UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANDREW HESS,

Plaintiff,

v.

OAKLAND COUNTY, MICHIGAN; KAREN McDONALD, Oakland County Prosecutor, Oakland County, Michigan; JOE ROZELL, Director of Elections, Oakland County, Michigan; MICHAEL J. BOUCHARD, Oakland County Sheriff, Oakland County, Michigan; and MATTHEW PESCHKE, Sergeant, Oakland County Sheriff's Office, Oakland County, Michigan,

Defendants.

No. 2:25-cv-10665-GAD-KGA

Hon. Gershwin A. Drain

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Andrew Hess ("Plaintiff"), by and through undersigned counsel, hereby moves this Court for a preliminary injunction to enjoin the enforcement of Michigan Compiled Laws § 750.543m as applied to Plaintiff's political speech while this case proceeds.

In April 2024, Defendant Karen McDonald charged Plaintiff with violating § 750.543m for allegedly making a "terrorist threat." The Oakland County Prosecutor, with the assistance of the Oakland County Sheriff, sought to punish Plaintiff for

making an off-hand comment ("hang Joe for treason," which is political opinion and hyperbole at best), that was expressed in conversational tone in a near-empty lobby of the Oakland County Election Division Training Room during an election recount held in December 2023. Section 750.543m is a 20-year felony.

The requested injunctive relief is necessary because this effort to prosecute Plaintiff under § 750.543m violates Plaintiff's rights protected by the First Amendment, and it violates Michigan Compiled Laws § 750.543z, which expressly prohibits prosecution under § 750.543m for conduct that is "presumptively" protected by the First Amendment.

This first attempt to prosecute Plaintiff was dismissed without prejudice on March 6, 2025,[1] as a result of the Michigan Court of Appeals' decision in *People v. Kvasnicka*, No. 371542, 2025 Mich. App. LEXIS 1202 (Ct. App. Feb. 13, 2025), which held that § 750.543m was facially unconstitutional. However, on March 28, 2025, the Michigan Supreme Court vacated the Court of Appeals' decision and remanded the case for further consideration. Consequently, there is nothing preventing Defendant McDonald from renewing her prosecution of Plaintiff, thereby necessitating this motion.

[1] Plaintiff filed this action on March 10, 2025. (Compl., ECF No. 1, PageID 1-32). At the time of the filing, there were no ongoing state court proceedings against him.

For the reasons set forth in the accompanying brief, Plaintiff can demonstrate a likelihood of success on his First Amendment claim, he will suffer irreparable harm absent the requested injunction, granting the injunction will not cause substantial harm to others, and granting the injunction is in the public interest. As the U.S. Supreme Court has long held, even minimal infringement upon First Amendment freedoms constitutes irreparable harm sufficient to warrant injunctive relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *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*, 427 U.S. at 373).

Pursuant to E.D. Mich. LR 7.1, on March 29, 2025, Plaintiff's counsel, Robert J. Muise, sent an email to Defendants' counsel, Christopher Trebilcock of Clark Hill, PLC, seeking Defendants' position on this motion. Plaintiff's counsel requested a response by noon on Monday, March 31, 2025. Defendants' counsel did not respond directly to the email. However, counsel spoke by phone on March 31, 2025, and had a follow-up email exchange. Defendants do not concur in the relief requested by this motion, and they expressly reserve the right to enforce § 750.543m against

Plaintiff for his expressive conduct at the December 2023 election recount at "any time."

Accordingly, because Plaintiff remains under the continuing threat of arrest and prosecution under § 750.543m for his political speech, he is suffering and will continue to suffer irreparable harm, thereby warranting the requested injunctive relief.

WHEREFORE, Plaintiff requests that the Court grant the requested injunction to prevent the enforcement of § 750.543m against him while this case proceeds.

Respectfully submitted,

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PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

ISSUE PRESENTED

Whether the enforcement of Michigan Compiled Laws § 750.543m facially and as applied to punish Plaintiff's speech deprives Plaintiff of his rights protected by the First Amendment, thereby causing irreparable harm and warranting the requested injunctive relief.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Bible Believers v. Wayne Cnty., 805 F.3d 228 (6th Cir. 2015)

Brandenburg v. Ohio, 395 U.S. 444 (1969)

Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001)

Counterman v. Colo., 600 U.S. 66 (2023)

Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474 (6th Cir. 1995)

Elrod v. Burns, 427 U.S. 347 (1976)

G & V Lounge, Inc. v. Mich. Liquor Control Comm'n, 23 F.3d 1071 (6th Cir. 1994)

NAACP v. Claiborne Hardware Co, 458 U.S. 886 (1982)

Watts v. United States, 394 U.S. 705 (1969)

Fed. R. Civ. P. 65

INTRODUCTION

In the United States, we have a profound national commitment to the principle that debate on public issues, which unquestionably includes elections and the conduct of elections, should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *See infra*. Prosecutions for engaging in such speech under Michigan Compiled Laws § 750.543m are barred by the First Amendment and by Michigan Compiled Laws § 750.543z.

This case arises in the context of a contentious election recount. By its very nature, the context of this case is political. And elections by their nature are contentious. It's the nature of politics. Expressing one's opinion on how elections are conducted or decided—quintessential public issues—is core political speech protected by the First Amendment. Opining that election officials who cheat on elections should be prosecuted and punished for treason under federal law is *core political speech*. For good or ill, our political discourse is far from civil, but "breathing space" must be allowed in order to protect the First Amendment. The election recount in Oakland County in December 2023 is no different. It was not some special event that stripped Plaintiff of his fundamental right to freedom of speech—including the right to engage in caustic and unpleasantly sharp attacks directed at the government officials involved. This Court should issue the requested

injunction to prevent the arrest and prosecution of Plaintiff for engaging in protected speech.

STATEMENT OF FACTS

On December 15, 2023, a recount of an election that occurred in November 2023 in Oakland County was held at the Election Division Training Room ("Recount Room") inside the County Courthouse. Defendant Joseph Rozell, the Director of Elections for the County, was overseeing the recount. Deputies from the County Sheriff's Office were present to provide security. Several members of the public attended as observers. Plaintiff was one of those members. At times, the recount became heated as some of the observers complained that cheating was taking place. In fact, challenges were filed to the ongoing process. Plaintiff was one of the challengers, complaining about the fact that seals on the ballot bags appeared to be tampered with, calling into question the chain of custody for the ballots. (Muise Decl. ¶ 2, Ex. A [Prelim. Hr'g Tr. (Vol I) at 6-14, 23, 28, 29, 46-48, 53-60] at Ex 1).[1] Indeed, 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 lobby. And while in the lobby, a receptionist for the county, Kaitlyn Howard, claims to have

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

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, Plaintiff proceeded to make a speech about cheating on elections. Nothing he said during this public comment period served as a basis for prosecution. Indeed, deputies stood by listening with their arms folded. (*See id*. *supra* & *infra*; *id*. at 28, 34, 51, 54, 58; Exs. B [Public Comment Video], C [Photo], D [Photo], E [Bodycam Video] at Ex. 1).[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 any of the deputy sheriffs present at the

[2] During the initial investigation of the incident by the senior County deputy at the recount, Plaintiff provided a written statement in which he reemphasized the point 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. F, at Ex. 1).

recount.[3] (Muise Decl. ¶ 5, at Ex. 1). The deputy witnesses would have provided further evidence that there was no imminent threat to anyone and that no one present considered the alleged "threat" to be a "serious expression of an intent to commit an act of terrorism." (*Id.*). Nonetheless, this is evidenced by the photographs of the deputies standing with their arms folded and listening to Plaintiff give a speech about cheating on elections during the public comment period—a speech that was made *after* Plaintiff was questioned by the senior County deputy about the alleged "threat." (*See* Exs. C & D, at Ex. 1).

Defendant Rozell testified under oath during the preliminary examination 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***.

[3] The Circuit Court remanded the case to the District Court for the deputies' testimony to be taken. However, the case was dismissed prior to this happening. (Muise Decl. ¶ 5, at Ex. 1).

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***.

(Prelim Hr'g Tr (Vol I) at 38-39 [emphasis added], Ex A, at Ex. 1). Ms. Howard testified under oath during the preliminary examination 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 [emphasis added]).

* * * *

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 [emphasis added]).

* * *

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 [emphasis added]). [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 [emphasis added]).

* * * *

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 [emphasis added]).

* * * *

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

(*Id*. at 71 [emphasis added]).

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 <u>don't take kindly</u> to that kind of behavior or language***.

(*Id*. at 75 [emphasis added]).

[4] Consequently, the <u>only</u> 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] Jeffrey S. Hall was the Special Prosecutor assigned to the prosecution by Defendant McDonald.

On April 4, 2024, nearly *four months* after the alleged threat, a warrant issued for Plaintiff's arrest. (Ex. G, at Ex. 1). Plaintiff was held on a $20,000 personal recognizance bond (Ex. H, at Ex. 1), which included, *inter alia*, conditions that restricted his travel and that deprived him of his fundamental right to bear arms. *See* U.S. Const., Am. II; Const. 1963, art. 1, § 6. Plaintiff was ordered to surrender his CPL, which he did. (*See* Ex. I, at Ex. 1). 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. ¶ 9, at Ex. 1). In other words, process is punishment.

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 (*i.e.*, not the case brought by the Oakland County Prosecutor against Plaintiff), that § 750.543m was facially unconstitutional based on *Counterman v. Colorado*, 600 U.S. 66 (2023). As a result of this appellate decision, Plaintiff's counsel promptly filed a motion to dismiss the pending prosecution against Plaintiff. (Muise Decl. ¶ 1, at Ex. 1). On March 6, 2025, the District Court dismissed the case, thereby ending any ongoing state court proceedings against Plaintiff.[6] (*Id.*).

The Wayne County Prosecutor filed an application for leave to appeal to the

[6] This civil rights lawsuit was filed on March 10, 2025. (Compl., ECF No. 1).

Michigan Supreme Court. On March 28, 2025, the Michigan Supreme Court issued its Order in the Wayne County case. (Ex. J, at Ex. 1). In its ruling, the Court "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 the U.S. Supreme Court's opinion in *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 (as in the case with Plaintiff). 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. J, at Ex. 1). Notably, the Court did not address the constitutional deficiencies of this statute in light of the U.S. Supreme Court's decision in *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 thus the impact of the U.S. Supreme Court's decisions in *Brandenburg*, *Watts v. United States*, 394 U.S. 705 (1969), and *NAACP v. Claiborne Hardware Co,* 458 U.S. 886 (1982). These U.S. Supreme Court cases are discussed more fully below. Also, for purposes of this case, the Michigan Supreme Court vacated the decision of the Michigan Court of

Appeals, thereby reinstating the constitutionality of § 750.543m and opening the door for the Oakland County Prosecutor and Sheriff to arrest and prosecute Plaintiff yet again.

MICHIGAN COMPILED LAWS § 750.543M: "TERRORIST THREAT"

Section 750.543m, the 20-year felony statute at issue, has been construed by the Michigan Appellate Courts to proscribe 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) (affirming conviction for multiple, direct, and explicit threats to kill, including threatening a school shooting). This limiting construction was necessary to comport with the U.S. Supreme Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003).

In light of the U.S. Supreme Court's decision in *Counterman v. Colorado*, 600 U.S. 66 (2023), the prosecutor must also prove "that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." Whether this constitutional requirement can be applied by a limiting construction of § 750.543m is an issue that will be considered by the Michigan Court of Appeals based on the recent Order and remand of the Michigan Supreme Court discussed above. Nonetheless, under the First Amendment, this *Counterman* element remains a requirement to be proven in all threat cases, including the case involving Plaintiff.

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). Thus, the statute requires the existence of an intent to intimidate or coerce *when communicating the threat*. Mich. Comp. Laws § 750.543b(a); *Osantowski*, 274 Mich. App. 593. When applying this statute, "[t]he meaning of a particular speech must be considered in its context." *People v. Gerhard*, 337 Mich. App. 680, 694 (2021). In fact, to prevent criminal prosecutions such as the one Defendants recently sought against Plaintiff, M Crim JI 38.4(3) was adopted in August 2020, and it specifically provides that to prove the offense at issue, "the prosecution *must prove* that the threat"

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

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

As noted, while the Michigan Appellate Courts have upheld the validity of this statute under *Virginia v. Black*, 538 U.S. 343 (2003), as discussed further below,

the statute is facially overbroad and invalid under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Moreover, as argued further below, in light of clearly established First Amendment jurisprudence, the speech at issue cannot possibly be considered a "true threat" as it is not a "serious expression of an intent to commit an act of terrorism." Rather, it is protected political speech as a matter of law. In short, facially or applied against Plaintiff's speech, § 750.543m violates the First Amendment.

ARGUMENT

I. Standard for Issuing a Preliminary Injunction.

The standard for issuing a preliminary injunction is well established:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (same). Typically, the reviewing court will balance these factors, and no single factor will necessarily be determinative of whether or not to grant the injunction. *Connection Distributing Co.*, 154 F.3d at 288. However, because this case deals with a violation of Plaintiff's First Amendment rights, the crucial and often dispositive factor is whether Plaintiff is likely to prevail on the merits. *Id*.

II. Plaintiff Satisfies the Standards for Granting the Injunction.

A. Plaintiff Is Likely to Succeed on His First Amendment Claim.

1. Section 750.543m Violates the First Amendment.

Because the government can only proscribe speech with "narrow specificity," and only contextually credible threats "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence *to a particular individual or group of individuals*" may be punished under the First Amendment, the government must set forth clear and indisputable facts demonstrating not only that the specific words at issue constitute a "terrorist threat" but that the specific factual context in which the words were uttered makes these specific words a "serious expression of an intent to commit an act of terrorism." The undisputed facts here in light of controlling law demonstrate that the speech at issue could not possibly be considered a "true threat"—it is political speech protected by the First Amendment as a matter of law.[7]

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 Michigan statutory law. In fact, § 750.543z expressly states, "a prosecuting agency *shall not* prosecute any person or seize any property for conduct *presumptively*

[7] Under federal law, this is an issue for the Court and not a jury. *See infra*.

protected by the first amendment to the constitution of the United States in a manner that violates *any* constitutional provision."[8] (emphasis added).

Pursuant to §750.543z, if the speech at issue is presumably protected by the First Amendment, then *no* ("shall not") prosecution is permitted.[9] 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. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). 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. "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *NAACP v. Claiborne Hardware Co,* 458 U.S. 886, 913 (1982) (citations omitted).

[8] Under the rule of lenity, the statute must be construed in Plaintiff's favor.
[9] *See* https://dictionary.thelaw.com/presumptive/ (defining presumptive in the law to mean "inferred; assumed; supposed").

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. *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."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (same).

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). Accordingly, there are only a very few and limited exceptions to protected speech.[10] And this is particularly

[10] *See United States v. Alvarez*, 567 U.S. 709, 717 (2012) (describing "the few historic and traditional categories of expression" that may be restricted: "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation,

true when the government is seeking to criminalize speech, as in this case. 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.[11]

"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. 343, 359 (2003). Political hyperbole—even if it involves threatening an act of violence—is protected speech. 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" that may be punishable under the law. By contrast, communications which convey political hyperbole (even if they mention the use of weapons or 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

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speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent") (internal quotations and citations omitted).

[11] It is *not possible* 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).

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:

> [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*,[12] 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

[12] 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*.

hyperbole—a "vehement, caustic, and . . . unpleasantly sharp attack[] on [a] public official[]." *See also Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949) (stating that "a function of free speech under our system of government is to invite dispute . . . induce[] a condition of unrest . . . or even stir[] people to anger").

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. 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 <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 F3d 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 or imminent "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 without incident. 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 (Defendant McDonald) 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 over the subsequent fifty years following *Watts* has both solidified the principle and provided more guidance about the kind of statements that are protected speech—speech which cannot provide the grounds for criminal or civil liability. In *Brandenburg v. Ohio*, 395 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 used the words "revengence" by the "Caucasian race" and made statements and derogatory comments about "the n**ger" and "the Jew." Despite the loathsome rhetoric, the Court reversed the conviction because the statute punished "mere advocacy not distinguished from incitement to imminent lawless action." *Id*. at 448-49. Thus, in *Brandenburg*, the Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe 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. 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 (emphasis added). Consequently, even if the Court were to conclude that the alleged "terrorist threat" in this case was not political hyperbole or rhetoric but a serious expression advocating for the "use of force or of law violation," the statement

in the lobby was plainly not directed to inciting or producing imminent lawless action nor likely to incite or produce such action (where were the ropes or gallows?). As noted, 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.* (emphasis added).[13] 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 dulcet phrases. An advocate must be free to stimulate [] his audience . . . . When appeals do not incite lawless action, *they must be regarded as protected speech*. To rule otherwise would ignore the profound commitment that debate on public issues should be uninhibited, robust, and wide-open.

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

Id. (internal quotations and citations omitted) (emphasis added). Here, there are no statements that incited *any* 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.

2. Section 750.543m Violates *Brandenburg*.

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned*, 408 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; it is more like the statute at issue in *Brandenburg* (and the speech at issue in *Claiborne Hardware*) than the cross-burning statute at issue in *Black*. As explained in *Brandenburg*:

> In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act . . . , the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" *violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it*. . . . But *Whitney* has been *thoroughly*

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

Brandenburg, 395 U.S. at 447-48 (emphasis added). The same is true here. An element of the "terrorist threat" statute is threatening violence to "*influence* or *affect* the conduct of government or a unit of government through intimidation or coercion." Mich. Comp. Laws § 750.543b(a)(iii). 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.

B. Irreparable Harm to Plaintiff.

Plaintiff will be irreparably harmed without the preliminary injunction. As stated by the Sixth Circuit, "[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001). Here, Defendants seek to enforce § 750.543m to criminally punish Plaintiff for engaging in political speech. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *Connection Distributing Co.*, 154 F.3d at 288. And this injury is sufficient to justify the requested injunctive relief. *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*).

Indeed, the threat of prosecution under § 750.543m remains. And this threat hangs over Plaintiff's head (and the collective head of his family) like the sword of Damocles, causing ongoing and irreparable harm. *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."); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or

prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *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.").

C. Harm to Others.

The likelihood of harm to Plaintiff is substantial because the deprivation of his right to freedom of speech, even for minimal periods, constitutes irreparable injury. *See supra*. On the other hand, if Defendants are restrained from unlawfully enforcing § 750.543m, 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.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiff shows that his constitutional rights have been violated, then the harm to others is inconsequential.

D. The Public Interest.

The impact of the preliminary injunction on the public interest turns in large part on whether the enforcement of § 750.543m facially and/or applied violates the

First Amendment. As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079; *see also Dayton Area Visually Impaired Persons, Inc.,* 70 F.3d at 1490 (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties"). As set forth above, the enforcement of § 750.543m to punish and thus restrict Plaintiff's political speech violates the First Amendment. It is in the public interest to issue the preliminary injunction.

CONCLUSION

Plaintiff requests that the Court issue a preliminary injunction, enjoining § 750.543m facially and/or as applied against him. This injunction is necessary to avoid irreparable harm by preventing Defendant Oakland County, its Prosecutor (Defendant McDonald), and Sheriff (Defendant Bouchard) from arresting and prosecuting Plaintiff for engaging in political speech while this case proceeds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2025, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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