STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NUMBER And-22-317

JACOB R. LABBE, SR.,
APPELLANT,

v.

STATE OF MAINE,
APPELLEE.

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION OF MAINE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Freedom of speech is a bedrock protection of article I, § 4, of the Maine Constitution and the First Amendment to the United States Constitution. To ensure that public discussion remains "uninhibited, robust, and wide-open," this protection extends to speech that is "vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S.705, 708 (1969) (per curiam). And to avoid chilling protected speech, the U.S. Supreme Court "ha[s] often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element." *Counterman v. Colorado*, 143 S. Ct. 2106, 2113 (2023). It did so most recently in *Counterman*, which held that a state may not convict someone of stalking carried out via speech alone, based on a theory that the speech constituted a "true threat," unless the state establishes some degree of subjective intent. *Id.*

The prosecution below was not consistent with those principles because the jury was authorized to convict appellant Jacob Labbe of stalking based on his speech alone, without any finding as to his subjective intent. The prosecution involved communications from Labbe to his estranged wife that were, without question, distressing. Labbe was prosecuted for and convicted of several crimes under Maine law, including an aggravated stalking offense called "domestic violence stalking."

But while the offense is called "stalking," and while the relevant statutes require proof of a "course of conduct," they also provide that "communications" alone—that is, speech—can constitute the "course of conduct." 17-A M.R.S. §§ 210-A(1)(A), 210-A(2)(A), 210-C(1)(B)(3). And although the statutes require proof that the defendant intentionally or knowingly undertook the course of conduct, they do *not* require proof that the defendant subjectively intended, or even understood, the likely impact of that conduct—which, again, is defined to include speech—on someone else. *Id.* § 210-A(1)(A). Instead, the statutes deploy an objective standard that looks to whether the defendant's behaviors would have caused a reasonable person to experience "serious inconvenience or emotional distress." *Id.* § 210-A(1)(A)(1).

For two reasons, the stalking prosecution in this case violated Labbe's free speech rights. First, the *Counterman* decision squarely forecloses the possibility that the prosecution in this case was valid under the "true threats" doctrine. *Counterman* made clear that, for speech to be prosecuted as a true threat, the state must prove a subjective-intent element. Here, the statutes authorized a stalking conviction for speech alone, without any subjective-intent element. In fact, the prosecution emphasized these features of Maine law in its rebuttal argument to the jury. Trial Transcript (Tr.) at 331–32. Second, there is no other readily identifiable free speech exception that could justify permitting a jury to convict a defendant of

stalking based on their speech alone, without any finding of an impermissible subjective intent.

Stalking and violence against women are serious problems that cause real individual and societal harms. States can, and should, craft meaningful tools to prevent and redress those harms. But Labbe is entitled to be subjected to tools that pass constitutional muster, instead of ones that don't.

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") and the American Civil Liberties Union of Maine ("ACLU of Maine") submit this brief of *amici curiae* in response to the Court's invitation for *amicus* briefs.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU frequently litigates and files *amicus curiae* briefs in cases involving women's rights and important First Amendment principles.

The ACLU of Maine is the Maine state affiliate of the ACLU. Founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers, the ACLU of Maine strives to protect and defend the rights secured by the Maine and United States Constitutions, including the right to free speech and to gender justice.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Following a pattern of unwanted contact with his estranged wife, the state charged Labbe with one count of domestic violence stalking and two counts of violating civil protective orders. As the parties' briefs demonstrate, some of Labbe's behaviors took the form of speech, while others took the form of conduct. *See* Appellant's Brief at 1–2; Appellee's Brief at 1–9. But, with respect to the stalking charge, the jury was authorized, and indeed encouraged, to convict Labbe based on his speech alone.

I. The Statutory Scheme

Labbe was convicted of "domestic violence stalking" under 17-A M.R.S. § 210-C(1)(B)(3), an aggravated stalking offense that requires, as a predicate, proof of regular stalking under 17-A M.R.S. § 210-A.

There are several ways to violate 17-A M.R.S. § 210-A. As pertinent here, a defendant can be convicted of stalking for "intentionally or knowingly engag[ing] in a course of conduct directed at or concerning a specific person that would cause a reasonable person . . . [t]o suffer serious inconvenience or emotional distress." *Id.* § 210-A(1)(A)(1). The statute provides that a "course of conduct" can consist of speech alone. It defines "course of conduct" to mean "two or more acts, including but not limited to acts in which the actor, by any action, method, device or means, directly or indirectly follows, monitors, tracks, observes, surveils, threatens,

harasses *or communicates to or about a person* or interferes with a person's property." *Id.* § 210-A(2)(A) (emphasis added).

The statutory text does not require any proof of mens rea with respect to the likely effect of the "course of conduct" on another person. That is, the statute does not require any showing that the defendant intended, or consciously disregarded a risk of, "serious inconvenience or emotional distress." Instead, the statute appears to require proof only that the defendant "intentionally or knowingly" engaged in the relevant course of conduct.

Thus, Labbe was prosecuted under a statute that, according to its plain text, permits someone to be convicted of stalking based on a course of conduct comprising only speech, so long as that speech would cause a reasonable person to feel serious inconvenience or emotional distress. The statute permits such a conviction even if the defendant did not subjectively intend—or even realize—that their speech would have that effect, so long as the defendant intended to speak.

II. The Prosecution

Consistent with the text of 17-A M.R.S. §§ 210-A and 210-C(1)(B)(3), the jury was authorized to find Labbe guilty of stalking based on his speech alone, without regard to whether he engaged in that speech with unlawful intent or even a conscious disregard of his speech's likely impact.

The jury instructions defined "course of conduct" to include "two or more acts . . . in which the actor . . . follows, monitors, tracks, observes, surveys, threatens, harasses *or communicates* to or about a person or interferes with a person's property." Tr. at 288 (emphasis added). Likewise, the instructions defined "knowingly" and "intentionally," but seemingly only for the purpose of requiring the jury to find that Labbe knowingly or intentionally *spoke*; the instructions did not require any proof that Labbe knew or intended that his speech would have any particular effect on a reasonable listener. Tr. at 286–88.

The state expressly sought a conviction along those lines. The state's rebuttal—its final message to the jury—emphasized that the jury could convict Labbe based on speech alone. The prosecution said that "[t]wo or more instances of [Labbe] *communicating with [his estranged wife], contacting her*, that is a course of conduct that proves the domestic violence stalking charge." Tr. at 331 (emphasis added). Perhaps worrying that jurors might rebel against that expansive statutory definition of "conduct," the prosecution warned them:

> [Y]ou're not being asked whether you like that or you agree with it or you think that ought to encompass stalking. You heard the judge. You took an oath and you have a duty to apply the law as it was given to you.

Tr. at 331–32.

With respect to mens rea, the prosecution argued that Labbe's conduct was "intentional" in the sense that "[h]e's not accidentally calling her" and "[h]e's not

accidentally sending her these messages." Tr. at 330. But, consistent with the statutes and jury instructions, the prosecution did not tell the jurors they had to find that Labbe intended "serious inconvenience or emotional distress"; instead, the state invited the jurors to convict Labbe of stalking if they found it was "reasonable" for Labbe's spouse to be distressed by his communications. Tr. at 332.

STATEMENT OF THE ISSUES

The Court invited *amicus curiae* briefs on the following two issues:

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*?

ARGUMENT

I. Labbe's prosecution violated the free speech protections of the Maine and U.S. Constitutions.

The Maine Constitution is at least as protective of free speech as the U.S. Constitution, and this Court has observed that "[o]ur fundamental interest in free speech 'demands the existence of a compelling governmental interest to justify

legislative restrictions upon it.'" *State v. Janisczak*, 579 A.2d 736, 740 (Me. 1990) (quoting *Opinion of the Justices*, 306 A.2d 18, 21 (Me. 1973)). Nevertheless, this Court's cases contain some language that could be read to say that Maine's stalking provisions do not violate constitutional guarantees for the freedom of speech. The free speech issues present in this case were not squarely presented in those prior cases, so at present it is unclear whether this Court's precedent allows stalking prosecutions like Labbe's. *See State v. Williams*, 2020 ME 17, 225 A.3d 751, 759 n.5, 760 n.7 (stating that Maine's stalking statutes address "'conduct" that "is not protected" speech, where the defendant argued that his speech was protected "political speech" aimed at "a public figure" and "that 'actual malice' had to be proved"); *State v. Elliott*, 2010 ME 3, ¶ 20, 987 A.2d 513, 519 (stating that "stalking another person is not constitutionally protected behavior," where defendant asserted a violation of the constitutional right to travel).

Counterman provides the Court with an opportunity to clarify those prior decisions or overrule them as necessary. Maine's statutes proscribe stalking carried out via non-speech conduct, like following or surveilling someone. Those provisions are not in question. But the stalking statutes also proscribe speech. Although there are certain "classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," those classes must be "well-defined" and "narrowly limited." *Chaplinsky v. New Hampshire*,

315 U.S. 568, 571–72 (1942); *accord United States v. Stevens*, 559 U.S. 460, 468–69 (2010). As explained below, the convictions for pure speech authorized by Maine's stalking statutes do not fall into the true threats exception—because they do not require proof that the speaker had some subjective understanding that their statements were threatening—or any other category of unprotected speech.

A. Labbe's prosecution is not supported by the "true threats" doctrine.

In June 2023, the U.S. Supreme Court held that when the state prosecutes someone based on a theory that their speech amounted to a "true threat," the state must prove that "the defendant had some subjective understanding of the threatening nature of his statements." *Counterman*, 143 S. Ct. at 2111. Because Labbe's jury was authorized to convict him of stalking based on his speech alone, and because the jury was not required to find that Labbe had any subjective understanding that his statements were threatening, Labbe's stalking conviction does not fall within the true-threats exception.

In *Counterman*, the U.S. Supreme Court considered a prosecution under a Colorado stalking statute like the one at issue here. The statute made it unlawful to "[r]epeatedly . . . make[] 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." Colo. Rev. Stat. § 18-3-602(1)(c) (2022); *Counterman*, 143 S. Ct. at 2112. After the trial court

denied Counterman's motion to dismiss the charge on First Amendment grounds, Counterman urged the Colorado Court of Appeals "to hold that the First Amendment required the State to show that he was aware of the threatening nature of his statements." *Id.* at 2113. But the appellate court affirmed the denial of Counterman's motion to dismiss because it reasoned that the First Amendment did not require any showing of a speaker's subjective intent in order to establish a true threat. *Id.* The Colorado Supreme Court denied review. *Id.*

The U.S. Supreme Court granted certiorari and reversed. The Court held that when a state prosecutes someone for stalking based on a true-threats theory, it cannot rely on a purely objective test that looks only to the likely or actual effect of the alleged threat on a listener. Instead, "the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character." *Id.* at 2113. In short, the state must prove "a subjective-mental-state element." *Id.* The Court then held that the subjective-mental-state element could be satisfied by a showing of recklessness, which occurs when the "defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.* at 2112. Applying those principles to Counterman's case, the Court held that because the stalking statute, as construed by the courts, required the prosecution to prove "only that a reasonable person would understand [Counterman's] statements as threats," without having "to show

any awareness on his part that the statements could be understood that way," the prosecution had "violat[ed] . . . the First Amendment." *Id.* at 2119.

Counterman forecloses any possibility that Labbe's conviction can be upheld via a true-threats theory. As in *Counterman*, Labbe was prosecuted for a stalking offense under a statute that permits convictions for speech alone. As in *Counterman*, Labbe was prosecuted under an objective standard; both the statute and the jury instructions authorized a conviction if the jury found that Labbe had engaged in communications that "would cause a reasonable person . . . [t]o suffer serious inconvenience or emotional distress." 17-A M.R.S. § 210-A(1)(A)(1). And finally, as in *Counterman*, the prosecution was not required to prove "any awareness on [Labbe's] part that [his] statements could be understood" to be threatening." *Counterman*, 143 S. Ct. at 2119. This means Labbe's jury was authorized to deliver a verdict that, at least from a true-threats standpoint, is inconsistent with constitutional free speech guarantees. To the extent any prior decisions by this Court suggest otherwise, *Counterman* requires clarifying or overruling them.

B. Labbe's prosecution is not supported by some other free speech exception.

Although *Counterman*'s core holding concerns the true-threats doctrine, the U.S. Supreme Court's pronouncements in that case, as well as other free speech

cases, indicate that Labbe's stalking prosecution cannot be salvaged by invoking some other category of unprotected speech.

Counterman emphasized that, even outside the true-threats doctrine, "our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element." *Counterman*, 143 S. Ct. at 2113. That is true. In many contexts where speech is made criminal, such as conspiracy, solicitation, and incitement, unlawful intent marks an essential distinction between protected and unprotected speech. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 298–99 (2008); *Hess v. Indiana*, 414 U.S. 105, 109 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

For example, the U.S. Supreme Court has held that it is not "an abridgment of freedom of speech . . . 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." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (emphasis added). This holding is sometimes called an exception for "speech integral to criminal conduct." In *Giboney* itself, the Court upheld an injunction against picketing by an ice peddlers' union in Missouri. But this was not ordinary picketing: the Court repeatedly emphasized that the union's "sole, unlawful immediate objective" was to convince an ice company to break the law

by refusing to sell to nonunion businesses. *Id.*; *see id.* at 498 ("sole immediate object"); *id.* at 501 ("sole immediate purpose").

For at least two reasons, this doctrine cannot salvage Labbe's stalking conviction. First, *Giboney*'s exception applies only if the offending speech is "part" of some *other* unlawful non-speech conduct. *Giboney*, 336 U.S. at 502. That is, the state cannot properly invoke an exception for speech integral to criminal conduct unless there is actually some unlawful conduct to which the speech is *integral*. In solicitation and aiding-and-abetting cases, for example, speech that solicits or facilitates a particular criminal act is integral to the underlying unlawful activity. *See, e.g.*, *United States v. Hansen*, 143 S. Ct. 1932, 1940 (2023). But here, neither the statute nor the jury instructions required the jury to find that Labbe's illegal "course of conduct" involved anything besides "communications." And the prosecutor expressly invited the jury to convict Labbe for his communications alone. Because the jury was not required to find any unlawful conduct to which Labbe's speech was integral, *Giboney* does not apply.[1]

[1] *See, e.g.*, *United States v. Sryniawski*, 48 F.4th 583, 588 (8th Cir. 2022) ("Congress may not define speech as a crime, and then render the speech unprotected by the First Amendment merely because it is integral to speech that Congress has criminalized. To qualify as speech integral to criminal conduct, the speech must be integral to conduct that constitutes another offense that does not involve protected speech, such as antitrust conspiracy"); *United States v. Osinger*, 753 F.3d 939, 954 (9th Cir. 2014) (Watford, J., concurring) ("If a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn't apply.").

Second, even when the state proves that the defendant's speech was integral to some other unlawful activity, *Giboney* imposes a stricter intent requirement than the recklessness standard that the Supreme Court articulated for true threats in *Counterman*. Specifically, *Giboney* requires proof that the defendant's "sole immediate purpose" was unlawful. *Giboney*, 336 U.S. at 501.[2] Without this limitation, the *Giboney* exception would threaten to criminalize speech lacking any unlawful intent merely because it has some superficial connection to unlawful activity. *Cf. Rice v. Paladin Ents.*, Inc., 128 F.3d 233, 265–66 (4th Cir. 1997) (stating that a newspaper need not fear liability for publishing an account of a crime that could lead to copycat offenses, because the newspaper's purpose was presumably lawful); 18 U.S.C. § 2261A(2) (requiring the government to prove "intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person" in order to establish a violation of the Violence Against Women Reauthorization Act's cyberstalking provision). But again, Labbe's jury was not required to find *anything* about his intent, let alone that his "sole immediate purpose" was to advance some unlawful activity.

[2] *See also United States v. Sayer*, 748 F.3d 425, 434 (1st Cir. 2014) ("Sayer points to no lawful purpose of the communications at issue here that would take them outside the *Giboney* exception."); *Osinger*, 753 F.3d at 953 (Watford, J., concurring) ("Because the 'sole immediate object' of Osinger's speech was to facilitate his commission of the interstate stalking offense, that speech isn't entitled to constitutional protection." (quoting *Giboney*, 336 U.S. at 498)); *Commonwealth v. Johnson*, 470 Mass. 300, 309 (2014) ("Where the sole purpose of the defendants' speech was to further their endeavor to intentionally harass . . . , such speech is not protected by the First Amendment.").

Indeed, in the harassment context, this Court has indicated that the state may criminalize pure speech only if it proves illicit intent. *See Childs v. Ballou*, 2016 ME 142, ¶ 16, 148 A.3d 291, 296 ("[A]lthough the First Amendment may protect the right to communicate with another person, it does not protect a person's choice to engage in harassing conduct *with a purpose to intimidate* a person who cannot avoid hearing statements that place them in fear." (emphasis added)); *see also id.*, 2016 ME 142, ¶ 19, 148 A.3d at 297 (stating that speaking to someone "not to communicate, but for other *unjustifiable motives*," is not protected speech (emphasis added)). The problem in this case is that the jury was never asked to find that Labbe had an illicit intent.

For all these reasons, Labbe's stalking prosecution was inconsistent with the free speech protections of the Maine and U.S. Constitutions.

II. This Court can and must address the issues raised by the Supreme Court's ruling in *Counterman*.

Because Labbe's case is pending on direct appeal, federal constitutional law requires this Court to resolve his appeal "in light of [the Court's] best understanding of governing constitutional principles," including by applying the Supreme Court's constitutional ruling in Counterman. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (quotation omitted). Failure to apply the Supreme Court's "newly declared constitutional rule" in Counterman would "violate[] basic norms of constitutional adjudication." *Id.* at 322.

In *Griffith* and subsequent cases, the U.S. Supreme Court established a bright-line rule for when to apply a newly declared constitutional rule to criminal cases, which depends on whether the criminal judgment was final before the new rule was announced. When a case is still pending on direct review and the judgment is not yet final, the new rule must be retroactively applied: "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," without exception. *Id.* at 328. This retroactivity mandate applies "regardless of the specific characteristics of the particular new rule announced," and it applies to *all* cases pending on direct appeal "with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id*. at 326–27.[3] However, after direct appeals have been exhausted and a judgment has become final, a newly announced rule generally does not apply retroactively in collateral habeas proceedings, with limited exceptions. *Teague v. Lane*, 489 U.S. 288, 310 (1989).

This Court has "relied on" these "principles of retroactivity established by the United States Supreme Court as a matter of federal constitutional law," and

[3] As *Griffith* recognized, the only two remaining "exceptions" to the retroactivity requirement for cases pending on direct appeal are both actually categories of cases in which the new rule of criminal prosecution "already was retroactively applied." *Griffith*, 479 U.S. at 324. Neither of those categories apply here. First, *Counterman* plainly is not a case that "did nothing more than apply settled precedent to different factual situations." *Id*. at 324. Instead, as detailed above, *Counterman* announced a new constitutional rule that when the state prosecutes someone based on a theory that they made "true threats," the state must prove that "the defendant had some subjective understanding of the threatening nature of his statements." *Counterman*, 143 S. Ct. at 2111. And second, *Counterman* was not a ruling "that a trial court lacked authority to convict a criminal defendant in the first place." *Griffith*, 479 U.S. at 324.

should do so here. *See Thompson v. State*, 625 A.2d 299, 300 (Me. 1993) (relying on *Teague* and *Griffith*). Under *Griffith*, the Court must apply the Supreme Court's "newly declared constitutional rule" in *Counterman* to this case, because Labbe's case is pending on direct appeal and the judgment is not final. The Court's duty to resolve this case in light of the recent *Counterman* ruling stems from fundamental principles of judicial integrity and equity. First, as the Supreme Court observed in *Griffith*, if a court fails to resolve direct appeals based on its "best understanding of governing constitutional principles," then "it is difficult to see why [the Court] should adjudicate any case at all"—"the integrity of judicial review requires that [the court] apply [a newly declared] rule to all similar cases pending on direct review." *Griffith*, 479 U.S. at 323 (quotation omitted). Second, if a court selectively applies new rules of criminal prosecution to some pending cases but not others, that violates the basic "principle of treating similarly situated defendants the same." *Id*.

This Court can and must address the issues raised by the Supreme Court's ruling in *Counterman* in Labbe's pending direct appeal.

CONCLUSION

For the reasons stated above, Labbe's stalking conviction should be vacated. This brief of *amici curiae* expresses no view on whether Labbe could be convicted of stalking under a constitutionally appropriate standard of proof, or whether

Maine's stalking statutes, as presently written, can be construed to require such proof. *See State v. Hotham*, 307 A.2d 185, 186 (Me. 1973) ("A state statute which contains language broad enough to reach protected speech will be struck down as unconstitutional on its face unless the state court has by construction limited the reach of the statute to unprotected speech."); *Elonis v. United States*, 575 U.S. 723, 737 (2015) (construing "[t]he mental state requirement" in a federal statute to "apply to the fact that the communication contains a threat").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on October 10, 2023, she caused to be sent by email and mail a copy of the above Brief of *Amici Curiae* to counsel of record, by depositing two copies of said brief to them by mail, at their respective mailing and email addresses:

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