UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW HESS, Plaintiff-Appellant, v. OAKLAND COUNTY, MI; KAREN MCDONALD, Oakland County Prosecutor, Oakland County, MI; MICHAEL J. BOUCHARD, Oakland County Sheriff, Oakland County, MI; MATTHEW PESCHKE, Sergeant, Oakland County Sheriff's Office, Oakland County, MI, Defendants-Appellees.	Case No. 25-1784

APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL

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Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Andrew Hess ("Plaintiff") hereby moves this Court for an injunction pending appeal, enjoining the enforcement of Michigan Compiled Laws § 750.543m as applied to his speech at an election recount in Oakland County, Michigan in 2023, while this appeal proceeds. The Oakland County Prosecutor steadfastly maintains that Plaintiff's speech constitutes a "terrorist threat" punishable under § 750.543m and that Plaintiff remains subject to a renewed prosecution as a result.

PROCEDURAL BACKGROUND

On March 6, 2025, the criminal charge against Plaintiff for allegedly violating § 750.543m was dismissed without prejudice. On March 10, 2025, Plaintiff commenced this civil action. (R-1, Compl.). On April 1, 2025, Plaintiff filed a motion for a preliminary injunction (R-12), which the district court denied on August 29, 2025 (R-36 at Ex. 3). That same day, Plaintiff filed his notice of appeal. (R-37). On September 2, 2025, Plaintiff filed a motion for an injunction pending appeal in the district court (R-39), which was denied on September 3, 2025 (R-40, at Ex. 2).

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. Defendant 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. Plaintiff was one of the challengers. (Muise Decl. ¶ 2, Ex. A [Hr'g Tr. (Vol I) at 6-14, 23, 28, 29, 46-48, 53-60] at Ex. 3).[1] Plaintiff is an outspoken critic of the way elections are conducted in Michigan, particularly in Oakland County. (*See id*. at 15-18).

At one point, Plaintiff 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 Plaintiff 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 Defendant Rozell nor any other election official was in the lobby at the time. Defendant Rozell never heard this statement from Plaintiff. Ms. Howard eventually reported the alleged "threat" to the County deputies, who then proceeded to question Plaintiff. Following this questioning, Plaintiff was permitted to reenter the Recount Room where Defendant Rozell and the other election officials were located. Plaintiff was not arrested, searched, detained, nor was he told to leave the recount. During the public comment period,

[1] Exhibits A through H are attached to the Declaration of Robert J. Muise, which is attached as Exhibit 3.

Plaintiff 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] at Ex. 3).[2]

During the preliminary examination, the prosecution presented two witnesses: Defendant Rozell and Kaitlyn Howard. The 50th District Court judge denied Plaintiff's request to call as witnesses the deputy sheriffs present at the recount.[3] (Muise Decl. ¶ 4, at Ex. 3). The deputy witnesses would have provided further evidence that 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 Plaintiff's speech, which he made *after* he was questioned by the senior County deputy about the alleged "threat."

Defendant 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?

[2] At the recount, Plaintiff 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." (Ex. D, at Ex. 3).

[3] The circuit court remanded the case to the district court for the deputies' testimony to be taken, but the case was dismissed prior to this happening. (Muise Decl. ¶ 4, at Ex. 3).

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.

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

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).

* * * *

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?

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

> 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 Plaintiff's arrest. (Ex. E, at Ex. 3). Plaintiff was held on a $20,000 personal recognizance bond (Ex. F, at Ex. 3), 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. Plaintiff was ordered to surrender his CPL, which he did. (*See* Ex. G, at Ex. 3). Following his initial appearance, Plaintiff 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. (Muise Decl. ¶ 6, at Ex. 3).

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, Plaintiff's counsel promptly filed a motion to dismiss the criminal case against Plaintiff. (Muise Decl. ¶ 1, at Ex. 3). 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 (Ex. H, at Ex. 3), 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. (Ex. H, at Ex. 3).

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 reulcta[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 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 door is now open for the Oakland County Prosecutor and Sheriff to arrest and prosecute Plaintiff yet again, thus prompting the request for an injunction.

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 Plaintiff, 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, Plaintiff's speech cannot be criminalized as it is protected political speech *as a matter of law*. The requested injunction should issue.

ARGUMENT

I. Plaintiff Satisfies the Standard for Issuing an Injunction Pending Appeal.

This Court "consider[s] four factors when deciding whether to grant an injunction pending appeal: (1) whether the applicant is likely to succeed on the merits of the appeal; (2) whether the applicant will be irreparably harmed absent the

injunction; (3) whether the injunction will injure the other parties; and (4) whether the public interest favors an injunction." *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477, 479 (6th Cir. 2020).

II. Plaintiff Has a Strong Likelihood of Succeeding on the Merits.

A. The Application of § 750.543m Violates the First Amendment.

Controlling law demonstrate that Plaintiff's speech is protected by the First Amendment *as a matter of law*. Plaintiff has a fundamental right not to be *prosecuted* for political speech, even if it is caustic or unpleasant. This right is protected by the First Amendment *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 no ("shall not") prosecution is permitted under § 750.53m. 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 continued threat of prosecution not only violate Plaintiff'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. *See infra* § III.

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 Plaintiff 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 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 Plaintiff 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:

[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).

> [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) (emphasis added). 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 Plaintiff cannot be punished as a "true threat" under binding First Amendment jurisprudence as it was, at best, political hyperbole.

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

[7] Whether Plaintiff'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.

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); *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 *not* 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 *not* 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

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

Supreme Court 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, Plaintiff 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. Plaintiff'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 Plaintiff's speech under § 750.543m.

B. Section 750.543m Violates *Brandenburg*.

"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

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

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; 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 (emphasis added). The same is true here. A required element of the "terrorist threat" statute is advocating 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 Plaintiff'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. There can be little doubt that the speech at issue in *Brandenburg* (by armed individuals) or 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. Other Injunction Factors Favor Granting the Motion.

Plaintiff will be irreparably harmed without the injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *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 Plaintiff'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."); *Dombrowski*, 380 U.S. at 486.

The harm to Plaintiff is substantial because the deprivation of his right to freedom of speech constitutes irreparable injury. *See supra*. On the other hand, if Defendants are restrained from unlawfully enforcing § 750.543m *against Plaintiff while this appeal proceeds*, they will suffer no harm because the exercise of constitutionally protected rights can never harm any of Defendants' 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.

CONCLUSION

The Court should issue the requested injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 27(d), the foregoing is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5,200 words, excluding those accompanying documents identified in Fed. R. App. P. 27(a)(2)(B).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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/s/ *Robert J. Muise*
Robert J. Muise, Esq.