IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 23-483

JOHN MICHAEL CONNORS,
Petitioner and Appellee,

v.

HAZEL NOONAN,
Respondent and Appellant

BRIEF OF APPELLEE

Michael C. Doggett
DOGGETT LAW OFFICE, PLLC
2120 S. Reserve St., #130
Missoula, MT 59801
Phone: (406) 442-1160
Emai: mike@doggettlawoffice.net
Attorney for Respondent/Appellant

Christopher R. Betchie
Hull, Swingley, & Betchie, P.C.
P.O. Box 534
Helena, Montana 59624
Phone: (406) 204-5710
Email: christopher@hullmtlaw.com

Attorney for Petitioner/Appellee

Austin Miles Knudsen
Montana Attorney General
Christian B. Corrigan
Solicitor General
Brent Mead
Deputy Solicitor General
MONTANA D.O.J.
215 North Sanders
P.O. Box 201401
Helena, Montana 59620-1401
Phone: (406) 444-2026
Email: christian.corrigan@mt.gov
brent.mead@mt.gov

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ISSUES PRESENTED

I. The Justice Court did not err in granting the order of protection against the Appellant, as harassment and stalking are not protected speech, even if some of the actions, individually would be protected speech, but when taken as a whole are clearly intended to harass and disturb the target of said speech.

II. Montana's stalking statute is not unconstitutional as it contains a mental state provision as required by the United States Supreme Court decision in *Counterman v. Colorado*, 600 U.S. 66, 143 S.Ct. 2106, 216 L.Ed.2d 775 (2023).

STATEMENT OF THE CASE AND FACTS

The facts of the present case are far more complex than represented by the Appellant. Although the facts may still be contested by Appellants Murray and Noonan, Justice of the Peace, Michael G. Swingley, held that Petitioner and his witnesses' versions of the facts were more consistent and credible than the testimony and versions of the facts put forth by Appellants Noonan and Murray. (D.C. Doc. 1.00).

The disputes began when concerns were brought to the Helena Lions Swim Team's (HLST's) Board of Directors about Appellant Murray's oldest daughter's, K.M.'s behavior at a practice, (also Appellant Noonan's granddaughter), and those concerns were presented to Ms. Murray by Plaintiff John Connors, who was the President of HSLT's Board at the time. (D.C. Doc. 1.00) It was after these concerns were addressed with Ms. Murray that she raised the allegation that Mr. Connors' son E.C. had entered the female locker room after a practice when a pool buoy entered the locker room, not inappropriate behavior in the female locker room. *Id*. Eventually the retaliatory and false allegations morphed into inappropriate conduct and E.C. having an erection at practice. *Id*. It was extremely distressing to the Connors family to have E.C.'s genitalia referenced in an email, written by an adult and parent, to the HLST board. *Id*.

Ms. Murray then brought the retaliatory complaint to State and National swimming organizations, and the allegation was investigated by USA Safe Sport, resulting in restrictive measures being taken against Mr. Connor's son E.C., until the conclusion of the investigation. *Id*. However, even after E.C. was cleared of any wrongdoing, Appellants Murray and Noonan continued to level the same accusations against E.C. at swim meets, involving swim meet officials on at least one occasion. *Id*.

Appellants Noonan and Murray then engaged in a knowing and purposeful course of conduct, intended to cause E.C. and the rest of the Connors family distress and fear. *Id*. Even after the temporary orders of protection (TOP) were granted by JP Swingley, Ms. Murray continued her course of behavior and actively violated her TOP at a subsequent swim meet. (D.C. Doc 8.00)

There was significant testimony offered by Mr. and Mrs. Connors, Coach Guillermo Per'zocha, Kieran Buckholder, Megan Stensel, and Thad Michaelson, about the actions of Appellants Noonan and Murray. (D.C. Doc. 1.00). Such behavior included but was not limited to the harassing statements made by the Appellants, faces and gestures made towards E.C. and Connors family in general, physical contact made by Appellant Noonan with Mrs. Connors, continually raising the unfounded and thoroughly investigated allegations of E.C. engaging in inappropriate behavior in the female locker room, making reference to E.C.'s genitalia in an email to the HLST Board, and Appellant Noonan surreptitiously observing and recording a HLST practice through the exterior windows of the YMCA swimming pool. *Id*.

Further at the hearing there was testimony that Appellant Murray violated the amended temporary order of protection, prior to the hearing, at the State swimming meet in Hardin Montana. *Id*. Also, Appellant Murray has actively ignored the permanent order of protection and continued come within 50 feet of E.C., John

Connors, Laura Connors, and C.C. at swim meets in Montana and California since the permanent order was issued by the Justice Court. (D.C. Doc 8.00) Resulting in Law Enforcement being called to every swim meet the Connors have attended since the permanent order was issued. (D.C. Doc 8.00) Also, it is still distressing that Appellant Murray continues to assert the false and repeatedly debunked allegations (by independent investigatory bodies and the Justice Court) regarding E.C. and his genitalia, now in public records in an effort to continue to paint E.C. as some kind of sexual deviant and herself and her child as the victims and whistleblowers. *Appellant's Opening Brief* at 7.

STANDARDS OF REVIEW

The Montana Supreme Court's review of constitutional questions is plenary. *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88 (citing *Walters v. Flathead Concrete Prods.*, 2011 MT 45, ¶ 9, 259 Mont. 346, 249 P.3d 913). "Legislative enactments are presumed to be constitutional, and the party challenging the provision bears the burden of proving beyond a reasonable doubt that it is unconstitutional." *Williams* at ¶ 23.

SUMMARY OF THE ARGUMENT

Appellant engaged in a course of conduct that was not protected speech and was in violation of Montana's stalking statute Mont. Code Ann. § 45-5-220.

Appellant's behaviors and statements were not protected speech under the First amendment of the United States Constitution nor Article II Section 7 of the Montana Constitution. Untrue statements and repeated courses of behavior intended to harass and cause emotional distress do not qualify as protected speech.

Montana's stalking statute Mont. Code Ann. § 45-5-220 is not unconstitutional under the holding in *Counterman v. Colorado*, 600 U.S. 66, 143 S.Ct. 2106, 216 L.Ed.2d 775 (2023). Montana's Mont. Code Ann. § 45-5-220, possesses a mental state requirement as required by *Counterman*.

ARGUMENT

I. Harassment and stalking are not protected speech, even if some of the alleged behavior individually would be protected speech, when the alleged behavior as a whole is clearly intended to harass and disturb the target of said speech.

Appellant points to their actions: raising repeated and verifiably untrue complaints about E.C. in multiple emails (libel), as pure speech and/or symbolic speech. However, this argument completely neglects the facts of Appellant Noonan's purposeful physical contact with Mrs. Connors or surreptitiously observing a LST practice from the exterior of the building and recording said practice. Further, Appellant cites *State v. Martel*, 273 Mont. 143, 902 P.2d 14, 1995 Mont. LEXIS 188, 52 Mont. St. Rep. 873, which expressly contradicts Appellant's argument. *Martel* states that Martel carried the burden of factually showing which of his rights were infringed and how, and that the stalking statue did not criminalize

a course of conduct that if "embarked upon once, might not be objectionable. The criminality of the offense arises when a defendant engages in such conduct repeatedly, purposely or knowingly causing another person substantial emotional distress." *Martel* at 151.

In the present case Appellant did not engage in a single action or a course of action that if engaged in once would be innocuous or unobjectionable, but instead engaged in a course of behavior that was purposefully or knowingly going to cause E.C. and the Connors family substantial emotional distress. (D.C. Doc. 1.00) These were not one-off incidents, but repeated behaviors. Repeatedly making faces and gestures at and comments toward E.C. and the Connors; making purposeful physical contact with Mrs. Connors; and setting up so as to monitor the male locker room, were not innocent or protected activities, but calculated actions purposefully intended to illicit an emotional response from E.C. and the Connors family. (D.C. Doc. 1.00)

Further, even if some of Appellant's actions or speech were protected speech, this argument disingenuously ignores the more egregious facts of Appellant Noonan's purposeful physical contact with Mrs. Connors at a swim meet or Appellant Noonan's surreptitiously observing a LST practice from the exterior of the building and recording said practice. (D.C. Doc. 1.00) Appellant Noonan's voyeuristic observation of the practice was so disconcerting, that the coach of the

aforementioned practice ceased practice early and ushered the children into the locker rooms for the children's safety. (D.C. Doc. 1.00)

II. Montana's stalking statute is not unconstitutional as it contains a mental state provision as required by the United States Supreme Court decision in *Counterman v. Colorado*, 600 U.S. 66, 143 S.Ct. 2106, 216 L.Ed.2d 775 (2023).

Appellant misstates the holding of *Counterman v. Colorado*, 600 U.S. 66, 143 S.Ct. 2106, 216 L.Ed.2d 775 (2023), by stating that stating that "Mont. Code Ann. § 45-5-220 uses an unconstitutional standard." *Counterman* expressly states that prosecutions based **solely** upon an objective standard and fail to require the prosecution to prove the existence of the mental state of the perpetrator are unconstitutional under the first amendment, as they could have the effect of improperly chilling speech. *Counterman* at 2115. However, contrary to Appellant's misrepresented holding and in line with *Counterman's* actual holding, Montana's stalking statute, M.C.A. § 45-5-220 expressly states in subsection (1) that "A person commits the offense of stalking if the person purposely or knowingly engages in a course of conduct . . . and knows or should have known . . . would cause a reasonable person to:"

Montana's stalking statute not only contains a more stringent level of culpability by requiring a finding of purposely or knowingly as opposed to the lowest level of culpability required by the U.S. Supreme Court in *Counterman*, which is recklessly, but it also requires that the prosecutor further show that the perpetrator

knew or should have known their course of conduct would result in effecting their target, under objective standard of a reasonable person, to experience apprehension of bodily harm or emotional distress. *Counterman* at 2115. Montana's stalking statute meets and exceeds the mental state requirement set forth by *Counterman* rendering it clearly constitutional. Petitioners were required to show that Appellant purposefully or knowingly engaged in a course of conduct that she knew or should have known would have caused a reasonable person to suffer substantial emotional distress. As such the District Court's decision to uphold the order of protection should not be overturned.

Further, Appellant knew or should have known that her course of action would have caused a teenage boy and his family substantial emotional distress, and she purposefully engaged in that course of action to cause such an effect. Appellant Noonan was undoubtedly intentional in her course of conduct. Her surreptitious and covert observation and recording of a LST swim practice, was not accidental. Further, she made purposeful and intentional physical contact with Mrs. Connors, when she shouldered Ms. Connors while walking past her at the swim meet. Finally Appellant Noonan intentionally and purposefully persisted in making faces, gestures, and comments at and to E.C. and the rest of the Connors family. These intentional and purposeful behaviors engaged in by Appellant Noonan, where

undoubtedly performed with the intent to harass and annoy E.C. and the Connors family.

CONCLUSION

Appellant's behaviors and actions were not protected speech under the First amendment of the United States Constitution nor Article II Section 7 of the Montana Constitution. Appellant's course of action was repeated, intentional, purposeful, and intended to cause distress. These were not isolated courses of actions that if they occurred once would be deemed unobjectionable. Even now Appellant Nooan continues to make libelous statements about E.C. by stating he was "accused of improper behavior in the girl's locker room." When in reality he was accused of entering the female locker room to retrieve a float that was thrown in there accidentally, and that accusation was deemed to be meritless by an independent investigatory body. Yet Appellant persists in her accusations and likens herself and her daughter, Appellant Murray, to whistleblowers in need of protected status, but whistleblowing does not include spreading false information, and neither libel nor slander are protected forms of speech of any kind. Appellant's argument fails under both Montana and U.S. case law regarding First Amendment and Article II Section 7 protections of free speech, and the order of protection was rightfully extended against Appellant.

Finally, Montana's stalking statute, under which the order of protection was made permanent against Appellant, is not unconstitutional under current or recent U.S. Supreme Court precedent as it includes both the mental states of "purposefully or knowingly," as well as that the Appellant/Defendant "knows or should have known" their course of conduct would cause a reasonable person to experience apprehension of bodily harm or emotional distress. The recent case law cited by Appellant holds no weight in the present case, because the Colorado statute was devoid of a mental state element. However, Montana's statute has no such deficiency. Appellant's representation that all stalking statutes that possess a reasonable person standard for measuring the impact on the victim is clearly mistaken, and an incorrect summarization of *Counterman*. Only in cases where the statute only possesses the reasonable person standard without a mental state element would *Counterman* apply. *Counterman* at 2115. In fact, Montana's mental state is more stringent than that required by *Counterman*. *Counterman* at 2117. As such Appellant's assertion that the statute under which the order of protection was made permanent against her fails, and the order of protection should remain in place as it is undoubtedly constitutional.

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Respectfully submitted this 12th day of February 2024.

HULL SWINGLEY & BETCHIE, P.C.

/s/ *Christopher R. Betchie*
Christopher R. Betchie
Attorney for Petitioner/Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and quoted, indented material; and the word count calculated by Microsoft Word is 2,168, excluding the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendices.

DATED this 12th day of February 2024.

HULL SWINGLEY & BETCHIE, P.C.

/s/ *Christopher R. Betchie*
Christopher R. Betchie
Attorney for Petitioner/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February 2024, I caused a true and accurate copy of the foregoing **RESPONSE BRIEF** to be electronically served to:

Michael C. Doggett
DOGGETT LAW OFFICE, PLLC
2120 S. Reserve St., #130
Missoula, MT 59801
Phone: (406) 442-1160
Emai: mike@doggettlawoffice.net
Attorney for Respondent/Appellant

Austin Miles Knudsen
Montana Attorney General
Christian B. Corrigan
Solicitor General
Brent Mead
Deputy Solicitor General
MONTANA D.O.J.
215 North Sanders
P.O. Box 201401
Helena, Montana 59620-1401
Phone: (406) 444-2026
Email: christian.corrigan@mt.gov
brent.mead@mt.gov

HULL SWINGLEY & BETCHIE, P.C.

/s/ *Christopher R. Betchie*
Christopher R. Betchie
Attorney for Petitioner/Appellee

CERTIFICATE OF SERVICE

I, Christopher R. Betchie, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-12-2024:

Michael Connor Doggett (Attorney)
2047 N. Last Chance Gulch #155
Helena MT 59601
Representing: Hazel Noonan
Service Method: eService

Brent A. Mead (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Christian Brian Corrigan (Govt Attorney)
215 North Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Electronically Signed By: Christopher R. Betchie
Dated: 02-12-2024