IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0483

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HAZEL NOONAN,

*Respondent/Appellant*,

v.

JOHN MICHAEL CONNORS,

*Petitioner/Appellee.*

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On appeal from the Montana First Judicial District Court,
Lewis and Clark County Cause No. ADV 2023-271
The Honorable Mike Menahan, Presiding

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# INTERVENOR STATE OF MONTANA'S RESPONSE BRIEF

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## STATEMENT OF THE ISSUES

1. Whether Mont. Code Ann. § 45-5-220's inclusion of the mental state, "knows or should know" satisfies *Counterman v. Colorado*, 143 S. Ct. 2106 (2023)?[1] [2]

## STATEMENT OF THE CASE

On February 9, 2023, John Connors filed a petition seeking an order of protection on behalf of himself and his minor sons, E.C. and C.C., in Lewis and Clark County Justice Court. Justice Court Record ("J.C.R.")

[1] The State intervened for the limited purpose of defending the constitutionality of Mont. Code Ann. § 45-5-220. The State takes no position on any other issue presented for appeal.

[2] A criminal defendant filed a similar appeal in *State v. Brackett*, No. DA 22-0478. The State has filed its Answer Brief in that matter on January 22, 2024.

at 3.[3] Connors alleged that Respondents Murray and Noonan harassed E.C. by repeatedly spreading unfounded rumors and false allegations about E.C. to his peers, and local, state, and national sporting organizations. J.C.R. at 7–8. Respondents' conduct resulted in E.C. suffering emotional trauma. J.C.R. at 9, 43.

The Justice Court granted a temporary order of protection and set a hearing for February 23, 2023. J.C.R. at 29–31.

The Justice Court made the temporary order permanent on March 20, 2023, because of the "harassment … specifically by Hazel Noonan caused the 8th grade boy to not be able to enjoy participating on the swim team, and caused him psychological damage, requiring counseling."

[3] The Justice Court Record is a single 57-page pdf. The State refers to the record according to the page number of the pdf. For this Court's reference and to avoid possible confusion, the record can be broken down as follows: cover page and docket sheet (J.C.R. at 1–3); petition for temporary order of protection and supporting documentation (J.C.R. at 4–28); temporary order of protection dated February 9, 2023 (J.C.R. at 29–31); order modifying February 9, 2023, temporary order of protection (J.C.R. at 32); receipt of service of temporary order of protection and order setting hearing and petition (J.C.R. at 33–37); communications from respondent Noonan (J.C.R. at 38); Findings of Fact, Conclusions of Law, and Order granting permanent order of protection until E.C. reaches 18 (J.C.R. at 39–45); order of protection (J.C.R. 46–48); Findings of Fact, Conclusions of Law, and Order granting permanent order of protection until E.C. reaches 18 (J.C.R. at 49–55); notice of appeal (J.C.R. at 56–57).

J.C.R. at 43. Noonan engaged in "extraordinarily disturbing" behavior intended to "cause anxiety in the Connors." J.C.R. at 42. This conduct "resulted in the embarrassment and traumatizing treatment" of E.C. J.C.R. at 43; *see also* J.C.R. at 23, 40 (Noonan showed up to early morning swim practices and engaged in suspicious activity by "staring through the windows which unnerved [E.C.]."); J.C.R. at 42 ("at a swim meet in Great Falls, [Noonan] taunted [E.C.] from the bleachers" causing visible distress). The Justice Court relied on Mont. Code Ann. § 40-15-102(2)(a) which allows for a protective order for a victim of stalking as defined in Mont. Code Ann. § 45-5-220. J.C.R. at 43.

Noonan timely appealed to the District Court. J.C.R. at 56. Noonan raised three issues on appeal. Doc. 7 at 2–3. First, that Justice Court erred by granting a protective order for both E.C. and C.C., because Noonan's conduct targeted E.C. Doc. 7 at 2–3. Second, Noonan's conduct consisted of constitutionally protected activity. Doc. 7 at 3–6. Third, Montana's stalking statute is unconstitutional. Doc. 7 at 3, 6–8. Noonan did not appeal the Justice Court's findings of fact. Doc. 10 at 4.

The District Court affirmed the Justice Court. Doc. 10. First, because Noonan's conduct "targeted the entire Connors family" the Justice

Court correctly applied the protective order to both of John Connors' minor sons. Doc. 10 at 5. Second, Noonan's conduct, which was "an attempt to intimidate and harass [E.C.] and his parents," Doc. 10 at 7, including purposeful physical contact with members of the Connors family wasn't protected by the First Amendment. Doc. 10 at 5–7. Third, the District Court found that Montana's stalking statute "clearly applies a constitutionally sufficient standard as to the mental state of a criminal defendant." Doc. 10 at 8.

Noonan failed to file a Mont. R. Civ. P. 5.1 Notice of Constitutional Challenge in the District Court.[4]

Noonan timely appealed the District Court order to this Court. Doc. 13. Noonan only appeals issues 2 and 3 from below. Op.Br. at 1.

Noonan filed a Notice of Constitutional Challenge in this Court on September 6, 2023. The Attorney General, under Mont. R. App. P. 27,

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[4] "The failure to file a timely notice of a constitutional challenge results in a party failing to 'procedurally comply with an essential condition precedent, thus precluding this Court from reaching the constitutional challenge.'" *City of Helena v. Cmty. of Rimini*, 2017 MT 145, ¶ 42, 388 Mont. 1, 397 P.3d 1 (quoting *Russell v. Masonic Home of Mont., Inc.*, 2006 MT 286, ¶ 20, 334 Mont. 351, 147 P.3d 216). "The public interest is not well served when a [state] statute is challenged and potentially invalidated in litigation among private parties … in the absence of input from the institution that has the responsibility and expertise to defend" legislative acts. *Okla. ex rel. Edmonson v. Pope*, 516 F.3d 1214, 1216 (10th Cir. 2008) (vacating district court judgment when the parties and district court failed to comply with Fed. R. Civ. P. 5.1). The State must have the opportunity to present "new arguments and issues and present new evidence, without limitation based on law of the case or other preclusion doctrines." *Id.* Afterall, the private parties may "waive[] or abandon[]" arguments or stipulate to facts that relate directly to a statute's constitutionality. *Id.* Rule 5.1(c) doesn't excuse a failure to comply with Rule 5.1(a). *City of Helena*, ¶ 42. And Rule 5.1(b) presupposes compliance with Rule 5.1(a) as a precondition for the court reaching the constitutional issue. *Id.* Ultimately, Noonan's failure to file the required notice below is harmless error because the district court rejected the claim. Doc. 10 at 7–8. This Court should, nevertheless, clarify that filing the required Mont. R. App. P. 27 notice does not cure a failure to file a Mont. R. Civ. P. 5.1 in the district court. Especially when the person challenging the statute contests factual findings on appeal. *E.g.*, Op.Br. at 2.

timely intervened on September 26, 2023, for the limited purpose of defending Mont. Code Ann. § 45-5-220's constitutionality.

## STATEMENT OF FACTS

Noonan does not challenge the Justice Court's findings that she engaged in "extraordinarily disturbing" behavior intended to cause the Connors anxiety. J.C.R. at 42; Op.Br. at 3; Doc. 10 at 4. She "harassed" E.C. by "showing up at the YMCA and staring through the windows" at practice. J.C.R. at 40, ¶ 4. She made "passive aggressive motions and utterances" towards the Connors. J.C.R. at 40, ¶ 4. "[E.C.] was noticeably traumatized by the actions." J.C.R. at 40, ¶ 5. She "made direct purposeful physical contact" with a member of the Connors family. J.C.R. at 41, ¶ 13. She "taunted [E.C.] from the bleachers, causing him to become very upset, crying and was almost unable to finish the meet." J.C.R. at 42, ¶ 15. This "harassment … caused the 8th grade boy to not be able to enjoy participating on the swim team, and caused him psychological damage, requiring counseling." J.C.R. at 43.

Contrary to allegations in the related Respondent Murray matter, DA 23-0482, repeated by Noonan here, the Justice Court found E.C. did nothing wrong. J.C.R. at 44; Op.Br. at 3.

Finally, the Justice Court found that Noonan likely violated the Justice Court's temporary protective order. J.C.R. at 42, ¶ 17.

The State otherwise accepts and adopts the Statement of Facts presented by Petitioner/Appellee Connors.

## STANDARD OF REVIEW

This Court reviews appeals from the district court in cases originating in justice court "as if the appeal originally had been filed in this Court." *State v. Lamarr*, 2014 MT 222, ¶ 9, 376 Mont. 232, 332 P.3d 258 (quotation omitted). This Court undertakes "an independent examination of the record" from the district court and "will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason." *State v. Gai*, 2012 MT 235, ¶ 11, 366 Mont. 408, 288 P.3d 164 (quotation omitted). This Court reviews the justice court's findings of fact for clear error, its conclusions of law de novo, and its discretionary rulings for an abuse of discretion. *Alto Jake Holdings, LLC v. Donham*, 2017 MT 297, ¶ 14, 389 Mont. 435, 406 P.3d 937. This Court "will not overturn a [trial court's] decision to continue, amend, or make permanent an order of protection absent an abuse of discretion." *Bardsley v. Pluger*, 2015 MT 301, ¶ 9, 381 Mont. 284, 358 P.3d 907.

This Court reviews constitutional questions for correctness. *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877 (internal citations omitted). "The constitutionality of a legislative enactment is prima facie presumed…." *Powell*, ¶ 13. "Every possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* "The party challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute." *Id.*

## SUMMARY OF THE ARGUMENT

Noonan's challenge to Mont. Code Ann. § 45-5-220 lacks merit. She ignores the plain text of the statute and the intent of the 2019 amendments. Op.Br.9–11. She also fails to present any argument that the Justice Court's findings of fact are in error. Op.Br. at 3, 9; J.C.R. at 42; Doc. 10 at 4. The record shows Noonan engaged in "extraordinarily disturbing" behavior intended to cause the Connors anxiety. J.C.R. at 42. Noonan observed the effect her conduct had on E.C. J.C.R. at 42, ¶ 15. She intended this conduct to cause anxiety and trauma. J.C.R. at 42. Noonan fails to carry her heavy burden to prove Mont. Code Ann. § 45-5-

220 is unconstitutional or that the Justice Court abused its discretion in light of her behavior.

Montana's stalking statute uses a dual mental state. Mont. Code. Ann. § 45-5-220(1). First, a person "commits the offense of stalking if the person *purposely or knowingly* engages in a course of conduct directed at a specific person…" *Id.* (emphasis added). Second, and the person "*knows or should know* that the course of conduct would cause a reasonable person to: … (b) suffer other substantial emotional distress." *Id.* (emphasis added). This statutory structure imposes a constitutionally sufficient subjective mens rea for each element—including the reasonable person element. *See Counterman v. Colorado,* S. Ct. 2106, 2117–19 (2023) (the First Amendment only requires the lowest tier of moral culpability—recklessness—in a true threat prosecution).

*Counterman* prohibits criminal prosecutions that rely *only* on an objective reasonable person standard. 143. S. Ct. at 2119. Unlike the Colorado law in *Counterman*, the Montana legislature intentionally inserted a subjective mental state of knowingly in 2019. SB 114 (2019). Montana's law, therefore, complies with *Counterman*. This is dispositive.

Finally, while "a guilty mind is a necessary element in the indictment and proof of every crime," *Elonis v. United States*, 575 U.S. 723, 734 (2015), civil proceedings impose lower burdens of proof for similar conduct. *Elonis*, 575 U.S. at 748 (Alito, J. concurring in part and dissenting in part). The State must prove a guilty mind to sustain a criminal stalking prosecution, but it does not necessarily follow that a private party seeking a protective order bears the same burden. Mont. Code Ann. § 40-15-201.

The Justice Court entered factual findings justifying a protective order—including findings that Noonan engaged in an intentional course of conduct to "cause anxiety in the Connors." J.C.R. at 42; *see also* J.C.R. at 43 (Noonan's conduct inflicted "psychological damage, requiring counseling" on E.C.). This Court should affirm.

## ARGUMENT

Noonan fails to meet her heavy burden to show that the stalking statute is unconstitutional beyond a reasonable doubt. Noonan misunderstands Montana's "reasonable person" standard and misinterprets the *Counterman* decision. Op.Br. at 10–11; *Counterman*, 143 S. Ct. at 2119. *Counterman* did not hold that incorporating an objective

reasonable person standard was unconstitutional. *Id.* (The First Amendment violation occurred "only" because "that a reasonable person would understand [Counterman's] statements as threats" without having to also show "any awareness on [Counterman's] part that the statements could be understood [as threatening]."). Here, there is no such concern because Montana requires proof the defendant subjectively understands the consequences of their conduct on the victim. Mont. Code Ann. § 45-5-220(1) (defendant "knows or should know that the course of conduct would cause a reasonable person to . . . suffer other substantial emotional distress.")

### A. The plain text of Montana's law incorporates a subjective mental state.

The plain language of Montana's stalking statute provides for a subjective mental state. Noonan misreads the plain text to find a constitutional issue where none exists. This Court should reject her challenge.

Courts "interpret a statute first by looking to its plain language." *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (internal citations omitted). Courts "construe a statute by reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature…

Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Mont. Sports Shooting Ass'n*, 2008 MT 190, ¶ 11. "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426 (internal citation omitted). The duty of this Court is to "read and construe each statute as a whole" so that we may "give effect to the purpose of the statute." *State v. Triplett*, 2008 MT 360, ¶ 25, 346 Mont. 383, 195 P.3d 819 (internal citations omitted).

The Montana Legislature substantially amended Mont. Code Ann. § 45-5-220 in 2019. *See* SB 114, § 2 (2019). The law currently reads:

> (1) A person commits the offense of stalking if the person purposely or knowingly engages in a course of conduct directed at a specific person and *knows or should know* that the course of conduct would cause a reasonable person to:
>
> (a) fear for the person's own safety or the safety of a third person; or
>
> (b) suffer other substantial emotional distress.

Mont. Code Ann. § 45-5-220(1) (2019) (emphasis added).

The 2019 amendments specifically added the language "knows or should know the course of conduct would cause a reasonable person…."

SB 114, § 2 (2019). Proponents of the law explained the purpose of this change was to focus on the "conduct of the offender, not the result to the victim."[5] This change aligned the statute with general principles of criminal liability. Mont. Code Ann. § 45-2-103.

The phrase "knows or should know" means that a person "is aware that it is highly probable that the result will be caused by the person's conduct." Mont. Code Ann. § 45-2-101(35). If a person acts knowingly, they also act negligently. Mont. Code Ann. § 45-2-102.

Even if the statute didn't specifically provide for a mental state of knowingly for the reasonable person element, that same mental state can be inferred to apply to each element. Mont. Code Ann. § 45-2-103(4) ("If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements of the offense, the prescribed mental state applies to each element."). The stalking statute imposes a mental state of purposely or knowingly to the course of conduct, and because the Legislature intended

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[5] *See* Mont. H. Judiciary Comm., Hearing on SB 114 (Mar. 9, 2019), 08:37:00–08:37:30 (testimony of Anna Saverud, Montana Department of Justice). Available online at https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/34666?agendaId=137937#handoutFile_ (last accessed February 4, 2024).

to apply a mental state to each element, this Court should apply the lower level of culpability to each element. *See* Mont. Code Ann. §§ 45-2-103(4); 45-2-104 (absolute liability applies only when the Legislature intended that result); 45-5-220(1); *supra* n. 5.

The statutory scheme imposes liability if the defendant knows or should know their course of conduct would case a reasonable person to "suffer substantial emotional distress." Mont. Code Ann. § 45-2-220(1). And the record satisfies that test. J.C.R. at 40–42.

The Justice Court substantiated its conclusions of law by finding that Noonan engaged in "extraordinarily disturbing" behavior. J.C.R. at 42. She peered through windows at E.C., engaged in purposeful physical contact, and taunted E.C. causing visible distress. J.C.R. at 40–42, ¶¶ 4, 13, 15. She repeatedly directed verbal remarks at the Connors. J.C.R. at 40–42, ¶¶ 4, 7, 11, 13, 15. The Justice Court adequately found these "incidences disturbing" and that the Respondents demonstrated an "intent to cause damaging complaints against the Connors." J.C.R. at 42.

Noonan cannot plausibly satisfy her heavy burden to prove Mont. Code Ann. § 45-5-220 is unconstitutional. The statute's plain text imposes a subjective mental state. The inquiry ends there. Even if it didn't,

the Court can infer the Montana legislature's intent to apply a subjective mental state to each element. *Supra* n. 5; Mont. Code Ann. § 45-2-103(4). The statute is constitutional.

### B. Montana's law complies with the *Counterman* decision.

The United States Supreme Court invalidated Colorado's stalking law that imposed criminal liability without proof of a defendant's subjective mental state. *Counterman*, 143 S. Ct. at 2119. The Supreme Court held that the First Amendment was violated because Colorado "only" required a showing "that a reasonable person would understand [Counterman's] statements as threats" without having to also show "any awareness on [Counterman's] part that the statements could be understood [as threatening]." *Id.*

The Supreme Court considered which mental state—purpose, knowledge, or recklessness—provided the constitutional floor for a prosecution. *Id.* at 2118. The Supreme Court settled on recklessness because this standard allows states to punish individuals who "consciously accepted a substantial risk of inflicting serious harm." *Id.*

Colorado courts previously determined that the law did not require proof that the defendant was aware his conduct would cause serious emotional distress in a reasonable person. *Counterman*, 143 S. Ct. at 2112 (citing *People v. Cross*, 127 P.3d 71, 76 (Colo. 2006)). The Colorado court found that the Colorado legislature intended to impose an objective, not subjective, standard for stalking prosecutions. *Cross*, 127 P.3d at 77. "Applying 'knowingly' to the phrase 'in a manner that would cause a reasonable person to suffer serious emotional distress' is untenable because it injects a subjective standard where the legislature clearly specified an objective inquiry." *Id.* (citations omitted).

The Montana legislature intended the opposite. *See supra* n. 5. That intent is reflected in the plain text of the act. *See supra* Part.A. And by imposing a mental state of knowingly to the reasonable person element, Montana avoids any conflict with the *Counterman* decision. *See Counterman*, 143 S. Ct. at 2118 (requiring only recklessness); Mont. Code Ann. § 45-2-102 (knowingly requires greater culpability than recklessness or negligence).

This Court should affirm.

### C. Noonan's arguments ignore important differences between civil and criminal proceedings.

While Mont. Code Ann. § 45-5-220 is constitutional for both civil and criminal proceedings, this Court should not invalidate a criminal law in a civil protective order case. "[A] guilty mind is a necessary element in the indictment and proof of every crime." *Elonis*, 575 U.S. at 734 (cleaned up). The evidentiary burdens are lower in civil proceedings. *Elonis*, 575 U.S. at 748 (Alito, J. concurring in part and dissenting in part). And this Court determined that the reasonable person standard is sufficient to impose civil liability. *See State v. Martel*, 273 Mont. 143, 150, 902 P.2d 14, 19 (1995) (the "reasonable person" standard derives from tort law).[6]

*Counterman* concerned only true threat criminal prosecutions. 143 S. Ct. at 2113. The First Amendment does not protect true threats, but for the State to prosecute such threats, it must still prove the defendant's subjective mental state. *Id.* That simply applies the presumption that

[6] *Martel* analyzes an older version of Mont. Code Ann. § 45-5-220.

the State must prove a guilty mind for a criminal offense. *See* Mont. Code Ann. § 45-2-103(1).

It does not follow that civil liability can only attach with similar proof of a guilty mind. *Martel*, 273 Mont. at 150, 902 P.3d at 19 (civil liability for intentional infliction of emotional distress can attach based on an objective reasonable person standard). The reasonable person standard accounts for the context of the situation; both the course of conduct in Mont. Code Ann. § 45-5-220(2)(a) and the nature of the victim. This standard is familiar to civil law and *Counterman* does not require that petitioners under § 40-15-201 meet the same burden as the State under § 45-5-220.

## CONCLUSION

Noonan's challenge to Mont. Code Ann. § 45-5-220 lacks merit. The statute incorporates a subjective mental state that meets the standard in *Counterman*. Noonan misreads the statute to deflect from her own conduct that intentionally caused emotional trauma to minor.

This Court should affirm.

DATED this 12th day of February, 2024.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,550 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature, and any appendices.

/s/ *Brent Mead*
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