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**Testimony in Support of LD 2085,
*An Act to Update Maine's Domestic Violence and Stalking Laws***

Senator Carney, Representative Moonen, and Honorable Members of the Joint Standing Committee on Judiciary, my name is Laura Yustak. I am here to testify on behalf of the Attorney General in support of LD 2085, *An Act to Update Maine's Domestic Violence and Stalking Laws*. I am speaking only to Sections 1-3 of the bill, which would amend several criminal statutes.

As you know from Senator Carney's presentation, the U.S. Supreme Court's 2023 decision in *Counterman v Colorado* arose out of a stalking prosecution, where the stalking consisted of Counterman's threatening communications toward the victim. Because the basis of the prosecution rested on Counterman's verbal communications, the prosecution implicated his First Amendment rights.

The Supreme Court determined that when a person is prosecuted for threatening speech, the State has to prove, as an element of the crime, that the defendant has some culpable mental state—some level of intent—about the effect of the threat. It's not enough that a person deliberately utters a threat—even if it is a "true threat" (not spoken in jest) the person also has to have some intent with respect to the effect of those words. The State must prove that a defendant was at least reckless with respect to the effect of the threatening speech.

Counterman led to a review of criminal and PFA statutes. The criminal statutes identified are those that might result in prosecution premised on words alone, and that did not have this newly identified element. These crimes are terrorizing (including DV terrorizing), stalking (including DV stalking), and harassment by telephone or electronic communication device—essential tools in domestic violence prosecution, but with much broader application too.

LD 2085 does not change the class of any crime or criminalize additional conduct. It protects speech, because it requires the prosecutor to prove an

additional culpable mental state in these crimes. So, what is that culpable mental state?

Maine's Criminal Code defines four "culpable mental states," which are just different levels of intent. (You've heard it called *mens rea*; it has to do with what a person was thinking at the time of allegedly criminal conduct.) Most Maine crimes require the State to prove that a defendant acted intentionally, knowingly, recklessly, or with criminal negligence. *Counterman* requires and thus LD 2085 proposes "recklessly" as the appropriate standard.

A person acts recklessly with respect to the result of his/her conduct if the person "consciously disregards a risk that the person's conduct will cause such a result." 17-A M.R.S. § 35(3)(A). There's another component of Maine's definition of recklessly—the State has to prove that the conduct was a "gross deviation" from what a "reasonable and prudent person" would do in the same circumstances. 17-A M.R.S. § 35(3)(C). To capture this concept—and incorporate the Supreme Court standard in Maine's criminal statutes—LD 2085 uses the language "consciously disregarding a substantial risk" (or "conscious disregard of a substantial risk").

By adopting this standard, LD 2085 both protects a speaker's First Amendment rights and preserves the State's ability to prosecute harmful speech which, because of the speaker's intent, falls outside the protection of the First Amendment. LD 2085 represents the right balance, and is a wise response to *Counterman*.