STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

MICHAEL JOSEPH KVASNICKA,

Defendant-Appellant/Cross-Appellee.
_____/

Supreme Court No. 168181
Court of Appeals No. 371542
Wayne Circuit Court
No. 24-001354-FH

AMICUS BRIEF OF ATTORNEY GENERAL DANA NESSEL IN SUPPORT OF THE PEOPLE'S APPLICATION ASKING THIS COURT TO EITHER PEREMPTORILY REVERSE OR GRANT CONTROLLING CONSTRUCTION

The Michigan Attorney General Dana Nessel by and through her attorneys B. Eric Restuccia, Deputy Solicitor General, and John S. Pallas, Division Chief, consistent with MCL 7.311 asks this Court to grant the application of the Wayne County Prosecutor's Office in support of the constitutionality of Michigan's anti-terrorism law, MCL 750.543m, and requesting this Court to either peremptorily reverse or to provide a controlling constitutional application of the law during the pendency of the application, and she states the following in support of her amicus:

1. On February 13, 2025, the Court of Appeals issued a published decision in which it ruled that MCL 750.543m(1)(a) was "facially unconstitutional." See slip op, pp 1, 5.

2. On February 20, 2025, the Wayne County Prosecutor filed an emergency application, asking this Court to grant her application, affirm the constitutionality of Michigan law, and to stay the precedential effect of the decision below.

3. As the chief law enforcement officer for the State of Michigan, see MCL 14.30; *Fieger v Cox,* 274 Mich App 449, 451 (2007), the Attorney General wishes to advance two arguments in support of Wayne's emergency application for leave.

4. ***First***, as argued in Wayne's application, the decision of the Court of Appeals is clearly erroneous on an issue of major jurisprudential significance. See MCR 7.305(B)(1), (3), (5)(a). The statute at issue provides as follows:

> (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:
>
> > (a) *Threatens to commit an* ***act of terrorism*** and communicates the threat to any other person.
> >
> > (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.
>
> [MCL 750.543m (emphasis added).]

The statute further provides a definition of "act of terrorism," which requires proof of a specific blameworthy state of mind:

> (a) "Act of terrorism" means a *willful* and *deliberate* act that is ***all of the following***:
>
> > (*i*) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
> >
> > (*ii*) An act that the person knows or has reason to know is dangerous to human life.
> >
> > (*iii*) An act that *is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion*.
>
> [MCL 750.543b(a) (emphasis added).]

In other words, the People are required to prove all three elements, which notably includes the requirement for a "willful" and "deliberate" act that the person (1) "intended to intimidate or coerce a civilian population" or (2) "influence or affect the conduct of government or a unit of government through intimidation or coercion." MCL 750.543b(a)(*iii*). This is a subjective intent standard that complies with the U.S. Supreme Court's decision in *Counterman v Colorado,* 600 US 66 (2023).

In *Counterman,* the U.S. Supreme Court identified three possible subjective culpable criminal intents that would be sufficient to sustain the constitutionality of a law that punished a true threat, as Michigan law does here:

> The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices.
>
> [1] Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he "consciously desires" a result—so here, when he wants his words to be received as threats.
>
> [2] Next down, though not often distinguished from purpose, is knowledge. A person acts knowingly when "he is aware that [a] result is practically certain to follow"—so here, when he knows to a practical certainty that others will take his words as threats.
>
> [3] A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." That standard involves insufficient concern with risk, rather than awareness of impending harm. But still, recklessness is morally culpable conduct, involving a "deliberate decision to endanger another." *In the threats context, it means that* ***a speaker is aware "that others could regard his statements as" threatening violence and "delivers them anyway."*** [*Counterman*, 600 US at 78–79 (numbered brackets and paragraph breaks added; emphasis added; citations omitted).]

In short, the three subjective standards are "purpose," "knowledge," and "recklessness," i.e., "aware that others could regard his statements" as a threat and delivers them nonetheless.

In applying the definitions of *Counterman* to Michigan law, as noted it is clear that in order to prove that a person "threaten[ed] to commit an act of terrorism," see MCL 750.543m(1)(a), the People must prove that the person's act was "willful" and "deliberate," and that through that act the person "intended to intimidate" or "intended to influence" "through intimidation or coercion." MCL 750.543b(a)(*iii*). The requirements that the person's act be "deliberate" with a blameworthy "intent" are traditional hallmarks of subjective criminal intent. For example, this Court explained that the "proof of an intent to injure in order to establish an assault and battery" is a *mens rea* requirement that is "subjective" because it was "an intent to do 'wrong.' " *People v Datema*, 448 Mich 585, 599 (1995). Cf. *People v Langworthy*, 416 Mich 630, 650 (1982) ("It would be difficult, if not impossible, to premeditate and *deliberate* a killing without at the same time possessing the specific intent to kill.") (emphasis added). That applies equally here, which requires the People to prove a wrongful intent, i.e., the intent to intimidate or the intent to influence through the use of intimidation.

Likewise, the use of "willful" seems to be the paradigm of the culpable state of mind for recklessness, which appears both in the definition of depraved heart murder as well as in the definition of gross negligence for manslaughter. See, e.g., *People v Goecke*, 457 Mich 442, 464 (1998) ("the intent to do an act in wanton and *wilful* disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm") (emphasis added), citing *People v Aaron,* 409 Mich 672, 728

(1980); *Datema*, 448 Mich at 598–599 ("negligence [for involuntary manslaughter] is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like, while wantonness or *recklessness*, in effect wilfulness, is characterized, as the words imply, by *wilfulness*.") (emphasis added), quoting *People v Orr*, 243 Mich 300, 308 (1928).

The contrast to *Counterman* is notable. There, the U.S. Supreme Court explained that the prosecution would have to show that "a reasonable person would have viewed" the communication as "threatening." *Counterman,* 600 US at 71. But the prosecution "had no need to prove that Counterman had any kind of 'subjective intent to threaten.' " *Id.* (cleaned up). But that is exactly what the People need to prove here. The correct reading, as the Wayne County Prosecutor argues, is that Michigan's terrorism law requires proof that "the defendant was aware that others would regard the statement as threatening harm or injury and delivered [it] anyway." See Wayne App, p 17.[1]

In fact, the analysis of the Court of Appeals below ironically confirms the proper construction of the law as requiring proof of a subjective state of mind. In its review of the statutory language, in particular the definition of "act of terrorism," the Court of Appeals acknowledged that it "includes a specific intent requirement." Slip op, p 5. But that should have been the insight that led the court to affirm and find a requirement to provide a culpable subjective mental state. As this Court has explained, proof of a specific intent requires more than proof of the intent to commit the act, it requires proof of the intent to desire the result or at least know the outcome and act anyway:

[1] It is worth noting that even in *Counterman,* the U.S. Supreme Court merely remanded for further proceedings, but did not invalidate the statute. See *id.* at 83.

> The distinction between ***specific intent*** and general intent crimes is that the former *involve a particular criminal intent* ***beyond the act done***, while the latter involve merely the intent to do the physical act.
>
> [*People v Kowalski*, 489 Mich 488, 500 n 15 (2011) (cleaned up; citations omitted; emphasis added).][2]

Despite identifying the fact that the statute required a specific intent, the Court of Appeals then went on apparently to do just the opposite and read the statutory language to only require proof of an intent to commit the act. See slip op, p 5 ("MCL 750.543b provides that the phrase 'act of terrorism' requires . . . that *the act* be one that is 'intended to intimidate . . . ' ") (emphasis in original). The Court of Appeals then concluded that MCL 750.543m and the interrelated definition of "act of terrorism" in MCL 750.543b "only prohibit true threats" and then ruled that "the statute does not require the prosecution to prove that the defendant made the threat recklessly." (Slip op, p 5.) Yet, the express language of MCL 750.543b(a) would seem to provide to the contrary, because it is *the criminal defendant's intent* to either "intimidate" or "influence" "through intimidation" that must be proven in the definition's use of the phrase, "an act that is intended." § 543b(a)(*iii*).

Perhaps the point of the analysis of the Court of Appeals is that the specific intent requirement in the definition of "act of terrorism" in MCL 750.543b(a) cannot be imported into the crime of threatening an act of terrorism in MCL 750.543m. But that is not consistent with the canons of construction, which require that a definition be given the same meaning throughout the whole statutory chapter. Cf.

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[2] See also *People v Gould*, 225 Mich App 79, 85 (1997), quoting Lafave's Crim Law: "Thus, *in order to commit a specific intent crime*, ***an offender would have to subjectively desire or know that the prohibited result will occur***[.]") (Emphasis added.)

U.S. Fid & Guar v Mich Catastrophic Claims Ass'n, 484 Mich 1, 14 (2009) ("If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word.") See also *Peiffer v GM*, 177 Mich App 674, 677 (1989) ("words used in one place in a statute have the same meaning in every other place in the statute").

Moreover, any suggestion that the Legislature's failure to add "purposefully, knowingly, or recklessly" before "threaten" in MCL 750.543m, see slip op, p 5, somehow nullifies the definition of "willful" and "deliberate" and the "intent" requirements in §543b(a)'s definition of "act of terrorism" would be counterintuitive, as there is no indication that the Legislature was attempting to change the phrase's definition. And it would contradict the canon that requires this Court to construe Michigan law in a constitutional manner unless "clearly inconsistent with the [statute's] language." See *People v Skinner*, 502 Mich 89, 111 (2018) ("In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act"). The Court of Appeals' analysis was clearly erroneous. See MCR 7.305(B)(5)(a).

5. ***Second***, this Court needs to either (1) grant peremptory relief, see MCR 7.311 (motions generally), or (2) grant a stay of the precedential effect of the decision as the Wayne County Prosecutor has requested, and to ***provide a constitutional construction of the law as argued here and in Wayne County's brief in the intervening time to allow the lower courts to continue to apply the law while this matter pends.*** Cf. *People v Burkman,* 513 Mich 300, 340–341 (2024) (providing a controlling constitutional construction of MCL 168.932(a) for the bench and bar).

Significantly, the Court of Appeals previously did something similar in *People v Johnson* 340 Mich App 531 (2022). There, the Court of Appeals noted the preference for a law to require a criminal intent, rather than one that imposes strict liability. *Johnson*, 340 Mich App at 546–547 ("we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, ***even if it was left unstated***") (emphasis added), quoting Justice Kelly's opinion in *People v Tombs,* 472 Mich 446, 459 (2005). The court then went on to modify the standard jury instruction in a witness retaliation case, similar to the remedy the proposed here: "We hold that the jury was not properly instructed and that M Crim JI 37.6 lacks language necessary to avoid infringement of the First Amendment right to free speech. To satisfy the 'true threat' exception to the Free Speech Clause, the jury needed to be instructed that the prosecution was required to prove beyond a reasonable doubt that defendant meant to express a serious intent to kill or injure BP, although the prosecutor did not have to prove that defendant actually intended to kill or injure BP. . . . In any new trial held on remand, the court shall instruct the jury on witness retaliation consistently with this opinion.") *Johnson,* 340 Mich App at 547.

Without a controlling construction, Michigan's statute protecting against terrorism and other threats, see MCL 750.543m(1)(a), will continue to operate with a cloud of uncertainty while this appeal is pending. Given that the matter would not likely be heard until the Fall of 2025, it may be a year or longer that this statute would remain in limbo. A constitutional construction of the law during the pendency should instill confidence in the bench and bar to enable the pending cases to proceed while this Court reviews this case if it determines that peremptory reversal is not warranted.

The Attorney General hopes this Court will issue either a peremptory reversal or otherwise provide a constitutional construction of the law during the case's pendency of the case by **April 1, 2025,** to avoid the possibility that lower courts dismiss any of the current pending criminal cases. The Department of Attorney General alone has eight pending cases under this statute.

And it is worth pointing out the importance of this statute to Michigan law. The law is designed to stop threats that disrupt schools, places of business, and entire communities. The question of what to do with the defendant who engages in this kind of conduct is often complicated. Without a sound legal basis, the opinion of the Court of Appeals has removed the only statute that allows a significant criminal charge in response to such a threat of terrorism, as is at issue here. Threats of terrorism are too serious to have an unsupported decision block law enforcement from responding appropriately while this application winds its way through the appellate process.

Wherefore, the Attorney General supports the Wayne County Prosecutor's application for leave and asking for a stay of the precedential effect of the decision, hoping that this Court will either peremptory reverse the decision of the Court of Appeal or otherwise provide an interim controlling construction of this statute while this important matter pends.

CONCLUSION AND RELIEF REQUESTED

This Court should grant the Wayne County Prosecutor's application for leave and either stay the precedential effect of the decision and provide a controlling constitutional construction of the law, or otherwise should peremptorily reverse the decision of the Court of Appeals.

Respectfully submitted,

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