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 TEMPORARY RESTRAINING ORDER

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 Temporary Restraining Order ("TRO") to immediately enjoin the enforcement of Michigan Compiled Laws § 750.543m as applied to Plaintiff's expressive conduct engaged in at an election recount in Oakland County, Michigan in 2023, while this case proceeds. Plaintiff's motion for a preliminary injunction (ECF No. 12), which

seeks similar relief, was filed on April 1, 2025, and it remains pending.[1] This motion seeks a TRO pending this Court's resolution of the motion for a preliminary injunction. The standard for issuing a TRO and a preliminary injunction are the same. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (noting that the same factors apply in "determining whether to issue a TRO or preliminary injunction") (citation omitted). Consequently, the issues have been fully briefed, and the motion is ripe for decision.[2] (*See* Pl.'s Br. in Supp. of Mot. for Prelim. Inj., ECF No. 12; Pl.'s Reply in Supp. of Mot. for Prelim. Inj., ECF No. 19).

Immediate relief is necessary because Defendants Oakland County, the Oakland County Prosecutor (Defendant Karen McDonald), and the Oakland County Sheriff (Defendant Michael J. Bouchard), through counsel, have not disavowed the renewal of their unlawful prosecution of Plaintiff under Michigan Compiled Laws § 750.543m. This threatened enforcement of § 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

[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. Consequently, there is no *Younger* abstention issue.

[2] Plaintiff understands that a motion is ordinarily accompanied by a brief pursuant to the Local Rules. However, briefs and exhibits have already been filed in support of Plaintiff's request for a preliminary injunction. (*See* ECF No. 12 & associated filings). To avoid needless and redundant filings, Plaintiff incorporates herein his previously filed briefs and exhibits in support of his motion for a preliminary injunction as the standard and arguments are the same.

is "presumptively" protected by the First Amendment, thereby warranting the requested injunction. *See Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being *threatened or impaired*, a finding of irreparable injury is mandated.") (emphasis added); *see also 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.").

This renewed and credible threat of prosecution is the result of the recent decision by the Michigan Court of Appeals in *People v. Kvasnicka* ("*Kvasnicka II*"), which issued on July 21, 2025.[3] In *Kvasnicka II*, the court held that Michigan Compiled Laws § 750.543m(1)(a) is not facially unconstitutional, thereby reversing

[3] A copy of *Kvasnicka II* is attached to this motion as Exhibit A. As a result of this decision, there is no non-frivolous basis for arguing that *Pullman* abstention applies, as Defendants have previously argued. (*See, e.g.,* Pl.'s Reply in Supp. of Mot. for Prelim. Inj. at 5-7, ECF No. 19, PageID.319-21).

its earlier decision in light of the remand instructions provided by the Michigan Supreme Court. In its opinion, the Michigan Court of Appeals reluctantly[4] upheld the *facial* constitutionality of § 750.543m in light of the challenge presented,[5] but it also further held that in order to comply with the requirements of *Counterman v. Colorado*, 600 U.S. 66 (2023), "the prosecution must prove that [the defendant] recklessly threatened to commit an act of terrorism, *i.e.*, that he 'consciously disregarded a substantial risk that his [or her] communications would be viewed as threatening violence.'" *Kvasnicka II*, Slip. Op. at 9 (quoting *Counterman*, 600 U.S. at 69). The County Prosecutor cannot meet that burden in this case.

Indeed, Plaintiff addressed this issue in his brief filed in support of his pending motion for preliminary injunction:

> 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

[4] In its opinion, the Michigan Court of Appeals stated that "[i]t is only with the utmost hesitation and reluctance that we 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*, Slip. Op. at 8, n.2.

[5] Of course, the Michigan Court of Appeals was not addressing the application of § 750.543m to the facts of *this* case nor did the court address the issues of whether this statute is valid under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), or whether it can be applied to the facts here in light of *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982), and *Watts v. United States*, 394 U.S. 705 (1969)—issues that Plaintiff addressed in his pending motion for a preliminary injunction. (*See generally* ECF No. 12).

> 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.

(Pl.'s Br. in Supp. of Mot. for Prelim. Inj. at 9, ECF No. 12, PageID.79).

In short, Defendants seek 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 recount room during an election recount held in December 2023. Defendants claim that this political commentary warrants prosecution for making a "terrorist threat"—a 20-year felony under Michigan law. This threatened enforcement of § 750.543m against Plaintiff's expressive conduct is a patent violation of the First Amendment.

For the reasons set forth in Plaintiff's previously filed brief in support of his motion for a preliminary injunction (ECF No. 12), 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 the momentary loss of 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 July 30, 2025, Plaintiff's counsel, Robert J. Muise, and Defendants' counsel, Robert N. Dare of Clark Hill, PLC, exchanged emails regarding whether additional briefing is necessary in light of *Kvasnicka II*. During the course of that exchange, Plaintiff's counsel sought assurance from Defendants' counsel that the Oakland County Prosecutor would not renew the prosecution of Plaintiff pending resolution of this federal case. That is, Plaintiff's counsel asked whether in light of the Michigan Court of Appeals decision in *Kvasnicka II*, the Oakland County Prosecutor would seek, yet again, to prosecute Plaintiff under § 750.543m. Defendants' counsel could offer no assurance that the Oakland County Prosecutor would not renew her prosecution of Plaintiff under this statute, thereby prompting the filing of this motion for immediate relief. As stated by Defendants' counsel, "we cannot agree that as a condition of this ongoing civil case, the Prosecutor's Office will not issue criminal charges against Mr. Hess."

In sum, because Plaintiff remains under the credible threat of arrest and prosecution, he is suffering and will continue to suffer "immediate and irreparable injury." Fed. R. Civ. P. 65(b)(1)(A). The relevant issues have been briefed by the parties. The TRO should issue. Upon issuing the TRO, the Court can then set a

hearing to determine whether a preliminary injunction should issue, and it can decide whether additional briefing is necessary in light of *Kvasnicka II*. After the hearing, the Court can either dissolve the TRO and deny the preliminary injunction (which will force Plaintiff to file an immediate appeal to the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1292) or continue the restraining order via a preliminary injunction while the case proceeds.

WHEREFORE, Plaintiff requests that the Court immediately issue the requested TRO to prevent the unlawful arrest and prosecution of Plaintiff pending a hearing on whether a preliminary injunction should issue. Time is of the essence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 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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