No. 21-427

IN THE

Supreme Court of the United States

WILLIAM FREDERICK LAMOUREUX,
Petitioner,

v.

STATE OF MONTANA
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

FEDERAL STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

"In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding." *Fulton* v. *Philadelphia*, 141 S. Ct. 1868, 1924 (2021). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it." *Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46, 53 (1988). This is a "bedrock" principle of our civil liberties. *See Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). But even bedrock can be eroded. Many insist today that "offensive speech" is a category separate from "free speech," and that it should be outlawed. Sometimes, this effort to undermine the First Amendment is subtle. But Montana's attack is explicit. "[T]his wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

The State *brags* that "Montana's statute prohibits the act of communicating with a person using certain words with the specific intent to '… annoy[] or offend.'" Opp. 22. Montana's law does not specify those "certain words," but prohibits *all* "lewd[] or profane language," Opp. 25, in *any* electronic communication (phone, email, text, etc.) intended to "harass, annoy, or offend." This Court once warned that "[t]he breadth of the CDA's coverage is wholly unprecedented," *Reno* v. *ACLU*, 521 U.S. 844, 877 (1997), but Montana's law sweeps yet more broadly. It does not matter that Lamoureax's calls might be punishable under a properly-drafted law. What matters is that Lamoureux was prosecuted under an electronic harassment statute that "has the potential to chill the expressive activity of others." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130 (1992).

In defending its statute, the State asks this Court to "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen* v. *California*, 403 U.S. 15, 26 (1971). And the State does so brazenly, casting a law that encompasses speech "inten[ded] to … harass, annoy, or offend" as "*precisely tailored*," then claiming that "it's difficult to conceive of any protected speech this law would capture." Opp. 25-26 (emphasis added). This Court's own precedents refute that claim. If Paul Robert Cohen had tweeted, "Hey, @DeptofDefense, Fuck the Draft!" the State would have him criminally punished. *But see Cohen*, 403 U.S. at 26. If a Montana cheerleader posted to Snapchat "Fuck school fuck softball fuck cheer fuck everything" intending to cause "cheerleaders and other students" to become "'visibly upset,'" she could be prosecuted. *But see Mahanoy Area Sch. Dist.* v. *B. L.*, 141 S. Ct. 2038, 2043 (2021). If Larry Flynt had posted the lewd *and* profane "Jerry Falwell talks about his first time" parody on Facebook—"calculated to injure the feelings of the subject of the portrayal"—Montana could press criminal charges. *But see Hustler*, 485 U.S. at 53-56.

Montana is hardly alone in criminalizing annoying or offending electronic speech; dozens of states have similar statutes. And the Montana decision upholding Montana's statute is merely the latest in a long line of conflicting decisions weighing overbreadth challenges to these laws. *See* Pet. 6-18. The State's wooden "categories of statutes," *cf.* Opp. 6, bring no order to this confusion, for those categories cannot be squared with the relevant statutes, decisions, or First Amendment doctrines. Four decades after Justice White first recognized this split, *see Gormley* v. *Dir., Conn. State Dep't of Prob.*, 449 U.S. 1023, 1024 (1980) (dissenting

from denial of certiorari), it is time for this Court to clarify the application of overbreadth principles to such statutes.

This question carries real urgency. Electronic communication continues to proliferate. The reach of laws like Montana's give states freewheeling power to prosecute the use of "profane" language intended "annoy" or "offend" others. Decades ago, this Court warned that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Cohen,* 403 U.S. at 26. Today, polling shows a growing contingent of Americans believes—as Montana does—that "offensive" speech should be banned. In a 2020 Gallup poll, 78% of college students said that colleges should be able to ban "language on campus that is intentionally offensive to certain groups." Knight Foundation, *The First Amendment on Campus 2020 Report*, https://knightfoundation.org/wp-content/uploads/2020/05/First-Amendment-on-Campus-2020.pdf. But the same polling reveals that "offensive" speech is highly subjective. *See id.* Laws like Montana's "contain[] an obvious invitation to discriminatory enforcement against those whose [speech] is 'annoying' because their ideas" are "resented by the majority of their fellow citizens." *Coates* v. *Cincinnati*, 402 U.S. 611, 615-16 (1971). "Any variation from the majority's opinion may inspire fear," offense, or annoyance; "our Constitution says we must take this risk." *See Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

This petition offers the Court the opportunity resolve an enduring split while reinforcing bedrock First Amendment principles at a critical juncture. On this score, it is ironic that the State points to the Montana Supreme Court's prior decision in *State* v. *Dugan*, 303

P.3d 755 (Mont. 2013). Opp. 21, 24. In that case the State evaded this Court's review of the same Montana statute by *dismissing the charges*. Pet. 5-6. Given that the State has now mounted an aggressive defense of the same law—ignoring the legislature's subsequent amendment—this Court should grant review.

ARGUMENT

I. This Case Implicates an Intractable Split

Courts in 18 jurisdictions are evenly split on the Question Presented: whether a statute criminalizing speech intended to annoy or offend is overbroad. The State's attempt to reconcile these cases rests on artificial distinctions and distorts their holdings and the underlying statutes.

1. The split's persistence, and the futility of the State's harmonizing efforts, are "most poignantly demonstrate[d]" by the New York and Connecticut decisions flatly rejecting the Second Circuit's overbreadth holding in *Gormley* v. *Director, Connecticut State Department of Probation*, 632 F.2d 938 (2d Cir. 1980). *Cf.* Opp. 16. These decisions reviewed virtually identical statutes that, like Montana's law, criminalized phone calls with "intent to harass, annoy or alarm."

In *Gormley*, the Second Circuit reviewed a Connecticut law criminalizing telephone calls made "with intent to harass, annoy or alarm another person … in a manner likely to cause annoyance or alarm." 632 F.2d at 940 n.1. The court held that the "statute is not unconstitutionally overbroad" because it regulates "conduct, not mere speech," and "[t]he risk that the statute

will chill people from, or prosecute them for, the exercise of free speech is remote" and "minor." *Id.* at 941-42.

The Connecticut Supreme Court later deemed the same statute facially overbroad, and therefore adopted a narrowing construction limiting the statute to "speech, like true threats, that is not protected by the first amendment." *State* v. *Moulton*, 78 A.3d 55, 71 (Conn. 2013). In contrast to *Gormley*, the Court recognized that absent "proof that the allegedly threatening conduct at issue constituted a true threat, the statute would be overbroad because it could be applied to punish expressive conduct protected by the first amendment." *Id.* at 75.

The State attempts to reconcile these cases by suggesting *Moulton* deemed the statute "overbroad solely because of the 'likely to annoy' element." Opp. 16. Not so. The Court's "first amendment concerns" went to both the "likely to harass or alarm" *and* intent elements. 78 A.3d at 70-71. The statute was overbroad because it permitted prosecution based "entirely" on the "content of a telephone call," allowing the jury to determine guilt based on protected speech. *Id.* at 70, 72.

The New York Court of Appeals invalidated New York's nearly identical statute as overbroad. *People* v. *Golb*, 15 N.E.3d 805, 813-14 (N.Y. 2014). The statute contravened the First Amendment because it "criminalize[d], in broad strokes, *any communication that has the intent to annoy*," and "no fair reading of th[e] statute's unqualified terms supports or even suggests the constitutionally necessary limitations on its scope." *Ibid.* (emphasis added). The State maintains that *Golb* so held "because of [the statute's] 'likely to annoy' element." Opp. 16. But the Court specifically

emphasized the "broad strokes" painted by the "intent to annoy" element. 15 N.E.3d at 813. That leaves the State arguing that "New York is a lone outlier," Opp. 15, all but admitting that *Golb* cannot be reconciled with cases on the other side of the split.

Even at the time *Gormley* issued, Justice White recognized the division among courts weighing overbreadth challenges to "substantially equivalent provisions." *Gormley*, 449 U.S. at 1025. The split has only deepened since, as underscored by the recent decisions in *Moulton*, *Golb*, and this case. *See* Pet. 10-17.

2. The State's attempt to reconcile the cases by "category" also fails on its own terms.

a. The State frames "Category One" as "prohibitions on conduct undertaken with the intent to instill fear," Opp. 8, language borrowed from *United States* v. *Bowker*, 372 F.3d 365, 379 (6th Cir. 2004). But the statutes the State puts in this "category" are not actually so limited. The statute in *Bowker* prohibits telecommunications made "with intent to abuse, threaten, or harass." 47 U.S.C. § 223(a)(1)(C). Texas's statute criminalizes repeated telecommunications made "with intent to harass, annoy, alarm, abuse, torment, or embarrass." *Scott* v. *State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010). Georgia criminalizes repeated calls made "for the purpose of annoying, harassing or molesting," and making anonymous calls "with intent to annoy, abuse, threaten, or harass." *Constantino* v. *State*, 255 S.E.2d 710, 713 (Ga. 1979).

These statutes and others in the State's "Category One" do not actually require an "intent to instill fear." *See* Opp. 8-11. They are virtually identical to the statutes deemed facially overbroad by, for instance, Connecticut and New York. *Bowker* offered "intent to instill fear" as a gloss on the "thrust" of the statute, 372

F.3d at 379, not as a workable test to determine a statute's constitutionality. Moreover, the intent-to-instill-fear limitation *still* goes well beyond "speech, like true threats, that is not protected by the first amendment." *Cf. Moulton*, 78 A.3d at 71. For instance, President Biden's recent public-health warning of a "winter of severe illness and death" for the unvaccinated may have been intend to instill fear, but is no criminal threat.

b. The State's "Category Two" consists of decisions declaring harassment statutes overbroad. The State argues these laws were unconstitutional because they prohibited annoying communications without also prohibiting threatening, intimidating, or abusive communications. Opp. 11-12. That is a distinction without a difference.

These statutes, like those in "Category One," broadly criminalize speech that is not carved out of the First Amendment: speech intended to "annoy," "offend," or "harass" (in various combinations of the terms). If, as the courts addressing these statutes rightly concluded, such a prohibition is unconstitutional, then the "Category One" statutes are hardly saved because they have *additional* prohibitions—even if those additions cover unprotected speech. The decisions striking down "Category Two" statutes are simply on one side of the split, with cases upholding "Category One" statutes on the other. The "Category Two" cases are also irreconcilable with the State's contention that there is no conceivable protected speech that could be reached by Montana's law.

c. The State characterizes "Category Three" as statutes that were unconstitutional solely because of an additional "likely to annoy" element. Opp. 13. But as noted, the State is simply wrong to suggest that New

York and Connecticut courts deemed their statutes overbroad because of the "likely to annoy" element.

The same goes for the Colorado and Oregon cases. *See* Opp. 14-15. The Colorado Supreme Court focused on the statute as a whole:

> [I]f one has the *intent* to annoy—to irritate with a nettling or exasperating effect—and he communicates with another in a manner that is likely to cause alarm—to put on the alert—he too is guilty of harassment. The absurdity of this is patently obvious to anyone who envisions our society in anything but a state of languid repose. The First Amendment is made of sterner stuff.

Bolles v. *People*, 541 P.2d 80, 83 (Colo. 1975) (emphasis added). So too with Oregon. See *State* v. *Blair*, 601 P.2d 766, 768-69 (Or. 1979). These cases did not hold that the statutes would have been upheld if they included only the "intent" element.

The State's overbreadth "categories" cannot explain the cases' different outcomes; the only explanation is that there is a real and intractable split.

II. The State's Defense of the Montana Statute Highlights the First Amendment Dangers it Poses

The State insists the statute is "precisely tailored"—not overbroad—because there is no "protected speech this law would capture." Opp. 26. This reveals a basic misunderstanding of the First Amendment, which protects speech intended to annoy or offend, even if vulgar. *See Fulton*, 141 S. Ct. at 1924. Under Montana's statute, a citizen could be sent to prison for trying to annoy a military recruiter by emailing "Fuck

the Draft," *Cohen,* 403 U.S. at 16-17, trying to offend a police department by responding to its Facebook post, "you god damn m.f. police," *Lewis* v. *New Orleans*, 415 U.S. 130, 131 n.1 (1974), or trying to harass a religious politician by sending a recording profanely criticizing the church, *Cantwell* v. *Connecticut*, 310 U.S. 296, 308-11 (1940). Prosecutions could follow from late-night cracks about a purported Russian video of President Trump, or NASCAR fans chanting "Fuck Joe Biden" as a way of annoying the other side of the political spectrum. And political speech is just the tip of the iceberg; every instance of four-letter trash-talking in an online video game, every crude joke on Twitter, every vulgar meme on Facebook would be fair game for Montana's prosecutors. We may deplore the lack of decorum in public discourse, but the First Amendment does not permit states to threaten criminal prosecution as a cudgel to instill better manners.

Far from being a "precise tool" that "narrow[ly] appli[es] … to communications made with the intent to instill fear," Opp. 24, 25, Montana's expansive law underscores why this Court should intervene. The overbreadth doctrine forestalls "the threat of enforcement" of a law substantially burdening protected speech, lest it "deter[] people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *United States* v. *Williams*, 553 U.S. 285, 292 (2008). It is chilling, indeed, that the State declares it can prosecute any "annoy[ing]" or "offens[ive]" speech using "certain words." Opp. 22, 25-26.

The State insists the statute is not content-based because of its specific-intent requirement. Opp. 23. But content-based laws include those that "defin[e] regulated speech by its function or *purpose*." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015) (emphasis

added). The statute here directly regulates communicative content ("obscene, lewd, or profane language") and contains a purpose requirement that invariably will be proven through the communication's content. The "enforcement authorit[y]" and jury would have to "examine the content of the message" to determine both that it was "obscene, lewd, or profane" and that the speaker had the requisite "purpose." *McCullen* v. *Coakley*, 573 U.S. 464, 479 (2014). Worse, the statute is viewpoint-based, because "[g]iving offense is a viewpoint." *Matal* v. *Tam*, 137 S. Ct. 1744, 1763 (2017); *id.* at 1766 (Kennedy, J., concurring) (regulating offensiveness "is the essence of viewpoint discrimination").

The State is also wrong in suggesting the statute "addresses both conduct and speech." Opp. 22. The conduct covered by the statute is "electronic communication." It does not merely address ordinary criminal conduct that happens to be "initiated, evidenced, or carried out by means of language." Opp. 20 (quoting *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965)).

As anyone who spends time online knows, obnoxious, vulgar speech is omnipresent, and vastly exceeds the sliver of such speech consisting of true-threats, fighting-words, or obscenity. For that reason, the statute is *substantially* overbroad. A citizen may self-censor rather than face prosecution for writing an email or making a social-media post that could be seen as intended to annoy or offend. *See FEC* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 495 (2007) (Scalia, J., concurring) (tests that turn "on intent of the speaker" would unconstitutionally "compe[l] the speaker to hedge and trim"). And the State is all but invited to selectively prosecute those whose speech annoys or offends a favored group.

III. This Case Is a Good Vehicle for Resolving an Important and Pressing Issue

The overbreadth of statutes like Montana's is critically important today. Such statutes are widespread, *see, e.g.*, Idaho Code § 18-6710 (same as Montana's); Ark. Code Ann. § 5-71-209 (similar); Wash. Rev. Code § 9.61.230 (similar), and they regulate and stifle an ever-increasing volume of electronic communication.

The broad sweep of these laws is especially concerning because prohibiting "offensive" or "annoying" speech has become an increasingly popular means of regulating free speech. The risk of prosecution for electronic communications that are "annoy[ing]" or "offens[ive]" yet nevertheless protected is not hypothetical. *See, e.g.*, *United States* v. *Weiss*, 475 F. Supp. 3d 1015 (N.D. Cal. 2020) (messages on Mitch McConnell's website); *United States* v. *Popa*, 187 F.3d 672, 673 (D.C. Cir. 1999) (voicemails for Eric Holder); *People* v. *Mangano*, 796 N.E.2d 470, 470-71 (N.Y. 2003) (voicemails on Parking Violations Bureau's complaint line). Indeed, in *Dugan*, Montana prosecuted Randall Dugan for swearing when criticizing a public employee over the phone, and dismissed the charges only after he sought review in this Court. Pet. 5-6.

It is precisely when speech prohibitions entail the risk of arbitrary prosecution or, worse, prosecution driven by "public intolerance or animosity," that overbreadth protections are most needed. *Cf. Coates*, 402 U.S. at 615. The State cannot avoid these overbreadth concerns by focusing on the facts here. *See* Opp. 26. As the State recognizes in its re-framed Question Presented, the Petition does not raise an as-applied challenge. Opp. i. The statute is unconstitutional, instead, because it "burdens a substantial amount of protected speech relative to its plainly legitimate sweep." *Ibid.*

The facts of Petitioner's prosecution say nothing about what Montana *could* prosecute under the statute, or about speech it silences.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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December 28, 2021