court, it appears likely that Counterman's speech would still fall under the true threat definition.[2] Counterman was neither a successful as-applied challenge nor a successful facial challenge; The Court merely augmented the existing test for what constitutes a true threat and instructed the lower court to use the new test. Colorado prosecutors can continue to prosecute under the existing stalking statute.

b. Despite Counterman's narrowing of the true threat exception, the stalking statute is not constitutionally overbroad and, therefore, is facially constitutional.

[2] For instance, the fact that the victim blocked the defendant, never responded, and the defendant continued to make new accounts and contact with the defendant saying things like "Die" are very likely sufficient to show that Counterman was, at least, reckless to the threatening nature of his speech.

There are two types of facial challenges under the First Amendment. First, a statute may be facially invalidated if it is overly vague. *See Connally v. General Construction Co.*, 269 U.S. 385 (1926). Counterman has no impact on whether a statute is overly vague, so the MPA will not address that issue. Secondly, a statute may be facially invalidated if it is overbroad. Counterman narrowed what type of speech could be prosecuted and is, therefore, relevant to an over-breadth challenge.

To date, the Appellant has not raised a facial challenge to the statute through the overbreadth doctrine. However, given that amicus briefs in this matter are due on the same date as the supplemental briefing of the parties, the MPA wishes to address any potential overbreadth challenge that may be raised in the supplemental brief of the Appellant. Further, the MPA believes that an overbreadth challenge to the statute is inevitable post-*Counterman*.

In order for a party to successfully invalidate a statute due to overbreadth, the statute must be in violation of the overbreadth doctrine. As an initial matter, it is important to note that the mere fact that a statute may criminalize some protected speech is not sufficient to satisfy the overbreadth doctrine. .” *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973). Instead, the overbreadth “must be not only real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Id.* The overbreadth doctrine “is, at the very least . . . an exception to our traditional rules of practice.” *Id.* This is because the defendant’s conduct is irrelevant to the

overbreadth analysis. *Id.* at 610. Instead, the analysis focuses on how much protected speech *could be* criminalized by the statute compared to the "plainly legitimate sweep" of the statute. *Id.* at 615.

Additionally, claims arguing this doctrine, "if entertained at all, have been curtailed when invoked against ordinary criminal laws" even when those laws are being utilized to prosecute protected speech. *Broadrick*, 413 U.S. 601, 615 (1973) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). "Overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Broadrick*, 413 U.S. 601, 615 (1973) (citing United States v. Harriss, 347 U.S. 612 (1954).). "Invalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (internal quotations omitted).

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940) for instance, the Supreme Court vacated a conviction for breach of the peace but did not strike down the statute. *Id.* at 308. In that case, a Jehovah's Witness had been convicted after playing a phonograph record attacking the Catholic Church that two Catholic men heard on a public street. *Id.* at 311. Despite the government prosecuting clearly protected speech, the Court declined to invalidate the entirety of the statute. *Id.* at 308. The Court "seemingly envisioned its continued use against a great variety of

conduct . . . ." *Broadrick*, 413 U.S. 601, 614 (1973) (citing *Cantwell*, 310 U.S. 308 (1940)) (internal quotations omitted).

There are a number of cases which invalidate statutes which are clearly and substantially overbroad. The most noteworthy case where a statute was facially invalidated for violating the overbreadth doctrine is *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that case, the defendant was convicted under a statute which made it illegal to advocate for "crime, sabotage, violence . . . as a means of accomplishing industrial reform". *Id.* at 445. Importantly, the statute did not require that the advocacy actually be likely to cause such actions.[3] The Court deemed this statute to be unconstitutional because the law criminalized mere advocacy of the aforementioned conduct and did not require there to be any likelihood that those actions actually take place. *Id.* at 448. The Court reasoned that this encapsulated a significant amount of protected speech in comparison to the amount of speech it criminalized. *Id.* at 448-49. This was substantially overbroad because anyone advocating for this conduct where it was unlikely to occur could be subject to prosecution – despite the fact that this conduct would be protected under the First Amendment. *Id.*

[3] The exception to the First Amendment dealt with in that case was incitement. In order for speech to be deemed incitement (and therefore not be protected under the First Amendment), it must be directed to inciting or producing imminent lawless action and *be likely to invite or produce such action. Id.* at 447-48.

Another such example is *Thornhill v. Alabama*, 310 U.S. 88 (1940). In that case, the Supreme Court held that a statute which criminalized picketing any business was overbroad. *Id.* at 105-06. The Supreme Court reasoned that almost all of the conduct which would be criminalized by the statute would be, in fact, constitutionally protected. *Id.* at 105. On the other hand, the legitimate purpose of the statute was incredibly narrow. *Id.* ("We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the statute].").

The Supreme Court is reticent to invalidate criminal laws which only incidentally criminalize protected conduct such as in *United States v. Hansen*, 143 S. Ct. 1932 (2023). There, the Supreme Court reversed the Ninth Circuit which had held that a statute criminalizing "encouraging . . . or inducing" illegal immigration was constitutionally overbroad. *Id.* at 1937. The Supreme Court held that the lower court had erred when it had determined that the amount of protected speech criminalized by the statute was significant in comparison to its legitimate purpose. *Id.* at 1937-38. The Ninth Circuit, and Hansen himself, had asserted that the statute criminalized such conduct as inviting a person who had not immigrated legally inside during a storm or advising them about available social services. *Id.* at 1938. The Supreme Court rejected the Ninth Circuit's reasoning and held, instead, that the type of conduct which is constitutionally protected that is also criminalized by

the statute is minor in relation to its legitimate purpose of enforcing immigration laws. *Id.* at 1946.

Turning to the case at hand, a court would struggle to find a circumstance where a person is guilty under Maine's stalking statute and that conduct is also protected under the First Amendment. In order to be guilty of stalking, a person must intentionally or knowingly engage in a course of conduct directed at or concerning a specific person that would cause a reasonable person to either:

> (1) suffer serious inconvenience or emotional distress;
> (2) to fear bodily injury or to fear bodily injury to a close relation;
> (3) to fear death or to fear the death of a close relation
> (4) To fear damage or destruction to or tampering with property; or
> (5) to fear injury to or the death of an animal owned by or in the possession and control of that specific person.

17-A M.R.S. § 210-A(1)(A). In order to be protected under *Counterman*, the defendant's conduct would have to fall under the statute *and* the defendant would not have been even reckless in causing one of these results. It stretches one's imagination to come up with a fact pattern that would be both protected under the First Amendment and criminalized under the statute. While there may be some convoluted hypothetical case where actually protected speech is criminalized under the statute, the statute is nonetheless not substantially overbroad.

The obvious legitimate purpose of the stalking statute is public safety and to attempt to intervene in violent situations without having to wait for a violent result. The overbroadness of the statute, if any at all, is so slim as to not even approach

being substantially overbroad. Further, this Court should follow the Supreme Court's guidance in that "overbreadth scrutiny" should be "less rigid" when the statute regulates conduct in a "neutral, noncensorial way." *Broadrick*, 413 U.S. 601, 615 (1973).

In comparing this case to the precedent previously discussed, it is clear that Maine's stalking statute is constitutional. The breach of the peace statute was so overly broad that it criminalized debating religion in public and, yet, the Court did not deem the law overly broad. Here, no such hypothetical fact pattern is readily apparent and, even if such a fact pattern could be imagined, it is not nearly substantial enough to invalidate the statute. Similarly, the stalking statute is not remotely close to the statute at issue in *Thornhill* where the overwhelming majority of the criminalized conduct was protected speech.

Because Maine's stalking statute is not overly broad, let alone substantially overbroad as required under the overbreadth doctrine, it is facially constitutional.

III. This Court should clarify that, when a motion for dismissal under the First Amendment is raised, the State must prove to a trial court that the defendant was reckless in that others could regard his statements as threatening violence, consistent with *Counterman*.

Prosecutors, defense attorneys, and judges across the state are awaiting this Court's clarification on the proper procedure and tests in relation to *Counterman*.

The MPA argues that this Court should clarify that, in Maine, the test elucidated by the Supreme Court in *Counterman* should be followed. The MPA

sees no reason to depart for the reality that Maine's constitutional protection of free speech is coextensive with the Federal Constitution's First Amendment protections. *OccupyMaine v. City of Portland*, 2012 Me. Super. LEXIS 1, *35 (Jan. 31, 2012).

Once clarified, a defendant can move to dismiss a case because his conduct is protected by the First Amendment. Due to this question turning on the "general issue" it may be raised prior to trial, though, is not required to be raised pre-trial. Me. R. Crim. P. 12(b)(1). This motion should, obviously, be determined by the trial court as is always the case with motions to dismiss.

Clarifying this issue now, as opposed to waiting for the next stalking conviction to determine the facial constitutionality of Maine's stalking statute is in the interest of efficiency and the speedy adjudication of pending stalking cases.

CONCLUSION

For the aforementioned reasons, the MPA asks this Court to hold that Maine's stalking statute is facially constitutional.

Respectfully submitted,

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