No. 25A _____

IN THE

Supreme Court of the United States

ANDREW HESS,

Applicant,

v.

OAKLAND COUNTY, MI; KAREN MCDONALD, IN HER OFFICIAL CAPACITY AS OAKLAND COUNTY PROSECUTOR, OAKLAND COUNTY, MI; MICHAEL J. BOUCHARD, IN HIS OFFICIAL CAPACITY AS OAKLAND COUNTY SHERIFF, OAKLAND COUNTY, MI; MATTHEW PESCHKE, IN HIS OFFICIAL CAPACITY AS SEARGEANT, OAKLAND COUNTY SHERIFF'S OFFICE, OAKLAND COUNTY, MI,

Respondents.

To the Honorable Brett Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

Application from the United States Court of Appeals for the Sixth Circuit (No. 25-1784)

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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QUESTION PRESENTED

At a contentious election recount held in Oakland County, Michigan ("County") on December 15, 2023, Applicant made an offhand comment ("*Hang Joe for Treason*," which is political hyperbole as a matter of law), in conversational tone, in a near-empty lobby, outside of the presence of any election official (including Joe Rozell—the Director of Elections for the County and the "Joe" referenced in the comment), that was overheard by a secretary (Ms. Kaitlyn Howard), who was admittedly not a participant in the conversation and who waited before making a report of this statement to the deputy sheriffs at the scene because there was no threat of any imminent harm and she simply didn't "take kindly" to the use of such language.

After Applicant was questioned by a deputy sheriff about the alleged threat (Applicant denied threatening to harm Joe Rozell—he told the deputy he was accusing him of a crime), Applicant was permitted to return to the recount room where Joe Rozell was located, at which time Applicant gave a speech during the public comment period about how he believes that cheating on elections is treason. The County waited nearly four months before bringing the original criminal charge against Applicant for allegedly making a "terrorist threat" in violation of Michigan Compiled Laws § 750.543m. The charge was previously dismissed. And now the County is seeking to reinstate this 20-year felony charge against Applicant for his political comment. The question presented is as follows:

Whether Michigan Compiled Laws § 750.543m, facially and as applied to Applicant's speech, violates the First Amendment.

CORPORATE DISCLOSURE STATEMENT

Applicant Andrew Hess is a private person. There are no publicly traded companies with a financial interest in this case.

PARTIES TO THE PROCEEDING

Applicant, who is Plaintiff-Appellant in the Sixth Circuit, is Andrew Hess.

Respondents, who are Defendants-Appellees in the Sixth Circuit, are Oakland County, Michigan; Karen McDonald, in her official capacity as Oakland County Prosecutor, Oakland County, Michigan; Michael J. Bouchard, in his official capacity as Oakland County Sheriff, Oakland County, Michigan; and Matthew Peschke, in his official capacity as Sergeant, Oakland County Sheriff's Office, Oakland County, Michigan.

RELATED PROCEEDINGS

Andrew Hess v. Oakland County, MI, et al., No. 2:25-cv-10665-GAD-KGA, U.S. District Court for the Eastern District of Michigan. Order denying preliminary injunction entered on August 29, 2025, and order denying injunction pending appeal entered September 3, 2025.

Andrew Hess v. Oakland County, MI, et al., No. 25-1784, U.S. Court of Appeals for the Sixth Circuit. Order denying injunction pending appeal entered October 1, 2025.

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To the Honorable Brett Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Sixth Circuit:

Pursuant to Rule 22 of this Court and the All Writs Act, 28 U.S.C. § 1651(a), Applicant Andrew Hess respectfully seeks an emergency injunction prohibiting enforcement of Michigan Complied Laws § 750.543m against him pending the appeal, and the filing and disposition of a petition for certiorari seeking review, of his First Amendment challenge to § 750.543m, facially and as applied to his political speech. The County Prosecutor is seeking to reinstate a criminal prosecution of Applicant under this 20-year felony statute, which prohibits the "serious expression of intent to commit an act of terrorism." The Sixth Circuit denied Applicant's motion for an injunction pending appeal on October 1, 2025.

This request arises from the Sixth Circuit's decision to disregard the fact that whether speech is protected by the First Amendment is a question of law for the court and not an issue to be left to the biases and uncertainty of a jury, particularly when there is no genuine dispute of material fact as to the content and context of the speech. Moreover, the Sixth Circuit (and the district court) misapprehend this Court's ruling in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its application to this case. Michigan Compiled Laws § 750.543m is not simply a threat statute. It is a "terrorist" threat statute which closely resembles the syndicalism law struck down in *Brandenburg*. Yet, § 750.543m does not have the constitutionally mandated prohibition on punishing the advocacy of the use of force or of law violation unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447.

Absent immediate judicial intervention, Applicant will suffer irreparable harm as he will have to endure, yet again, a felony prosecution and the deprivation of his liberties that are associated with such prosecutions, such as restrictions on his right to travel, restrictions on his right to bear arms, as well as the social opprobrium that accompanies a felony prosecution, the agony and stress the prosecution places upon his wife and young children, and its negative impact on his ability to provide for his family.

Applicant is also likely to obtain certiorari review in this Court and succeed on the merits of his First Amendment claim as the lower courts' decisions are contrary to *Brandenburg*, *Watts v. United States*, 394 U.S. 705 (1969), and *NAACP v. Claiborne Hardware Co,* 458 U.S. 886 (1982), and they run afoul of our "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." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). At least four Justices are likely to grant certiorari on the important First Amendment question presented in this application.

Finally, the public interest and equities strongly favor an injunction. This Court has long stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And "it is always in the public interest to prevent

the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

Alternatively, the Court should treat this application as a petition for a writ of certiorari before judgment, grant certiorari, and issue an injunction pending review.

OPINIONS BELOW

The Sixth Circuit's order denying the motion for an injunction pending appeal is not reported, but is reproduced at App.001-004. The district court's order denying Applicant's motion for a preliminary injunction is available at *Hess v. Oakland Cnty.*, No. 2:25-cv-10665, 2025 U.S. Dist. LEXIS 169422 (E.D. Mich. Aug. 29, 2025), and it is reproduced at App.005-027.

JURISDICTION

The district court denied Applicant's motion for a preliminary injunction on August 29, 2025. App.005-027. Consistent with Rule 23.3, Applicant sought an injunction pending appeal from the Sixth Circuit. The Sixth Circuit denied the motion for an injunction pending appeal on October 1, 2025. App.001-004. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) & 1651, and it may grant the requested relief under 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions (Mich. Comp. Laws §§ 750.543b, 750.543m, & 750.543z) are reproduced at App.028-030.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

On March 6, 2025, the criminal charge against Applicant for allegedly violating § 750.543m was dismissed without prejudice. On March 10, 2025, Applicant commenced this civil action. (R-1, Compl.). On April 1, 2025, Applicant filed a motion for a preliminary injunction (R-12), which the district court denied on August 29, 2025 (App.004-027). That same day, Applicant filed his notice of appeal. (R-37). On September 2, 2025, Applicant filed a motion for an injunction pending appeal in the district court (R-39), which was denied on September 3, 2025 (R-40). On September 4, 2025, Applicant filed a motion for injunction pending appeal in the Sixth Circuit. (Doc. 9-1). The Sixth Circuit denied the motion on October 1, 2025. (App.001-004).

B. STATEMENT OF FACTS.

On December 15, 2023, an election recount was held in Oakland County at the Election Division Training Room ("Recount Room") inside the County Courthouse. Joseph Rozell, the Director of Elections, was overseeing the recount. Deputies from the County Sheriff's Office were present to provide security. Several members of the public attended as observers. At times, the recount became heated as some of the observers complained that cheating was taking place, and challenges were filed. Applicant was one of the challengers. (R.12-2, Muise Decl. ¶ 2, Ex. A [Hr'g Tr. (Vol I) at 6-14, 23, 28, 29, 46-48, 53-60]). Applicant is an outspoken critic of the way elections are conducted in Michigan, particularly in Oakland County. (*See id.* at 15-18).

At one point, Applicant departed the Recount Room and went out into the near-empty lobby. While in the lobby, a receptionist for the county, Kaitlyn Howard, claims to have overheard Applicant state, "*Hang Joe for treason*." The statement was made in conversational tone, and Ms. Howard was admittedly not an intended party to this conversation. No other witness came forward regarding the making of this alleged "terrorist threat." Neither Rozell nor any other election official was in the lobby at the time. Rozell never heard this statement from Applicant. Ms. Howard eventually reported the alleged "threat" to the County deputies, who then proceeded to question Applicant. Following this questioning, Applicant was permitted to reenter the Recount Room where Rozell and the other election officials were located. Applicant was not arrested, searched, detained, nor was he told to leave the recount. During the public comment period, Applicant proceeded to make a speech about cheating on elections while deputies stood by listening with their arms folded. (*See id*. *supra* & *infra*; *id*. at 28, 34, 51, 54, 58; Exs. B [Photo], C [Photo]).[1]

During the preliminary examination, the prosecution presented two witnesses: Joe Rozell and Kaitlyn Howard. The 50th District Court judge denied Applicant's request to call as witnesses the deputy sheriffs present at the recount.[2] (R.12-2, Muise Decl. ¶ 4). The deputy witnesses would have provided further evidence that

[1] At the recount, Applicant provided a written statement to the County deputy in which he affirmed that he was expressing his opinion that people who cheat on elections are committing a crime (treason) and that he "never threatened the life of Joe." (R.12-2, Muise Decl., Ex. F).

[2] The Michigan circuit court remanded the case to the state district court for the deputies' testimony to be taken, but the case was dismissed prior to this happening. (R.12-2, Muise Decl. ¶ 4).

there was no serious threat to anyone. (*Id*. ¶¶ 3, 4). Nonetheless, this point is demonstrated by the photographs of the deputies standing with their arms folded and listening to Applicant's speech, which he made *after* he was questioned by the senior County deputy about the alleged "threat." (*See id*.).

Joe Rozell testified as follows:

> Q. Sir, Mr. Hess never told you directly that he was going to hang you, correct?
> A. Correct.
> Q. So those words were never personally communicated to you by Mr. Hess at any time?
> A. Correct.
> Q. Mr. Hess never communicated to you the words, quote, "Hang Joe for treason," correct?
> A. Correct.
> Q. These words, "Hang Joe for treason," are what Ms. Howard claims she overheard Mr. Hess stating in the lobby. Are you aware of that?
> A. Yes.
> Q. And you were not in the lobby to hear the words, quote, "Hang Joe for treason" that were allegedly uttered by Mr. Hess; is that correct?
> A. I was not in the lobby.
> Q. And at no time in the election recount room with you and the other election officials did Mr. Hess state, quote, "Hang Joe for treason;" is that correct?
> A. Not that I recall, correct.
> Q. Okay. At no time in the election recount room with you and the other election officials did Mr. Hess state, quote, "I'm going to hang Joe Rozell," end quote, correct?
> A. Correct.
> Q. At no time while in the election recount room with you and the other election officials did Mr. Hess state that he was going to hang anyone?
> A. Not that I heard.

(R.12-2, Hr'g Tr (Vol I) at 38-39, Ex A).[3] Ms. Howard testified as follows:

[3] The district court's opinion denying Applicant's motion for a preliminary injunction asserts that Rozell *was told by a deputy* (*i.e.*, <u>not</u> Applicant) "that [Applicant] 'said that <u>he</u> was going to hang [him],'" and that this "threat" is what caused Rozell fear. (App.010) (emphasis added). But, of course, that is <u>not</u> what Applicant said as a

Q. And you made a statement, I believe it's approximately five lines long about what you had heard and saw, correct?
A. Correct.
Q. And you indicate that a person made a statement, "Hang Joe for treason."
A. Correct.

(*Id*. at 67).

* * * *

Q. After hearing the statement and the response, what did you do?
A. Immediately, not much. I mean I couldn't leave my position at the front desk. I was the only one guarding it, so I had to wait a little bit until I was able to go out into the lobby and find a deputy or someone I could report what I had heard to without disrupting the recount.

(*Id*. at 73-74).

* * *

Q. You actually waited a period of time before you even made the report to the law enforcement, correct?
A. Correct.
Q. So you didn't perceive any imminent harm at that point, correct?
A. Correct.

(*Id*. at 77).[4]

* * *

Q. When Mr. Hess made the statement, quote, "Hang Joe for treason," per your testimony, he wasn't having a conversation with you, correct?
A. Correct.
Q. You simply overheard that statement, correct?
A. Correct.

(*Id*. at 78).

* * * *

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matter of undisputed fact. Rozell's fear was an important factor for the district court's opinion denying the preliminary injunction (and the Sixth Circuit's order denying Applicant's motion for an injunction pending appeal, *see* App.003 [stating that "[t]he existence of a threat depends primarily on the understanding of the hearer: 'what the statement conveys' to the person on the other end.'"]). Yet, Rozell's fear is based upon a demonstrably false claim. The record shows that Applicant never uttered the words the deputy told Rozell.

[4] Consequently, the only witness to the alleged "threat" didn't consider it to be a "serious expression of an intent" to commit harm. Otherwise, she would have acted as such and immediately sought law enforcement assistance.

> Q. And, to be clear, Mr. Rozell was not in the lobby at all during the time when you heard this of this hang Joe for treason threat that you testified to, correct?
> A. Correct. He was not in the lobby at that time.
> Q. No member of the Board of Canvassers was there, as far as you recall?
> A. As far as I recall, no.

(*Id*. at 82).

* * * *

> MR. HALL:[5] I'd stipulate that it was a normal conversational tone.

(*Id*. at 71).

When questioned as to why she made the report to the deputies, Ms. Howard testified as follows:

> Q. And why did you feel the need to tell him?
> A. Because personally from what I've experienced and what I've done, I – I don't take kindly to that kind of behavior or language.

(*Id*. at 75).

On April 4, 2024, nearly *four months* after the alleged threat, a warrant issued for Applicant's arrest. (R.12-2, Ex. E). Applicant was held on a $20,000 personal recognizance bond (R.12-2, Ex. F), which included, *inter alia*, conditions that restricted his travel and that deprived him of his fundamental right to bear arms. *See* U.S. Const. amend. II; Mich. Const. 1963, art. 1, § 6. Applicant was ordered to surrender his CPL, which he did. (*See* R.12-2, Ex. G). Following his initial appearance, Applicant was ordered to go to the Oakland County Jail for fingerprinting, where he spent two hours in a jail cell while his family nervously waited in the parking lot for his release. (R.12-2, Muise Decl. ¶ 6).

[5] Mr. Hall was the Special Prosecutor assigned by County Prosecutor McDonald.

On February 13, 2025, the Michigan Court of Appeals held in *People v. Kvasnicka*, No. 371542, 2025 Mich. App. LEXIS 1202 (Ct. App. Feb. 13, 2025), a case brought by the Wayne County Prosecutor, that § 750.543m was facially unconstitutional based on *Counterman v. Colorado*, 600 U.S. 66 (2023). As a result of this decision, Applicant's counsel promptly filed a motion to dismiss the criminal case against Applicant. (R.12-2, Muise Decl. ¶ 1). On March 6, 2025, the district court dismissed the case without prejudice. (*Id.*).

The Wayne County Prosecutor filed an application for leave to appeal to the Michigan Supreme Court. On March 28, 2025, the Michigan Supreme Court issued its ruling (R.12-2, Ex. H), in which it "express[ed] no opinion on whether MCL 750.543m violates constitutional free-speech protection by imposing criminal liability without proof 'that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence,'" as required by *Counterman*. Rather, the Court remanded for the court of appeals to address, *inter alia*, the "proper interpretation of MCL 750.543m" in light of § 750.543z, which expressly prohibits a prosecutor from prosecuting someone for conduct that is "presumptively" protected by the First Amendment. The Court further instructed that in light of § 750.543z, the court of appeals should consider whether there is some "limiting construction" that could save the facial constitutionality of § 750.543m. (R.12-2, Ex. H).

On remand, the Michigan Court of Appeals in *People v. Kvasnicka* ("*Kvasnicka II*"), No. 371542, 2025 Mich. App. LEXIS 5764 (Ct. App. July 21, 2025), "hesita[ntly]

and reluctа[ntly] . . . read into MCL 750.543m(1)(a) a *mens rea* requirement that the Legislature did not deem necessary to expressly state when enacting MCL 750.543m(1)(a)." *Kvasnicka II*, 2025 Mich. App. LEXIS 5764, at *16, n.2. As a result, the court upheld the *facial* validity of § 750.543m in light of *Counterman* by requiring the prosecutor to also prove that the defendant "consciously disregarded a substantial risk that his [or her] communications would be viewed as threatening violence." *Kvasnicka II*, 2025 Mich. App. LEXIS 5764, at *16. Notably, the Michigan Court of Appeals did not address the constitutional deficiencies of § 750.543m in light of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), nor did the court opine on the application of § 750.543m to the facts in this case and the impact of *Brandenburg*, *Watts v. United States*, 394 U.S. 705 (1969), and *NAACP v. Claiborne Hardware Co,* 458 U.S. 886 (1982). These cases are discussed below.

Because the Michigan Court of Appeals reinstated the constitutionality of § 750.543m, the Oakland County Prosecutor has informed counsel that the criminal charge against Applicant will be reinstated.

MICHIGAN COMPILED LAWS § 750.543m

Section 750.543m, a 20-year felony, proscribes only those statements that communicate "a serious expression of intent to commit *an act of terrorism*." *People v. Osantowski*, 274 Mich. App. 593, 606 (2007) (emphasis added). This limiting construction was necessary to comport with *Virginia v. Black*, 538 U.S. 343 (2003). And in light of *Counterman* (and *Kvasnicka II*), the prosecutor must also prove "that

the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence."

Section 750.543m criminalizes the "making of a *terrorist* threat" by threatening to "commit an act of terrorism" and communicating, *with the requisite intent*, 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.* (emphasis added). Mich. Comp. Laws § 750.543b(a); *Osantowski*, 274 Mich. App. 593. To prevent criminal prosecutions such as the one against Applicant, M. Crim. JI 38.4(3) was adopted in August 2020, and it specifically provides that "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 courts have upheld § 750.543m under *Virginia v. Black* and *Counterman*, as discussed further below, the statute remains invalid under *Brandenburg*. Moreover, in light of clearly established First Amendment jurisprudence, Applicant's speech cannot be criminalized as it is protected political speech *as a matter of law*. The requested injunction should issue.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes a Circuit Justice or the Court to issue an injunction pending appeal. In the context of constitutional claims, an injunction is appropriate when an applicant faces irreparable harm, when he is likely to obtain certiorari review and succeed on the merits of his claims, and when the public interest would not be harmed. *See Tandon v. Newsom*, 593 U.S. 61, 63-64 (2021) (per curiam) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)); *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (citing same factors and considering whether there is a likelihood of granting certiorari and "fair prospect" of reversal). The Court also has discretion to issue an injunction "based on all the circumstances of the case," without the injunction "be[ing] construed as an expression of the Court's views on the merits" of the case. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014).

Applying these factors, Applicant is entitled to an injunction because he faces imminent, irreparable harm (being prosecuted for committing a 20-year felony for engaging in political speech); he is likely to obtain certiorari review and succeed on the merits; and an injunction will preserve the status quo, thereby allowing this Court time to decide the merits without Applicant suffering the grave and irreparable harm that a felony prosecution under Michigan's "terrorist threat" statute will inflict on him and his family.

I. ABSENT AN IMMEDIATE INJUNCTION, APPLICANT FACES IRREPARABLE HARM.

Absent an immediate injunction, Applicant will have to endure, yet again, an unlawful prosecution for engaging in political speech. In short, Applicant will be irreparably harmed without the injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod,* 427 U.S. at 373; *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). And this injury is sufficient to justify the requested injunction. *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*).

Here, the threat of prosecution under § 750.543m hangs over Applicant's head (and the collective head of his family) like a sword of Damocles, causing ongoing and irreparable harm. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.").

II. APPLICANT IS LIKELY CORRECT ON THE MERITS OF HIS CLAIMS.

A. THE APPLICATION OF § 750.543M VIOLATES THE FIRST AMENDMENT.

Controlling law demonstrates that Applicant's speech is protected by the First Amendment *as a matter of law*. Applicant has a fundamental right <u>not</u> to be *prosecuted* for political speech, even if it is caustic or unpleasant. This right is protected by the First Amendment *and* state law. *See, e.g.,* Mich. Comp. Laws, §

750.543z ("[A] prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment . . . ."). Pursuant to § 750.543z, if the speech is presumptively protected by the First Amendment, then <u>no</u> ("shall not") prosecution is permitted under § 750.543m. 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 (in this case, pure speech) "presumptively protected by the First Amendment" unquestionably chills the right to freedom of speech. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."). Process (*e.g.*, having a warrant issued for your arrest, having to retain an attorney, being subject to bond conditions that restrict fundamental liberties, and having to appear in court and stand trial) is punishment. And the right to freedom of speech is an essential right in our constitutional republic. *NAACP v. Claiborne Hardware Co,* 458 U.S. at 913 ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'") (citations omitted). In sum, the first prosecution and the renewed prosecution not only violate Applicant's fundamental right to freedom of speech, they are a grave threat to the broader public interest in protecting this fundamental liberty for all citizens.

The Legislature passed § 750.543z limiting the power of a "prosecuting agency" and carefully chose the word "*presumptively*" for good reason. 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 U.S. 415, 433 (1963); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[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.") (cleaned up). Bear in mind, *this is a pure speech case*. There is no violent or otherwise criminal conduct involved—the government is simply seeking to criminalize words allegedly spoken by Applicant in a near-empty lobby of an election hall away from the director of elections and other election officials during the course of a contentious recount.[6]

"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 U.S. at 359. Political hyperbole—even if it involves threatening an act of violence—is protected speech *as a matter of law*. In *Watts v. United States*, 394 U.S. 705 (1969), the Court instructed that only a contextually *credible* threat to kill, injure, or kidnap the President constitutes a "true threat." By contrast, communications which convey political hyperbole (even if they mention the use of weapons or advocate

[6] It is not possible as a matter of undisputed facts that this off-hand remark in the lobby outside of the presence of election officials was specifically "intended to intimidate or . . . influence or affect the conduct of government or a unit of government through intimidation or coercion." Mich. Comp. Laws § 750.543b(a).

for other acts of violence) are protected by the First Amendment. *Id*. 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 Applicant was protesting the conduct of a recount) was not a "true threat," but instead was mere "political hyperbole" immunized by the First Amendment. *Id*. at 706-08. Per the Court:

> [T]he statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by 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 well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 708 (citations and internal quotations omitted). Applying these principles, the Court reversed, *as a matter of law*,[7] the conviction for a threat based on the statement "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," *id*. 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 Applicant cannot be punished as a "true threat" under binding First Amendment jurisprudence as it was, at best, political hyperbole.

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[7] Whether Applicant's speech 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 is made clear by *Watts*, *Brandenburg*, and others. Moreover, there are no material fact disputes in this case.

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." *N.Y. Times Co.*, 376 U.S. at 270; *see also Watts*, 394 U.S. at 708 (observing that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact") (citations omitted).

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. Allowing a listener who may be offended (or even frightened) by the speech to be the catalyst for punishing the speaker is known as a "heckler's veto," which is impermissible. Under the First Amendment, a listener's reaction to speech is <u>not</u> a permissible basis for regulation, restriction, or punishment. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "The First Amendment knows no heckler's veto." *Lewis v. Wilson,* 253 F.3d 1077, 1082 (8th Cir. 2001). 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 F.3d 228, 248 (6th Cir. 2015) (*en banc*). Thus, the emotive impact of speech is <u>not</u> a permissible basis for punishing the speaker. *See Boos v. Barry*, 485 U.S. 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 Applicant in the

lobby of the Recount Room does not affect the First Amendment calculus. The same is true for Rozell's subjective feelings, fears, or reactions to hearing *from a third-party* what Applicant allegedly said in the lobby. It is quite evident that nothing Applicant said or did on December 15, 2023, was an actual, imminent, or serious "threat" to anyone. Applicant was not arrested (nor should he have been) on December 15, 2023. After being interviewed by a deputy following the alleged "terrorist threat," Applicant was permitted (rightfully so) to return into the Recount Room. And upon returning, Applicant was permitted (rightfully so) to give a speech during a public comment period expressing his opinions and concerns about cheating on elections. Applicant was not arrested for this speech (nor should he have been). Indeed, the incident occurred in December of 2023, yet the County Prosecutor waited until April 2024, nearly *four months* later, to charge Applicant. This was an abuse of the legal process to punish speech protected by the First Amendment.

This Court's precedent 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 U.S. 444 (1969), decided the same year as *Watts*, the Court reversed a criminal conviction based on a film of a gathering in which armed speakers made derogatory and threatening statements. Despite the threatening and 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 *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 and as applied, 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. 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, Applicant 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. Applicant's speech is protected by the First Amendment.

In *NAACP v. Claiborne Hardware Company*, 458 U.S. 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.*[8] The Court held that Evers' comments "did not transcend the bounds of protected speech." *Id.* at 928. Per the Court,

> [s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate [] his audience . . . . When such 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). Here, there are no statements that incited <u>*any*</u> lawless action. Thus, in light of clearly established First Amendment jurisprudence (and § 750.543z), it is unlawful to punish Applicant's speech under § 750.543m.

B. *BRANDENBURG* APPLIES TO § 750.543M AS THE STATUTE PROHIBITS ADVOCATING VIOLENCE TO INFLUENCE OR AFFECT THE CONDUCT OF GOVERNMENT.

The lower courts misapprehend the holding of *Brandenburg v. Ohio,* 395 U.S. 444 (1969), and its application in this case. Section 750.543m only applies to "serious expression[s] of intent to commit *an act of terrorism*." An "act of terrorism" under this statute "means a willful and deliberate act . . . that is intended to . . . influence or affect the conduct of government or a unit of government through intimidation or coercion." Mich. Comp. Laws § 750.543b. The Ohio syndicalism statute that was struck down in *Brandenburg*, which was similar to California's Criminal Syndicalism Act addressed in *Whitney v. California*, 274 U.S. 357 (1927), prohibited "'advocating'

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

violent means *to effect political and economic change,*" which is similar to the proscriptions of § 750.543m. The "constitutional principle" that comes out of *Brandenburg* is 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." *Brandenburg*, 395 U.S. at 447-48 (emphasis added). In other words, advocating for the hanging of a government official for treason cannot be punished under the First Amendment as a matter of law unless this "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." As stated by this Court in *Brandenburg*, "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." *Id.* at 447-48. The lower court's dismissive treatment of *Brandenburg* as applying to only "incitement" statutes and not "true threats" misapprehends *Brandenburg* and the First Amendment. In fact, this Court applied *Brandenburg* to hold that the threats of violence in *Claiborne Hardware* were protected speech. In short, § 750.543m is not simply a "threat" statute—this statute is similar to the syndicalism statute at issue in *Brandenburg*. Without evidence showing that Applicant's comment was directed to inciting or producing imminent lawless action and likely to produce such action, his speech is "immunized from governmental control" by the First Amendment. Without question, the speech at issue in

Brandenburg (by armed individuals) and in *Claiborne Hardware* (threatening to break necks) was intended to intimidate and coerce; yet, it was fully protected by the First Amendment.

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . ." *Grayned*, 408 U.S. at 114-15; *Lewis v. New Orleans*, 415 U.S. 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 U.S. at 114. Michigan's "terrorist threat" statute is overbroad. As noted, it is more like the statute at issue in *Brandenburg* ("advocating" violent means to influence government) 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 U.S. at 447-48. The same is true here. As noted, a required element of the "terrorist threat" statute is advocating for the use of violence to "*influence* or *affect* the conduct of government or a unit of government through intimidation or coercion." Mich. Comp. Laws § 750.543b(a)(iii). This is not simply a "threat" statute—this is *Brandenburg*. Yet, the statute fails to include the constitutional requirement that advocating for ("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." Without evidence proving that Applicant's statement was directed to inciting or producing imminent lawless action and likely to produce such action, his speech is "immunized from governmental control" by the First Amendment. As noted, the speech at issue in *Brandenburg* (by armed individuals) and in *Claiborne Hardware* was intended to intimidate and coerce; yet, it was fully protected by the First Amendment. Section 750.543m, facially and as applied, violates the First Amendment.

III. THE PUBLIC INTEREST AND EQUITIES FAVOR AN INJUNCTION.

The harm to Applicant is substantial because the deprivation of his right to freedom of speech constitutes irreparable injury. *Elrod*, 427 U.S. at 373; *Connection Distrib. Co.*, 154 F.3d at 288; *Newsome,* 888 F.2d at 378. On the other hand, if Respondents are restrained from unlawfully enforcing § 750.543m *against Applicant while this appeal proceeds*, they will suffer no harm because the exercise of

constitutionally protected rights can never harm any of Respondents' or others' legitimate interests. *See Connection Distributing Co.*, 154 F.3d at 288.

Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *Dayton Area Visually Impaired Persons, Inc. v. Fisher.,* 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring . . . protection of First Amendment liberties"). Because the enforcement of § 750.543m to punish political speech violates the First Amendment, it is in the public interest to issue the injunction.

IV. ALTERNATIVELY, THIS COURT SHOULD TREAT THIS APPLICATION AS A PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT, GRANT CERTIORARI, AND ISSUE AN INJUNCTION PENDING REVIEW.

In the alternative, this Court should treat this application as a petition for writ of certiorari before judgment, grant certiorari, and issue an injunction pending review. *See* S. Ct. R. 11 (citing 28 U.S.C. § 2101(e)). All the ordinary factors favor certiorari review. The Sixth Circuit's decision conflicts with this Court's precedents. In addition, this case implicates issues of imperative public importance regarding the application of the First Amendment, and it provides a clean vehicle for addressing these issues as the record is sufficiently developed through witness testimony, and there are no material disputes of fact. Immediate determination in this Court is needed because the County Prosecutor is moving to reinstate the criminal charge against Applicant.

CONCLUSION

This Court should grant this application. Alternatively, the Court should grant certiorari and issue an injunction pending resolution of the merits.

Respectfully submitted,

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APPENDIX

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No. 25-1784

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW HESS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	O R D E R
	)	
OAKLAND COUNTY, MI, et al.,	)	
	)	
Defendants-Appellees.	)	

Before: MOORE, COLE, and GRIFFIN, Circuit Judges.

Plaintiff Andrew Hess appeals the district court's denial of a temporary restraining order in this civil rights suit challenging the constitutionality of Michigan Compiled Laws § 750.543m(1)(a), both facially and as applied to Hess's conduct. He moves for an injunction pending appeal. Defendants Oakland County, Michigan; Prosecutor Karen McDonald; Director of Elections Joe Rozell; Sheriff Michael J. Bouchard; and Sergeant Matthew Peschke oppose Hess's motion.

While serving as an observer of an election recount run by Defendant Joe Rozell, Oakland County's Director of Elections, Hess was overheard saying to an associate, "hang Joe for treason." When the comment was reported to law enforcement who were on hand for security, Hess was questioned but ultimately allowed to return to the recount room. Months later, Oakland County prosecutors charged Hess under § 750.543m(1)(a) with making a terrorist threat. The charge was dropped when the Michigan Court of Appeals, in a separate proceeding, declared the terrorist-

threat statute facially unconstitutional because it did "not require the prosecution to prove that [the defendant] acted recklessly." *People v. Kvasnicka*, No. 371542, 2025 WL 492469, at *2 (Mich. Ct. App. Feb. 13, 2025), *vacated and remanded*, 18 N.W.3d 308 (Mich. 2025). But the Michigan Supreme Court vacated and remanded the decision for further consideration by the Michigan Court of Appeals, and the statute was reinstated. *See People v. Kvasnicka*, No. 371542, 2025 WL 2045006, at *6–7 (Mich. Ct. App. July 21, 2025). In the interim, Hess filed this civil rights suit and sought a temporary restraining order and preliminary injunction barring his prosecution under § 750.543m(1)(a). The district court denied injunctive relief. Hess appealed, and he now moves this court for an injunction while his appeal is pending.

We consider four factors when deciding whether to grant an injunction pending appeal: (1) the likelihood that the movant will succeed on the merits of the appeal; (2) the likelihood that the movant will suffer irreparable harm absent a stay; (3) whether a stay will cause substantial harm to others; and (4) whether a stay serves the public interest. *Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.3d 150, 153 (6th Cir. 1991)). The last two factors balance each other out; Defendants' interests in prosecutorial discretion are neutralized by the public's interest in protecting fundamental rights. *See McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (explaining the importance of prosecutorial discretion); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights"). And the Supreme Court has long recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, the motion boils down to Hess's likelihood of success in appealing the district court's denial of a preliminary injunction. And

because preliminary injunctions are subject to the same four-factor test applicable here, Hess's success on appeal turns on the merits of his First Amendment claim. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)))

The statute at issue, § 750.543m(1)(a), makes it a crime to "[t]hreaten[] to commit an act of terrorism and communicate[] the threat to any other person." Hess argues that § 750.543m(1)(a) is facially unconstitutional because it criminalizes offending speech without requiring proof that it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *see also N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Hess's *Brandenburg* argument is misplaced, however, because § 750.543m(1)(a) prohibits "true threats," not incitement to violence. *See Kvasnicka*, 2025 WL 2045006, at *4; *People v. Osantowski*, 736 N.W.2d 289, 298 (Mich. Ct. App. 2007) (holding that § 750.543m(1)(a) only prohibits "true threats"), *rev'd in part on other grounds*, 748 N.W.2d 799 (Mich. 2008).

Like incitement, true threats "lie outside the bounds of the First Amendment's protection." *Counterman v. Colorado*, 600 U.S. 66, 72 (2023). The existence of a threat depends primarily on the understanding of the hearer: "'what the statement conveys' to the person on the other end." *Id.* at 74 (quoting *Elonis v.* United States, 575 U.S. 723, 733 (2015)). A true threat also requires a mens rea of recklessness, as opposed to incitement, which demands a showing of specific intent. *Id.* at 79–81. In line with *Counterman*, the Michigan Court of Appeals on remand construed § 750.543m(1)(a) "as requiring that the prosecution prove (1) that the defendant *recklessly* threatened (2) to commit an act of terrorism and (3) that the threat was communicated to another

person." *Kvasnicka*, 2025 WL 2045006, at *6. This construction renders Hess unlikely to succeed on his *Brandenburg*-based facial challenge.

Hess next argues that § 750.543m(1)(a) is unconstitutional as applied to his statement here: "hang Joe for treason." He asserts that the court can determine, as a matter of law, that his comment is not a true threat because "no *reasonable* person on this planet" would consider it to be a "serious expression of intent to commit *an act of terrorism*." We disagree. Whether Hess's statement was a serious statement or mere political hyperbole, *see Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), and whether his actions demonstrate reckless disregard to a substantial and unjustifiable risk that others would regard his statement as threatening violence, *see Counterman*, 600 U.S. at 79, are both questions for the fact finder. *See Thames v. City of Westland*, 796 F. App'x 251, 262 (6th Cir. 2019). Hess himself recognizes that the answers to these questions turn on objective reasonableness and factual context. Because there are arguments and evidence on both sides of these questions, Hess has not demonstrated a likelihood of success on the merits of his as-applied challenge.

Accordingly, the motion for injunction pending appeal is **DENIED** and the motion for an expedited decision is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANDREW HESS,

Plaintiff,

v.

OAKLAND COUNTY *et al.*,

Defendants.

Case No. 2:25-cv-10665
Hon. Gershwin A. Drain

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER [ECF No. 32] AND MOTION FOR PRELIMINARY INJUNCTION [ECF No. 12]

On March 10, 2025, Plaintiff Andrew Hess filed the instant action against Oakland County, Oakland County Prosecutor Karen McDonald, Oakland County Director of Elections Joseph Rozell, Oakland County Sheriff Michael Bouchard, and Oakland County Sergeant Matthew Peschke. Plaintiff alleges that Defendants violated the First Amendment, Fourth Amendment, Fourteenth Amendment, Second Amendment, and Michigan state law by prosecuting him for his speech at a contentious election recount on December 15, 2023, in Oakland County, Michigan. The case against Plaintiff was ultimately dismissed without prejudice because the Michigan Court of Appeals found the statute under which Plaintiff was prosecuted—Michigan Compiled Laws § 750.543m(1)(a)—facially unconstitutional. However,

the Michigan Supreme Court vacated and remanded the Michigan Court of Appeals' decision, and the Michigan Court of Appeals ultimately concluded on remand that § 750.543m(1)(a) is, in fact, facially constitutional.

Presently before the Court is Plaintiff's motion for a temporary restraining order ("TRO") and motion for preliminary injunction. Plaintiff argues that an injunction is necessary because there is nothing to prevent Defendant Karen McDonald from renewing her prosecution of Plaintiff under Mich. Comp. Laws § 750.543m(1)(a) now that the Michigan courts have found the statute constitutional. Defendant responded in opposition to both motions. The Court concludes that a hearing will not aid in the disposition of these motions and will determine the outcome on the briefs. *See* E.D. Mich. L.R. 7.1(f)(2).

For the following reasons, Plaintiff's motion for a TRO [ECF No. 32] and motion for a preliminary injunction [ECF No. 12] are DENIED.

I. BACKGROUND

a. The Election Recount

On December 15, 2023, Oakland County held an election recount at the County Courthouse regarding Royal Oak Proposal B. ECF No. 16, PageID.220. Royal Oak Proposal B—which passed by a "slim margin"—introduced ranked choice voting, allowing voters to rank candidates for office rather than selecting a single candidate. *Id.* Defendant Joseph Rozell, Oakland County's Director of

Elections, oversaw the recount, and Oakland County Sheriff's Deputies were on-site to provide security. *Id.* In addition, several members of the public attended as observers. ECF No. 12, PageID.72. Plaintiff Andrew Hess was one of those observers. *Id.*

During the event, Plaintiff was critical of the recount process and questioned the chain of custody for the ballots. *Id.* At one point, Plaintiff confronted Rozell about the seal on a ballot box that Plaintiff believed was tampered with. *See* ECF No.12-2, PageID.126–27. When Rozell explained that the broken seal was not a problem because a new seal number was added and recorded, Plaintiff responded: "Treason. Treason's going to be tough, Joe." *Id.* at PageID.127–28; Exhibit 5, Plaintiff's Video 3, 00:40–42. At some point, Plaintiff briefly left the recount room and went into the lobby. A receptionist for the County, Kaitlyn Howard, alleges that she overheard Plaintiff say "hang Joe for treason" in a private conversation with another individual in the lobby. ECF No. 12, PageID.73; ECF No. 16-3, PageID.254. Howard reported Hess's statement to Officer Lee Van Camp of the Oakland County Sheriff's Office. ECF No. 16, PageID.221.

After receiving this report, Officer Van Camp retrieved Plaintiff out of the recount room to question him in the lobby. *See generally* Exhibit 5, Plaintiff's Video 2. During questioning, Officer Van Camp stated: "So it was reported to me that somebody overheard you saying you were going to hang Mr. Rozell for treason." *Id.*

at 01:21–28. In response, Plaintiff slightly smirked and said "okay." *Id.* at 01:28–29. Officer Van Camp explained that he has to "take that kind of stuff very seriously" and make a report about it. *Id.* at 01:30–44. Plaintiff then asked Officer Van Camp what the penalty is for treason, and Officer Van Camp responded with "hanging." *Id.* at 01:44–48. Plaintiff stated, "so all I did was accuse him of a crime. And so, it would be like saying if somebody murders somebody, they get to go to jail for the rest of their life." *Id.* at 01:50–55. Officer Van Camp responded that it is "still a threat against a county employee." *Id.* at 01:56–02:00. Ultimately, Officer Van Camp completed the report and permitted Plaintiff to return to the recount room. ECF No. 12, PageID.73.

Back in the recount room, Plaintiff gave an impassioned speech to the attendees about the value of voting and the treasonous nature of cheating an election. *See generally* Exhibit 5, Plaintiff's Video 1. Plaintiff ended his speech by saying: "The penalty for treason? I'll let somebody else tell you what it is." *Id.* at 01:03–07.

b. The Prosecution

On April 1, 2024, Defendant Karen McDonald, the Oakland County Prosecutor, charged Plaintiff with making a terrorist threat in violation of Mich. Comp. Laws § 750.543m(1)(a) when he made the statement, "Hang Joe for treason." ECF No. 16, PageID.223. That statute makes it a crime to "[t]hreaten[] to commit an act of terrorism and communicate[] the threat to any other person." Mich. Comp.

Laws § 750.543m(1)(a). A person convicted of violating § 750.543m is guilty of a felony and faces up to 20 years in prison and a fine up to $20,000. *Id.*(3).

At Plaintiff's preliminary evaluation, the prosecution and defense counsel questioned Rozell and Howard about the events at the election recount on December 15, 2023. Rozell testified that the recount petition at issue involved contentious allegations such as voting equipment not being certified, using voting equipment that was contrary to state law, and absentee ballots that were mailed and never received. ECF No. 12-2, PageID.112. Rozell also testified that the elections environment had become "pretty polarized" in general, noting that he had experienced "issues with challengers behaving badly at the absent voter counting board." *Id.* at PageID.113. As such, Rozell testified that the elections team requested security for the December 15 recount. *Id.* Rozell also noted that he was familiar with Plaintiff prior to December 15 because Plaintiff had confronted Rozell at a prior recount and requested that Rozell be arrested there as well. *Id.* at PageID.119.

Regarding the day in question, Rozell explained how Plaintiff told Rozell that "treason's going to be tough,"[1] and described Plaintiff as "agitated." *Id.* at PageID.128, 130. Rozell admitted that he did not personally hear Plaintiff say "hang Joe for treason" and that he was not in the lobby when Plaintiff uttered these words.

[1] Rozell testified that Plaintiff said, "treason is going to look very good on you." ECF No. 12-2, PageID.128. Video recording of this interaction between Plaintiff and Rozell confirms that the actual statement was "treason's going to be tough, Joe."

Id. at PageID.141–42. However, Rozell testified that when a deputy informed him that Plaintiff "said that he was going to hang [him]," Rozell "felt [his] heart drop," and described the situation as "very intimidating," "very scary," and nothing he had ever experienced in his professional career. *Id.* at PageID.138. Rozell testified further that he requested police patrols around his home and informed his alarm company about the possible threat to his welfare, advising the company to alert the police immediately upon suspicious activity around his home. *Id.* at PageID.138–39.

The parties also questioned Howard at the preliminary evaluation. When asked, Howard admitted that she did not perceive any imminent threat of harm when she heard Plaintiff say "hang Joe for treason." *Id.* at PageID.180. She testified that she felt the need to tell a deputy about his statement because she does not "take kindly to that kind of behavior or language." *Id.* at PageID.178.

c. The Kvasnicka Case

While Plaintiff's prosecution was ongoing, the Michigan Court of Appeals rendered a decision in *People v. Kvasnicka ("Kvasnicka I")*, No. 371542, 2025 WL 492496 (Mich. Ct. App. Feb. 13, 2025). In *Kvasnicka I*, the Court of Appeals discussed the constitutionality of § 750.543m(1)(a). Because the statute is "silent as to what state-of-mind the defendant must have when he 'threatens to commit an act of terrorism,'" the Court of Appeals concluded that the statute was unconstitutional under *Counterman v. Colorado*, 600 U.S. 66 (2023), which held that criminal

prosecutions for true threats must prove that the defendant had a *mens rea* of at least recklessness. *Id.* at *4. After the statute was ruled unconstitutional under *Counterman*, the charges against Plaintiff were dismissed without prejudice. ECF No. 12, PageID.65.

The *Kvasnicka I* decision was appealed, however, and the Michigan Supreme Court vacated the decision and remanded for further consideration. *People v. Kvasnicka ("Kvasnicka II")*, 18 N.W.3d 308 (Mich. 2025). The Michigan Supreme Court instructed the Michigan Court of Appeals to reevaluate the proper interpretation of § 750.543m(1)(a) in light of (1) Mich. Comp. Laws § 750.543z, which provides that a prosecuting agency shall not prosecute any person for conduct presumptively protected by the First Amendment in a way that violates any constitutional provision, and (2) the constitutional-doubt canon. *Id.* at 308–09. The Michigan Supreme Court further instructed the Michigan Court of Appeals to determine whether a limiting construction of § 750.543m(1)(a) could be adopted to address any constitutional deficiency and what that construction should be. *Id.* at 309.

On remand, the Michigan Court of Appeals found that § 750.543m(1)(a) is facially constitutional. In doing so, the Court of Appeals noted that a court can interpret a statute to have a *mens rea* element even if the statute is silent as to *mens rea*. *People v. Kvasnicka ("Kvasnicka III")*, No. 371542, 2025 WL 2045006, at *6

(Mich. Ct. App. July 21, 2025). Thus, under the constitutional-doubt canon, an interpretation of § 750.543m(1)(a) with a *mens rea* element that does not run afoul the Supreme Court's holding in *Counterman* was "fairly possible." *Id.* As such, the Court of Appeals held that, when prosecuting a case under § 750.543m(1)(a), a prosecutor must also prove that the defendant made the alleged threat recklessly. *Id.*

d. The Lawsuit

On March 10, 2025, Plaintiff filed the instant lawsuit against Oakland County, Karen McDonald, Joseph Rozell, Michael Bouchard, and Matthew Peschke. ECF No. 1. Plaintiff brings claims for violation of his right to free speech under the First Amendment, malicious prosecution under the Fourth Amendment, violation of equal protection under the Fourteenth Amendment, invasion of privacy/false light under Michigan law, violation of his right to bear arms under the Second Amendment, and unlawful seizure under the Fourth Amendment. *See* ECF No. 23. Plaintiff seeks declaratory and injunctive relief along with monetary damages.

The Michigan Supreme Court rendered its *Kvasnicka II* decision later that month, on March 28, 2025. *See Kvasnicka II*, 18 N.W.2d at 308–09. Thereafter, Plaintiff filed a motion for a preliminary injunction, requesting that the Court prohibit McDonald from renewing the prosecution of Plaintiff for the statement he made at the election recount. *See* ECF No. 12. While the preliminary injunction motion was pending before the Court, the Michigan Court of Appeals rendered its

decision in *Kvasnicka III*, ruling definitively that § 750.543m(1)(a) does not violate the Constitution. *See Kvasnicka III*, 2025 WL 2045006, at *6. Thereafter, Plaintiff filed a motion for a TRO with notice to Defendants. *See* ECF No. 32. Plaintiff argued that the *Kvasnicka III* decision made the need for an injunction even more urgent and requested the Court immediately enter a TRO, and upon issuing the TRO, hold a hearing on the preliminary injunction motion. *Id.* at PageID.827–28, 831–32.

For both motions, Plaintiff relies solely on his First Amendment claim as the reason that he is entitled to an injunction. Specifically, Plaintiff claims that prosecution under § 750.543m(1)(a) is facially unconstitutional under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and unconstitutional as applied to him because his speech did not constitute a "true threat" under the circumstances. *Id.* at PageID.87, 92.

II. LAW & ANALYSIS

TROs and preliminary injunctions are "extraordinary measure[s]" that have been characterized as "the most drastic tools in the arsenal of judicial remedies." *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001) (quoting *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 273 (2d Cir. 1986)). These remedies are "never awarded as of right." *Beckerich v. St. Elizabeth Med. Ctr.*, 563 F. Supp. 3d 633, 638 (E.D. Ky. 2021) (quoting *Munof v. Geren*, 553 U.S. 674, 690 (2008)). In determining whether to grant a TRO or preliminary injunction, a court must balance

the following four factors: (1) whether the movant has a likelihood of success on the merits, (2) whether the movant would suffer irreparable injury without the injunction, (3) whether the injunction would cause substantial harm to others, and (4) whether the injunction serves the public interest. *Bonnell*, 241 F.3d at 809.

In the context of the First Amendment, "the likelihood of success on the merits often will be the determinative factor." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). This is because the balance of the other factors is necessarily dependent on the likelihood of success determination. *See id.* For example, "it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Likewise, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Moreover, the government (and its citizens) would not be harmed if the government were prevented from enforcing an unconstitutional law. *See id.* However, the applicability of these considerations can only be determined once the likelihood of success on the First Amendment claim is established. *See id.* In sum, "because the questions of harm to the parties and the public interest generally cannot be addressed properly in the First Amendment context without first determining if

there is a constitutional violation, the crucial inquiry often is… whether the statute at issue is likely to be found constitutional." *Id.*

A. Likelihood of Success on the Merits

Plaintiff argues that he is likely to succeed on his First Amendment claim because § 750.543m(1)(a) is facially unconstitutional under *Brandenburg v. Ohio*, and unconstitutional as applied to him because his speech was not a true threat. Plaintiff claims that § 750.543m(1)(a) violates *Brandenburg* because it fails to include as an element that the alleged threat is "directed to inciting or producing imminent lawless action and [] likely to produce such action." ECF No. 12, PageID.92. Further, Plaintiff claims that his statement "hang Joe for treason" was not a "true threat" unprotected by the First Amendment, but rather mere political hyperbole. ECF No. 12, PageID.86. Plaintiff highlights how the Sheriff's Deputies did not arrest him on the recount day, and even permitted him to return to the recount room to give a speech after he made the statement, as evidence that his statement could not possibly be serious enough to constitute a true threat. *Id.* at PageID.88.

In response, Defendants argue that Plaintiff's facial constitutionality argument is no longer viable after the Michigan Court of Appeals' *Kvasnicka III* decision, which found the statute facially constitutional. ECF No. 34, PageID.857. Furthermore, Defendants claim that Plaintiff's statement is a true threat, asserting

that Howard and Rozell both considered the threat serious. ECF No. 16, PageID.229–31.[2]

a. First Amendment Principles

"The First Amendment offers sweeping protection that allows all manner of speech to enter the marketplace of ideas. This protection applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted." *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 243 (6th Cir. 2015); *see also United States v. Alvarez*, 567 U.S. 709, 716 ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. 460, 468

[2] Defendants also argue that their entitlement to qualified immunity may be considered in determining likelihood of success on the merits, and that qualified immunity bars liability in this case. *Id.* at PageID.858–59. However, "Sixth Circuit precedent dictates that the defense of qualified immunity protects officials only from suit for monetary damages." *Mumford v. Zieba*, 4 F.3d 429, 435 (6th Cir. 1993). In this case, in addition to monetary damages, Plaintiff also seeks declaratory relief that Defendants violated his First Amendment rights and permanent injunctive relief barring Defendants from prosecuting him under § 750.543m(1)(a). ECF No. 23, PageID.554. Therefore, even presuming Defendants may be entitled to qualified immunity regarding Plaintiff's request for money damages, they still must face the merits of Plaintiff's claim. *See Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001). As such, the Court will address the merits of Plaintiff's claim here.

(2010) (cleaned up). These traditional limitations include incitement of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, "fighting words," child pornography, "true threats," and "speech presenting some grave and imminent threat the government has the power to prevent." *Alvarez*, 567 U.S. at 717.

Of relevance here, "[t]rue threats are serious expressions conveying that a speaker means to commit an act of unlawful violence." *Counterman*, 600 U.S. at 74 (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)) (cleaned up). "The speaker need not actually intend to carry out the threat." *Black*, 538 U.S. at 359–60. Rather, "[t]he existence of a threat depends not on the mental state of the author, but on what the statement conveys to the person on the other end." *Counterman*, 600 U.S. at 74 (quotation marks omitted). "When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. True threats subject individuals to fear of violence and to the many kinds of disruption that fear engenders." *Id.* (quotation marks omitted). Although the speaker need not have a certain mental state to make his statement a true threat, the government is required to prove a *mens rea* of at least recklessness in order to prosecute a speaker for a true threat. *Id.* at 79.

b. Plaintiff Does Not Have a Likelihood of Success on His Facial Unconstitutionality Claim

Plaintiff first argues that § 750.543m(1)(a) is facially unconstitutional because it is inconsistent with the Supreme Court's decision in *Brandenburg v. Ohio*. ECF No. 12, PageID.91. Plaintiff is not likely to succeed on this theory.

In *Brandenburg*, the appellant was a Ku Klux Klan leader and invited a reporter to attend a cross-burning rally so that it could be televised and documented. *Brandenburg*, 395 U.S. at 445–46. The reporter attended the rally with a cameraman, and the appellant stated on camera that if the Government continued to "suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446. The appellant further stated that the Klan would be "marching on Congress" on the Fourth of July. *Id.* The appellant was later tried and convicted under the Ohio Criminal Syndicalism Statute for making these statements. That statute proscribed advocating for the propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. *Id.* at 444–45, 447.

The appellant argued on appeal that the Ohio Criminal Syndicalism Statute was unconstitutional under the First and Fourteenth Amendments. *Id.* at 445. Ultimately, the Supreme Court agreed. The Court held that:

> [T]he 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 except where such advocacy is (1) directed to inciting or producing imminent lawless action and is (2) likely to incite or produce such action.

Id. at 447 (numbering added). Because the Ohio Criminal Syndicalism Statute criminalized mere advocacy without requiring that the advocacy be directed at inciting imminent lawless action and likely to do so, the Court concluded that it was unconstitutional. *Id.* at 448–49.

The Supreme Court's *Brandenburg* decision provided the test that courts use today to determine whether speech constitutes incitement, a category of speech that is not protected under the First Amendment. *See Bible Believers*, 805 F.3d at 246; *see also Alvarez*, 567 U.S. at 717. But in this case, incitement is not at issue. Section 750.543m(1)(a)—the statute under which Plaintiff was prosecuted—does not purport to sanction speech that constitutes incitement, but rather, speech that constitutes "true threats." *See People v. Osantowski*, 736 N.W.2d 289, 298 (Mich. Ct. App. 2007), *rev'd for resentencing*, 748 N.W.2d 799 (2008) (holding that § 750.543m prohibits "only 'true threats'" as understood under constitutional law); *see also Thames v. City of Westland*, 796 F. App'x 251, 261–62 (6th Cir. 2019) (discussing § 750.543m and the Michigan Court of Appeals' *Osantowski* decision).

True threats are conceptually distinct from incitement. While the incitement category focuses on whether the speech at issue is directed at and likely to spur imminent lawless action, *Brandenburg*, 395 U.S. at 447, the true threat category focuses on whether the speech at issue communicates a "serious expression of an intent to commit an act of unlawful violence" against a particular person or group.

Black, 538 U.S. at 359. In other words, incitement focuses on the effect of the speech on a broader audience, whereas true threats are personal to the speaker. The rationales for excluding these distinct categories of speech from the protection of the First Amendment are different: while incitement is excluded to prevent the immediate harm, violence, and lawlessness caused by incendiary language, *Brandenburg*, 395 U.S. at 447, true threats are excluded so that individuals may be free "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

As such, Plaintiff's argument that § 750.543m(1)(a) is unconstitutional because it does not contain the *Brandenburg* elements is misguided. The statute need not contain those elements because it criminalizes true threats, not incitement.

c. Whether Plaintiff Has a Likelihood of Success on His As-Applied Unconstitutionality Claim Is Neutral

Plaintiff next argues that it is unconstitutional to prosecute him under § 750.543m(1)(a) because his statement, "hang Joe for treason," was not a true threat. While Plaintiff has a credible argument, so do Defendants. The Court cannot conclude that Plaintiff is likely to succeed on the merits of this theory or that this factor favors Plaintiff. *See Novak v. Federspiel*, 649 F. Supp. 3d 562, 573 (E.D. Mich. 2023) ("For an unclear likelihood of success, [this] factor is neutral.").

Notably, Plaintiff claims that whether a statement constitutes a "true threat" is a legal question for the Court to determine as a matter of law. ECF No. 12, PageID.86 n.12. However, the Sixth Circuit has consistently stated that whether a statement is a "true threat" is a factual question for the jury to decide.[3] *Thames*, 796 F. App'x at 262 ("The jury determines whether a statement is a true threat."); *United States v. Hankins*, 195 F. App'x 295, 301 (6th Cir. 2006) (same); *see also United States v. Polson*, 154 F. Supp. 2d 1230, 1235 (S.D. Ohio 2001) (stating that the defendant's statement falls "well within the wide spectrum of prosecutable threat cases, and, therefore, should be submitted to the jury to determine whether the message… constitutes a 'true threat.'"); *United States v. Censke*, No. 2:08-cr-19, 2009 WL 10681232, at *6 (W.D. Mich. Apr. 29, 2009) ("It is up to the jury to decide at trial whether a communication is a true threat applying the objective standard."); *Osantowski*, 736 N.W.2d at 612 ("As an issue of fact, the determination whether a statement was a true threat is generally a question for the jury.").

[3] Plaintiff seeks both legal and equitable relief on his First Amendment claim. Of course, actions that *solely* seek equitable relief (such as injunctive relief) are not entitled to be heard by a jury. However, "when legal and equitable actions are tried together, the right to a jury trial in the legal action encompasses the issues common to both." *In re Lewis*, 845 F.2d 624, 629 (6th Cir. 1988). Because the factual questions for Plaintiff's legal and equitable claims overlap entirely, the Court will be bound by the jury's determination of the facts as they relate to Plaintiff's First Amendment claim when determining the scope of equitable relief that he seeks. *See id.* As such, whether Plaintiff's statement is a true threat is a jury question.

Determining whether a statement constitutes a true threat is a factually-intensive and context-driven inquiry that is "determined objectively from all the surrounding facts and circumstances." *Censke*, 2009 WL 10681232, at *6; *see also Hankins*, 195 F. App'x at 301 ("A statement's context must be considered in determining whether it is a true threat."); *United States v. Jeffries*, No. 3:10-CR-100 (Phillips), 2011 WL 13186518, at *17 (E.D. Tenn. May 24, 2011) (stating that in the context of summary judgment, the question is whether a "reasonable juror… would view the communication as a 'true threat,' having considered the content of the communication, and the context in which it was sent.").

Many contextual factors are relevant when determining if a statement is a true threat. The reaction of those who hear the statement and those against whom the statement is directed is relevant. *See Thames*, 796 F. App'x at 262 (noting that the person who heard the alleged true threat was "alarmed enough" and "sincere enough" to report it; stating that this response is "meaningful" in determining whether the statement was a true threat); *Hedrick v. W. Mich. Univ.*, No. 1:22-cv-308, 2022 WL 10301990, at *8 (W.D. Mich. Oct. 17, 2022) (discussing the reactions of those who heard the alleged "true threats"). Whether the statement has a political dimension is also highly relevant. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that true threats must be distinguished from mere "political hyperbole"); *Hankins*, 195 F. App'x at 301 (stating that "[t]here was no political

context to Mr. Hankins' statements" in its analysis of the alleged true threat); *Jeffries*, 2011 WL 13186518, at *17 (stating that a court must be mindful that there is a "profound national commitment" to the principle of open political speech about public officials). The location the statement is made, to whom the statement is uttered, and whether the statement is made in conditional or absolute terms are also important considerations. *See Watts*, 394 U.S. at 708; *Thames*, 796 F. App'x at 262; *Hankins*, 195 F. App'x at 301; *United States v. Baker*, 890 F. Supp. 1375, 1381 (E.D. Mich. 1995).

Given the factual intricacy of this case, the Court cannot conclude that Plaintiff is likely to prevail on his First Amendment claim. Both parties raise good arguments on this issue. As Plaintiff explains, the Supreme Court has stated that "[t]he language of the political arena… is often vituperative, abusive, and inexact," and may "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708. As such, "political hyperbole" is protected, even if it is crude and offensive. *Id.* It cannot be doubted that Plaintiff's speech in this case regarded a political issue of public concern—he was voicing his anger over his belief that Rozell, a public official, may have been tampering with the votes in the recount.

However, "a person may not escape prosecution for uttering threatening language merely by combining the threatening language with issues of public

concern." *Polson*, 154 F. Supp. 2d at 1235–36 (quoting *United States v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993)). It also cannot be doubted that Plaintiff voiced a desire to see that Rozell is killed, a sentiment that has the potential to be highly threatening. Plaintiff points out that the deputies present at the recount allowed him to remain on the premises after he made the alleged "true threat," and even allowed him to give a speech to attendees, which arguably suggests that his statement was not perceived as truly threatening. ECF No. 12, PageID.88. On the other hand, Rozell testified at length about the fear he felt after learning of Plaintiff's statement and the precautions he took to protect himself and his home immediately thereafter. ECF No. 12-2, PageID.138–39. And while Howard admitted that she did not feel there was any threat of imminent harm after hearing Plaintiff's statement, *id.* at PageID.180, she was clearly "alarmed enough" and "sincere enough" to make a police report about the statement. *Thames*, 796 F. App'x at 262.

Moreover, Plaintiff's statement was not conditional—he said, in absolute terms, "hang Joe for treason," and made the statement at a contentious election recount where tensions were already running high. *See Watts*, 394 U.S. at 708 (finding a statement mere political hyperbole where it was "expressly conditional"). The history of the relationship between Plaintiff and Rozell was also strained and somewhat hostile. Plaintiff had attended prior recounts, had requested Rozell be arrested on prior occasions, and had accused Rozell of treason multiple times during

the recount in question. *See Censke*, 2009 WL 10681232, at *6 ("The alleged threatening statement must be viewed from the objective perspective of the recipient, which frequently involves the context of the relationship between the [speaker] and the recipient."). And while Plaintiff made his statement in a public location—which could support a finding that his statement was not a true threat—he also made the statement in a private conversation to someone else, which could support a finding that he was making a true threat. *See Hankins*, 195 F. App'x at 301 (the fact that the speaker was in his own home when he made his threatening statement and spoke it privately to a friend were relevant considerations in finding that his statement was a true threat, not protected political expression).

In sum, the factual circumstances of this case make it impossible for the Court to hold, at this juncture, that Plaintiff has a *likelihood* of success on his as-applied unconstitutionality argument. There are facts for and against all parties. While Plaintiff offers compelling arguments in his favor, Defendants offer compelling arguments in defense. The Court cannot anticipate how the jury will weigh these fact-intensive considerations. Therefore, the likelihood of success factor is neutral and weighs against granting a preliminary injunction. *See FCCI Ins. Co. v. Nicholas Cnty. Library*, No. 5:18-cv-038-JMH, 2019 WL 1048838, at *3 (E.D. Ky. Mar. 5, 2019) ("At present, both parties have made strong legal arguments indicating that

they may be correct… As a result, the likelihood of success on the merits is neutral, which weighs against granting a preliminary injunction.").

B. The Remaining Preliminary Injunction Factors

Because the Court cannot conclude that Plaintiff has a likelihood of success on the merits, the remaining preliminary injunction factors do not favor Plaintiff. *Connection Distrib. Co.*, 154 F.3d at 288. For example, if Plaintiff's statement was protected speech, being criminally prosecuted for that speech would constitute irreparable harm. *See Elrod*, 427 U.S. at 373 (stating that the loss of First Amendment freedoms constitutes irreparable injury). But it is not clear that Plaintiff's speech was protected, such that prosecution for that speech is an irreparable harm.

Moreover, while an injunction would not harm the government if it was attempting to enforce § 750.543m(1)(a) in an unconstitutional manner, "the government presumably would be substantially harmed" if it were prevented from enforcing § 750.543m(1)(a) against a defendant who made a true threat. *Connection Distrib. Co.*, 154 F.3d at 288. Finally, while the public interest lies in "prevent[ing] the violation of a party's constitutional rights," *G & V Lounge, Inc.*, 23 F.3d at 1079, the public interest would certainly not lie in preventing the state government and Defendant McDonald from enforcing a criminal law in a constitutional manner. Indeed, "prosecutorial discretion is a fundamental part of our criminal justice system

and… should not be infringed upon without 'exceptionally clear proof' of abuse." *United States v. Edelin*, 134 F. Supp. 2d 59, 83 (D.D.C. Mar. 9, 2001) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987)).

Thus, because the likelihood of success of Plaintiff's First Amendment claim is uncertain, the remaining TRO and preliminary injunction factors are also uncertain. TROs and preliminary injunctions are "extraordinary and drastic remed[ies]" that should only be awarded on "a clear showing that the plaintiff is entitled to such relief." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019). Plaintiff has not made that showing.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction [ECF No. 12] and motion for a temporary restraining order [ECF No. 32] are **DENIED**.

IT IS SO ORDERED.

Dated: August 29, 2025

/s/Gershwin A. Drain
GERSHWIN A. DRAIN
United States District Judge

STATUTORY PROVISIONS INVOLVED

§ 750.543b. Definitions.

Sec. 543b.

As used in this chapter:

(a) "Act of terrorism" means a willful and deliberate act that is all of the following:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that the person knows or has reason to know is dangerous to human life.

(iii) An act that is 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.

(b) "Dangerous to human life" means that which causes a substantial likelihood of death or serious injury or that is a violation of section 349 or 350.

(c) "Harmful biological substance", "harmful biological device", "harmful chemical substance", "harmful chemical device", "harmful radioactive material", and "harmful radioactive device" mean those terms as defined in section 200h.

(d) "Material support or resources" means currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance.

(e) "Person" means an individual, agent, association, charitable organization, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee, trustee in bankruptcy, unincorporated organization, or any other legal or commercial entity.

(f) "Renders criminal assistance" means that the person with the intent to avoid, prevent, hinder, or delay the discovery, apprehension, prosecution, trial, or sentencing of a person who he or she knows or has reason to know has violated this chapter or is wanted as a material witness in connection with an act of terrorism pursuant to section 39 of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.39, does any of the following:

(i) Harbors or conceals that other person.

(ii) Warns that other person of impending discovery or apprehension.

(iii) Provides that other person with money, transportation, a weapon, a disguise, or false identification, or any other means of avoiding discovery or apprehension.

(iv) Prevents or obstructs, by means of force, intimidation, or deception, anyone from performing an act that might aid in the discovery, apprehension, or prosecution of that other person.

(v) Suppresses, by any act of concealment, alteration, or destruction, any physical evidence that might aid in the discovery, apprehension, or prosecution of that other person.

(vi) Engages in conduct proscribed under section 120, 120a, or 122 or chapter XXXII.

(g) "Terrorist" means any person who engages or is about to engage in an act of terrorism.

(h) "Violent felony" means a felony in which an element is the use, attempted use, or threatened use of physical force against an individual, or the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device.

§ 750.543m. Making terrorist threat or false report of terrorism; intent or capability as defense prohibited; violation as felony; penalty.

Sec. 543m.

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) Threatens to commit an act of terrorism and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

§ 750.543z. Constitutionally protected conduct; prosecution prohibited.

Sec. 543z.

Notwithstanding any provision in this chapter, 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.