No. 21-427

In the Supreme Court of the United States

WILLIAM FREDERICK LAMOUREUX
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute that criminalizes obscene, lewd, or profane statements made with the specific intent to terrify, intimidate, threaten, harass, annoy, or offend burdens a substantial amount of protected speech relative to its plainly legitimate sweep.

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.

STATEMENT OF 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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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 The relevant order of the Montana Eleventh Judicial District Court, Pet.App.23a, is unpublished.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 Montana Supreme Court entered judgment 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. amend. 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. amend. XIV.

Section 45-8-213 of the Montana Code Annotated (to Sept. 2019)[1] provides, in relevant part:

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[1] Lamoureux challenges the previous version of this statute, which was amended in 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 ….

…..

(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."

INTRODUCTION

State legislatures possess broad discretion to define criminal acts and impose criminal penalties. *See Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001). That means different states often define similar acts differently. The result, of course, is that similar conduct may be criminal in one state but not another. For example, in California, it is illegal to drive while under the influence, Cal. Vehicle Code § 23152(a), but in Montana, it is illegal to drive or be in "actual physical control of a vehicle" while under the influence. Mont. Code Ann. § 61-8-401. This means that a person who is under the influence and sitting in a parked car in Montana could be subject to criminal penalties, *see State v. Ruona*, 321 P.2d 615, 618 (Mont.

1958) *overruled in part, State v. Christiansen*, 239 P.3d 949 (2010), but a person who is under the influence and sitting in a parked car in California may not be subject to criminal penalties. *See Mercer v. Dep't of Motor Vehicles*, 809 P.2d 404, 414 (Cal. 1991) (requiring "proof of volitional movement of a vehicle"). No one argues there is anything wrong this. After all, each state Legislature is elected by the people of that state to carry out policy goals that best reflect the values of that body politic.

Lamoureux's request to this Court, therefore, is extraordinary. His petition suggests that states with different electronic harassment laws should nevertheless reach the same outcome simply because they regulate similar conduct. Lamoureux asserts that federal and state courts have reached different results under these laws and are "deeply divided." Pet. at 9. But this "enduring and worsening split," *id.* at 1, only exists when comparing statutes that are dissimilar. When comparing like statutes to like statutes, courts have applied First Amendment principles consistently.

The split—such as it is—is not a split in any conventional sense. Different courts have applied First Amendment analyses to different statutes, considering whether the overbreadth is both real and substantial "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Those courts have resultantly reached varying conclusions. And that's exactly as it should be. This Court should deny the petition.

STATEMENT OF THE CASE

Stacey McGough has called Whitefish, Montana home for several decades, and she now owns the jewelry shop once owned by her parents. Pet.App.2a (¶3). Stacey's jewelry shop is located in a building owned by her father, Sam McGough, and she employs five individuals at the store, including an employee named Ashley. Pet.App.2a–3a (¶¶3–4). Stacey and William Frederick Lamoureux were married for 16 years until they divorced in 2009. Pet.App.2a–3a (¶3). Together, they had two children. Pet.App.3a (¶3).

Late on September 20, 2017, Lamoureux called the jewelry shop and spoke with Ashley. Pet.App.3a (¶4). During this phone call, Lamoureux was drunk and aggressive and was seeking the phone numbers for one of his children and Sam. *Id.* When Ashley refused to give him those numbers, Lamoureux said, "Fuck you, I'm going to get you fired." *Id.* He dropped the phone and hung up, but then immediately called again. *Id.* He asked again for the numbers, and when Ashley again refused, he said "bullshit" and then said he "was going to kiss [Ashley] and come down to the store and slap her ass." *Id.*

After this call, Sue and Ashley closed the shop early, fearing that Lamoureux would show up there. Pet.App.3a (¶4). Ashley closed the store early, called the police, and spoke with a neighboring shop owner to explain the situation. *Id.*

A few weeks later, on October 12, 2017, Lamoureux called Sam, who knew Lamoureux's voice and described him as drunk and angry. Pet.App.3a (¶5). Lamoureux told Sam, in reference 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." *Id.* Sam contacted the Whitefish police and asked them to go down to the jewelry shop to check on Stacey and walk her to her car. *Id.*

On November 7, 2017, Lamoureux called Sam while Sam was traveling out of state. Pet.App.3a (¶6). Lamoureux stated that he was "going to burn [Sam's] building down so that [Stacey] won't have a job." Pet.App.4a (¶6). He also 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." Pet.App.3a–4a (¶6). Lamoureux then told Sam, "I'm on my way, I'm going to kill her." *Id.*

Sam knew that Lamoureux lived nearby and owned a .45 caliber firearm. Pet.App.2a (¶3), 4a (¶6). He believed the threat was real. So he called Stacey and law enforcement, who checked on Stacey and circled her neighborhood for a while. Pet.App.4a (¶6). Sam considered these two phone calls to be profane, threatening, offensive, and harassing. *Id.*

The State charged Lamoureux with three felony violations of privacy in communications. Pet.App.1a–2a (¶1). Lamoureux moved to dismiss the charges, claiming the Act was unconstitutionally overbroad on its face and violated both the First Amendment and the Montana State Constitution. Pet.App.4a (¶7). The district court denied his motion, and a jury convicted Lamoureux on all three counts. Pet.App.28a.

Lamoureux raised this same constitutional challenge in the Montana Supreme Court, but to no avail.

Pet.App.6a–7a (¶¶11–13); Pet.App.13a (¶23). The Montana Supreme Court affirmed his convictions.

Lamoureux now asks this Court to hear his case and consider his twice-rejected facial overbreadth challenge. Respondent urges this Court to decline.

REASONS FOR DENYING THE PETITION

I. No genuine First Amendment conflicts exist in state and federal courts regarding electronic harassment statutes.

Lamoureux discusses the "growing split" between courts that have addressed "electronic harassment laws." Pet. for Cert. at 4. But the split only exists if all "electronic harassment laws" are defined at the highest level of generality. Closer examination shows different statutes generating different analyses. When courts have adjudicated similar statutes, they have been consistent in their First Amendment analysis. The cases cited as evidence of the perceived growing split address three distinct categories of electronic harassment statutes. Courts have uniformly recognized that all three categories of statutes are not pure speech restrictions—they regulate conduct.

The first category broadly prohibits making obscene or threatening phone calls with the specific intent to instill fear in the listener. This category not only prohibits annoying phone calls but also prohibits threatening phone calls. These statutes have survived facial overbreadth challenges because of their specific intent requirement and because they do not criminalize a substantial amount of protected speech.

The second category prohibits annoying and harassing phone calls only. Courts have uniformly

declared these statutes unconstitutional because they criminalize a substantial amount of protected speech.[2]

The third category includes—like the first—an "intent" requirement but adds a "likely to annoy" element. These statutes condition criminality on the listener's potential perceptions. Courts have consistently declared these statutes unconstitutional, though the reasoning has varied.

Montana's statute belongs to the first category—it requires a knowing intent to instill fear in the listener. It, and Lamoureux's convictions under it, were patently constitutional. Lamoureux, however, jams these categories of different statutes together to portray a jurisprudential chaos that doesn't really exist. In the end, Montana's electronic harassment law should survive because its plainly legitimate aim to proscribe electronic harassment doesn't prohibit a substantial amount of protected speech.

This Court should deny the petition.

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[2] Not all harassing speech, notably, is protected speech. It is well established that otherwise protected speech can constitute unlawful, discriminatory harassment when it crosses a particular line. *See, e.g., Harris v. Forklift Sys.*, 510 U.S. 17, 21–23 (1993) (defining a hostile work environment under Title VII as "an environment that a reasonable person would find hostile or abusive"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (actionable sexual harassment "must be sufficiently severe or pervasive"). "Offensive" speech therefore requires more nuanced treatment than Lamoureux suggests. *See* Pet. for Cert. at 20–21 (discussing *Snyder v. Phelps*, 562 U.S. 443 (2011) (offensive political speech) and *Mahanoy Area Sch. Dist. V. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021) (offensive student speech)).

A. Category One: prohibitions on conduct undertaken with the intent to instill fear

Where courts have upheld these electronic harassment laws, the statutes address a narrower category of conduct. The statutes prohibited actions taken with a malicious intent, or an intent to instill fear in the victim. *See United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005) ("[T]he thrust of the statute is to prohibit communications intended to instill fear in the victim, not to provoke a discussion about political issues of the day."). Category One statutes prohibit communications "usually … targeted toward a particular victim and are received outside of a public forum." *Id.* And as a result, "the domain of prohibited speech is far more circumscribed, and the government's interest in protecting recipients of the speech is far more compelling …." *Id.*

Kansas's statute targeted conduct most clearly—it prohibited stalking and harassment. In *State v. Whitesell*, 13 P.3d 887 (Kan. 2000), the Kansas Supreme Court considered a statute that prohibited "harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety." Kan. Stat. Ann. § 21-3438(a) (2000), *repealed by* 1020 Kan. Sess. Laws 136. The statute, in turn, defined harassment as a "knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose." Kan. Stat. Ann. § 21-3438 (2000), *repealed by* 1020 Kan. Sess. Laws 136. Upholding the statute's constitutionality, the court determined that

because the statute required intent, action, and a credible threat, the statute excluded constitutionally protected conduct. *See Whitesell*, 13 P.3d at 269 (citing *State v. Rucker*, 987 P.2d 1080, 1095 (Kan. 1999).

Similarly, Maryland's statute prohibited a person from engaging in a "course of conduct that alarms or seriously annoys another person … with intent to harass, alarm, or annoy the other person." Md. Code (1957, 1996 Repl. Vol., 2000 Cum. Supp.), Article 27, § 123. Because this statute required specific intent and only prohibited conduct that persisted after a reasonable warning to desist, the Maryland Court of Appeals ruled that it was constitutional. *See Galloway v. State*, 781 A.2d 851, 862–63 (Md. 2001). Like the Kansas law, this statute targeted conduct aimed at instilling fear in the victim.

And that trend holds for other statutes like Montana's. South Dakota's law—upheld by its high court—prohibited a person from "willfully, maliciously, *and* repeatedly harass[ing] another person." *State v. Asmussen*, 668 N.W.2d 725, 729 (S.D. 2003). The law defined harassment as "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose." *Id.* Quite simply, "[t]he scope of the statute d[id] not sweep free expression of ideas into its scope." *Asmussen*, 668 N.W.2d at 730. Rather, the law limited a specific type of action taken with a specific intent to instill fear in the victim that did not "reach substantial numbers of impermissible applications." *Id.*

So too in Texas, Georgia, and Nebraska. In Texas, the statute required a specific intent "to inflict harm on the victim in the form of one of the listed types of

emotional distress" and targeted "noncommunicative" conduct. *Scott v. State*, 322 S.W.3d 662, 669–70 (Tex. Crim. App. 2010), *abrogated in part by Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014). In Georgia, a person who used a telephone call "whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number" was guilty of a misdemeanor. *Constantino v. State*, 255 S.E.2d 710, 713 (Ga. 1979). Again, these statutes prohibited conduct undertaken with malicious intent to cause harm to the victim. *Id.*

The Nebraska statute, likewise, prohibited the making of a telephone call with a specific intent and with the use of certain sexual language. *See State v. Kipf*, 450 N.W.2d 397, 409 (Neb. 1990). Although the Nebraska Supreme Court's overbreadth analysis noted that the statute "concerns itself with sexual speech," the analysis focused on the law's legitimate proscription of conduct undertaken with specific intent to cause harm and instill fear. *Id.* at 408–09.

The Sixth and Eleventh Circuits reached the same conclusion when reviewing the Communications Decency Act. *United States v. Eckhardt*, 466 F.3d 938, 944 (11th Cir. 2006); *Bowker*, 372 F.3d at 379–80. Both courts held that the statute—prohibiting telephone calls "whether or not conversation or communication ensues … with intent to annoy, abuse, threaten, or harass any person"—targeted conduct, not solely speech. So any overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Bowker*, 372 F.3d at 378 (internal quotations omitted); *Eckhardt*, 466 F.3d at 943 (relying on *Bowker*'s analysis). In *Bowker*, the

court noted that the telephone harassment statute went beyond regulating annoying telephonic communications and "also prohibit[ed] abusive, threatening or harassing communications." 372 F.3d at 379. The statute criminalized "communications intended to instill fear in the victim, not to provoke a discussion about political issues of the day." *Id.*

Lamoureux cites to Florida's statute as falling on the other side of the perceived split, but close examination proves that wrong. This statute prohibited making an anonymous telephone call with the "intent to annoy, abuse, threaten, or harass any person at the called number." Fla. Stat. § 365.16(1)(b). The court upheld this statute in *State v. Elder*, 382 So.2d 687, 690 (Fla. 1980), noting that, while it clearly regulated conduct and speech, "the asserted overbreadth of [the statute] is not real and substantial in relation to the statute's plainly legitimate sweep." *Id.*[3]

In each of these cases, the statutes were similar. They didn't regulate pure speech; instead, they regulated conduct undertaken with a specific intent to instill fear in targeted, specific victims. *See Bowker*, 372 F.3d at 379.

B. Category Two: prohibitions on annoying phone calls

The second category of cases includes statutes that broadly restrict annoying phone calls. Unlike the

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[3] Another subsequent Florida case excised "annoy" and "offend" from a different section of the statute, but even so, left the statute in effect. *See Gilbreath v. State*, 650 So.2d 10, 13 (Fla. 1995) (prohibiting harassing phone calls directed at people in their homes). So that case is of questionable utility to Petitioners here.

Category One statutes, these stop short of also prohibiting threatening, intimidating, or abusive phone calls. Because these statutes are written more broadly, they pose a greater threat to protected speech and have been more readily declared unconstitutional.

Statutes in Illinois, Wisconsin, and New Hampshire illustrate the point well. In Illinois, a person committed disorderly conduct if he made a telephone call "[w]ith intent to annoy another." *People v. Klick*, 362 N.E.2d 329, 330 (Ill. 1977). The Supreme Court of Illinois found this statute overbroad because it limited more than just "perverse telephone calls;" it also swept in any calls made with the broad intent to annoy rather than with the intent to instill fear in the listener. *Id.* at 331. Even though the Illinois statute targeted conduct, it did so by restricting a substantial amount of protected speech. *Id.*

The Wisconsin Supreme Court did likewise with a similar statute that criminalized telephone calls made "[w]ith intent to annoy another." *State v. Dronso*, 279 N.W.2d 710, 713 (Wis. 1979). Attempting to narrow the statute, the State suggested in court that "intent to annoy" really required obscenity, threats, or harassment. *Id.* at 713. But this attempt to rewrite its law *post facto* and squeeze it into Category One failed. The court rightly rejected the State's revisionist argument, concluding that it would require "judicial legislation in its worst form." *Id.* Again, the statute targeted conduct, but it did so by targeting too wide a swathe of protected speech.

And in New Hampshire, a statute prohibited phone calls "with a purpose to annoy or alarm." *State v. Brobst*, 857 A.2d 1253, 1256 (N.H. 2004). The New Hampshire Supreme Court—relying on *Klick*—

distinguished the statute at issue from the one examined by the Sixth Circuit in *Bowker* because it aimed not only at "communications intended to instill fear in the victim, but instead swe[pt] far more broadly." *Id.* at 1257. It lacked the narrowing features of the Category One statutes and was therefore overbroad. The court concluded that the statute criminalized a substantial amount of protected speech and likely discouraged individuals from engaging in protected speech. *Id.* at 1256.

Category Two targets conduct, but the statutes in this category did so by prohibiting far too much protected speech. And because courts can't rewrite statutes to include the additional, narrowing Category One criteria, *see Dronso*, 279 N.W.2d at 713, the courts consistently ruled that the challenged Category Two laws prohibited a substantial amount of protected First Amendment activity.

C. Category Three: prohibitions on annoying speech made with specific intent and that is likely to annoy

Oregon, Colorado, and New York present a third category including somewhat more complicated statutes. These laws required a communication made with an intent to harass, annoy, threaten, or alarm ("intent" element), like Category One. But they also required that the communication be expressed in a manner likely to cause annoyance or alarm ("likely to annoy" element). This additional element stretches beyond "intent" and conditions criminality on the speech's potential effects on the listener. Under these statutes, therefore, the listener's perception or

interpretation of the speech could control whether or not it was criminal.

The Oregon Supreme Court determined Oregon's statute was unconstitutional because of this "likely to annoy" element. *See State v. Blair*, 601 P.2d 766 (Or. 1979). Remarking on the law's overbreadth, the court noted: "[m]essages that are likely to cause 'annoyance' or 'alarm' are almost limitless." *Id.* at 768.[4] Colorado's statute also included both "intent" and "likely to annoy" elements. *Bolles v. People*, 541 P.2d 80, 81 n.1 (Col. 1975). The Colorado Supreme Court considered both facets but concluded it was unconstitutional because of the "likely to annoy" element. *Id.* at 81 ("In effect, if unsettling, disturbing, arousing, or annoying communications could be proscribed, or if they could only be conveyed in a manner that would not alarm, the protection of the First Amendment would be a mere shadow indeed."). The court explained it would be criminal under this statute to "forecast a storm, predict political trends, warn against illnesses, or discuss anything that is of significance" because of the potential to annoy or alarm people. *Id.* In both *Blair* and *Bolles*, the criminality of the statute depended—in part—on the listener's potential perceptions. Obviously, conditioning criminal convictions on whether a listener may or may not find communications annoying or alarming makes the sweep of these statutes unpredictable and deprives potential criminal

[4] While it touched on overbreadth, the *Blair* court struck down the Oregon statute on vagueness grounds. 601 P.2d at 768. That makes it of limited utility here, for Lamoureux only raises an overbreadth challenge to Montana's statute.

malefactors of fair notice. These statutes are therefore quite different from those in Category One.

New York comes closest to defying the uniformity with which the lower courts have treated the different statutory categories. But Respondent believes the New York example still clearly fits within Category Three. And even if it didn't, this single divergence would hardly create the canyon-like split Petitioners decry.

Like the statutes in Oregon and Colorado, New York's included both "intent" and "likely to annoy" elements. In *People v. Golb*, 15 N.E.3d 805, 813–14 (N.Y. 2014), the New York Court of Appeals declared the law unconstitutional. But pinning down how it got there is a more challenging endeavor. The court appeared to hold that "[t]he statute criminalizes … any communication that has the intent to annoy." *Id.* at 813. And that would seemingly place it in tension with Category One. But the court's analysis doesn't clearly explain what element—"intent to annoy" or "likely to annoy"—it actually found troubling.

Golb relied on several cases to reach its conclusion, none of which shed additional light on its reasoning. For example, in *Vives v. New York*, 305 F.Supp.2d 289 (S.D.N.Y 2003), the court held the statute was unconstitutional based on both the "intent" and "likely to annoy" elements. But in *Schlagler v. Phillips*, 985 F.Supp. 419, 421 (S.D.N.Y. 1997), the court held the statute was unconstitutional because of the "likely to annoy" element. In *People v. Dietze*, 549 N.E.2d 1166 (N.Y. 1989), the "intent" element was problematic, but in *People v. Dupont*, 107 A.D.2d 247 (N.Y. 1985), the "likely to annoy" element was the fatal issue. In short, these cases compound the confusion created by *Golb*'s

lack of precision. They all work at cross-purposes and therefore shed little coherent light on why the New York court believed the statute unconstitutional. If unconstitutional solely because of the "intent" element, it would distinctly part ways with its Category One compatriots. But if unconstitutional because of its "likely to annoy" element—the more coherent reading, in Respondent's view—it would place New York's law firmly beside its analogs in Oregon and Colorado. And that of course would further confirm that different statutes produce different outcomes. At worst, New York is a lone outlier.

Lamoureux believes Connecticut's statute most poignantly demonstrates a split. Not so. It fits neatly within Category Three. The Connecticut statute—like the others—includes both "intent" and a "likely to annoy" elements. And while the Second Circuit initially upheld this statute, *see Gormley v. Director, Connecticut State Dep't of Probation*, 632 F.2d 938, 942 (2d Cir. 1980) (focusing on the "intent" element), the Connecticut Supreme Court later held that the "likely to annoy" element was overbroad. *See State v. Moulton*, 78 A.3d 55, 69–70 (Conn. 2013). The "intent" element—consistent with Category One statutes—was fine; the "likely to annoy" language—consistent with Category Three statutes—presented problems. *See id.* And the court did not declare the statute unconstitutional but rather limited its application through jury instructions. *Id.* at 71–72. These two cases nevertheless do not clearly contribute to the "split" in authorities given the conclusion that the statute was overbroad solely because of the "likely to annoy" element.

Category Three statutes are notably different than those in Categories One and Two, so it's no surprise

that courts have treated them differently.[5] The Oregon court reviewed a vagueness challenge, which is not directly on point. The Colorado court concluded the statute was overbroad because criminality depended in part on the listener's perception of the communication. Connecticut's high court also took issue with the "likely to annoy" element. Given the statutory differences, none of these meaningfully conflict with Category One's outcomes. Meanwhile, the New York court failed to clearly articulate why the statute was unconstitutional and, as a result, contributed very little—if at all—to the so-called split in authorities.

Despite minor differences, these Category Three cases hang together. Like Categories One and Two, they clearly target conduct rather than pure speech. Yet they reached different overbreadth conclusions because of important differences in the statutory text.

Montana's statute is not a Category Three statute. It does not condition criminality on the listener's perception. The different statutory language in Categories One, Two, and Three resulted in different outcomes. But each court undertook the same basic judicial framework—to determine whether the proscribed conduct sweeps in too much protected speech.

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[5] Lamoureux cites to *Virgin Islands v. Vanterpool*, 767 F.3d 157 (3d Cir. 2014) and *State v. Vaughn*, 366 S.W.3d 513 (Mo. 2012). But neither helps him here. Missouri's statute only prohibited repeated and unwanted communications; there was no requirement that the communications be annoying or harassing. *See Vaughn*, 366 S.W.3d at 519–21. And in *Vanterpool*, the Third Circuit treated the statute under the second prong of a *Strickland* analysis. *Vanterpool*, 767 F.3d at 166–68; *see also* Pet. for Cert. 17 n.3 (acknowledging its limited applicability).

II. This Court already declined to address this exact "split."

Years ago, this Court refused to address the phenomenon Lamoureux here describes as an "intractable" split. Pet. for Cert. 18; *Gormley v. Director, Connecticut State Dep't of Adult Probation*, 449 U.S. 1023 (1980). Justice White, in his dissent from the denial of certiorari, noted the differences among "courts that have considered constitutional challenges to similar state statutes." *Id.* at 1024 (White, J., dissenting from denial of certiorari). But then as now, the cases he surveyed do not demonstrate an "obvious tension." *Id.* Justice White compared the treatment of statutes in Illinois (criminalizing annoying phones calls), Wisconsin (same), and Oregon (including the "likely to annoy" element) to those in Florida (requiring intent to instill fear in listener) and Georgia (same). Again, these deviations didn't and don't constitute a split. Illinois and Wisconsin targeted annoying communications alone. *See People v. Klick*, 362 N.E.2d 329, 330 (Ill. 1977); *State v. Dronso*, 279 N.W. 2d 710, 713 (Wis. App. 1979). Oregon was not an overbreadth challenge. *State v. Blair*, 601 P.2d 766, 768 (Or. 1979). The Florida and Georgia statutes, conversely, prohibited phone calls made with the specific intent to instill fear in the listener. *See Constantino v. State*, 255 S.E.2d 710, 713 (Ga. 1979); *State v. Elder*, 382 So. 2d 687, 690 (Fl. 1980). In some broad sense, these statutes are similar. But a closer look at the text reveals why they fared differently: they had important dissimilarities. When accounting for that, the results are actually quite consistent. So this Court should do what it did in 1980—deny the petition. *See Gormley v. Director,*

Connecticut State Dep't of Adult Probation, 449 U.S. 1023 (1980).

It makes sense why significantly different statutes are treated differently when it comes to overbreadth challenges: "where conduct and not merely speech is involved … the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615; *see also New York v. Ferber*, 458 U.S. 747 (1982) (people "may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression"). In statutes like Montana's, the sweep is narrower, and clearly legitimate. It covers precisely the type of calls Lamoureux made—calls that are intended to instill fear in the listener. Forecasting a storm, predicting political trends, warning against illness, or discussing other significant matters is not done with this sort of intent. *See Bowker*, 372 F.3d at 379.

Montana's statute—like the other Category One statutes—plainly and materially differs from those in Category Two that prohibit merely "annoying" phone calls. The former focuses narrowly on criminal and unprotected conduct. The latter purport to criminalize much protected—albeit annoying—speech.

Finally, in Category Three, statutes are unsurprisingly overbroad where the communication's criminality depends in part on its potential effect on the listener. Almost definitionally, that enables the statute to sweep in "communications that cannot be constitutionally proscribed." *Bolles*, 541 P.2d at 81 (declaring overbroad a statute that allowed prosecution of a pro-life activist for sending anti-abortion mailers).

III. The Montana Supreme Court correctly upheld Montana's Privacy in Communications Act.

The Montana Supreme Court got it right, below. The First Amendment prohibits States from enacting laws that "abridge[e] the freedom of speech." U.S. Const. amend 1. States cannot "restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U. S. 92, 95 (1972). Any such restriction is presumptively unconstitutional. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

But this presumption does not extend to restrictions on conduct that contains speech elements. *See Cox v. Louisiana*, 379 U.S. 536, 555 (1965) ("[I]t has never been deemed an abridgment of freedom of speech … to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.") (quotations omitted). Courts review these restrictions by considering whether the restriction is overbroad—whether it prohibits conduct at the expense of prohibiting protected speech. "Where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. The test is not whether a statute reaches "some" protected speech, Petition at 19, but whether it reaches "a *substantial* amount of constitutionally protected conduct." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (emphasis added). Below, the Montana Supreme Court

faithfully applied this Court's test for adjudging the constitutionality of restrictions on behavior that is both conduct *and* speech. *See, e.g.*, *Broadrick*, 413 U.S. at 615; *Hoffman Estates*, 455 U.S. at 494.

Montana's statute does not burden a substantial amount of protected speech. As the Montana Supreme Court aptly observed, the question "is not whether hypothetical remote situations exist, but whether there is a significant possibility that the law will be unconstitutionally applied." *State v. Lamoureux*, 485 P.3d 192, 198 (Mont. 2021) (quoting *State v. Lilburn*, 875 P.2d 1036, 1043 (Mont. 1994)). A statute is not "invalid on its face merely because it is possible to conceive of a single impermissible application," *Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting). The overbreadth doctrine is "strong medicine," and courts only employ it "as a last resort." *Broadrick*, 413 U.S. at 613.

No medicine needed here: the Montana 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." *Lamoureux*, 485 P.3d at 199. The Court relied on *State v. Dugan*, 303 P.3d 755 (Mont. 2013), which previously upheld the Act because of its heightened requirement that the criminal communication be made with "specific intent" to "terrify, intimidate, threaten, harass, annoy, or offend." So in this case, just as in *Dugan*, the Montana Supreme Court correctly concluded that the statute was not overbroad.

Lamoureux additionally attacks the Montana Supreme Court's decision on two grounds, neither of which is persuasive.

1. First, he argues the Montana statute is a content-based regulation. But that ignores how this Court and others have treated electronic harassment laws. The Court considers whether conduct, "and not merely speech," is addressed by the statute. *Broadrick*, 413 US at 615. The Montana statute clearly addresses both conduct and speech. It requires specific intent and an act. Mont. Code. Ann. § 45-8-213. This is not a content-based regulation—a person does not commit a crime simply by spewing "obscene, lewd, or profane language." *Id.* The crime occurs when the person does so (1) via electronic communication and (2) with the specific intent to "terrify, intimidate, threaten, harass, annoy, or offend." *Id.* And like the statute in *Bowker*, Montana's statute proscribes conduct targeted toward a particular victim. 372 F.3d at 379. This type of communicative conduct is restricted because of the *intent* with which it's communicated—not the idea being expressed.

Reed makes clear that a law is only content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." 576 U.S. at 163. Montana's statute prohibits the act of communicating with a person using certain words with the specific intent to "terrify, intimidate, threaten, harass, annoy, or offend." The specific content doesn't matter; nor does it matter whether the words used actually terrify, intimidate, threaten, harass, annoy, or offend the listener. For, as the Montana Supreme Court stated, "the statute at issue criminalizes intentionally harmful activities—communication with the purpose to terrify, intimidate, threaten, harass, or offend—not merely disagreeable communication." Pet.App.12a.

Lamoureux violated the Montana statute because he acted purposely or knowingly, he communicated with another person by telephone, and he did so with the purpose to "harass, annoy or offend." Pet.App.5a (¶¶8–9). Lamoureux was not convicted under this statute because he made ungentlemanly and ungenerous statements—though he certainly did. He wasn't even convicted because he said he wanted to kill his ex-wife and let skunks feast on her corpse. He was convicted because he made all these statements *with the intent* to harass, annoy, and offend his ex-wife's employee and father.

Lamoureux could not have been convicted for phoning a friend and making the very same obscene threats in jest. Foul and crass? Sure. But Montana's statute wouldn't snare that conduct. Lamoureux was convicted because his statements—which included profanity and very specific threats of harm—were made with the intent to instill fear in the person who answered the phone.

2. Lamoureux next argues that the specific intent requirement necessarily requires a court to adjudge the content of his statements. As this Court has held, "[a]n Act would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)). But specific intent goes beyond and doesn't depend upon the words used by the speaker. Thus, the applicability of the statute doesn't hinge "on what they say," but rather what the speaker intends to accomplish with his statement. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

The speaker does not violate the law simply by swearing on the phone—he must have the specific intent to terrify, intimidate, threaten, harass, annoy, or offend. *See Dugan*, 303 P.3d at 772.

Montana's statute targets electronic communications made with the intent to instill fear in the listener. That intent element makes all the difference, for—as the Montana Supreme Court reasoned—it often operates to remove expressive conduct from the protective confines of the First Amendment. *See Lamoureux*, 485 P.3d at 199 (citing *Virginia v. Black*, 538 U.S. 343, 363 (2003)). Criminality therefore hinges upon a specific intent to undertake harmful conduct. And this is conduct that Montana has every ability to regulate. The state has an interest in protecting individuals from receiving "unwelcome, anonymous telephone calls," particularly when the individual is "outside a public forum." *Bowker*, 372 F.3d at 379; *see also Cox*, 379 U.S. at 563. The Montana statute is a precise tool for the precise job of protecting individuals from harassment: it only proscribes expressive conduct that "serves little, if any, informative or legitimate communicative function." *Elder*, 382 So.2d at 691.

IV. This case is not the vehicle to address Lamoureux's perceived split of authorities.

Again, this Court judges the unconstitutional applications of the statute in relation to the statute's plainly legitimate sweep. *Broadrick*, 413 U.S. at 615. And even if the statute "deter[s] protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against

conduct that is admittedly within its power to proscribe." *Id.* *Broadrick* thus makes clear that the Court reviews overbreadth challenges on a case-by-case basis. 413 U.S. at 615–16 ("[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.").

With that in mind, Lamoureux asks a lot from this Court. Pet. for Cert. 28–29 ("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."). In effect, he suggests that this Court should invalidate Montana's statute *and* all others with similar language. That cuts sharply against *Broadrick*'s wise instruction to evaluate overbreadth on a case-by-case basis. Indeed, that instruction to evaluate overbreadth in discrete factual and statutory contexts is precisely why different courts have treated different statutes differently. Lamoureux's purported "split" is merely the result of lower courts following *Broadrick*'s guidance.

Montana's statute doesn't prohibit a substantial amount of protected speech. *See Bowker*, 372 F.3d at 378. First, the law applies to all phone calls where the caller uses obscene, lewd, or profane language with a specific intent to terrify, intimidate, threaten, harass, annoy, or offend. As discussed above, the specific intent requirement narrows the application of the statute to communications made with the intent to instill fear in the listener. Second, the statute does not proscribe any "particular groups or viewpoints." *Id.* So it applies "in an even-handed and neutral manner." *Broadrick*, 413 U.S. at 616. These two features of the Montana statute—like other Category One statutes—

ensure that it does not ensnare overmuch protected speech. Indeed, it's difficult to conceive of any protected speech this law would capture.

The 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.'" Pet.App.8a (¶ 16) (quoting *State v. Lilburn*, 875 P.2d 1036, 1040 (Mont. 1994)). Lamoureux hasn't done that. And even the heartiest First Amendment maximalist would have to concede that his conduct—obscene, intoxicated calls laced with imminent threats of job termination, sexual assault, arson, murder, and desecration of a corpse—is not protected speech. *See Roth v. United State*, 354 U.S. 476 (1957) ("[O]bscenity is not within the area of constitutionally protected speech."); *see also Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir. 1991) ("As speech strays further from the values of persuasion, dialogue and free exchange of ideas the first amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to enact statutes that effectively neutralize verbal expression."). The facts of this case demonstrate that the Montana statute is precisely tailored to the harms it seeks to prevent. It's Lamoureux's burden, and he hasn't demonstrated—or come close to demonstrating—that the Montana statute captures and proscribes a substantial amount of protected speech. His facial challenge, therefore, must fail. *See Elder*, 382 So.2d at 690 (the challenged statute "is clearly applicable to a whole range of activity which is easily identifiable and which constitutionally may be proscribed"). Free speech is not in danger.

The states (and Congress) crafted unique statutes, and the courts reached different but consistent results. While similarities exist, the statutes are not identical, and the resulting "split" in authorities means that the facial overbreadth test is working exactly as it should.

Clearly, the lower courts have the tools necessary to navigate the distinctions among differing statutes. At this time, this Court need not step in.

CONCLUSION

For the reasons set forth above, this Court should deny the petition.

Respectfully submitted,

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