STATE OF MICHIGAN
IN THE 50th DISTRICT COURT
PONTIAC, MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN

Case No. 240538FY

v.

Hon. Ronda M. Gross

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PROOF OF SERVICE

The undersigned certifies that the foregoing was served upon all parties to the above cause and/or to each of the attorneys of record herein by the means set forth below on May 2, 2024.

BY: _____ U.S. Mail
_____ Facsimile Transmission
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DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS

This prosecution presents a clear and present danger to the First Amendment. It must be dismissed. In the United States, we have a profound national commitment to the principle that debate on public issues, which unquestionably includes elections and the conduct of elections, should be uninhibited, robust, and wide open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *infra*. Prosecutions for engaging in such speech are barred by the First Amendment and MCL 750.543z, which codifies this fundamental protection as a matter of state statutory law.

We have a system of checks and balances under the Constitution for a reason. The judicial branch, including this Court, is a check on the power of the executive branch to prosecute a private citizen for conduct protected by the First Amendment. Without judicial vigilance, we have tyranny. The right to freedom of speech is one of our most precious freedoms, and it needs breathing space to survive. In a case involving the prosecution of pure speech, such as this one, the *process is punishment* as it causes a chilling effect not only on the speech of the defendant charged with a crime but on the speech of all private citizens who must now steer wide of the boundaries to avoid becoming ensnared in the prosecutor's net. The courts have said time and again that it is always in the public interest to prevent the violation of a party's constitutional rights. Consequently, immediately dismissing this case is not only in Defendant Hess's interests, it is in the public interest. Justice and our Constitution require it.

BACKGROUND

This case arises in the context of a contentious election recount. Thus, by its very nature, the context of this case is political. And elections by their nature are contentious. For example, Al Gore repeatedly claimed that the 2000 election was "stolen" by George W. Bush.[1] Hillary

[1] See https://gop.com/video/12-minutes-of-democrats-denying-election-results/.

Clinton continues to claim that the 2016 election was "stolen" by Donald Trump,[2] and she has publicly proclaimed that Donald Trump was an "illegitimate president."[3] It's the nature of politics.

Moreover, election fraud is real, and it is very much a public concern. As Justice Stevens noted, "flagrant examples of [voter] fraud . . . have been documented throughout this Nation's history by respected historians and journalists," and "the risk of voter fraud" is "real" and "could affect the outcome of a close election." *Crawford v Marion Cnty Election Bd*, 553 US 181, 195-96 (2008) (plurality op of Stevens, J) (collecting examples).

In Michigan, there are and have been serious concerns about the way in which elections are conducted. In 2020, for example, the presidential election was decided by a mere 154,188 votes.[4] This is a *fraction* of the vote when you consider the fact that there were approximately 3 million absentee ballots (the most in Michigan history) alone,[5] and Secretary of State Jocelyn Benson's guidance on how these ballots should be treated (*i.e.,* she directed the clerks "*to presume that signatures are valid*") was declared unlawful.[6] *Genetski v Benson*, 2021 Mich Ct Cl LEXIS 3, *12, 19 (March 9, 2021) ("[T]he standards issued by defendant Benson on October 6, 2020, with respect to signature-matching requirements . . . [are] invalid."). But that court decision was issued too late to do anything to remedy the unlawful guidance or to prevent its adverse impact on the election. This is problematic as the courts have long held that mail-in ballots are particularly susceptible to fraud.[7] *Griffin v Roupas,* 385 F3d 1128, 1130-31 (CA7, 2004) (voting fraud is a

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[2] See *id.*

[3] See https://abcnews.go.com/theview/video/hillary-clinton-calls-donald-trump-illegitimate-president-66010832.

[4] See https://www.cnn.com/election/2020/results/state/michigan.

[5] See https://wwmt.com/news/election/more-than-27-million-michigan-voters-request-absentee-ballots-for-nov-3-election.

[6] Consequently, the number of votes that Trump lost by was only approximately 5% of the *absentee* ballots.

[7] Adding to this public concern about voter fraud in Michigan is the fact that the state constitution

"serious problem" and is "facilitated by absentee voting"); *Veasey v Abbott,* 830 F3d 216, 239, 256 (CA5, 2016) (en banc) (stating that "mail-in ballot fraud is a significant threat"—so much so that "the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting"); see also *id.* at 263 (recognizing "the far more prevalent issue of fraudulent absentee ballots"). We will never know the true impact of Secretary Benson's unlawful guidance on the 2020 election. Additionally, in *Johnson v Secretary of State*, 506 Mich 975 (2020), the Michigan Supreme Court denied a petition for an extraordinary writ that sought an independent audit of the votes in the 2020 election (a petition that Secretary Benson opposed). The petition failed by a vote of 4 to 3 (hardly a decisive victory for the Secretary). In his dissent, Justice Viviano stated, in relevant part, the following:

> For the second time in recent weeks, individuals involved in last month's election have asked this Court to order an audit of the election results under Const 1963, art 2, § 4. . . . As in that case, petitioners here allege that election officials engaged in fraudulent and improper conduct in administering the election. In support of these claims, petitioners have submitted *hundreds of pages of affidavits and expert reports detailing the alleged improprieties*.

Johnson, 506 Mich at 984-85, 951 NW2d at 319 (Viviano, J., dissenting) (emphasis added). Unfortunately, as a result, an independent audit was not conducted.

The above is offered by way of background and to provide context. It illustrates the very contentious nature of our elections at both the national and local levels. Fair and honest elections are the lifeblood of our constitutional republic. Its survival depends upon it. Accordingly, private citizens rightfully demand and deserve honest, fair, and transparent elections. They demand and deserve a process that ensures that their legal votes will count and that illegal votes will not. Consequently, expressing one's opinion on how elections are conducted or decided—

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was amended in 2018 to permit absentee ballots for any reason (Const 1963, art 2, § 4), resulting in a proliferation of this method of voting—a method exceedingly susceptible to fraud, see *supra*.

quintessential public issues—is core political speech protected by the First Amendment. Opining that election officials who cheat on elections should be prosecuted and punished for treason under federal law (a crime that permits "death" as a penalty)[8] is *core political speech*.

For good or ill, our political discourse is far from civil, but "breathing space" must be allowed in order to protect the First Amendment. Many of us were likely taken aback when comedian Kathy Griffin posted an image of her holding a severed Trump head[9] or when Madonna expressed thoughts of "blowing up the White House"[10] or when Senator Chuck Schumer directed threats toward Supreme Court Justices Kavanaugh and Gorsuch ("You won't know what hit you if you go forward with these awful decisions.")[11] or when Representative Maxine Waters urged supporters to publicly fight and harass Trump supporters.[12] Even today you can purchase online Trump "traitor"[13] or "Hang Biden for Treason"[14] t-shirts. Indeed, recently we saw reports of Muslims in Dearborn, Michigan publicly shouting, "Death to America" and "Death to Israel" in protest of the ongoing war in Israel.[15] This is all part of the rough and tumble world of politics that we live in. And it is all protected by the First Amendment, and for good reason—debate on public issues should be uninhibited, robust, and wide open. The election recount in Oakland

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[8] See 18 USC 2381 ("Whoever . . . is guilty of treason . . . shall suffer death . . . .").
[9] See https://www.cbsnews.com/philadelphia/news/kathy-griffin-trump-head/.
[10] See https://www.washingtonpost.com/local/2017/live-updates/politics/womens-march-on-washington/madonna-says-shes-thought-about-blowing-up-the-white-house/.
[11] https://thehill.com/homenews/senate/486007-schumer-warns-kavanaugh-and-gorsuch-they-will-pay-the-price/.
[12] See https://www.foxnews.com/politics/maxine-waters-pushes-supporters-to-fight-trump-wh-says-the-people-will-absolutely-harass-trump-staffers.
[13] See shortened link to Amazon (https://tinyurl.com/3bseuv9a).
[14] See https://www.redbubble.com/shop/biden+treason+t-shirts.
[15] See https://www.detroitnews.com/story/news/politics/2024/04/08/death-to-america-chant-dearborn-jihad-rally-al-quds-day-draws-condemnation/73247053007/ ("Any system that would allow such devilries to happen and would support it *does not deserve to exist on God's Earth*," he said of the U.S. "So when these fools ask if Israel has a right to exist, the chant 'Death to Israel' has become the most logical chant shouted across the world today.") (emphasis added).

County in December 2023 is no different. It was not some special event that stripped observing private citizens (including Defendant Hess) of their fundamental right to freedom of speech—including the right to engage in caustic and unpleasantly sharp attacks directed at the government officials involved. The County Prosecutor apparently thinks otherwise, but she is patently wrong. And this Court has a duty to say so. *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

SUMMARY OF MATERIAL FACTS[16]

On December 15, 2023, a recount of an election that occurred in November 2023 in Oakland County was held at the Election Division Training Room ("Recount Room") inside the County Courthouse. Joseph Rozelle, the Director of Elections for the County, was overseeing the recount. Deputies from the County Sheriff Office were present to provide security. As the recount took place in the County Courthouse, those observing the event had to pass through security and a metal detector. Several members of the public attended as observers. Defendant Hess was one of those members. At times, the recount became heated as some of the observers complained that cheating was taking place. In fact, "[c]hallenges were filed to the ongoing process." Defendant Hess was one of the challengers, complaining about the fact that seals on the ballot bags appeared to be tampered with, calling into question the chain of custody for the ballots. (Case Report at 3, 4, 10, 14, 15 at Ex 1).

[16] The facts set forth herein are taken directly from the Case Report prepared by the Oakland County Sheriff Office, which is attached as Exhibit 1. *This report was the basis for the Oakland County Prosecutor to charge Defendant Hess with the felony offense of making a terrorist threat*. Accordingly, even when reviewing the facts in a light most favorable to the prosecutor, there is *zero* basis for allowing this prosecution to continue as doing so is a clear violation of the First Amendment. Additionally, on April 8, 2024, Defendant Hess, through counsel, served the prosecutor with a Request for a Bill of Particulars. A copy of this request is attached at Exhibit 2. As of this filing, the prosecutor has not responded.

At one point during the recount, Defendant Hess departed the Recount Room and went out into the lobby. While in the lobby, a receptionist for the county, Ms. Kaitlyn Howard, allegedly overheard Defendant Hess state, "***hang Joe for treason***." No other witness came forward regarding the making of this alleged "terrorist threat." Mr. Rozelle was not in the lobby at the time. Consequently, he never heard this statement. (Case Report at 3, 6, 12, 15 at Ex 1).

The receptionist made a report of the alleged "terrorist threat" to Sgt. Van Camp, an Oakland County Deputy Sheriff who was one of the deputies overseeing security for the recount. Upon receiving the complaint, Sgt. Van Camp entered the Recount Room and asked Defendant Hess to step out into the lobby with him to discuss the matter. Defendant Hess cooperated. During this interview, Sgt. Van Camp asked Defendant Hess about the alleged "terrorist threat." Sgt. Van Camp recounts this conversation as follows:

> Once in the lobby, I told Hess that I had a report that he stated he was going to hang Mr. Rozelle for treason.[17] Hess smirked, slightly nodded his head "yes." I told him that I understood that sometimes things get heated, and people say things they many not mean, but that I had to look into it anyway. Hess laughed and said, "let me ask you . . . what's the penalty for treason?" I replied, "hanging." He smirked and nodded his head "yes" and said, "so all I did was accuse him [Joe Rozelle] of a crime, and it would be like saying [if] somebody murdered someone they go to jail for the rest of their life."

[17] Sgt. Van Camp is not being precise here as the witness expressly stated that the alleged threat was "hang Joe for treason" and not that "he [Hess] was going to hang Mr. Rozelle for treason." Indeed, the Oakland County Prosecutor's Press Release confirms Defendant's point. In her release, the prosecutor stated, "Charges are related to an incident that occurred at the County Complex in Pontiac on December 15, 2023, during a recount of several local elections from November 2023. During the recount, when challenges were being filed, the defendant is alleged to have walked outside of the recount room and stated, '***hang Joe for treason***.' This alleged statement is in reference to the Oakland County Director of Elections. An individual heard the statement made by the defendant and reported the incident to law enforcement." (Prosecutor's PR at Ex 3) (emphasis added). While this highlights the importance of Defendant's request for a Bill of Particulars (a request that has gone unfulfilled as of the filing of this motion, see n.1, *supra*), as discussed further in this brief, neither statement can be criminally punished as a matter of clearly established First Amendment jurisprudence. See *infra* & see, e.g., *NAACP v Claiborne Hardware Co*, 458 US 886 (1982).

(Case Report at 3 at Ex 1).

In a contemporaneously made written statement prepared for the deputy by Defendant Hess on the day in question, Defendant Hess states, "I am being accused of making a threat against the elections commissioner Joe Rozelle by saying he is committing treason. According to 18 USC Ch. 115 Section 2381, the penalty for treason if found guilty is 'shall suffer death.' I never threatened the life of Joe." (Case Report at 7 [Def.'s Statement] at Ex 1).

Following the interview, Defendant Hess was permitted to return to the Recount Room (*i.e.*, Defendant Hess was not arrested, nor should he have been, as there was no imminent threat to anyone as there is none today). During the public comment period of the recount, Defendant Hess made a speech, which was recorded. During this speech, Defendant makes the political point that in his opinion, cheating on elections undermines our constitutional republic and those that cheat on elections are committing treason. Defendant Hess then leaves the floor stating, "the penalty for treason . . . I'll let somebody else tell you what that is" or words to that effect.[18] (See also Case Report at 3, 17 (Deputy Taliercio Mem. ["While voicing his ***opinion*** to the board, he stated that what has transpired is considered treason and would leave it up to everyone to look up the punishment for treason." [emphasis added]).

On April 4, 2024, a warrant issued for the arrest of Defendant Hess. (Ex 5). Defendant Hess is charged with making a terrorist threat in violation of MCL 750.543m, a 20-year felony. (*Id*.). The same day the warrant issued, Defendant Hess voluntarily surrendered and appeared in the 50th District Court before the Honorable Jeremy D. Bowie. Judge Bowie placed Defendant Hess on a $20,000 personal recognizance bond (Ex 6), which includes, *inter alia*, conditions that

[18] A video recording of this speech, which is part of the police report, is provided on a DVD enclosed with this brief as Exhibit 4.

restrict his travel (he may not leave Michigan without permission) and that deprive him of his fundamental right to bear arms ("no weapons"), which is guaranteed by the United States and Michigan Constitutions. US Const, Am II; Const 1963, art 1, § 6. In fact, as a result of this charge, the Wayne County Clerk ordered Defendant Hess to surrender his CPL. See Ex. 7. Following his initial appearance, Defendant Hess was ordered to go to the Oakland County Jail for fingerprinting. During this process, Defendant Hess spent two hours in a jail cell while his family nervously waited in the parking lot for his release. And each time Defendant Hess has to appear for this matter, he must request time away from his employment. In short, the *process is punishment*.

THE CHARGED OFFENSE: MAKING A TERRORIST THREAT

MCL 750.543m has been construed by the Michigan Appellate Courts to proscribe only those statements that communicate "a serious expression of an intent to commit an act of terrorism." *People v Osantowski*, 274 Mich App 593, 606, 736 NW2d 289, 300 (2007) (affirming conviction for multiple, direct, and explicit threats to kill, including threatening a school shooting). Thus, MCL 750.543m criminalizes the "making of a terrorist threat" by threatening to "commit an act of terrorism" and communicating that "threat to any other person." An "act of terrorism" is defined as a "willful and deliberate act" that would comprise a "violent felony," known to be "dangerous to human life," and which is specifically "intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion." *Id.* Thus, the statute requires the existence of an intent to "intimidate or coerce." MCL 750.543b(a); see *Osantowski*, 274 Mich App 593, 736 NW2d 289. When applying this statute (as required in First Amendment cases), "[t]he meaning of a particular speech must be considered in its context." *People v Gerhard*, 337 Mich App 680, 694 (2021). In fact, in an apparent effort to prevent criminal prosecutions such as this, in August 2020, M Crim JI 38.4(3)

was adopted, and it specifically provides that to prove the offense at issue, "the prosecution must prove that the threat"

> must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a ***political comment***. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage.

People v Byczek, 337 Mich App 173, 190 n.7 (2021) (emphasis added).

While the Michigan Appellate Courts have upheld the validity of this statute under *Virginia v Black*, 538 US 343 (2003), as discussed further below, the statute is facially overbroad and invalid under *Brandenburg v Ohio*, 395 US 444 (1969). See § II, infra. Nonetheless, as argued in greater detail in Section I below, in light of clearly established First Amendment jurisprudence, the speech at issue cannot possibly be considered a "true threat." ***The charge must be dismissed***.

STANDARD OF REVIEW

"[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v Irish-Am Gay, Lesbian & Bisexual Group of Bos*, 515 US 557, 567 (1995). Thus, when determining whether this statute applies, "[t]he meaning of a particular speech must be considered in its context." *Gerhard*, 337 Mich App. 680, 694. In light of the importance of First Amendment rights, the U.S. Supreme Court instructs lower courts to engage in a *de novo* review of the entire record in free speech cases. *Hurley*, 515 US at 567 (stating that the Court should "conduct an independent examination of the record as a whole, without deference to the trial court" in First Amendment cases). Indeed, *Watts*, *Brandenburg*, and *Claiborne Hardware*, which are discussed in greater detail below, all involved reversals of cases in which there was either a criminal trial and a conviction (*Watts* and *Brandenburg*) or a civil trial and a judgment (*Clairborne Hardware*). In other words, the conclusion of a trier of fact (whether it be a jury in a

criminal case or a trial court judge in a civil case) is not the final say as to whether the speech in question was beyond punishment (criminal or civil) by the First Amendment.

Because the government can only proscribe speech with "narrow specificity," and only contextually credible threats "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" are proscribable under the First Amendment, the government must set forth clear and indisputable facts demonstrating not only that the specific words at issue constitute a "terrorist threat" but that the specific factual context in which the words were uttered makes these specific words a "terrorist threat." Context matters.[19] As the alleged facts in light of controlling law demonstrate, "the speech at issue could not possibly be considered a true threat"—it is political hyperbole/commentary protected by the First Amendment as a matter of law. *Gerhard*, 337 Mich App at 692 ("The clear conclusion is that the preliminary examination for a charge of making a terrorist threat under MCL 750.543m should include consideration by the district court of whether the speech at issue could not possibly be considered a true threat."). *The charge must be dismissed*.

ARGUMENT

I. The "Terrorist Threat" Charge Must Be Dismissed.

Defendant Andrew Hess has a fundamental right ***not*** to be *prosecuted* for political speech, even if it is caustic or unpleasant. This right is protected by the First Amendment to the U.S.

[19] See generally *People v Adams*, 54 Misc 3d 234, 39 NYS3d 923 (NY Sup Ct, 2016) (dismissing indictment for making a terrorist threat in a case where the defendant became irate, loud, and unruly and told a judge to tell another judge "that she will be hung from the highest tree, from a branch of the highest tree, for treason" and then pointing his hand like a gun at the sitting judge and saying "as for you, pop," holding that "the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act," and further noting that "[t]he words and actions of this defendant cannot be viewed in a vacuum, but in view of all the surrounding circumstances") (internal citation and quotation omitted).

Constitution, the Michigan Constitution, and Michigan statutory law. In fact, MCL 750.543z expressly states, "a prosecuting agency *shall not* prosecute any person or seize any property for conduct *presumptively protected by the first amendment to the constitution of the United States* in a manner that violates *any* constitutional provision." (emphasis added). The charge must be dismissed.[20]

Pursuant to MCL 750.543z, if the speech at issue is presumably protected by the First Amendment, then *no* ("shall not") prosecution is permitted. See https://dictionary.thelaw.com/presumptive/ (defining presumptive in the law to mean "inferred; assumed; supposed"); see also https://dictionary.cambridge.org/dictionary/english/presumptively (defining presumptively as "used to show that something is believed to be true, based on the information that is available"). Accordingly, the statute, for good reason, *strongly* favors the *protection* of speech and *presumes* the speech is protected and thus beyond the reach of a "prosecuting agency." The reason for this is obvious: prosecuting someone for conduct "presumptively protected by the First Amendment" unquestionably chills the right to freedom of speech. *Elrod v Burns*, 427 US 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Process (*i.e.*, having a warrant issued for your arrest, appearing in court on the warrant, having to retain an attorney, being subject to bond conditions that restrict fundamental liberties, having to appear at a preliminary examination, and having to stand trial) is punishment. And the right to freedom of speech is perhaps the most important right in our constitutional republic. Indeed, the U.S. Supreme Court "has recognized that expression on public issues 'has always rested on the highest rung of the

[20] Under the rule of lenity, the statute must be construed in favor of Defendant Hess. *United States v Lanier*, 520 US 259, 266 (1997); see generally *United States v Wiltberger*, 18 US 76 (1820).

hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the *essence of self-government*.'" *NAACP v Claiborne Hardware Co,* 458 US 886, 913 (1982) (citations omitted) (emphasis).

At the end of the day, this prosecution is not only a threat to (and violation of) Defendant Hess's fundamental right to freedom of speech; it is a grave threat to the broader public interest in protecting this fundamental liberty for all citizens. *G & V Lounge, Inc v Mich Liquor Control Comm'n*, 23 F3d 1071, 1079 (CA6, 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc v Fisher*, 70 F3d 1474, 1490 (CA6, 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

Contrary to the County Prosecutor's public statements about this case (see Prosecutor's PR at Ex 3), our form of government is not a "democracy," as a pure democracy permits the tyranny of the majority. In fact, the word "democracy" appears nowhere in the Declaration of Independence or the U.S. Constitution. Our Constitution guarantees a republican form of government. And our constitutional republic has checks and balances in order to protect liberty and to prevent tyranny. Each independent branch of government has a duty to uphold this principle. The Legislative branch places checks on the Executive branch, such as those expressed in MCL 750.543z, and this Court has an independent obligation to uphold the law and protect those rights enshrined in the United States and Michigan Constitutions. Accordingly, this Court is an important brake on the power of the County Prosecutor to use the legal "process" to punish speech. In our constitutional republic, the Prosecutor is not permitted to use her power and access to vast government resources to suppress political speech. That is what tyrants do.

As noted, the Legislature passed this statute limiting the power of a "prosecuting agency" and carefully chose the word "*presumptively*" for a very good reason. The U.S. Supreme Court has long stated that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society," and "[b]ecause [these] freedoms *need breathing space to survive*, government may regulate in the area only with *narrow specificity*." *NAACP v Button*, 371 US 415, 433 (1963) (emphasis added); see also *Grayned v City of Rockford*, 408 US 104, 109 (1972) (observing that where a law "abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked") (internal quotations omitted, cleaned up).

Accordingly, there are only a very few and limited exceptions to protected speech.[21] And this is particularly true when the government is seeking to criminalize speech, as in this case. Bear in mind, <u>*this is a pure speech case*</u>. There is no violent or otherwise criminal conduct involved—the government is simply seeking to criminalize words allegedly spoken by Defendant Hess (in the lobby of an election hall away from the director of elections and other election officials during the course of a contentious recount no less).[22]

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[21] See *United States v Alvarez*, 567 US 709, 717 (2012) (describing "the few historic and traditional categories of expression long familiar to the bar" that may be restricted, stating, "[a]mong these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent") (internal punctuation, quotations, and citations omitted).

[22] This undisputed fact alone demonstrates that it is <u>*not possible*</u> that this off-hand remark in the lobby outside of the presence of election officials was specifically "intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion." MCL 750.543b(a).

"True threats" are very narrowly defined to "encompass those statements where the speaker *means to communicate* a *serious* *expression of an intent to commit an act of unlawful violence* to a particular individual or group of individuals." *Va v Black*, 538 US 343, 359 (2003) (emphasis added). Political hyperbole—even if it involves threatening an act of violence—is protected speech. For example, in *Watts v United States*, 394 US 705, 708 (1969), the Supreme Court instructed that only a contextually *credible* threat to kill, injure, or kidnap the President constitutes a "true threat" that may be punishable under the law. By contrast, communications which convey political hyperbole (even if they mention the use of weapons or other such acts of violence) are protected by the First Amendment and do not constitute a "true threat." *Watts*, 394 US at 707-08. Thus, the Court instructed that Watt's alleged "threat," in its factual context (*i.e*., Watts was engaging in a political protest, not unlike the fact that Defendant Hess was protesting what he considered to be an improper conduct of an election) was not a "true threat" which could be constitutionally prosecuted, but instead was mere "political hyperbole" immunized by the First Amendment. *Id*. at 706-08. Per the Court:

> [w]hatever the 'willfulness requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe the kind of political hyperbole indulged by the petitioner fits within that statutory term. *For we must interpret the language . . . against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open*, and that *it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials*.

Watts, 394 US at 708 (citations and internal quotations omitted) (emphasis added). Applying these principles, the Court reversed, *as a matter of law*,[23] the conviction for a threat based on the

[23] In other words, the question of whether the speech for which a person is subject to prosecution is protected by the First Amendment is ***not*** an issue for the jury to decide. It is a question of law for the court. This principle of law, made clear by *Watts*, is binding on this Court. In First Amendment cases, the U.S. Supreme Court demands *de novo* review of the facts and law because the ultimate question as to whether conduct is protected by the First Amendment is a question for

statement "if they ever make me carry a rifle the first man I want in my sights is L.B.J.," *Watts*, 394 US at 706, because the "offense here was a kind of very crude offensive method of stating a political opposition to the President," *id*. at 708 (internal quotations omitted). Similarly here, stating the opinion that a director of elections should "hang for treason" is a crude method of stating political opposition to the way in which the contentious election recount was being conducted and supervised. The alleged "threat" made by Defendant Hess is not a proscribable "true threat" as a matter of binding First Amendment jurisprudence as it was, at best, political hyperbole—a "vehement, caustic, and . . . unpleasantly sharp attack[] on [a] public official[]."[24] See also *Terminiello v City of Chi*, 337 US 1, 4 (1949) (stating that "a function of free speech under our system of government is to invite dispute . . . induce[] a condition of unrest . . . or even stir[] people to anger," which is "why freedom of speech . . . is . . . protected against censorship or punishment. . . . , noting that [t]here is no room under our Constitution for a more restrictive view").

As *Watts* instructs, this Court must "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *NY Times Co v Sullivan*, 376 US 254, 270 (1964); see also *Watts*, 394 US at 708 (observing that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact") (citations omitted).

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the court and not a jury. This is also true in the civil context, as the Michigan Courts acknowledge. See, e.g., *Battaglieri v Mackinac Ctr for Pub. Policy*, 261 Mich App 296, 305-06 (2004) ("We have conducted the constitutionally required independent examination of the evidence presented here and conclude that, under the actual malice requirements imposed by the First Amendment, plaintiffs' complaint should have been dismissed as a matter of law."); *Garvelink v Detroit News*, 206 Mich App 604, 608 (1994) ("The question whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law.").

[24] Unlike this case, the speech at issue in *Gerhard* was not political speech, political commentary, or political hyperbole.

And whether or not the speech at issue is protected by the First Amendment does not depend *at all* upon the sensitivities of the listener. See generally *Reed v Ponton*, 15 Mich App 423, 426 (1968) (noting that in a false-light/defamation context, which implicates First Amendment rights, "super-sensitiveness is not protected"). Allowing a listener who may be offended (or even frightened) by the speech to be the catalyst for punishing the speaker is known in First Amendment jurisprudence as a "heckler's veto," which is impermissible. It is a clearly established principle of First Amendment jurisprudence that a listener's reaction to speech is ***not*** a permissible basis for regulation, restriction, or punishment. See *Forsyth Cnty v Nationalist Movement*, 505 US 123, 134 (1992). "The First Amendment knows no heckler's veto." *Lewis v Wilson,* 253 F3d 1077, 1082 (CA8, 2001); *Ctr for Bio-Ethical Reform, Inc v. LA Cnty Sheriff Dep't*, 533 F3d 780 790 (CA9, 2008) (same). It is clearly established that "[t]he heckler's veto is [a] type of odious viewpoint discrimination" prohibited by the First Amendment. *Bible Believers v Wayne Cnty,* 805 F3d 228, 248 (CA6, 2015) (en banc.). Thus, the emotive impact of speech is ***not*** a permissible basis for punishing the speaker. See *Boos v Barry*, 485 US 312, 321 (1988) (O'Connor, J.) (observing that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" that would permit restricting the speech). Consequently, the fact that Ms. Howard may have been offended or even frightened by the words she claims were stated by Defendant Hess in the lobby of the Recount Room does not affect the First Amendment calculus. The same is true for Mr. Rozelle's subjective feelings, fears, or reactions to hearing *from a third-party* (or even directly, which did not happen) what Defendant Hess allegedly said in the lobby. It is quite evident that nothing Defendant Hess said or did on December 15, 2023, was an actual or imminent "threat" to anyone. Defendant Hess was not arrested (nor should he have been) on December 15, 2023. After being interviewed by a deputy sheriff following the alleged "terrorist threat," Defendant Hess was

permitted (rightfully so) to return into the Recount Room without incident. And upon returning, Defendant Hess was permitted (rightfully so) to give a speech during a public comment period expressing his opinions and concerns about cheating on elections. He was not arrested for this speech (nor should he have been). Following this recount in December 2023, there was no personal protective order issued against Defendant Hess, as none was warranted. Indeed, the incident occurred in December of last year, yet the County Prosecutor waited until April 2024 to charge Defendant Hess. Defendant Hess, a 38-year-old married man and father of four young children, now may have to stand trial for having allegedly committed a 20-year felony for engaging in political hyperbole.[25] This is not justice by any man's measure. This is an abuse of the legal process to punish speech protected by the First Amendment. ***The charge must be dismissed***.

The Supreme Court's precedent over the subsequent fifty years following *Watts* has both solidified the principle and provided more guidance about the kind of statements that are protected speech—speech which cannot provide the grounds for criminal or civil liability. In *Brandenburg v Ohio*, 395 US 444 (1969), decided the same year as *Watts*, the Court reversed a criminal conviction based on a film of a gathering in which speakers, some of whom wielded arms, used the words "revengence" by the "Caucasion race" and made statements and derogatory comments about "the n**ger" and "the Jew." Despite the loathsome rhetoric, the Court reversed the conviction because the statute punished "mere advocacy not distinguished from incitement to imminent lawless action." *Id*. at 448-49. Thus, in *Brandenburg*, the Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe

[25] To opine that cheating on elections is treason under federal criminal law and that a person found guilty of this offense should then be punished by hanging (an archaic form of capital punishment) is political hyperbole and rhetoric. It is utter nonsense and a clear violation of the First Amendment, particularly in the context in which the opinion arose, to conclude otherwise.

advocacy of the use of force or of law violation except where such advocacy *is directed* to inciting or producing *imminent* lawless action *and is likely to incite or produce such action*." *Id*. at 447 (emphasis added). As summarized by the Court:

> [W]e are here confronted with a statute which, by its own words <u>*and as applied*</u>, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.

Id. at 449 (emphasis added).

Consequently, even if the Court were to conclude that the alleged "terrorist threat" in this case was not political hyperbole or rhetoric but a serious expression advocating for the "use of force or of law violation," the statement in the lobby was plainly not directed to inciting or producing imminent lawless action nor likely to incite or produce such action (where were the ropes or gallows?). As noted, Defendant Hess was permitted to return to the Recount Room and make a speech during the public comment period, and all of this occurred without incident. This is not a close call. Defendant Hess's speech is protected by the First Amendment.

Over twenty years later, in *NAACP v Claiborne Hardware Company*, 458 US 886 (1982), the Court applied these same principles to threatening rhetoric employed to ensure compliance with a boycott against racial discrimination and held those statements were protected by the First Amendment. In other words, the violent statements could not serve as grounds for civil liability (let alone criminal liability). In that case, Charles Evers told members of the community that "blacks who traded with white merchants would be answerable to him" *id.* at 900 n 28, and they would "***have their necks broken*** . . . ," *id.* (emphasis added).[26] The Court held that Evers' comments "did not transcend the bounds of protected speech . . . ." *Id*. at 928. Per the Court,

[26] Obviously, when someone is "hung," he has his "neck broken."

> [s]trong and effective extemporaneous rhetoric cannot be nicely channeled into dulcet phrases. And an advocate must be free to stimulate [] his audience . . . . When appeals do not incite lawless action, *they **must** be regarded as protected speech*. To rule otherwise would ignore the profound commitment that debate on public issues should be uninhibited, robust, and wide-open.

Id. (internal quotations and citations omitted) (emphasis added). As noted, in the case at bar, there are no statements that incited *any* lawless action.

In light of this clearly established and binding First Amendment jurisprudence and the Michigan statute that prohibits prosecutions based on speech that is "presumptively" protected by the First Amendment, the charge against Defendant Hess ***must be dismissed***. It's not a close call.

II. The "Terrorist Threats" Statute Violates *Brandenburg*.

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned*, 408 US at 114-15; *Lewis v New Orleans*, 415 US 130, 134 (1974) (stating that because the challenged ordinance "is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid"). Thus, a statute is overbroad if it prohibits constitutionally protected activity, in addition to activity that may be prohibited without offending constitutional rights. *Grayned*, 408 US at 114. Michigan's "terrorist threat" statute is overbroad; it is more like the statute at issue in *Brandenburg* (and the speech at issue in *Claiborne Hardware*) than the cross-burning statute at issue in *Black*. As explained in *Brandenburg*:

> In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act . . . , the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" *violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it*. . . . But *Whitney* has been ***thoroughly discredited*** by later decisions. . . . These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe

> advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, 367 U.S. 290, 297-298 (1961), "*the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action*." . . . *A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control*.

Brandenburg, 395 US at 447-48 (emphasis added). The same is true here. An element of the "terrorist threat" statute is threatening violence to "*influence* or *affect* the conduct of government or a unit of government through intimidation or coercion." MCL 750.543b(a)(iii) (emphasis added). Yet, the statute fails to include the constitutional requirement that advocating for (i.e., "threatening") the use of violent means to effect political change must be "directed to inciting or producing imminent lawless action and [] likely to produce such action." For example, if a Biden supporter publicly stated, "hang all Trump supporters for treason" or "hang Trump for treason," without evidence proving that these statements were directed to inciting or producing imminent lawless action and likely to produce such action, the speech is "immunized from governmental control" by the First Amendment. There can be little doubt that the speech at issue in *Brandenburg* (by armed individuals) or the speech of Charles Evers in *Claiborne Hardware* was intended to intimidate and coerce; yet, it was fully protected by the First Amendment. The Michigan statute, facially and as applied, violates the First Amendment. ***The charge must be dismissed***.

Respectfully submitted,

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