No. 21-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute that criminalizes speech intended to annoy or offend is unconstitutionally overbroad under the First Amendment.

PARTIES TO THE PROCEEDING

William Frederick Lamoureux, petitioner on review, was the defendant-appellant below.

The State of Montana, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

State v. *Lamoureux*, No. DC-17-633(A) (Mont. Dist. Ct. 2018)

State v. *Lamoureux*, No. DA 18-0639 (Mont. 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Frederick Lamoureux respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court.

INTRODUCTION

William Frederick Lamoureux was convicted under a Montana statute that criminalizes electronic communications made with the purpose to "harass, annoy, or offend," using "obscene, lewd, or profane language." Mont. Code Ann. § 45-8-213 (to Sept. 2019). Virtually every state has a similar form of electronic harassment law, with varying degrees of breadth.

Since Justice White urged this Court to consider the "application of First Amendment principles in this area of the law" four decades ago, *Gormley* v. *Dir., Conn. State Dep't of Prob.*, 449 U.S. 1023, 1024 (1980) (White, J., dissenting from denial of certiorari), courts have split over whether laws prohibiting speech intended to annoy or offend are facially overbroad. Eight state high courts and one federal court of appeals have held that such laws are facially overbroad in violation of the First Amendment. Three federal courts of appeals and six state high courts, including the Montana Supreme Court here, have held that they do not violate the First Amendment, either because they regulate conduct rather than speech, or because they do not sweep in enough constitutionally protected speech to warrant facial invalidation.

The Court should resolve this enduring and worsening split. The question is one of great and increasing importance, particularly given the prevalence of similar statutes, the proliferation of electronic communications that fall within the reach of those statutes, and

the possibility of such electronic communications being covered by multiple jurisdictions. This petition presents a suitable vehicle for resolving the question because Lamoureux was convicted only under Montana's electronic harassment statute and raised a First Amendment challenge to the statute at each stage of the proceedings. The Court should grant the petition.

OPINIONS BELOW

The opinion of the Montana Supreme Court, Pet. App. 1a, is published at 485 P.3d 192 (Mont. 2021). The relevant order of the Montana Eleventh Judicial District Court, Pet. App. 23a, is unpublished.

JURISDICTION

The judgment of the Montana Supreme Court was entered on April 20, 2021. Pet. App. 1a. On March 19, 2020, this Court entered a standing order that extended the time within which to file a petition for a writ of certiorari in this case to September 17, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., Amdt. 1.

The Fourteenth Amendment to the Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

without due process of law . . . ." U.S. Const., Amdt. 14.

Section 45-8-213 of the Montana Code Annotated (to Sept. 2019) provides, in relevant part:

> "(1) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person knowingly or purposely:
>
> > "(a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with a person by electronic communication and uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of the person. . . .
>
> .....
>
> "(4) "Electronic communication" means any transfer between persons of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system."[1]

STATEMENT OF THE CASE

William Frederick Lamoureux was convicted under a Montana state law that criminalizes speech intended

[1] Montana amended Section 45-8-213 in 2019. Lamoureux was tried and convicted under the pre-2019 version, and accordingly challenges that version. See *Massachusetts* v. *Oakes*, 491 U.S. 576, 585-86 (1989) (permitting First Amendment overbreadth challenges to statutes that were amended after the challenger's conviction).

to annoy or offend listeners. Eighteen courts have weighed in on whether similar statutes that criminalize speech intended to annoy or offend are unconstitutionally overbroad under the First Amendment, and they are evenly split. Half have held that electronic harassment laws that prohibit speech intended to annoy or offend are facially overbroad and therefore unconstitutional. The other half have held either that the statutes regulate conduct, not speech, or that they do not sweep broadly enough to warrant facial invalidation. This Court should resolve the growing split over whether Montana's law and others like it around the country are consistent with the First Amendment.

1. Certain narrow categories of speech are constitutionally unprotected, and states may criminalize them. Nearly every state in the country bans certain forms of cyberstalking and other cybercrimes through electronic harassment statutes. Office of Just. Programs, U.S. Dep't of Just., Stalking and Domestic Violence 17 (2001) (NCJ 186157), available at https://www.ncjrs.gov/pdffiles1/ojp/186157.pdf.

At the same time, state legislatures must draft these laws carefully to avoid infringing constitutional rights. The vast majority of electronic speech *is* protected by the First Amendment, and statutes criminalizing electronic communications may sweep up broad swaths of constitutionally protected speech. Because "First Amendment freedoms need breathing space to survive," the "government may regulate in the area only with narrow specificity," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), and states must ensure their laws do not proscribe speech that the Constitution protects.

To ensure that states have struck the right balance between regulating unprotected speech and respecting

protected speech, this Court recognizes that statutes may be challenged as facially overbroad under the First Amendment. *Ams. for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2378 (2021); *United States* v. *Stevens*, 559 U.S. 460, 473 (2010). The overbreadth doctrine serves to protect against the chilling effect of overbroad laws, because "continued existence of the statute . . . would tend to suppress constitutionally protected rights" of others. *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972). A law that intrudes on First Amendment freedoms "may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found*, 141 S. Ct. at 2378.

This Court has never resolved a First Amendment facial overbreadth challenge to a state electronic harassment law. But many lower courts have, and they have gone in divergent directions. As Justice White observed four decades ago, the lower courts "are not in agreement concerning application of First Amendment principles in this area of the law." *Gormley*, 449 U.S. at 1024 (White, J., dissenting from denial of certiorari). For example, it is "a bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal* v. *Tam*, 137 S. Ct. 1744, 1751 (2017) (Alito, J.). Yet many lower courts have upheld state electronic harassment statutes that primarily ban annoying or offensive speech, while others have struck them down as facially overbroad.

In *State* v. *Dugan*, 303 P.3d 755 (Mont.), cert denied, 571 U.S. 881 (2013), the Montana Supreme Court rejected a facial overbreadth challenge to Montana's electronic harassment law, the Privacy in Communications Act, Mont. Code Ann. § 45-8-213(1)(a) (to Sept.

2019) ("the Act"). After Dugan petitioned this Court for certiorari, Montana avoided this Court's review by dismissing the prosecution. See Letter from Counsel for Respondent, *Dugan* v. *Montana*, No. 13-13 (Aug. 2, 2013).

2. In this case, William Frederick Lamoureux was convicted under the Act for three phone calls that he placed in 2017. Pet. App. 1a-2a (¶ 1). Lamoureux was previously married to Stacey McGough and had two children with her. Pet. App. 2a-3a (¶ 3). At the time of trial, McGough owned a jewelry store in a building owned by her father, Sam. *Ibid.* In his three calls, Lamoureux threatened violent acts against McGough's person, business, and employees. Pet. App. 3a-4a (¶¶ 4-6).

The first call was to a female employee at McGough's store. The employee described Lamoureux tone as "aggressive, angry, [and] drunk." Pet. App. 3a (¶ 4) (alteration in original). In that call, Lamoureux asked for the phone numbers for his own child and for Sam. *Ibid.* After the employee refused to give him the numbers, Lamoureux responded: "Fuck you, I'm going to get you fired." *Ibid.* He also told the employee that he "was going to kiss [her] and come down to the store and slap [her] ass." *Ibid.* (alterations in original). The second call was to Sam. Lamoureux told him: "I want to kill that fucking cunt [McGough]. I'm going to stuff her in a culvert for the skunks to eat her. I'm going to kill her now." Pet. App. 3a (¶ 5). The third call was also to Sam. Lamoureux told Sam: "I'm going to go kill [McGough] now. I want to shoot her in the face with my .45 and watch her eyes bulge out. I'm going to kill that fucking cunt and then I'm going to put her in the garbage bin in back and set it on fire." Pet. App. 3a-4a (¶ 6). He also threatened to burn down Sam's building. *Ibid.*

3. Montana charged Lamoureux with three felony violations of the Act. Before trial, Lamoureux moved to dismiss the charges against him on the ground that the Act was unconstitutionally overbroad on its face and violated both the First Amendment and the Montana State Constitution. Pet. App. 4a (¶ 7). The trial court denied Lamoureux's motion, and he was convicted on all three counts. Pet. App. 23a-27a; Pet. App. 28a-29a.

Lamoureux raised the same facial constitutional challenge to the Act to the Montana Supreme Court. Pet. App. 6a-7a (¶¶ 11-13). He argued that the Act's prohibition against speech made with the purpose to "annoy" or "offend" was overbroad on its face because it burdened constitutionally protected speech. Pet. App. 6a-8a (¶¶ 11-15). And by singling out those categories of speech, the Act unconstitutionally discriminated against speech based on its content. Pet. App. 11a-12a (¶ 21). The Montana Supreme Court rejected Lamoureux's arguments. Pet. App. 13a (¶ 23).

The court reaffirmed the holding of *State* v. *Dugan*, 303 P.3d 755, and rejected Lamoureux's argument the Act was unconstitutionally overbroad. Pet. App. 9a-11a (¶¶ 18-20). The court held that the Act's specific-intent requirement "removes the danger of criminalizing protected speech" because the First Amendment does not "prohibit the State from prosecuting a person for using certain types of language with the *purpose* to terrify, intimidate, threaten, harass, annoy, or offend the listener." Pet. App. 9a (¶ 18).

In support of its First Amendment holding, the Montana Supreme Court invoked this Court's decision in *Virginia* v. *Black*, 538 U.S. 343 (2003). Pet. App. 10a-11a (¶ 20). The Virginia law at issue in *Black*

criminalized burning a cross with the intent to intimidate. 538 U.S. at 363. The Montana Supreme Court reasoned that just as a state could ban cross burning with the intent to intimidate, so too could Montana ban any electronic communication with the intent to terrify, intimidate, threaten, harass, annoy, or offend. Pet. App. 10a-11a (¶ 20). The court also cited to a string of lower-court cases that upheld telephone harassment statutes. *Ibid.*

Based on these cases, the court held that the Act does not criminalize speech. Pet. App. 11a-12a (¶ 21). Instead, it criminalizes "conduct; that conduct being that the speech was uttered with the purpose and specific intent of intimidating, threatening, or harassing another person." *Ibid.* As a result, the Montana Supreme Court held that the Act does not violate the First Amendment because it is "narrowly tailored to control conduct without reaching a substantial amount of protected speech." *Ibid.*

REASONS FOR GRANTING THE WRIT

The right to free speech is a core constitutional guarantee central to the free exchange of ideas. Yet federal and state high courts are starkly divided, 9-9, over whether electronic harassment laws that proscribe speech intended to annoy or offend are unconstitutionally overbroad. The split has only worsened since it first came to this Court's attention. See *Gormley*, 449 U.S. at 1024 (White, J., dissenting from denial of certiorari). Moreover, the need for uniformity has grown given the ubiquity of electronic communications that may be subject to different jurisdictions.

The decision below flouts the First Amendment's bedrock principle that states may not ban speech just

because it is offensive. By criminalizing speech intended to annoy or offend, the Act reaches far beyond the narrow categories of speech that this Court has previously recognized as unprotected. The Act sweeps in broad categories of protected speech, punishing speakers and chilling others.

This case provides this Court with a good vehicle to provide much-needed guidance on the First Amendment's application to annoying or offensive speech over electronic media. The issue frequently recurs and has fully percolated, as nearly 20 lower courts have already weighed in. The issue will only grow more important as more and more speech takes place over electronic media. This Court should grant certiorari.

I. Federal and State Courts Are Deeply Divided Over the Facial Validity of Electronic Harassment Laws Under the First Amendment.

Courts in 18 jurisdictions have addressed the constitutionality of electronic harassment laws that criminalize speech intended to annoy or offend. These courts have divided evenly into two groups. Nine courts, including the Montana Supreme Court, have held that such laws do not violate the First Amendment and rejected facial overbreadth challenges. Another nine courts have reached the exact opposite conclusion, holding that such laws are facially overbroad and violate the First Amendment.

A. Nine Jurisdictions Have Upheld Electronic Harassment Laws that Prohibit Speech Intended to Annoy or Offend Against Overbreadth Challenges.

Three federal courts of appeals and six state courts of last resort, including the Montana Supreme Court, have rejected facial overbreadth challenges to state electronic harassment statutes that proscribe speech intended to annoy or offend. Six of these nine courts have held that these statutes regulate conduct, not speech. The remaining three held that these statutes do not sweep broadly enough to warrant facial invalidation.

1. One federal circuit and five states have held that electronic harassment laws proscribe conduct rather than speech. The first case adopting this position was *Gormley* v. *Director, Connecticut State Department of Probation*, 632 F.2d 938 (2d Cir. 1980). Gormley was convicted under Connecticut's electronic harassment statute, which at the time prohibited making phone calls with the "intent to harass, annoy or alarm another person." *Id.* at 940 & n. 1 (quoting Conn. Gen. Stat. § 53a-183(a)(3) (Supp. 1979)). Gormley argued that the Connecticut law was unconstitutionally overbroad on its face. *Ibid.*

The Second Circuit rejected Gormley's argument, holding that the "Connecticut statute regulates conduct, not mere speech." *Id.* at 941. It observed that the statute proscribed all phone calls, "whether or not a conversation actually ensues." *Id.* at 942. As a result, the court reasoned, the statute criminalized only the placement of the intrusive phone call, and not what was said over the phone. *Ibid.* Any possible chilling effect on free speech was deemed "minor compared

with the all-too-prevalent and widespread misuse of the telephone to hurt others." *Ibid.*

The Second Circuit also observed that "several states have struck down telephone harassment statutes as unconstitutionally overbroad." *Id.* at 942 n. 5 (citing *Bolles* v. *People*, 541 P.2d 80 (Colo. 1975); *People* v. *Klick*, 362 N.E.2d 329 (Ill. 1977); *State* v. *Dronso*, 279 N.W.2d 710 (Wis. App. 1979)). Those three cases struck down state laws that prohibited electronic communications intended to "annoy" another. But the Second Circuit, without further elaboration, "decline[d] the invitation" to follow those three courts' lead and invalidate Connecticut's law. *Ibid.*

Justice White would have accepted that invitation. Gormley petitioned this Court for certiorari, and this Court denied his petition. *Gormley*, 449 U.S. 1023. Justice White dissented. He explained that the Second Circuit's decision was in "obvious tension" with this Court's First Amendment case law. *Id.* at 1024 (White, J.). But even if the decision were correct, Justice White would have granted review to resolve "the difference in opinion among those courts that have considered constitutional challenges to similar state statutes." *Id.* at 1024-1025.

Since *Gormley*, four state courts of last resort, in Kansas, Maryland, South Dakota, and Texas, have all reached the same conclusion as *Gormley*. These courts all held that state electronic harassment statutes regulate conduct and do not proscribe any expression protected by the First Amendment. *State* v. *Whitesell*, 13 P.3d 887, 901 (Kan. 2000); *Galloway* v. *State*, 781 A.2d 851, 877-878 (Md. 2001); *State* v. *Asmussen*, 668 N.W.2d 725, 730 (S.D. 2003); *Scott* v. *State*, 322 S.W.3d 662, 669-670 (Tex. Crim. App. 2010), abrogated in part

on other grounds by *Wilson* v. *State*, 448 S.W.3d 418 (Tex. Crim. App. 2014).

For example, the Texas criminal high court upheld a Texas law that criminalized repeated phone calls made with "intent to harass, annoy, alarm, abuse, torment, or embarrass another." *Scott*, 322 S.W.2d at 666 n. 4 (quoting Tex. Penal Code § 42.07(a)). The court rejected the defendant's First Amendment challenge, holding that the Texas law "does not implicate the free-speech guarantee of the First Amendment" because it regulates "noncommunicative [conduct], even if the conduct includes spoken words." *Id.* at 669-670. The Texas law was not overbroad, the court said, because "in the usual case, persons whose conduct violates [Tex. Penal Code] § 42.07(a) . . . will have only the intent to inflict emotional distress for its own sake," and the First Amendment does not protect a bald desire to inflict emotional distress. *Ibid*.

The Montana Supreme Court has joined the Second Circuit and the four other state supreme courts holding that electronic harassment statutes criminalize the intentional misuse of phones to annoy others, and not speech. The Montana Supreme Court explained that the Act is not "a content-based regulation on speech," but rather "a regulation of conduct; that conduct being that the speech was uttered with the purpose and specific intent of intimidating, threatening, or harassing another person." Pet. App. 11a-12a (¶ 21).

2. Two federal circuits and one state high court have upheld electronic harassment laws with different reasoning—that the laws do not burden enough protected speech to warrant facial invalidation. The Sixth and Eleventh Circuits have both rejected facial challenges to the federal Communications Decency Act, 47

U.S.C. § 223 *et seq.* *United States* v. *Bowker*, 372 F.3d 365 (6th Cir. 2004); *United States* v. *Eckhardt*, 573 F.2d 783 (11th Cir. 2006). As relevant in those cases, the Communications Decency Act prohibited anonymously making phone calls with the intent to "annoy, abuse, threaten, or harass" another. *Bowker*, 372 F.3d at 374 (quoting 47 U.S.C. § 223(a)(1)(C)).

In *Bowker*, the defendant was convicted under the Communications Decency Act for several lewd and sexually explicit phone calls to a radio host. *Id.* at 370. The Sixth Circuit rejected the defendant's overbreadth challenge to the law. It held that the law did more than just prohibit annoying speech: it also prohibited abusive speech that does not enjoy First Amendment protections. *Id.* at 379. The court acknowledged that the statute, "if interpreted to its semantic limits, may have unconstitutional applications." *Ibid.* But those cases should be dealt with on an as-applied basis and did not warrant facial invalidation. *Id.* at 380.[2] The Eleventh Circuit then adopted *Bowker*'s reasoning. *Eckhardt*, 573 F.2d at 944.

The Nebraska Supreme Court rejected a First Amendment overbreadth challenge to Nebraska's telephone harassment statute on similar grounds. In *State* v. *Kipf*, 450 N.W.2d 397 (Neb. 1990), the defendant was convicted under a Nebraska statute that prohibited telephoning others and using "indecent, lewd,

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[2] This Court summarily vacated *Bowker* on an unrelated Sixth Amendment sentencing issue. *Bowker* v. *United States*, 543 U.S. 1182 (2005) (granting, vacating, and remanding for further proceedings in light of *United States* v. *Booker*, 543 U.S. 220 (2005)). On remand, the Sixth Circuit reiterated its First Amendment analysis. *United States* v. *Bowker*, 125 Fed. Appx. 701, 702 (6th Cir. 2005).

lascivious or obscene language" "with intent to terrify, intimidate, threaten, harass, annoy, or offend." *Id.* at 402-403 (quoting Neb. Rev. Stat. § 28-1310). The court looked to cases outside Nebraska, observing that some courts had held similar laws unconstitutionally overbroad, while other courts had reached the exact opposite outcome with respect to similar statutes. *Id.* at 407-409. Without distinguishing the contrary cases, the Nebraska Supreme Court held that Nebraska's law was not overbroad because it was properly aimed at "the making of telephone calls which are designed to inflict mental discomfort." *Id.* at 406, 409. To the extent the law did burden free speech, the court held that those issues should be resolved on a case-by-case basis. *Id.* at 409.

3. Many state intermediate appellate courts have also upheld harassment statutes that targeted communications made with the intent to annoy or offend. See, *e.g.*, *State* v. *Hagen*, 558 P.2d 750 (Ariz. App. 1976); *People* v. *Astalis*, 172 Cal. Rptr. 3d 568 (2014); *State* v. *Richards*, 896 P.2d 357 (Idaho App. 1995); *People* v. *Taravella*, 350 N.W.2d 780 (Mich. App. 1984); *State* v. *Gattis*, 730 P.2d 497 (N. M. App. 1986); *City of Everett* v. *Moore*, 683 P.2d 617 (Wash. App. 1984).

B. Nine Jurisdictions Have Held that Electronic Harassment Laws Prohibiting Speech Intended to Annoy or Offend Are Facially Overbroad.

Eight state courts of last resort and one federal court of appeals have reached the opposite conclusion as the nine courts above, holding that statutes similar to Montana's are facially overbroad in violation of the First Amendment. These courts split from the courts upholding such laws in two ways. First, they hold that laws like Montana's criminalize protected speech, not

just unprotected conduct. Second, they hold that words like "annoy" and "offend" are too broad and proscribe far too much speech to pass constitutional muster under the First Amendment.

1. The most direct repudiation of the conduct-not-speech rationale comes from Connecticut. In *State* v. *Moulton*, 78 A.3d 55 (Conn. 2013), the Connecticut Supreme Court returned to the same Connecticut law that the Second Circuit upheld in *Gormley*. The law criminalized phone calls made "with intent to harass, annoy or alarm another person" and "in a manner likely to cause annoyance or alarm." Conn. Gen. Stat. § 53a-183 (2012). *Gormley* and prior Connecticut cases had held that § 53a-183 "simply does not purport to regulate speech" and instead regulates "harassing conduct." *Moulton*, 78 A.3d at 67-68 (citation omitted).

But after reconsidering the issue, the Connecticut Supreme Court reversed course. *Id.* at 71. Breaking with *Gormley*, the Connecticut Supreme Court held that a caller's "manner" includes what the caller said over the phone "and is not confined solely to the timing and placement of the call." *Id.* at 69-70. In other words, the statute's implicit reference to the content of the phone call meant that the law reached beyond the caller's conduct and regulated the caller's speech. The court then held that the First Amendment prohibited criminal prosecutions for protected speech, and that the Connecticut law had to be narrowed in order to survive First Amendment scrutiny. *Id.* at 71. To save the statute, the court held that it could only be applied to "speech, like true threats, that is not protected by the first amendment." *Ibid.* Furthermore, the jury must be instructed as to the "difference between protected and unprotected speech." *Id.* at 71-72.

The Illinois Supreme Court also rejected the conduct-not-speech rationale. In *Klick*, 362 N.E.2d 329, Klick was convicted under an Illinois law that prohibited making phone calls "[w]ith intent to annoy another." *Id.* at 330 (quoting 720 Ill. Comp. Stat. ch. 38, §26-1 (1973)). The court brushed aside arguments that the statute merely proscribed conduct by making "the call itself the criminal act." *Id.* at 331. The court found that the statute was simply too broad to be construed so narrowly because it reached "any call made with the intent to annoy," including calls that are protected by the First Amendment. *Id.* at 332. For example, the Illinois law would reach a dissatisfied customer's call to customer service, an irate constituent's call to a public official, or family members' bickering. *Ibid.* Such speech, while certainly annoying or unwelcome, is nevertheless constitutionally protected.

As the Illinois court put it, while there is no "unlimited right to annoy another, by speech or otherwise," states "cannot abridge one's first amendment freedoms merely to avoid slight annoyances caused to others." *Id.* at 331-332 (citing *Coates* v. *Cincinnati*, 402 U.S. 611, 615-616 (1971)). By proscribing calls intended to "annoy," Illinois had reached far beyond the limited range of speech that states may proscribe under the First Amendment. *Id.* at 332.

2. Five more states—Colorado, Florida, New Hampshire, New York, and Oregon—agree with *Klick* that statutes criminalizing communications with intent to "annoy" are unconstitutionally overbroad. *Bolles*, 541 P.2d at 81 n. 1, 82-83; *Gilbreath* v. *State*, 650 So. 2d 10, 11, 13 (Fla. 1995); *State* v. *Brobst*, 857 A.2d 1253, 1256 (N.H. 2004); *People* v. *Golb*, 15 N.E.3d 805, 813-814 (N.Y. 2014); *State* v. *Blair*, 601 P.2d 766, 768-769 (Or. 1979).

Two other courts, including the Third Circuit, have reached the same conclusion with respect to similar statutory language. *Virgin Islands* v. *Vanterpool*, 767 F.3d 157, 162, 166-168 (3d Cir. 2014) ("intent to harass or alarm" (citation omitted));[3] *State* v. *Vaughn*, 366 S.W.3d 513, 519-521 (Mo. 2012) ("[k]nowingly makes repeated unwanted communication" (citation omitted)).

Many of these courts also highlighted that the sheer breadth of laws like Montana's would produce absurd results by criminalizing protected speech. For example, the New Hampshire Supreme Court observed that a law prohibiting phone calls "with a purpose to annoy or alarm another" would criminalize "a call from a neighbor warning of an approaching tornado," or "a call from a bill collector demanding that payments be made." *Brobst*, 857 A.2d at 1254, 1256 (citation omitted). And the Missouri Supreme Court noted that a Missouri law prohibiting "knowingly mak[ing] repeated unwanted communication" would criminalize a Salvation Army volunteer's needling of passersby to donate. *Vaughn*, 366 S.W.3d at 519-521. These courts all agree: "The absurdity of this is patently obvious . . . . The First Amendment is made of sterner stuff." *Bolles*, 541 P.2d at 83.

3. At least two state intermediate courts likewise agree, holding that laws that proscribe speech in-

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[3] *Vanterpool* was an ineffective assistance of counsel appeal. 767 F.3d at 160-161. The Third Circuit held that Vanterpool had been prejudiced by his counsel's failure to raise a First Amendment challenge at trial to the Virgin Islands law under which Vanterpool was convicted because the challenge likely would have succeeded. *Id.* at 168.

tended to annoy are overbroad under the First Amendment. *Dronso*, 279 N.W.2d at 714; *McKillop* v. *State*, 857 P.2d 358, 365 (Alaska App. 1993).

C. The Split Is Intractable.

These cases reveal a sharp division over the constitutional analysis that should apply to laws that prohibit speech intended to annoy or offend.

More broadly, the Second Circuit, Montana, and the four other state courts holding that electronic harassment laws regulate conduct rather than speech are in tension with other courts that have invalidated electronic harassment statutes on an as-applied basis. For example, in *United States* v. *Popa*, 187 F.3d 672 (D.C. Cir. 1999), a Virginia resident placed racist and vulgar phone calls to the office of the United States Attorney for the District of Columbia and was prosecuted under a federal law that prohibited making calls "with intent to annoy, abuse, threaten, or harass." *Id.* at 674 (quoting 47 U.S.C. § 223(a)(1)(C)). The D.C. Circuit held that the law was unconstitutional as applied to Popa's calls because such political speech from a constituent to a government official is protected by the First Amendment. *Id.* at 673. But if *Popa* arose in any of the six conduct-not-speech jurisdictions, Popa could still be prosecuted.

The split among courts has persisted, and there is no reason to believe they will reach consensus. If anything, the split has deepened in the 40 years since Justice White first called upon this Court to resolve the issue.

There is a need for uniformity in this area, especially given the ubiquity of electronic communications that may be subject to different jurisdictions, and that there is not even agreement between state and federal

courts in the same jurisdiction. In the Second Circuit, the New York Court of Appeals came to the opposite conclusion as the Second Circuit Court of Appeals regarding similar laws, and the Connecticut Supreme Court disagreed with the Second Circuit over whether the *same* statute proscribes conduct or speech. Compare *Gormley*, 632 F.2d at 941 with *Golb*, 15 N.E.3d at 813-814, and *Moulton*, 78 A.3d at 71.

Only this Court is capable of resolving this entrenched disagreement and bringing uniformity to the important question presented here.

II. The Montana Supreme Court's Decision Is Wrong.

The deep fracture among lower courts would warrant review even if Montana's rule were correct. But certiorari is all the more necessary because the Montana Supreme Court's application of this Court's First Amendment jurisprudence is wrong, and that constitutional error will chill speech and stifle the free exchange of ideas.

This Court's First Amendment overbreadth test has two steps. First, the court must determine whether some of the challenged statute's applications unconstitutionally burden speech. *City of Houston* v. *Hill*, 482 U.S. 451, 458 (1987). Second, the court must balance the unconstitutional applications against the law's plainly legitimate sweep. *Id.* at 464. A statute is facially overbroad "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found.*, 141. S. Ct. at 2387; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973).

The Montana Supreme Court erred at both steps of the test. Montana's Privacy in Communications Act

proscribes vast amounts of protected speech, and its unconstitutional applications far exceed its narrow legitimate sweep.

A. Montana's Privacy in Communications Act Burdens Protected Speech.

The Act regulates all "electronic communication"—in other words, all speech over electronic media. Mont. Code Ann. § 45-8-213(1)(a) (to Sept. 2019). It contains no safety valves for any kind of protected speech, even for political speech that is "at the core of what the First Amendment is designed to protect," *Morse* v. *Frederick*, 551 U.S. 393, 403 (2007) (citation omitted). Instead, the Act's reach is limited in just two ways: the speaker's purpose and the speaker's message. First, the Act's reach is limited to communications made "with the purpose to terrify, intimidate, threaten, harass, annoy, or offend." Mont. Code Ann. § 45-8-213(1) (to Sept. 2019). Second, the Act targets speech that "uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of the person." *Ibid.* These two limitations are inadequate to safeguard, and avoid burdening, protected speech.

1. As this Court has repeatedly held, speech is not unprotected simply because it is annoying or offensive. In *Snyder* v. *Phelps*, 562 U.S. 443 (2011), this Court vacated a civil damages award for intentional infliction of emotional distress against a group that picketed the funeral of a gay servicemember with signs that said, among other vulgarities, "Fags Doom Nations," "Thank God for Dead Soldiers," and "God Hates Fags." *Id.* at 454, 460-461. Had the picketers shared the exact same messages over electronic media (for example, via public comments on a Facebook event for the funeral), they all could have faced criminal liability

in Montana. But the fact that the picketers had every intention to inflict pain and offense did not strip their speech of First Amendment protections. *Id.* at 460-461.

Similarly, this Court held last term that a student's profane social media posts were protected by the First Amendment. *Mahanoy Area Sch. Dist.* v. *B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021). In *Mahanoy*, a high-schooler, B.L., did not make the varsity cheerleading squad and posted a picture on social media with the caption: "Fuck school fuck softball fuck cheer fuck everything." *Id.* at 2042-2043. The message included a picture of B.L. raising her middle finger. *Id.* at 2043. Some of B.L.'s social media "friends" were members of the varsity squad and were offended by the post. *Ibid.* They shared the photo with administrators, who suspended B.L. from the junior varsity team. *Ibid.* This Court determined that while B.L.'s speech was certainly "crude," it was nonetheless protected by the First Amendment, and the school's suspension violated her rights. *Id.* at 2046-2047.

Yet if *Mahanoy* had arisen in Montana, B.L. could have faced a $500 fine, a six-month jail sentence, or both. Mont. Code Ann. § 45-8-213(3)(a) (to Sept. 2019). She used "profane language" in an "electronic communication" with "the purpose to . . . offend" to underscore her displeasure. *Id.* § 45-8-213(1)(a). In other words, if Montana's rule were correct, prosecutors could punish with jail time what principals cannot punish with a suspension.

2. The Montana Supreme Court held that criminalizing speech according to its content and its purpose is permitted by the First Amendment because states may "proscribe the knowing or purposeful use of

speech that is communicated electronically for the purpose of terrifying, intimidating, threatening, harassing, annoying, or offending the recipient of the communication." Pet. App. 9a (¶ 18). Not so.

States cannot target speech for regulation based on its content. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). And they certainly cannot target speech for conveying offensive ideas. *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2299-2300 (2019). Yet the Montana law does both of those things. It regulates speech based on the words used and specifically targets speech that conveys offensive ideas by prohibiting the use of "obscene, lewd, or profane language." Mont. Code Ann. § 45-8-213(3)(a) (to Sept. 2019).

The Act's specific intent requirement does not save it, either. Intent cannot be cleanly severed from speech, because proving a speaker's purpose often turns on what the speaker said. Cf. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 488-489 (1993) (explaining that a defendant's speech may be used to prove his intent). Proving that someone spoke with the purpose to offend often depends on whether that person said something offensive. Proscribing offensive purpose therefore often has the effect of proscribing offensive speech *because of its content*—something that states cannot do.

More broadly, protected speech does not become unprotected conduct simply because the speaker intended to annoy or offend the listener. Only in very limited circumstances does speech lose its protections based on the speaker's intent. For example, true threats must be "conscious to be criminal." *Elonis* v. *United States*, 575 U.S. 723, 740 (2015) (citation omitted). And in *Black*, 538 U.S. 343, this Court held that a state could prohibit burning crosses with the purpose

to intimidate others because "burning a cross is a particularly virulent form of intimidation" associated with the Ku Klux Klan. *Id.* at 363. At most, these cases hold that threats of violence made with intent to threaten or intimidate are not protected by the First Amendment. See also *Snyder*, 562 U.S. at 461 (Breyer, J., concurring) ("And in some circumstances the use of certain words as means [to assault others] would be similarly unprotected."). But they do not hold that bans on speech intended to *annoy or offend* are constitutional.

Furthermore, speakers often have multiple purposes when seeking to convey a message. For example, an activist who tweets out "Fuck the Draft" may intend to both offend and communicate his displeasure with conscription. See *Cohen* v. *California*, 403 U.S. 15, 16-17 (1971). Even if the activist's intent to offend were not constitutionally protected, his intent to convey his opinion on matters of public concern is. *Id.* at 25-26; *Snyder*, 562 U.S. at 458. The Act, however, makes no attempt to distinguish between permissible and impermissible purposes. Nor could it: it would be impossible to punish the activist's purportedly illegitimate purpose without also punishing the activist's legitimate purposes. The Act's specific intent requirement does not prevent it from reaching protected speech.

B. The Act's Burden on Protected Speech Is Substantial Relative to Its Plainly Legitimate Sweep.

The next step in the overbreadth analysis requires courts to compare the law's unconstitutional applications to the law's "plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The law is unconstitutional if its burden on speech is "substantial" relative to its permissible applications. *Ibid.*

The Act's range of unconstitutional applications is vast, as the Act would punish speakers that this Court has previously held are shielded by the First Amendment. Its long overreach is amplified by the threat of criminal sanction, while its legitimate sweep is confined to the narrow categories of unprotected speech that cannot justify such a heavy burden on free expression.

1. Countless cases involve offensive speech. See, *e.g.*, *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2043 ("Fuck school fuck softball fuck cheer fuck everything"); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 48, 51 (1988) (sexually explicit satire); *Cantwell* v. *Connecticut*, 310 U.S. 296, 302-303, 311 (1940) (Anti-Catholic audiobook). Many participants in political debates or speakers on matters of public concern use profane language with the purpose of annoying or offending others. See, *e.g.*, *Snyder*, 562 U.S. at 460-461 ("God Hates Fags"); *Cohen*, 403 U.S. at 16-17 ("Fuck the Draft"). And constituents may choose to express their concerns to public officials in similarly offensive ways. See, *e.g.*, *Popa*, 187 F.3d at 673 (calling then-United States Attorney Eric Holder a "whore, born by a negro whore").

All of these speakers intended for their speech to offend or annoy. All of these speakers used profane or lewd language. And all of their speech enjoyed the protections of the First Amendment. But had these speakers expressed themselves over the phone, social media, or any other electronic medium in Montana, all of them would be subject to criminal prosecution.

2. What is more, criminal laws like the Act "must be scrutinized with particular care," *id.* at 459, for fear that "[t]he severity of criminal sanctions may well

cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno* v. *ACLU*, 521 U.S. 844, 871-872 (1997). In Montana, speakers who intend to annoy another over electronic media and use profanity are subject to a $500 fine, a six-month jail sentence, or both. Mont. Code Ann. § 45-8-213(3)(a) (to Sept. 2019). That is too high of a price for the right to free expression, even to express ideas that some may find annoying or offensive.

Moreover, the Act's chilling effect on speech is amplified by the use of vague and imprecise terms like "annoy" and "offend." In *Coates* v. *Cincinnati*, 402 U.S. 611 (1971), this Court held that a city ordinance prohibiting congregations of people from "conduct[ing] themselves in a manner annoying to persons passing by" was unconstitutionally vague. *Id.* at 611. This Court observed that "[c]onduct that annoys some people does not annoy others," and that "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.* at 614. Without a clear definition of what speech is proscribed and what is not, the range of speech that might be "arguably unlawful" under the Act is expansive indeed.

3. In comparison, the Act's "legitimate sweep" is far narrower than the broad range of protected expression within its grasp. The Act certainly can be applied to cover some forms of constitutionally unprotected speech, such as obscenity, *Miller* v. *California*, 413 U.S. 15, 23 (1973), and true threats, *Elonis* v. *United States*, 575 U.S. 723, 751-752 (2015). If the Act regulated only unprotected speech, there would be no First Amendment issue here.

But these categories of unprotected speech are "narrowly limited." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942); *Elonis*, 575 U.S. at 751. Laws that seek to regulate unprotected expression must be careful not to extend beyond those categories of speech that are "historically unprotected," lest they violate the First Amendment. *Elonis*, 575 U.S. at 751.

For example, in *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974), the defendant was convicted under a municipal ordinance that prohibited using "opprobrious language" towards a police officer. *Id.* at 132. The Louisiana Supreme Court twice held that the ordinance did not reach any protected speech because it only prohibited fighting words. *Ibid.* (citation omitted). This Court reversed. It first held that the proscription against "opprobrious language" clearly went beyond speech that the state could constitutionally prohibit. *Id.* at 133. Since the ordinance, "as construed by the Louisiana Supreme court, is susceptible of application to protected speech, the [ordinance] is constitutionally overbroad and therefore is facially invalid." *Id.* at 134.

This case parallels *Lewis* and invites the same result. Just as the Louisiana Supreme Court did, the Montana Supreme Court interpreted the challenged law twice and held that it did not reach any protected expression. As with the New Orleans ordinance, Montana's law is "susceptible of application to protected speech." Importantly, the *Lewis* Court did not reinterpret the New Orleans law or otherwise limit its reach to unprotected speech. Nor could it have, for only state courts may adopt limiting constructions of their own laws. *Gooding*, 405 U.S. at 520; *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971). Rather than attempt to contort the Act into a

constitutionally permissible law, this Court should invalidate the Act on its face. The Act is unconstitutional on its face because its sheer breadth dwarfs its limited range of legitimate applications.

III. This Case Is a Good Vehicle for Resolving an Important and Recurring Question of First Amendment Law.

1. This case squarely and cleanly presents the issue that has divided courts across many jurisdictions. Petitioner raised his First Amendment argument at every stage of the proceedings below: the trial court, Pet. App. 23a, and in the Montana Supreme Court, Pet App. 2a (¶ 2). The case comes before this Court on direct review, without any of the complications that sometimes arise on collateral review. And the constitutionality of Montana's Privacy in Communications Act is dispositive to petitioner's case. Petitioner was only charged under the Act and no other Montana law. If the Act is unconstitutionally overbroad, petitioner's conviction cannot stand regardless of the Act's constitutionality as applied to petitioner. *Broadrick*, 413 U.S. at 612; see also *Ams. for Prosperity Found.*, 141 S. Ct. at 2378; *Lewis*, 415 U.S. at 133.

That Montana has since amended the statute has no bearing on this case. This Court has permitted overbreadth challenges to criminal convictions even where the underlying statute was amended. *Massachusetts* v. *Oakes*, 491 U.S. 576, 585-586 (1989) (Scalia, J.) (five-justice opinion).[4] That is only just. It would be "strange judicial theory that a conviction initially

[4] Though the *Oakes* Court splintered into three different opinions, a majority of the Court agreed that the overbreadth challenge could proceed.

invalid can be resuscitated by postconviction alteration of the statute under which it was obtained." *Ibid.* Moreover, Montana's revised statute still criminalizes speech that "makes repeated use of obscene, lewd, or profane language" with the purpose to "harass, or injure." Mont. Code Ann. § 45-8-213 (2019). That law continues to burden a substantial amount of protected speech in relation to its legitimate sweep.

2. This case presents an opportunity for the Court to give much-needed guidance on an issue of widespread importance. The federal government and nearly every state in the country have enacted electronic harassment statutes similar to Montana's. Office of Just. Programs, U.S. Dep't of Just., Stalking and Domestic Violence 17 (2001) (NCJ 186157), available at https://www.ncjrs.gov/pdffiles1/ojp/186157.pdf. As a result, many courts around the country have already weighed in on this issue, as discussed above. The issue has fully percolated and is ripe for this Court's consideration.

Finally, statutes like the Act are expansive in scope, reaching anything said over the phone, the internet, and countless other forms of electronic communication. Their reach continues to expand as changes in how people communicate lead to more and more speech taking place over electronic forms of communication. Some of that speech will be undeserving of First Amendment protection. But much of it will be vital to the free flow of ideas in a democratic society. "Citizens must be free to use new forms, and new forums, for the expression of ideas." *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 372 (2010). Until this Court resolves the entrenched and enduring split among the courts below, states seeking to regulate those new forms of communication remain in the dark as to what the First Amendment requires of them. The

time has come for this Court to resolve this important issue and clarify that states may not prohibit speech intended to annoy or offend.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 16, 2021

APPENDIX

APPENDIX A

DA 18-0639

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2021 MT 94

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WILLIAM FREDERICK LAMOUREUX,

Defendant and Appellant.

APPEAL FROM:

District Court of the Eleventh Judicial District,
In and For the County of Flathead,
Cause No. DC 17-633(A)
Honorable Amy Eddy, Presiding Judge

Submitted on Briefs: February 3, 2021

Decided: April 20, 2021

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 A jury found William Frederick Lamoureux guilty of three felony counts of Privacy in Communications, in violation of § 45-8-213(1)(a), MCA (2017).[1] The charges arose out of three threatening phone calls Lamoureux made to the victims: one to

[1] The Legislature revised parts of § 45-8-213(1)(a) in 2019. *See* § 45-8-213(1)(a), MCA (2019 Mont. Laws ch. 56, § 1). The State's Information alleged Lamoureux violated subsection (1)(a) in 2017. Unless otherwise noted, this Opinion refers to subsection (1)(a), and all other sections of the Code, as they existed in 2017.

Ashley Dunigan (Ashley) and two to Sam McGough (Sam). Because Lamoureux had at least one prior conviction for Privacy in Communications, the instant convictions became felonies. Lamoureux appeals his convictions, which were entered in the Eleventh Judicial District Court, Flathead County. We affirm.

¶2 Lamoureux raises the following four issues on appeal:

1. Is the Privacy in Communications statute, § 45-8-213(1)(a), MCA, facially overbroad or does it constitute a content-based restriction on speech in violation of the First Amendment to the United States Constitution and Article II, Section 7 of the Montana Constitution?

2. Does a person violate the Privacy in Communications statute when the threatening communication was made about someone other than the recipient of that communication?

3. Was there sufficient evidence to conclude there was jurisdiction when the threatening communication was made to a person located outside of Montana?

4. Did the District Court fully and fairly instruct the jury in accordance with the evidence presented?

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Lamoureux's ex-wife, Stacey McGough (Stacey), owns a jewelry store in Whitefish that her parents previously owned. At the time of trial, Stacey's father, Sam, still owned the building in which the jewelry store is located. Both Stacey and Lamoureux were residents of Flathead County—Stacey lived in Whitefish, and Lamoureux lived between Whitefish and Columbia Falls. Stacey and Lamoureux were

married for 16 years and had two children together, A. and H.

¶4 On September 20, 2017, Ashley, one of Stacey's employees, was working at the jewelry store when Lamoureux called the store. On the call, Lamoureux was "aggressive, angry, [and] drunk" and he told Ashley he wanted Sam's and H.'s phone numbers. Ashley told him she was not able to give him the numbers and Lamoureux responded, "Fuck you, I'm going to get you fired." He dropped the phone and hung up but called the store again. He reiterated that he wanted the phone numbers, and Ashley responded that she could not give him the phone numbers. He shouted "bullshit" and then told Ashley he "was going to kiss [her] and come down to the store and slap [her] ass." Ashley was afraid and concerned that Lamoureux was going to come to the store, so she and another employee immediately closed and locked the store early, called the police, and let the neighboring store owner know what was happening.

¶5 On October 12, 2017, Sam received a call from Lamoureux. Lamoureux had been drinking and sounded angry. Lamoureux told Sam, referring to Stacey, "I want to kill that fucking cunt. I'm going to stuff her in a culvert for the skunks to eat her. I'm going to kill her now." Sam considered Lamoureux's language profane, offensive, threatening, and harassing. He contacted the Whitefish police and asked them to go to the jewelry store, walk Stacey to her car, and make sure that she was safe.

¶6 On November 7, 2017, Sam received another phone call from Lamoureux. At the time, Sam was in New York. This time, Lamoureux said,

> I'm going to go kill her now. I want to go shoot her in the face with my .45 and

> watch her eyes bulge out. I'm going to kill that fucking cunt and then I'm going to put her in the garbage bin in back and set it on fire.

Lamoureux said he was on his way there: "I'm on my way, I'm going to kill her." He told Sam he was going to destroy the jewelry store building: "I'm going to burn your building down so that she won't have a job." Again, Sam testified that the language was profane, threatening, offensive, and harassing. Sam perceived the threats to be very real. He knew Lamoureux owned a .45, and he assumed Lamoureux was on his way to Stacey's from his home. Accordingly, Sam called Stacey and law enforcement.

¶7 The State charged Lamoureux in an Amended Information, with three counts of felony Privacy in Communications. Lamoureux filed two motions to dismiss before trial: one contending that the State had failed to state an offense in Count II—relating to the October 12, 2017 phone call—because the threatening communication was made about someone other than the recipient of the communication; and another—as to all three counts—contending § 45-8-213(1)(a), MCA, was unconstitutionally overbroad under the "freedom of speech" clauses of the Montana and United States Constitutions. At the close of evidence, Lamoureux also moved to dismiss Count III, regarding his second communication to Sam, arguing there was insufficient evidence for the jury to conclude the offense occurred in Montana. The District Court denied all three motions.

¶8 The District Court instructed the jury that Lamoureux was charged by Amended Information with three counts of Privacy in Communications. The court gave four instructions relevant to the issues

presented on appeal: the specific and entire statutory language for the offense of Privacy in Communications, and three separate instructions on the elements for each offense. The District Court instructed the jury that the State must prove Lamoureux knowingly or purposely communicated by electronic communication with the victim, and that Lamoureux acted knowingly or purposely as to each offense. As to Count I, the court instructed that the State must also prove "the Defendant knowingly or purposely used obscene, lewd, or profane language, or suggested lewd and lascivious acts, with the purpose to harass, annoy or offend Ashley Dunigan." As to Count II, the court instructed that the State also must prove: "[t]hat in threatening to kill Stacey McGough, the Defendant knowingly or purposely used obscene, lewd, or profane language with the purpose to harass, annoy or offend Sam McGough." Finally, as to Count III, the court instructed that the State also must prove:

> That in threatening to kill Stacey McGough, the Defendant knowingly or purposely used obscene, lewd, or profane language with the purpose to harass, annoy or offend Sam McGough; or the Defendant knowingly or purposely threatened to inflict injury or physical harm to the property of Sam McGough with the purpose to harass, annoy or offend Sam McGough.

¶9 The jury found Lamoureux guilty on all three counts. Lamoureux appeals his convictions.

STANDARDS OF REVIEW

¶10 This Court reviews de novo the denial of a motion to dismiss in a criminal case. *State v. Dugan*,

2013 MT 38, ¶ 13, 369 Mont. 39, 303 P.3d 755. This Court's review of constitutional questions is plenary and we examine a district court's interpretation of the law for correctness. *State v. Sedler*, 2020 MT 248, ¶ 5, 401 Mont. 437, 473 P.3d 406. A court's determination of its jurisdiction is a conclusion of law, which this Court reviews de novo to determine whether the court's interpretation of the law is correct. *Stanley v. Lemire*, 2006 MT 304, ¶ 52, 334 Mont. 489, 148 P.3d 643. A district court has broad discretion in formulating jury instructions, and our standard of review is whether the court abused that discretion. *State v. Spotted Eagle*, 2010 MT 222, ¶ 6, 358 Mont. 22, 243 P.3d 402.

DISCUSSION

¶11 *1. Is the Privacy in Communications statute, § 45-8-213(1)(a), MCA, facially overbroad or does it constitute a content-based restriction on speech in violation of the First Amendment to the United States Constitution and Article II, Section 7 of the Montana Constitution?*

¶12 The statute under which Lamoureux was charged provides that a person commits the offense of violating Privacy in Communications if the person knowingly or purposely:

> with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with a person by electronic communication and uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of the person. The use of obscene, lewd, or profane language or the making of a

> threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend.

Section 45-8-213(1)(a), MCA.

¶13 Lamoureux challenges the constitutionality of the statute, arguing it is overbroad and violates free speech rights guaranteed by the Montana and United States Constitutions. He argues the statute criminalizes substantial constitutionally-protected speech and, therefore, the State's prosecution under the statute is void.

¶14 "In reviewing constitutional challenges to legislative enactments, the constitutionality of a legislative enactment is prima facie presumed, and 'every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt.'" *State v. Egdorf*, 2003 MT 264, ¶ 12, 317 Mont. 436, 77 P.3d 517 (quoting *T & W Chevrolet v. Darvial*, 196 Mont. 287, 292, 641 P.2d 1368, 1370 (1982) (citations omitted). Thus, the party challenging a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Egdorf*, ¶ 12 (citing *State v. Price*, 2002 MT 229, ¶ 28, 311 Mont. 439, 57 P.3d 42 (*rev'd in part on other grounds*)).

¶15 An overbroad statute is one that is designed to burden or punish activities that are not constitutionally protected but includes within its scope activities that are protected by the First Amendment. *State v. Nye*, 283 Mont. 505, 515, 943 P.2d 96, 102 (1997). The crucial question is whether the statute sweeps within its prohibitions what may not be punished constitutionally. *Dugan*, ¶ 52 (citing

Whitefish v. O'Shaughnessy, 216 Mont. 433, 440, 704 P.2d 1021, 1026 (1985) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972))).

¶16 "A statute is unconstitutionally overbroad only if its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *State v. Spottedbear*, 2016 MT 243, ¶ 15, 385 Mont. 68, 380, P.3d 810 (quoting *State v. Lilburn*, 265 Mont. 258, 264-65, 875 P.2d 1036, 1040 (1994) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973))). A party facially challenging a statute on overbreadth grounds must prove there is a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . ." *Lilburn,* 265 Mont. at 265, 875 P.2d at 1041 (quoting *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 801 (1984)). The test for overbreadth, therefore, "is not whether hypothetical remote situations exist, but whether there is a significant possibility that the law will be unconstitutionally applied. *Lilburn,* 265 Mont. at 269, 875 P.2d at 1043 *(*citing *Broadrick*, 413 U.S. at 615).

¶17 When there is no realistic danger or significant possibility that First Amendment protections will be meaningfully compromised, this Court has held that any unconstitutional application of a statute should be addressed under an as-applied challenge on a case-by-case basis. *Spottedbear*, ¶ 16. "To the extent that the statute may reach constitutionally protected expression, we conclude, as did the Supreme Court in *Broadrick*, U.S. at 615-16, that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations where the statute is assertedly being applied unconstitutionally." *Lilburn*,

265 Mont. at 270, 875 P.2d at 1044. Lamoureux makes only a facial overbreadth challenge and does not challenge the statute as applied to his own conduct.

¶18 We addressed the constitutionality of § 45-8-213(1)(a), MCA, in *Dugan* and determined the statute, after striking one invalid provision, was not facially overbroad in violation of free speech protections guaranteed by the Montana and United States Constitutions. While concluding that the prima facie evidence provision of the statute was facially overbroad, we held that neither the Montana nor the United States Constitutions prohibit the State from prosecuting a person for using certain types of language with the *purpose* to terrify, intimidate, threaten, harass, annoy, or offend the listener. *Dugan*, ¶¶ 50, 64 (emphasis added). This Court concluded that the Privacy in Communications statute does not run afoul of free speech principles because "the requirement that the State prove [the defendant's] statement was made with a specific intent removes the danger of criminalizing protected speech." *Dugan*, ¶ 50. This Court recognized that while First Amendment jurisprudence dictates that the State may not generally proscribe the use of language simply because it is objectively offensive or because the language chosen actually offended a particular person (*Dugan*, ¶ 45), it may proscribe the knowing or purposeful use of speech that is communicated electronically for the purpose of terrifying, intimidating, threatening, harassing, annoying, or offending the recipient of the communication. *Dugan*, ¶ 64.

¶19 Hence, in *Dugan*, this Court rejected the argument that Lamoureux makes on appeal: that § 45-8-213(1)(a), MCA, is unconstitutionally overbroad by

prohibiting protected speech. The statute is, as this Court and the United States Supreme Court have said long before *Dugan*, "narrowly tailored to accomplish the State's asserted purpose—caustic, abusive, and robust speech is fully protected until it rises to the level of threats which cause harm to society." *State v. Lance*, 222 Mont. 92, 105, 721 P.2d 1258, 1267 (1986). The statute "curtails no more speech than is necessary to accomplish its purpose." *Lance*, 222 Mont. at 105, 721 P.2d at 1267. The statute does not suppress or infringe upon Lamoureux's, or any person's, freedom to engage in the uninhibited, robust, and wide-open expression of ideas or a suitable level of discourse within the body politic. But Lamoureux did not engage in protected speech when he called Ashley and Sam. While the Montana Constitution guarantees that Lamoureux be "free to speak or publish whatever he will on any subject," § 45-8-213(1)(a), MCA, ensures that he be "responsible for all abuse of that liberty." Mont. Const. art. II, § 7.

¶20 Nonetheless, Lamoureux argues our holding in *Dugan* was manifestly wrong and asks that we now reconsider and overrule our decision. Lamoureux maintains that the statute's intent element cannot render the law constitutional. However, the United States Supreme Court and other federal and state courts have similarly upheld statutes including specific intent elements as constitutional. *See Virginia v. Black*, 538 U.S. 343, 363 (2003) (the "First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate" a person or group of persons); *United States v. Waggy*, 936 F.3d 1014 (9th Cir. 2019) (upholding as constitutional a statute that prohibited making telephone calls with the intent to harass, intimidate, or torment another; although the statute at issue contained a speech component, the

defendant was convicted for his specific conduct); *United States v. Lampley*, 573 F.2d 783 (3d Cir. 1978) (upholding a conviction under a federal telephone harassment statute, against a First Amendment challenge because of the intent requirement); *State v. Kipf*, 450 N.W.2d 397 (Neb. 1990) (upholding a statute that criminalized calling another and using indecent, lewd, lascivious, or obscene language with the intent to terrify, intimidate, threaten, harass, annoy, or offend); *State v. Hagen*, 558 P.2d 750 (Ariz. Ct. App. 1976) (upholding a statute that made it unlawful to telephone another and use any obscene, lewd, or profane language or suggest a lewd or lascivious act with the intent to terrify, intimidate, threaten, harass, annoy, or offend). Many of these cases invalidated prima facia provisions establishing intent while leaving untouched parts of the statutes that criminalize speech used with a specific intent or purpose. These decisions illustrate that the intent or purpose of a person's speech can form the basis for excluding a person's speech from First Amendment protections.

¶21 Lamoureux next asserts that the statute is unconstitutional because it is a content-based restriction on speech. Under the First Amendment of the United States Constitution and Article II, § 7, of the Montana Constitution, a law regulating expressive content is "presumptively invalid." *United States v. Stevens*, 559 U.S. 460, 468 (2010). A regulation is content-based if the law "on its face, draws distinctions based on the message a speaker conveys," such as "the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 171 (2015) (citations omitted). Lamoureux argues § 45-8-213(1)(a) is content-based because the statute classifies electronic communications by the topic discussed or

the idea or message expressed. He argues by its very terms, subsection (1)(a) targets speech with the content of "obscene," "profane," "lewd," "lascivious," or "threat[ing]" language and that the statute does not register speech without that content. We find this argument unavailing and without merit. As we have previously stated, the statute at issue criminalizes intentionally harmful activities—communication with the purpose to terrify, intimidate, threaten, harass, or offend—not merely disagreeable communication. Obscene communications made with criminal intent are restricted not because their content communicates any particular idea but because of the purpose for which it is communicated. *Dugan v. State*, 451 P.3d 731, 739 (Wyo. 2019) (citations and internal quotation marks omitted). The fact that § 45-8-213(1)(a), MCA, identifies obscene, profane, lewd, and lascivious language does not render it a content-based regulation on speech rather than a regulation of conduct; that conduct being that the speech was uttered with the purpose and specific intent of intimidating, threatening, or harassing another person. Such laws are constitutional because they are narrowly tailored to control conduct without reaching a substantial amount of protected speech. *Dugan v. State*, 451 P.3d 731, 739 (Wyo. 2019).

¶22 We take the opportunity to note that the statements Lamoureux made to both Ashley and Sam were debasing, callous, and malicious. Although quite expressive, his statements were void of any social value whatsoever and they bore little to "no essential part of any exposition of ideas." *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942). His statements served one purpose: to threaten and harass Ashley and Sam. Such speech is not in any proper sense "communication of information or opinion safeguarded by the

Constitution, and its punishment as a criminal act would raise no question under that instrument." *Chaplinsky*, 315 U.S. at 572. "An individual cannot be permitted to terrorize members of the public through threats, and then claim protection from prosecution under the First Amendment." *Lance*, 222 Mont. at 104-05, 721 P.2d at 1267. Consequently, Lamoureux could not have prevailed on an as-applied challenge to the statute, even had he raised one.

¶23 The District Court correctly denied Lamoureux's motion to dismiss on constitutional grounds. Section 45-8-213(1)(a), MCA, is not facially overbroad nor is it restrictive of content-based speech in violation of the "freedom of speech" clauses of the Montana and United States Constitutions. The court based its decision on our holdings in *Dugan*, which Lamoureux has not shown to be manifestly wrong.

¶24 *2. Does a person violate the Privacy in Communications statute when the threatening communication was made about someone other than the recipient of that communication?*

¶25 When interpreting a statute, this Court will not look beyond its plain language if the language is clear and unambiguous. *State v. Jardee*, 2020 MT 81, ¶ 8, 399 Mont. 459, 461 P.3d 108. We construe a statute by reading and interpreting the statue as a whole, without isolating specific terms from the context in which they are used by the legislature. *Jardee*, ¶ 8 (citations and quotation marks omitted).

¶26 Count II alleged that Lamoureux, "knowingly or purposely, and with the purpose to intimidate, threaten, and harass, communicated with another, Sam McGough, by telephone and threatened to kill his daughter . . . ." The affidavit filed in support of the Amended Information further alleged that Lamoureux

"used threatening and offensive language [and] told Sam he was planning to find Sam's daughter, Lamoureux's ex-wife, Stacey McGough, and kill her." In his motion to dismiss Count II and on appeal, Lamoureux argues that Count II failed to state an offense because the threat made to Sam on the phone to kill his daughter did not amount to a threat to "inflict injury or physical harm" to Sam's "person or property," as Sam was the person to whom he communicated the threat. Lamoureux argues he threatened to inflict injury or physical harm on Stacey alone, "a person other than the communication's recipient." Lamoureux maintains a threat to someone other than the person receiving the communication is not a threat to the "person or property" of the person receiving the communication.

¶27 The District Court correctly denied the motion finding that Lamoureux's sole focus on whether the threat "to inflict injury or physical harm" language included a third party placed too narrow a reading on the plain language of the statute. The District Court correctly pointed out that the statute also encompassed other acts of prohibited communication including the use of "obscene, lewd, or profane language," or suggesting a "lewd or lascivious act." Certainly, a threat to kill another's daughter constitutes the use of obscene or profane language used to terrify, intimidate, threaten, harass, or at the very least, annoy, or offend a person. The plain statutory language reasonably encompasses threats such as those made by Lamoureux.

¶28 Before trial, Lamoureux again questioned the District Court whether a threat to injure someone's daughter was a sufficient allegation to say that there was a threat to injure or physically harm Sam himself.

The District Court reiterated that "part of the way this is charged is broader than the threats to [Sam]," and that "the threat to kill his daughter is sufficient . . . to demonstrate the purpose to . . . not just threaten but intimidate [and] harass [Sam] through the threats to his daughter." The District Court's interpretation was correct based on the plain language of the statute and is consistent with the statutory definition of "threat" as applied to criminal offenses in general. "Threat" means "a menace, however communicated, to: inflict physical harm on the person threatened *or any other person* or on property; . . . commit a criminal offense; . . . [or] expose a person to hatred, contempt, or ridicule." Section 45-2-101(76)(a), (c), (e), MCA, (emphasis added). The plain meaning of "threatens to inflict injury" by the statute's terms and substance, must include the threat of "killing" that person's daughter. Section 45-8-213(1)(a), MCA.

¶29 The District Court correctly interpreted the statute and denied Lamoureux's motion to dismiss Count II. Lamoureux's threat to kill Sam's daughter fell within the plain meaning and substance of the statute proscribing "threat[s] to inflict injury" that are communicated electronically with the purpose to terrify, intimidate, threaten, harass, annoy, or offend.

¶30 *3. Was there sufficient evidence to conclude there was jurisdiction when the threatening communication was made to a person located outside of Montana?*

¶31 Jurisdiction addresses a court's authority to adjudicate a proceeding. *City of Helena v. Frankforter*, 2018 MT 193, ¶ 18, 392 Mont. 277, 423 P.3d 581. Lack of jurisdiction is a "nonwaivable defect and must be noticed by the court at any time during the pendency of a proceeding." Section 46-13-101(3), MCA. Unlike venue, a defendant may not waive, nor stipulate to, a

court's jurisdiction over his or her criminal case. *Frankforter*, ¶ 18. Thus, in criminal proceedings, the prosecution must establish that the trial court has the authority, or jurisdiction, to preside over the trial. *Frankforter*, ¶ 18. We have held that "[n]o positive testimony that the violation occurred at a specific place is required; it is sufficient if it can be concluded from the evidence as a whole that the act was committed in the county where the indictment is found." *State v. Jackson*, 180 Mont. 195, 200, 589 P.2d 1009, 1013 (1979) (*rev'd in part on other grounds by Frankforter*) (emphasis omitted); *see State v. Dahlin*, 2004 MT 19, ¶¶ 8, 12, 319 Mont. 303, 84 P.3d 35 (a reasonable person, "after viewing the evidence in the light most favorable to the prosecution," could conclude that felony theft was committed in Golden Valley County). Circumstantial evidence can establish jurisdiction—"if, from the facts and evidence, the only rational conclusion [that] can be drawn is that the crime was committed in the state and county alleged, the proof is sufficient." *Jackson*, 180 Mont. at 200, 589 P.2d at 1013 (emphasis omitted) (quoting *State v. Campbell*, 160 Mont. 111, 118, 500 P.2d 801, 805 (1972) (*rev'd in part on other grounds by Frankforter*)).

¶32 Montana's criminal procedure statutes governing jurisdiction provide that a person is subject to prosecution in Montana for an offense "committed either wholly or partly within the state." Section 46-2-101(1)(a), MCA. "An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element occurs within the state." Section 46-2-101(2), MCA. To establish jurisdiction, the State had to prove either the conduct or result proscribed by § 45-8-213(1)(a), MCA, occurred in Montana. Here, the "result," in a Privacy in Communications prosecution, corresponds to the

reception of an electronic communication, and the "conduct" corresponds to the making of the electronic communication. *See* § 45-8-213(1)(a), MCA.

¶33 Lamoureux's conduct establishes jurisdiction in this case. "Acts done outside a jurisdiction but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). Section 45-8-213(1)(a), MCA, includes, as an element of the offense, threats "to inflict injury or physical harm to the person or property of the person." Because the statute includes threats to property, and Lamoureux's threat was to physically harm property located in Montana, the offense, at least in part, was committed in Montana. We conclude that Lamoureux's conduct of making a threat occurred at least partly in Montana because the content of his threat intended to produce detrimental and criminal effects within Montana.

¶34 Aside from the undisputed evidence that Lamoureux lived in Flathead County, there was also ample circumstantial evidence that Lamoureux, while in Montana, threatened Sam when Sam was in New York. The very content of Lamoureux's threat evinces a purpose and ability to immediately locate Stacey at the store and carry out his threat to physically harm her and burn down the building in which the jewelry store was located. Lamoureux told Sam: "I'm going to kill [Stacey] now"; "I'm going to kill her now . . . I'm on my way, I'm going to kill her . . . I'm going to burn your building down"; and Sam immediately took precautions to protect Stacey. Stacey spoke to law enforcement and was terrified by the threats; and Sam called law enforcement to have them protect Stacey

while at the store and home. Sam and Stacey perceived Lamoureux's threats to be real and threatening, with the present ability for Lamoureux to carry them out. In addition to the content of his threat establishing jurisdiction, there was sufficient evidence and testimony for the court to conclude that Lamoureux made the threatening communication while in Montana. Here, "from the facts and evidence, the only rational conclusion [that] can be drawn is that the crime was committed in the state and county alleged"; it was reasonable to conclude that Lamoureux, while in Montana, communicated threats to immediately harm Stacey while she was in Montana, and burn down the building in which the jewelry store was located. *Jackson*, 180 Mont. at 200, 589 P.2d at 1013.

¶35 *4. Did the District Court fully and fairly instruct the jury in accordance with the evidence presented?*

¶36 "A criminal defendant has the right to notice of the crime under which he will be prosecuted." *State v. Hanna*, 2014 MT 346, ¶ 19, 377 Mont. 418, 341 P.3d 629. "An information must reasonably apprise the defendant of the charges against him so that he may have the opportunity to prepare and present his defense." *Spotted Eagle*, ¶ 9. That right is violated when the information charges the defendant of one crime, but the jury is permitted to convict the defendant of another. *Hanna*, ¶ 19. The State may seek to amend its charging choice but may not make substantive amendments within five days of trial. Section 46-11-205(1), MCA. The prohibition on late substantive amendments extends to prohibit a court from effectively amending the charge by instructing the jury on uncharged elements of an offense. *Spotted Eagle*, ¶¶ 13-16.

¶37 Lamoureux challenges the instructions given regarding Counts II and III and argues the District Court effectively amended the Information by improperly instructing the jury on uncharged elements as to Counts II and III.[2] He argues that by changing the essential elements, the instructions changed the nature and substance of the charge. He relies on our decision in *Spotted Eagle*. In *Spotted Eagle*, the State charged the defendant with Partner or Family Member Assault and specifically alleged in the information that the defendant had caused bodily injury. At the end of trial, the State offered a jury instruction that the defendant alternatively had committed the offense by causing reasonable apprehension of bodily injury. *Spotted Eagle*, ¶¶ 2-3. This Court determined that the State's reliance on the additional theory of reasonable apprehension of bodily injury constituted a substantive change to the charge, requiring reversal. *Spotted Eagle*, ¶¶ 11, 13-15. We concluded that "[c]hanging the essential elements change[s] the nature and substance of the charge" against the defendant. *Spotted Eagle*, ¶ 11.

¶38 Our decision in *Spotted Eagle*, however, did not take into account whether evidence presented at trial,

---

[2] Count II charged Lamoureux with communicating to Sam and threatening Stacey, while speaking with the purpose to intimidate, threaten, and harass. The District Court instructed the jury on "obscene, lewd, or profane language" with the purpose to "harass, annoy or offend"—elements not found in the State's charge. Similarly, Count III charged Lamoureux with communicating to Sam and threatening Stacey and Sam's store, and speaking with the purpose to intimidate and threaten. The District Court, instructed the jury on Lamoureux using "obscene, lewd, or profane language with the purpose to harass, annoy or offend," or, alternatively, threats "with the purpose to harass, annoy or offend."

and inferences therefrom, supported the alternative instruction. A jury instruction "may be given when it is relevant to evidence or issues in a case, and when it is supported either by some evidence or some logical inference from other evidence presented at trial." *State v. Johnson*, 1998 MT 289, ¶ 35, 291 Mont. 501, 969 P.2d 925 (citations omitted); *see also State v. Robbins*, 1998 MT 297, ¶ 28, 292 Mont. 23, 971 P.2d 359 ("As a basic rule, trial courts are required to instruct a jury on . . . issue[s] or theor[ies] that [are] supported by the evidence.") (*rev'd on other grounds*). Our decision in *Spotted Eagle* rested on the premise that the State made no suggestion, before or during trial, that it would offer a reasonable apprehension of bodily injury theory. The State first raised the theory through the jury instruction at the close of evidence.

¶39 Lamoureux cannot claim similar surprise here. In contrast to *Spotted Eagle*, evidence and inferences at trial manifestly supported giving the instructions for Counts II and III. Here, Lamoureux's own words were evidence that in threatening to "kill" Stacey, Lamoureux used "obscene, lewd, or profane language with the purpose to harass, annoy or offend," as the jury was instructed for Counts II and III. As to Count II, Sam testified, without objection, that Lamoureux said, "I want to kill that fucking cunt . . . . I'm going to stuff her in a culvert for the skunks to eat her . . . . I'm going to kill her now." Sam testified that Lamoureux's language was profane, offensive, threatening, and harassing. As to Count III, Sam testified, again without objection, that Lamoureux said,

> I'm going to go kill her now. I want to go shoot her in the face with my .45 and watch her eyes bulge out. I'm going to kill that fucking cunt and then I'm going to

> put her in the garbage bin in back and set it on fire.

Again, Sam testified that Lamoureux's language was profane, threatening to him, offensive, and harassing. Thus, the court's instructions took this evidence into account—a factor that was not at issue in *Spotted Eagle*.

¶40 A district court has broad discretion in formulating jury instructions, and we review jury instructions to determine whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *Spotted Eagle*, ¶ 6. To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights. *Spotted Eagle*, ¶ 6. Here, Lamoureux's right to notice of the charges brought against him was not violated—Lamoureux knew what he had been charged with, knew what the law said, knew what he said to Sam, and knew what the evidence against him was, as it was presented at trial. All three counts alleged that Lamoureux's conduct was contrary to § 45-8-213(1)(a), MCA, the entirety of which was given to the jury as an instruction without objection. We do not find this was an abuse of discretion.

CONCLUSION

¶41 The Privacy in Communications statute, § 45-8-213, MCA, is not overly broad nor an improper content-based law and does not violate the Montana and United States Constitutions. A violation of the Privacy in Communications statute may occur when the threatening communication is made about someone other than the recipient of that communication. The District Court correctly concluded that the evidence and testimony established that Lamoureux made the threatening communication

to Sam while Lamoureux was in Montana and that it had jurisdiction over Count III. The District Court fully and fairly instructed the jury on the elements of the offenses in accordance with the charges and evidence that was presented. Lamoureux's convictions are affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JIM RICE

APPENDIX B

Cause No. DC-17-633(A)

THE MONTANA ELEVENTH JUDICIAL
DISTRICT COURT
FLATHEAD COUNTY

STATE OF MONTANA,

Plaintiff,

v.

WILLIAM FREDERICK LAMOUREUX,

Defendant.

ORDER RE: DEFENDANT'S MOTION TO DISMISS

Pending before the Court is Defendant's *Motion to Dismiss,* filed April 25, 2018. The State filed its *Response* on May 9, 2018. Defendant filed a *Reply* on May 15, 2018.

The Defendant has moved to dismiss this case, challenging the constitutionality of the underlying Privacy in Communications statute. The State responds by arguing this Court is bound by precedent in application of the statute and provides support for the constitutionality of the provision.

ORDER

Based on the following Rationale, the Defendant's *Motion to Suppress* is DENIED.

RATIONALE

A. Factual Background

Defendant has been charged with four counts of Privacy in Communications under Section 45-8-213(1)(a), MCA. With a jury trial imminent,

Defendant "moves for an order declaring § 45-8-213(1)(a) unconstitutional and dismissing the Information in its entirety." Def. Mot. to Dismiss, p. 22, Apr. 25, 2018.

B. Legal Analysis

The offense of Privacy in Communications in codified under Section 45-8-213(1)(a), MCA, which provides, in relevant part:

> (1) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person knowingly or purposely:
>
> > (a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with a person by electronic communication and uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of the person. The use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend.

The Montana Supreme Court has recently analyzed this statute in *State v. Dugan*, 2013 MT 38, 369 Mont. 39, 303 P.3d 755. In *Dugan*, the Court struck down "the prima facie provision of the Privacy in Communications statute" as "facially overbroad." *Dugan*, ¶63. However, the Court maintained the constitutionality of the remainder of the statute, holding that it is "well established that 'the same

statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected."" *Ibid*. (citing *State v. Lance*, 222 Mont. 92, 99, 721 P.2d 1258, 1264, (1986); *Brockett v. Spokane Arcades*, 472 U.S. 491, (1985). The Court went on to hold that:

> Though the statute was only designed to burden or punish activities which are not constitutionally protected, the statute includes within its scope activities which are protected by the First Amendment. Therefore, the statute sweeps within its prohibitions speech which may not be punished constitutionally. With the prima facie provision invalidated, Montana's Privacy in Communications statute legitimately encompasses only those electronic communications made with the purpose to terrify, intimidate, threaten, harass, annoy, or offend. Such communications can be proscribed without violating the Montana and United States Constitutions.

Dugan, ¶64.

In his *Motion*, Defendant confronts *Dugan*, urging this Court "to read the opinion on overbreadth as merely addressing the constitutionality of the prima facie evidence provision." Def. Mot. to Dismiss, p. 9, Apr. 25, 2018. Defendant contends that doing so would be "keeping with the flow of the court's decision, which tends to focus almost exclusively on the prima facie evidence provision when discussing overbreadth." *Id*. In other words, Defendant asserts the Court's analysis

of the remainder of the Privacy in Communications statute comprises nonbinding dicta.

The Court does not agree. Although analysis on the rationale behind the constitutionality of the rest of Section 45-8-213, MCA, is light, it is not mere suggestion. Conversely, the Court upheld the provision and found that "such communications can be proscribed without violating the Montana and United States Constitutions." Nothing could drive this point home with any greater magnitude then Defendant's own logic. Defendant argues that because the briefs submitted in *Dugan* did not analyze the constitutionality of the statute as a whole, "nobody involved in the case gave significant attention to the gravity of the court's declaration" regarding the constitutionality of the remaining statute. *Id*. However, clearly, from their own words, one entity gave the issue significant consideration: The Montana Supreme Court. The Court found it imperative to review the prima facie issue in the context of the statute as a whole. After doing so, the Court invalidated part of the statute, and kept the rest. When doing so, the Court explicitly found the remainder of the statute to be constitutional. Thus, the Court does not view the Court's holding as mere dicta.

This district court cannot find Section 45-8-213, MCA, to be unconstitutionally overbroad when the Montana Supreme Court has explicitly held the opposite. *Dugan* is controlling. The Court does not dismiss Defendant's challenge as lacking in merit or support. Instead, the Court finds it is bound by *Dugan*, and therefore Defendant's efforts must be rejected. Defendant's *Motion* is DENIED.

Dated this *2nd* day of July, 2018.

/S/ AMY EDDY
Amy Eddy, District Judge

APPENDIX C

Cause No. DC-17-633(A)

THE MONTANA ELEVENTH JUDICIAL
DISTRICT COURT
FLATHEAD COUNTY

STATE OF MONTANA,

Plaintiff,

v.

WILLIAM FREDERICK LAMOUREUX,

Defendant.

JUDGMENT AND SENTENCE

On September 6, 2018, the above-named Defendant appeared with counsel for a hearing in aggravation and mitigation of sentence following the Defendant's conviction on July 13, 2018. Following the hearing it is the Judgment and Sentence of this Court as follows:

I. COUNT I: Privacy in Communications, a Felony, in violation of Mont. Code Ann. §45-8-213(1)(a).

☐ The imposition of sentence is **Deferred** for a period of ___ years.

☐ The Defendant is committed to the **Department of Corrections** for a period of ___ year(s), with ___ years suspended.

☑ The Defendant is sentenced to the **Montana State Prison** for a period of _5_ years, with _0_ years suspended

☐ The Defendant is sentenced to the **Flathead County Jail** for a period of ___ days, with ___ days suspended.

II. COUNT II: Privacy in Communications, a Felony, in violation of Mont. Code Ann. §45-8-213(1)(a).

☐ The imposition of sentence is **Deferred** for a period of ___ years.

☐ The Defendant is committed to the **Department of Corrections** for a period of ___ year(s), with ___ years suspended.

☑ The Defendant is sentenced to the **Montana State Prison** for a period of _5_ years, with _0_ years suspended

☐ The Defendant is sentenced to the **Flathead County Jail** for a period of ___ days, with ___ days suspended.

III. COUNT III: Privacy in Communications, a Felony, in violation of Mont. Code Ann. §45-8-213(1)(a).

☐ The imposition of sentence is **Deferred** for a period of ___ years.

☐ The Defendant is committed to the **Department of Corrections** for a period of ___ year(s), with ___ years suspended.

☑ The Defendant is sentenced to the **Montana State Prison** for a period of _5_ years, with _0_ years suspended.

☐ The Defendant is sentenced to the **Flathead County Jail** for a period of ___ days, with ___ days suspended.

IV. Credit for Time Served: Defendant is given credit for _253_ day time served.

V. Concurrent/Consecutive Provisions: The Sentence shall run Concurrent/Consecutive. Additional provisions:

_____

_____

VI. Enhancements: N/A

☐ Pursuant to §46-18-221, MCA, the Defendant shall serve an additional ___ years at the Montana State Prison for the use of a firearm or weapon in the commission of the offense. This sentence shall be served consecutively to the sentences imposed under the other Count(s) above.

☐ Other: _____

_____

_____

VII. Persistent Felony Offender: Pursuant to §46-18-502, MCA, the Court finds Defendant is a Persistent Felony Offender ___N/A_____

VIII. Parole Restriction: Pursuant to §46-18-202, MCA, the Court finds the Defendant ineligible for parole and participation in the supervised release program while serving the above term of imprisonment, as follows, for the following reasons:
___N/A_____

_____

_____

IX. Conditions: The Court recommends that any deferred or suspended portions of sentence(s) shall be subject to the conditions, as amended at the sentencing hearing, contained in the Presentence

Investigation Report, dated August 31, 2018, which are attached hereto as Exhibit A.

X. **Additional Provisions and Recommendations**: The Court recommends Defendant be screened and considered for:

_____

_____

X. **Forfeiture:** Pursuant to §45-9-206, MCA, the Court enters the following forfeiture order:

N/A

_____

XI. **Reasons for Sentence:** In fashioning the sentence the Court has been guided by sentencing policy of the State of Montana to punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable; protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders; provide restitution, reparation, and restoration to the victim of the offense; and encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community. Mont. Code Ann. §46-18-101. In addition, the sentence:

☐ Is consistent with the plea agreement.

There was no plea agreement

_____

_____

☑ Is consistent with the recommendation of Adult Probation and Parole.

Adult P&P assessed the Defendant as having a moderate risk of reoffending, which they concede errors on the side of caution

☑ Considers the Defendant's past criminal record.

The Defendant has 19 prior misdemeanors, including DUI, assault and multiple privacy in communications convictions

☑ Takes into account the position and input of the victim(s).

Sam McGough, Stacey McGough and employees of McGough & Company testified as to the Defendant's escalating behaviors and have fear of him based on their history

☑ Provides for substantial punishment or potential punishment, commensurate with the seriousness of the offenses(s).

While the language & comments were made to Sam McGough & Ashley Dunigan they were directed at Stacey McGough who had a restraining order against the Defendant

☑ Provides opportunity for Defendant's treatment or rehabilitation, and is in the best interest of the community.

The Defendant needs chemical dependency and mental health treatment needs

☑ Acknowledges the positive steps the Defendant has taken since charges were filed.

The Defendant has been in custody

☑ Acknowledges the financial position of the Defendant.

The Defendant is self-employed electrician, but since this has lost his licensure, his tools have been stolen. He earns $2,400/month when employed, owns a home, but owes $45,000 in child support and $4,000 IRS lien

Bond, if any, posted by or on behalf of the Defendant, is exonerated and shall be released.

If either party believes that the written Judgment filed herein does not conform to the oral pronouncement of this Court at the time of sentencing, either the Defendant or the State may request a hearing to modify the written, filed Judgment. **This request must be made by either the State or the Defendant within 120 days of the filing of the written Judgment.** In the event such request is made, a hearing will be held to consider the motion at which the Defendant must be present unless Defendant waives the right to be present. If no request for modification is filed by either the State or the Defendant within 120 days, the right to a modification hearing shall be waived.

Dated this *19th* day of September, 2018.

/S/ AMY EDDY
Amy Eddy, District Judge

APPENDIX D

Mont. Code Ann. § 45-8-213

Privacy in communications

Effective: [See Text Amendments] to September 30, 2019

(1) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person knowingly or purposely:

(a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with a person by electronic communication and uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of the person. The use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend.

(b) uses an electronic communication to attempt to extort money or any other thing of value from a person or to disturb by repeated communications the peace, quiet, or right of privacy of a person at the place where the communications are received;

(c) records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation. This subsection (1)(c) does not apply to:

(i) elected or appointed public officials or to public employees when the transcription or

recording is done in the performance of official duty;

(ii) persons speaking at public meetings;

(iii) persons given warning of the transcription or recording, and if one person provides the warning, either party may record; or

(iv) a health care facility, as defined in 50-5-101, or a government agency that deals with health care if the recording is of a health care emergency telephone communication made to the facility or agency.

(2) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person purposely intercepts an electronic communication. This subsection does not apply to elected or appointed public officials or to public employees when the interception is done in the performance of official duty or to persons given warning of the interception.

(3)(a) A person convicted of the offense of violating privacy in communications shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(b) On a second conviction of subsection (1)(a) or (1)(b), a person shall be imprisoned in the county jail for a term not to exceed 1 year or be fined an amount not to exceed $1,000, or both.

(c) On a third or subsequent conviction of subsection (1)(a) or (1)(b), a person shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed $10,000, or both.

(4) "Electronic communication" means any transfer between persons of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.