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TO: The Honorable Luke Clippinger
Chair, Judiciary Committee

FROM: Benjamin A. Harris, Assistant Attorney General
Deputy Division Chief, Criminal Appeals Division, Office of the Attorney
General

RE: HB 941 – Criminal Law – Threats and Stalking – Recklessness –
SUPPORT

The Office of the Attorney General supports House Bill 941 and urges a favorable report. Delegate Rosenberg's bill would amend several criminal prohibitions that involve threats or stalking to establish a uniform mental state requirement ("mens rea") of recklessness. This would bring these criminal statutes in line with the constitutional standard adopted by the U.S. Supreme Court last year in *Counterman v. Colorado*, 600 U.S. 66 (2023).

In *Counterman*, the Supreme Court clarified the mens rea that is required under the First Amendment to criminally prosecute the making of a threat. It is already well established that, to be criminally prosecuted, a threat must be a "true threat," which means a statement that a reasonable person could interpret as a "serious expression" of the speaker's intent to "commit an act of unlawful violence." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The word "true" in "true threat" means that true threats are distinct from jokes, hyperbole, or other statements that, in context, do not convey a real possibility that violence will follow. Whether a statement is a "true threat" is an objective question that depends on how a reasonable listener would interpret the statement. *Abbott v. State*, 190 Md, App. 595, 629–30 (2010). In *Counterman*, the Supreme Court held that, in order to prosecute someone for a threat, the First Amendment requires the State to prove not only that the statement is objectively a "true threat" but also that the defendant

made the threat with a subjective mens rea of, at minimum, recklessness as to whether it would be perceived as a true threat—meaning that a speaker may be criminally liable if the “speaker is aware ‘that others could regard his statements as’ threatening violence and ‘delivers them anyway.’” *Counterman*, 600 U.S. at 79 (citation omitted).

Maryland’s current criminal prohibitions of threatening are not consistent in the mens rea that they require, and none of them clearly specifies the recklessness standard adopted in *Counterman*. The prohibitions of threats to public officials (Criminal Law § 3-708) and threats of mass violence (Criminal Law § 3-1001) require that the threat be made “knowingly.” That mens rea standard is higher than the recklessness standard adopted in *Counterman*. By setting the bar higher than what the First Amendment requires, these two statutes leave Maryland public officials and citizens unprotected from reckless threats that could be criminally prosecuted.

On the other hand, the mens rea required under the prohibition of stalking (Criminal Law § 3-802) is that the defendant “knows or reasonably should have known the conduct would place another in reasonable fear” which may differ from the *Counterman* recklessness standard (*Counterman* recklessness means “knows that it could,” which is not necessarily the same as “should have known that it would”). And the prohibition of hate-crime threats (Criminal Law § 10-304) does not explicitly address the mens rea that it requires.

Delegate Rosenberg’s bill would amend all of these prohibitions to uniformly require a mens rea of “recklessness”—the standard that *Counterman* has established is the constitutional minimum.

In so doing, House Bill 941 would bring clarity and consistency to Maryland’s criminal threat statutes. This will better protect Maryland’s citizens and public officials from criminal threats, better protect criminal defendants in Maryland from potential misinterpretation of the law, and enhance the predictability of how Maryland’s threat statutes are applied in State and federal courts. For these reasons, the Office of the Attorney General urges a favorable report.