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 UNIFIED CRIMINAL DOCKET

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF FACTS & PROCEDURAL HISTORY

The State of Maine incorporates its Statement of Facts and Procedural History from Brief of Appellee previously filed in this matter.

On May 9, 2023, the Maine Supreme Judicial Court sitting as the Law Court heard oral argument in this case. On June 27, 2023, the United States Supreme Court decided *Counterman v. Colorado*, 143 S.Ct. 2106 (2023), addressing the interpretation of Colorado's stalking statute in the context of a First Amendment challenge by the defendant.

Following the *Counterman* decision, on September 11, 2023, the Law Court requested supplemental briefing from the parties and invited briefs of amici curiae on the issues of (1) whether the *Counterman* decision applies retroactively to this case, (2) whether, considering principles of issue preservation, this Court can or should address the issues raised in *Counterman*, and (3) whether *Counterman* effects this case, specifically focusing on the State's burden of proof, if any, on Labbe's subjective awareness that his conduct could cause an enumerated effect in Maine's stalking statute, 17-A M.R.S. § 210-A (2022).

STATEMENT OF THE ISSUES

I. Whether the United States Supreme Court's decision in *Counterman v. Colorado*, 143 S. Ct. 2106 (2023) applies retroactively to the pending appeal.

II. Whether Labbe sufficiently preserved a First Amendment defense to Maine's stalking statute, 17-A M.R.S. § 210-A (2022), and, if not, should the Law Court nevertheless address the issues presented in *Counterman*.

III. Whether, when reviewed for obvious error, the U.S. Supreme Court's holding in *Counterman* effects the State's burden of proof regarding Labbe's subjective awareness that his conduct could cause the suffering of serious inconvenience or emotional distress, 17-A M.R.S. § 210-A.

SUMMARY OF THE ARGUMENT

First, the United States Supreme Court's holding in *Counterman v. Colorado* applies retroactively to this case as the matter is pending direct appellate review.

Nevertheless, because Labbe did not sufficiently preserve the specific issue raised in *Counterman*—whether Labbe's stalking conduct constituted "true threats" as an exception to First Amendment protection—this Court *should not* address whether *Counterman* effects Labbe's stalking conviction.

Were this Court to address the U.S. Supreme Court's holding in *Counterman* to this case, when reviewed for obvious error, this Court should affirm the conviction because Labbe's stalking conduct was not "speech" protected by the First Amendment nor did his conduct constitute "true threats" because the State prosecuted Labbe for the frequency and persistency of his unwanted communications to the victim, including in violation of a protection from abuse order, and not for the content of the messages and calls.

ARGUMENT

I. *Counterman v. Colorado*, 143 S.Ct. 2106 (2023), applies retroactively as this case is pending direct appellate review.

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the United States Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" *Id.* at 328; *see also Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) ("When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review.") Because Labbe's case is pending direct review by this Court, the U.S. Supreme Court's decision in *Counterman* applies retroactively to this case.

II. Because Labbe did not sufficiently preserve a First Amendment challenge to Maine's stalking statute, this Court *should not* address whether the U.S. Supreme Court's holding in *Counterman* applies to this case.

On appeal, Labbe argued that Maine's stalking statute is unconstitutionally vague because his behavior could not have constituted a "course of conduct" where he had not seen his son for three years because he was in prison, communicated to the victim about obtaining clothing for his release, and texted the victim "non-threatening messages." (Blue Br. 8-9.)

At trial, Labbe raised a facial and as-applied challenge to the constitutionality of the stalking statute. (Trial Tr. 12-13, 15.) Specifically, he argued,

> [T]he statute itself for stalking, I'm going to raise an unconstitutionally vague argument both facially and as applied. . . . [A]s applied in this case, I don't think any ordinary person would understand what – what conduct is prohibited and it encourages arbitrary and discriminatory . . . enforcement. And then the as applied test is in the circumstances of the individual case you must consider whether the language was sufficiently clear to give the defendant adequate notice that his conduct was prohibited. . . . I think when you hear the evidence today, I think as applied in this case, Mr. Labbe would have no idea that his conduct would . . . have been a violation of law.

(Trial Tr. 12-13.) As part of Labbe's motion for judgment of acquittal (Trial Tr. 248) and in his Motion for a New Trial or Acquittal (A. 36), he renewed the same argument. Labbe did not file a motion for further findings or clarification after the court denied the Motion for a New Trial. (Sentencing Tr. 5-8.)

At no time—either on appeal or at trial—did Labbe challenge the constitutionality of Maine's stalking statute pursuant to the First Amendment freedom of speech clause.

"[I]issues raised for the first time on appeal are generally unpreserved." *Scott v. Lipman & Katz, P.A.*, 648 A.2d 969, 974 (Me. 1994). "We have applied

this rule consistently whether the alleged right is constitutional or based on the common law." *Berg v. Bragdon*, 1997 ME 129, ¶ 9, 695 A.2d 1212.

As this Court has noted,

> The reason for the rule is that a contrary appellate procedure would deprive the trial justice of the opportunity to rule on the issue raised for the first time on appeal and deny the appellate court the trial court's decision thereon made in the atmosphere of the trial. . . . Specifically, proper appellate practice will not allow a party to shift his ground on appeal and come up with new theories after being unsuccessful on the theory presented in the trial court. It is a well settled universal rule of appellate procedure that a case will not be reviewed by an appellate court on a theory different from that on which it was tried in the court below.

Teel v. Colson, 396 A.2d 529, 534 (Me. 1979).

Both on appeal and before the trial court,[1] Labbe never identified the free speech clause of either the State or Federal Constitution. Instead, Labbe argues that Maine's stalking statute is "void for vagueness," which is rooted in the "due process clauses of the United States and Maine Constitutions." *State v. Reckards*, 2015 ME 31, ¶ 5, 113 A.3d 589; *Johnson v. U.S.*, 576 U.S. 591, 595 (2015). (Blue Br. 3, 4, 5.) It cannot be said that Labbe raised a challenge to Maine's stalking

[1] Because the First Amendment was never raised before the trial court, the issue of whether there was a "true threat" was not presented to the jury. *Childs v. Ballou*, 2016 ME 142, ¶ 17, 148 A.3d 291 ("It is the fact-finder who properly determines whether a true threat or harassment has occurred).

statute based on the First Amendment to the United States Constitution[2] or article I section 4 of the Maine Constitution[3] enshrining the freedom of speech.

III. If this Court decides that it *can* address the application of *Counterman* to Labbe's stalking conduct, when reviewed for obvious error, because Labbe's conduct was not constitutionally protected speech nor "true threats," *Counterman*'s holding is inapplicable.

When an issue is unpreserved, this Court reviews for obvious error.[4] M.R.U. Crim. P. 52(b); *see also Childs v. Ballou*, 2016 ME 142, ¶ 9, 148 A.3d 291 (reviewing for obvious error an unpreserved First Amendment challenge to an appeal involving an extension of a protection from abuse order). To rise to the level of an obvious error, there must "be (1) an error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, [this Court] will set aside a jury's verdict only if [it] conclude[s] that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." *State v. Penley*, 2023 ME 7, ¶ 22, --- A.3d --- (quotation marks and internal citation omitted). "An error is plain if the error is so clear under current law

[2] "Congress shall make no law . . . abridging the freedom of speech[.]"

[3] "Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty[.]"

[4] Because Labbe did not raise or identify any freedom of speech constitutional provision and the narrow issue presented is whether the holding in *Counterman* can or should apply to this case, this Court should not look to the primacy approach typically employed when both State and Federal Constitutional claims are at issue. *State v. Moore*, 2023 ME 18, ¶ 17, 290 A.3d 533. Instead, this Court should address only the application of the First Amendment to the United States Constitution as that was constitutional provision at issue in *Counterman v. Colorado*, 143 S. Ct. 2106, 2111-113 (2023).

that the trial judge and prosecutor were derelict in countenancing it even absent the defendant's timely assistance in detecting it." *State v. Dolloff*, 2012 ME 130, ¶ 36, 58 A.3d 1032 (quotation marks and internal citation omitted). The ultimate task is to determine "whether the defendant received a fair trial." *State v. Lajoie*, 2017 ME 8, ¶ 15, 154 A.3d 132.

Moreover, because Labbe failed to seek further findings after the court's ruling on his motion for a new trial (A. 36-37), this Court reviews all evidence in the light most favorable to the trial court's ruling. *State v. Connor*, 2009 ME 91, ¶ 9, 977 A.2d 1003 ("On review after a hearing in which the court has stated its findings, and there has been no motion for further findings, we will infer that the court found all the facts necessary to support its judgment if those inferred findings are supportable by evidence in the record.").

A. First Amendment Principles

i. Expressive or Symbolic Speech

The First Amendment's protection of free speech "is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Virginia v. Black*, 538 U.S. 343, 358 (2003). "The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct

can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea, we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (internal citations and quotation marks omitted). This latter category of speech has been called "symbolic or expressive conduct." *Black*, 538 U.S. at 358.

Thus, for "expressive conduct" to have "sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quotation marks omitted). "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements." *Id.* at 406 (citations omitted and emphasis in original). In characterizing expressive conduct "for First Amendment purposes, [the U.S. Supreme Court has] considered the context in which it occurred." *Id.* at 405.

The following conduct has been recognized as sufficiently expressive in nature to require First Amendment protection: "students[] wearing black

armbands to protest American involvement in Vietnam, *Tinker v. Des Moines Independent Comm. School. Dist.*, 393 U.S. 503, 505 (1969); of a sit-in by blacks in a 'whites only' area to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58 (1970); and of picketing about a wide variety of causes, *see, e.g.*, *Food Employees v. Logan Valley Plaza Inc.*, 391 U.S. 308, 313-14 (1968); *United States v. Grace*, 461 U.S. 171, 176 (1983)." *Johnson*, 491 U.S. at 404. In these cases, "there was little doubt from the circumstances of the conduct that it formed a clear and particularized political or social message very much understood by those who viewed it." *Young v. N.Y. City Transit Auth.*, 903 F.2d 146, 153 (2d Cir. 1990).

ii. True Threats

"The protections afforded by the First Amendment, however, are not absolute, and [the U.S. Supreme Court has] long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Black*, 538 U.S. at 358. One area that falls outside of the bounds of First Amendment protection are "true threats:" "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. The speaker need not actually intend to carry out the threat." *Id.* at 359.

"The existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end." *Counterman*, 143 S. Ct. at 2114 (quoting *Elonis v. United States*, 575 U.S. 723, 733 (2015)). This is because true threats "subject individuals to 'fear of violence' and to the many kinds of 'disruption that fear engenders.'" *Counterman*, 143 S.Ct. at 2114 (quoting *Black*, 538 U.S. at 360).

This Court has also recognized that "a true threat is not constitutionally protected speech." *Ballou*, 2016 ME at ¶ 17, 148 A.3d 291 (quotation marks omitted). "Nor is conduct amounting to criminal harassment protected by the First Amendment." *Id.* Maine has distinguished "[c]ases involving harassing conduct . . . from those involving communicative conduct that is undertaken to express a social or political viewpoint, such as burning a flag as a statement to holding a sit-in." *Id.* at ¶ 17 n.6 (citing *State v. Brown*, 85 P.3d 109, 113-14 (Ariz.Ct.App. 2004)). "It is the fact-finder who properly determines whether a true threat or harassment has occurred." *Ballou*, 2016 ME at ¶ 17, 148 A.3d 291. Similarly, "[c]onduct involving constant surveillance and an obtrusive and intruding presence has been held unwarranted and unreasonable, and

therefore not protected by the First Amendment." *Id.* at ¶ 19 (quotation marks omitted).

B. *Counterman v. Colorado*

In *Counterman v. Colorado*, 143 S.Ct. 2106 (2023), two issues were addressed by the U.S. Supreme Court. First, whether in a "true threats" case, the First Amendment required the State to prove that the defendant acted with "some subjective understanding of the threatening nature of his statements." *Id.* at 2111. If so, the Court was tasked with determining what mental state was sufficient for communications that constituted true threats. *Id.*

Over two years, the defendant sent hundreds of Facebook messages to the victim who the defendant had never met. *Id.* at 2112. Those messages ranged from the "utterly prosaic," to those that indicated the defendant might have been surveilling the victim, to "most critically, a number expressed anger at [the victim] and envisaged harm befalling her[.]" *Id.* The victim was in fear and repeatedly blocked the defendant; yet, he kept creating a new Facebook account and persisted in his messages. *Id.* The victim had difficulty sleeping, suffered anxiety, and stopped much of her daily and social activities. *Id.*

As a result of the defendant's communications, Colorado charged the defendant with stalking, which required the State to prove beyond a reasonable doubt that the defendant "repeatedly ma[de] any form of communication with

another person in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person to suffer serious emotional distress." *Id.* at 2112 (alterations omitted); Colo. Rev. Stat. § 18-3-602(1)(c) (2022). The only evidence the State anticipated introducing at trial were the Facebook messages sent by the defendant. *Counterman*, 143 S.Ct. at 2112. The defendant moved to dismiss the case on First Amendment grounds: the messages were not "true threats" and could not be prosecuted. *Id.* The court denied the motion, and a jury convicted. *Id.* at 2112-13.

The Court determined that in a "true threats" case, the First Amendment required the State to prove that a defendant was "aware in some way of the threatening nature of his communications," *id.* at 2113, reasoning that the "chilling effect" of otherwise protected speech necessitated the imposition of a *mens rea* requirement to provide "breathing room" for such speech, *id.* at 2114-115. As a result, a recklessness *mens rea* standard was sufficient for the prosecution of "true threats" cases. *Id.* at 2113. This is because "value lies in protecting against the profound harms, to both the individuals and society, that attend true threats of violence—as evidenced in this case." *Id.* at 2118.

Because the defendant was prosecuted under an objective standard without proving that the defendant had an awareness that his messages could

be understood as threats, the conviction stood as a violation of the First Amendment and was vacated. *Id.* at 2119.

Justice Sotomayor concurred in part with the Court's holding. *Id.* at 2119. She agreed that the "[t]rue-threats doctrine covers content-based prosecutions for single utterances of 'pure speech,' which need not even be communicated to the subject of the threat." *Id.* at 2120. However, she distinguished a more traditional true threats case from the conduct for which the defendant was convicted—"stalking causing serious emotional distress for a combination of threatening statements and repeated, unwanted, direct contact with [the victim]." *Id.* at 2121 (quotation marks omitted).

Continuing, Justice Sotomayor noted that which is directly applicable to Labbe's conduct,

> Stalking can be carried out through speech but need not be, which requires less First Amendment scrutiny when speech is swept in. The content of the repeated communications can sometimes be irrelevant, such as persistently calling someone and hanging up, or a stream of 'utterly prosaic' communications. Repeatedly forcing intrusive communications directly into the personal life of an unwilling recipient also enjoys less protection. Finally, while there is considerable risk with a single intemperate utterance that a speaker will accidentally or erroneously incur liability, that risk is far reduced with a course of repeatedly unwanted contact. Take, for example, petitioner continuously contacting [the victim] despite her blocking him.

Id. at 2121 (quotation marks and citations omitted).

C. Application

Because Labbe's conduct was not expressive conduct or symbolic speech protected by the First Amendment nor did his conduct constitute true threats of violence, *Counterman* is inapplicable here. To frame it in different terms, Labbe's stalking conduct was not "speech" triggering any First Amendment protection. As such, there is no obvious error to warrant vacating the conviction because it cannot be said that Labbe was deprived of a "fair trial or . . . result[s] in such a serious injustice that, in good conscious, the judgment cannot be allowed to stand." *Ballou*, 2016 ME at ¶ 9, 148 A.3d 291 (quotation marks omitted); *see also State v. Williams*, 2020 ME 17, ¶ 24 n.7, 225 A.3d 751 ("The trial court committed no obvious error in not instructing the jury regarding the First Amendment right to freedom of speech because the conduct proscribed by Maine's criminal harassment and stalking statues is not protected by the First Amendment of the United States Constitution or article I, section 4 of the Maine Constitution.").

Unlike *Counterman*, the State did not prosecute Labbe for the content of his communications—*i.e.*, the "threatening nature of his communications," *Counterman*, 143 S.Ct. at 2113—but for the act of the frequent, repeated, and

unwanted communication and the effect of those unwanted communications on the victim. (Trial Tr. 49-50, 175-76, 178, 183-84, 249, 302-03, 304-06, 328, 331.) *See Counterman*, 143 S.Ct. at 2121 (Sotomayor, J., concurring) (In a stalking case, the "content of the repeated communications can sometimes be irrelevant" and "[r]epeatedly forcing intrusive communications directly into the personal life of an unwilling receipting also enjoys less [First Amendment] protection." (quotation marks omitted)); *Cox v. Louisiana*, 379 U.S. 536, 465 (1965) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (quotation marks omitted)). This is consistent with Labbe's argument that his communications to the victim were not threatening. (Blue Br. 2, 3, 4, 9.)

Nor were Labbe's repeated messages and calls to the victim "expressive, overtly political [in] nature" to fall within First Amendment protection. *Johnson*, 491 U.S. at 406; *see also Brown*, 85 P.3d at 114 (determining that the defendant's "repeated entreaties to [the victim] that they resume their relationship do not contain any such particularized political or social message warranting First Amendment protection").

Labbe's stalking course of conduct occurred from November 15, 2019, to December 3, 2019. (Trial Tr. 78, 110-11, 113, 142, 148, 159, 161, 166, 174, 179, 180-81, 184, 189, 286-87; State's Ex. 3, 4; App. 34.)It began with the victim dropping her son off with Labbe on November 15 for the weekend and Labbe hugging the victim in front of her boyfriend, "like [she] was his possession[.]" (Trial Tr. 142, 144-45; Sentencing Tr. 9-10.) For the rest of that weekend, the victim's calls and messages to Labbe went unanswered, and she grew concerned because she was not able to say goodnight to her son and had difficulty getting her son back. (Trial Tr. 145, 154-55, 206.) After her son was returned with the help of law enforcement, her son was acting different and, when the victim confronted Labbe, he admitted to taking their son's medication that weekend. (Trial Tr. 241-43.) Without looking to Labbe's calls and messages, this conduct alone is sufficient to constitute a "course of conduct" that caused the victim "serious inconvenience or emotional distress" required by 17-A M.R.S. § 210-A.

Nevertheless, turning to Labbe's calls and texts,[5] because of what happened the weekend of November 15, the victim obtained a protection from

[5] For example, some of the messages sent by Labbe to the victim ranged from Labbe wanting to get his belongings and telling the victim "[y]ou['re], gonna fuck yourself over in the courts" (Trial Tr. 174-75), "text[ing] [the victim] all the time" and making "private calls, no name calls, calls from his new number . . . calls from his sister's number" (Trial Tr. 157-59), messaging her, "I didn't want you to block. Can we communicate without others being involved" (Trial Tr. 176-770), and sending "X, Y,

abuse order on November 19 and held her son back from school. (Trial Tr. 155-56, 244.) The next day, the victim received phone calls and text messages "nonstop from [Labbe's sister's] phone" and from Labbe as well. (Trial Tr. 83.) The messages and calls from Labbe continued from that time until December 3, 2019—before and after Labbe was served with the protection order on November 27, 2019, and despite the victim telling him to stop, blocking him and his family, and changing her phone number. (*Generally* State's Ex. 3; Trial Tr. 78-79, 83, 86-91, 113-14, 116, 118-21, 124-31, 148, 155-62, 174-84, 244; Sentencing Tr. 11-12.) Labbe "wo[uld not] leave her alone." (Trial Tr. 303.)

In short, the focus of the prosecution of Labbe's stalking behavior was not *what* he said to the victim—it was the act of the repeated and persistent contact itself.[6] For instance, as the State noted in its rebuttal closing, the victim received "seven private calls between November 28 and December 3;" five texts from

Z" (Trial Tr. 179). In one of the recorded phone calls, the victim tells Labbe to "leave me alone, stop calling." (Trial Tr. 118.) In another call by Labbe, the victim described it as "dead air and [she] could hear someone breathing." (Trial Tr. 160.) Some of the content of the calls and messages were used to identify Labbe as the sender of the communication. (Trial Tr. 160-62, 178-82.)

[6] The State acknowledges that some of the messages could be interpreted as threatening, such as "I hope your boyfriend is a cop" (Trial Tr. 176) or Labbe's comment to the victim's boyfriend that "he should break his legs" (Trial Tr. 165). However, the State's overall prosecution of Labbe for stalking was not based primarily on the content of the messages but on the frequency of the unwanted contact that Labbe thrust onto the victim. *See Counterman v. Colorado*, 143 S.Ct. 2106, 2121 n.2 (2023) (Sotomayor, J., concurring) (noting that where "prosecuting threatening statements made *as part of a course of stalking* does not squarely present the hardest questions about the *mens rea* required to prosecute isolated utterances based solely on their content" these "stalking prosecutions that *do not rely on the content of communications* would raise even fewer First Amendment concerns") (emphasis added).

Labbe; "three calls from his new number;" and two calls from Labbe's mother's number. (Trial Tr. 331.) The State also argued that the "PFA violations alone would be a course of conduct that a reasonable person would understand might cause another emotional distress." (Trial Tr. 249.)

This is consistent with the State's opening statement (Trial Tr. 49-50), and closing argument to "[c]onsider the evidence that you heard, the effect that it had on [the victim], the *relentlessness of the defendant* and his disregard of not only her mental wellbeing but of a court order which prohibited him from having contact with her and he flagrantly violated on multiple occasions" (Trial Tr. 306) (emphasis added). In short, the State did not prosecute Labbe because of the *content* of the calls and text messages but because he continued to repeatedly contact the victim despite her requests to stop.

"The First Amendment does not provide a wall of immunity for . . . criminal conduct, and does not compel one to submit to unwanted or detrimental association with another." *Ballou*, 2016 ME at ¶ 19, 148 A.3d 291 (quotation marks and internal citations omitted). Because it did not matter the *content* of Labbe's communication—it was his *conduct* of repeatedly texting and calling the victim (Trial Tr. 111-14, 116, 124, 130, 157-62, 178-83)—Labbe's actions cannot be said to be protected First Amendment "speech" nor are they "true threats." *See Counterman*, 143 S.Ct. at 2120 (Sotomayor, J.,

concurring) (objectively threatening statements "can also be punished if they fall into another category of unprotected speech, such as speech integral to criminal conduct"); *Johnson*, 491 U.S. at 404 (rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (quotation marks omitted)).

As such, when the evidence is viewed in the light most favorable to the trial court's ruling, *Connor*, 2009 ME at ¶ 9, 977 A.2d 1003, it was not obvious error for the trial court to not evaluate the evidence under First Amendment jurisprudence nor was this such an error that effected Labbe's substantial rights or seriously affected the fairness and integrity or public reputation of trial. *Penley*, 2023 ME at ¶ 22, --- A.3d ---.

CONCLUSION

For the foregoing reasons, the State of Maine respectfully requests that this Court affirm the judgment of conviction.

Dated: October 10, 2023

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CERTIFICATE OF SERVICE

I, Katherine M. Hudson-MacRae, certify that I have mailed two copies, postage prepaid, of the "Supplemental Brief of Appellee" to the Appellant's attorney of record, Verne E. Paradie, Jr., Esq., 472 Main Street, Lewiston, Maine 04240, and one copy by electronic mail to vparadie@lawyers-maine.com.

Dated: October 10, 2023

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