

No. 25-1784

**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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE GERSHWIN A. DRAIN
CIVIL CASE No. 2:25-CV-10665-GAD-KGA

APPELLANT'S BRIEF

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTERESTS**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiff-Appellant Andrew Hess (“Plaintiff-Appellant”) states the following:

Plaintiff-Appellant is a private individual. There are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

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

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiff-Appellant respectfully requests that this Court hear oral argument. This case presents for review important legal issues regarding the right to free speech protected by the First Amendment and whether a felony statute, facially and as applied to criminalize Plaintiff-Appellant's political comment as a "terrorist threat," violates the First Amendment.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this Court deems relevant.

AMERICAN FREEDOM LAW CENTER

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

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INTRODUCTION

At a contentious election recount held in Oakland County, Michigan (“County”) on December 15, 2023, Plaintiff made an offhand comment (“*Hang Joe for Treason*,” which is political hyperbole as a matter of law), in a “normal 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 Plaintiff was questioned by a deputy sheriff about the alleged threat (Plaintiff denied threatening to harm Joe Rozell—he told the deputy he was accusing Rozell of a crime), Plaintiff was permitted to return to the recount room where Joe Rozell was located, at which time Plaintiff 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 Plaintiff for allegedly making a “terrorist threat” in violation of Michigan Compiled Laws § 750.543m. The initial charge was dismissed without prejudice. And now the County is seeking to reinstate this 20-year felony charge against Plaintiff for his political

comment.

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.

As noted, 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 protect Plaintiff's

fundamental right to freedom of speech.

STATEMENT OF JURISDICTION

On March 10, 2025, Plaintiff filed this action, alleging violations arising under the United States Constitution, 42 U.S.C. § 1983, the Michigan Constitution, and Michigan state law. (R.1, Compl.). On May 28, 2025, Plaintiff filed a First Amended Complaint, alleging similar violations arising under the United States Constitution, 42 U.S.C. § 1983, the Michigan Constitution, and Michigan state law. (R.23, First Am. Compl, PageID.511-63). The district court has jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1343, and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

On April 1, 2025, Plaintiff filed a motion for a preliminary injunction. (R.12, Mot. for Prelim. Inj., PageID.64-97). On August 29, 2025, the district court denied Plaintiff's motion. (R.36, Op. & Order, PageID.873-95). That same day, Plaintiff filed his notice of interlocutory appeal. (R.37, Notice of Appeal, PageID.896-98). This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

STATEMENT OF THE ISSUE FOR REVIEW

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

STATEMENT OF THE CASE

I. Procedural Background.

On March 6, 2025, the criminal charge against Plaintiff for allegedly violating § 750.543m was dismissed without prejudice. (R.12-2, Muise Decl. ¶ 1, PageID.99-100). 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, Op. & Order, PageID.873-95). That same day, Plaintiff filed his notice of appeal. (R.37, Notice of Appeal, PageID.896-98). 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). On September 4, 2025, Plaintiff filed a motion for injunction pending appeal in the Sixth Circuit. (Doc. 9-1). The Sixth Circuit denied the motion on October 1, 2025. (Doc.16). On October 3, 2025, Plaintiff filed an emergency application for writ of injunction directed to the Honorable Brett Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit. The application was denied on October 20, 2025, without explanation.

This appeal to the merits panel follows.

II. 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. 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. (R.12-2, Muise Decl. ¶ 2, Ex. A [Prelim. Exam. Hr’g Tr. (Vol I) at 6-14, 23, 28, 29, 46-48, 53-60], PageID.100, 109-17, 126, 131, 132, 149-51, 156-63). Indeed, Plaintiff is an outspoken critic of the way elections are conducted in Michigan, particularly in Oakland County. (*See id.* at 15-18, PageID.118-21).

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 overheard Plaintiff state, “***Hang Joe for treason.***” The statement was made in a “normal 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 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 Rozell and the other election officials were located. Plaintiff was not arrested, searched, or 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*; R.12-2, Prelim. Exam. Hr'g Tr. (Vol I) at 28, 34, 38-40, 46, 48, 50-51, 53-55, 58-59, Ex. A, PageID.131, 137, 141-43, 149, 151, 153, 154, 156-58, 161-62; Ex. C [Photo of Public Comment], PageID.189-90; Ex. D [Photo of Public Comment], PageID.191-92).¹

During the preliminary examination, the prosecution presented two witnesses: Joe 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 recount.² (R.12-2, Muise Decl. ¶ 5, PageID.100). 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

¹ 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." (R.12-2, Ex. F [Plaintiff's Written Statement to Oakland County Deputy], PageID.194-95).

² The Michigan Circuit Court remanded the case to the Michigan District Court for the deputies' testimony to be taken. However, the case was dismissed prior to this happening. (R.12-2, Muise Decl. ¶ 5, PageID.100).

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 during the public comment period about cheating on elections—a speech that was made *after* Plaintiff was questioned by the senior County deputy about the alleged “threat.” (See R.12-2, Exs. C [Photo of Public Comment], PageID.189-90; Ex. D [Photo of Public Comment], PageID.191-92).

Joe 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.*

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, Prelim. Exam. Hr'g Tr. (Vol. I) at 38-39 [emphasis added], Ex. A, PageID.141-42).

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], PageID.170).

* * *

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]. PageID.176-77).

* * *

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], PageID.180).³

³ 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. 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], PageID.181).

* * * *

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], PageID.185).

* * * *

MR. HALL⁴: I’d stipulate that *it was a normal conversational tone.*

(*Id.* at 71 [emphasis added], PageID.174).

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 [emphasis added], PageID.178).

When questioned about the precise words she claims Plaintiff uttered in the

⁴ Jeffrey S. Hall was the Special Prosecutor assigned to the prosecution by Defendant McDonald.

lobby, Ms. Howard testified as follows:

Q. *So you didn't tell [the officer] that Andrew Hess said I am going to hang Joe for treason, correct?*

A. I told him what I put in the report, to be *as accurate as possible*.

(*Id.* at 76 [emphasis added], PageID.179).

On April 4, 2024, nearly *four months* after the alleged threat, a warrant issued for Plaintiff's arrest. (R.12-2, Ex. G [Warrant], PageID.196-97). Plaintiff was held on a \$20,000 personal recognizance bond (R.12-2, Ex. H [Bond], PageID.198-99), 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* R.12-2, Ex. I [Letter from County], PageID.200-01). 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. (R.12-2, Muise Decl. ¶ 8, PageID.101).

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. (R.19-2, Muise Suppl. Decl. ¶ 2, PageID.326). On March 6, 2025, the District Court dismissed the case, thereby ending any ongoing state court proceedings against Plaintiff.⁵ (*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 Order in the Wayne County case. (R.12-2, Ex. J [Michigan Supreme Court Order], PageID.202-04). 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. 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. J [Michigan Supreme Court Order], PageID.202-04).

⁵ This civil rights lawsuit was filed on March 10, 2025. (R.1, Compl.).

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 relucta[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 taken steps to reinstate the criminal charge against Plaintiff.

**MICHIGAN COMPILED LAWS § 750.543m:
“TERRORIST THREAT”**

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.” See *Kvasnicka II*, 2025 Mich. App. LEXIS 5764, at *16 (citing *Counterman*).

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.*” Mich. Comp. Laws § 750.543b(a) (emphasis added); *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 political speech cannot be criminalized under the First Amendment *as a matter of law*. The requested injunction should issue.

STANDARD OF REVIEW

This Court reviews the district court’s preliminary injunction decision *de novo* because it involves the application of the First Amendment. “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.’” *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). “Because the determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed *de novo*, the standard of review for a district court decision regarding a preliminary injunction with First Amendment implications is *de novo*.” *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) (internal quotations and citations omitted).

Under *de novo* review, this Court is free to substitute the flawed judgment of the lower court (or a motions panel) with its own judgment and give the findings of the lower court “no form of appellate deference.” *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

Additionally, since this case implicates First Amendment rights, this Court must conduct an independent examination of the record because “[the court] must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995). Consequently, this Court should “conduct an independent examination of the record as a whole, without deference to the trial court.” *Id.*; see also *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

SUMMARY OF THE ARGUMENT

There is no dispute of material fact as the prosecutor’s primary witnesses (Kaitlyn Howard and Joe Rozell) have already testified during a preliminary examination in this case, and they were subject to cross examination by Plaintiff’s counsel. Thus, the content and context of the alleged “threat,” which must be a “serious expression of intent to commit an act of terrorism,” are known and not disputed. Absent the requested injunction, Plaintiff will face the punishment of a felony prosecution (1) because of a political comment (“hang Joe for treason”), (2) made in a “normal conversational tone,” (3) in a near-empty lobby, (4) outside of the presence of any election official (including the “Joe” referenced in the comment), (5) that was merely overheard by a secretary, (6) who was admittedly not part of the conversation, and (7) who believed there was no imminent threat of harm, (8) but

who made the complaint because she doesn't "take kindly" to such language. This enforcement of Michigan Compiled Laws § 750.543m violates the First Amendment as a matter of law. It is contrary to the Supreme Court's decisions in *Watts v. United States*, 394 U.S. 705 (1969), *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and it is contrary to Michigan Compiled Laws § 750.543z, which expressly provides that "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." Mich. Comp. Laws § 750.543z (emphasis added).

Moreover, § 750.543m is facially unconstitutional under *Brandenburg* as the statute forbids the *advocacy of the use of force or of law violation* to "influence or affect the conduct of government or a unit of government through intimidation or coercion" without the constitutionally mandated requirement that such advocacy be directed to inciting or producing imminent lawless action and likely to incite or produce such action.

Plaintiff will suffer irreparable harm absent the requested injunction. Consequently, 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. On the other hand, if Defendants are restrained from unlawfully enforcing §

750.543m in this case, they will suffer no harm because the exercise of constitutionally protected rights can never harm any of Defendants' or others' legitimate interests. And finally, it is always in the public interest to prevent the violation of a party's rights protected by the First Amendment.

The injunction should issue.

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 Standard for Granting the Injunction.

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

1. Application of § 750.543m against Plaintiff's Speech 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” 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.

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 protected by the first amendment to the constitution of the United States in a manner

that violates *any* constitutional provision.”⁶ Mich. Comp. Laws § 750.543z (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.⁷ 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 is punishment. Enduring the trials and tribulations of a felony charge (*i.e.*, having a warrant issued for your arrest, being subject to bond conditions that restrict your liberty, having to miss work to appear in court, enduring the stress placed on your young family over the uncertainty of your fate, facing social opprobrium associated with a felony charge, and having your ability to provide for your young family sharply impaired) causes significant harm. Such prosecutions destroy lives well before a jury is empaneled.

The right to freedom of speech is an essential right in our constitutional

⁶ Under the rule of lenity, the statute must be construed in Plaintiff’s favor.

⁷ See <https://dictionary.thelaw.com/presumptive/> (defining presumptive in the law to mean “inferred; assumed; supposed”).

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).

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* § II.D.

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). And this is particularly 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 at which Plaintiff was permitted to remain *after* his comment (*i.e.*, after he made the alleged “terrorist threat”).⁸

“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. 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 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

⁸ 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).

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,⁹ 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—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

⁹ Whether Plaintiff’s speech is protected by the First Amendment in this case is not an issue for the jury to decide. There is no fact dispute. This is a question of law for the Court, as demonstrated by *Watts* and other cases. *See infra* § II.A.3.

unrest . . . or even stir[] people to anger”). As observed by this Court, sitting *en banc*:

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. The protection would be unnecessary if it only served to safeguard the majority views. In fact, it is the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment.

Bible Believers v. Wayne Cnty., 805 F.3d 228, 243 (6th Cir. 2015). We are here today because Kaitlyn Howard overheard a comment uttered by Plaintiff that she didn’t “take kindly to.” The First Amendment does not permit this prosecution for political speech.

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.” *Watts*, 394 U.S. at 708 (quoting *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 (contrary to the district court’s conclusion, [see R.36, Op. & Order at 18, PageID.890]). Allowing a listener who may be offended (doesn’t “take kindly to”) or is 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*, 805 F.3d at 248 (*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 Rozell’s subjective feelings, fears, or reactions to hearing *from a third-party* what Plaintiff allegedly said in the lobby (indeed, what Rozell was told by the deputy was not true . . . Plaintiff never said that he was going to hang anyone, as the only percipient witness’s testimony proves).¹⁰ 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

¹⁰ (*See* R.12-2, Prelim. Exam. Hr’g Tr. (Vol I) at 76 [testifying that she wanted to be “accurate” as to the precise words that were stated], Ex. A, PageID.179).

interviewed by a deputy following the alleged “terrorist threat,” Plaintiff was permitted (rightfully so) to return into the recount room without incident. 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). And 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 following *Watts* has both solidified the principles and provided more guidance about the kinds 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 “revenge” by the “Caucasian race” and made threats 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 (emphasis added). 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 (emphasis added). Consequently, even if this 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 Supreme 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).¹¹ 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 appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.

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 as a matter of law.

2. ***Brandenburg* Applies to § 750.543m as the Statute Prohibits Advocating Violence to Influence or Affect the Conduct of Government.**

The district court misapprehends 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

¹¹ Obviously, when someone is “hung,” he has his “neck broken.”

Act addressed in *Whitney v. California*, 274 U.S. 357 (1927), prohibited “‘advocating’ 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 the 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

Plaintiff’s political 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 similar to the statute at issue in *Brandenburg* (“advocating” violent means to influence or affect government) and the speech at issue in *Claiborne Hardware*. 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. Plaintiff did not “steel” anyone into action to “hang Joe for Treason.”¹² In fact, the district court unwittingly affirms Plaintiff’s point here when it stated, “It also cannot be doubted that Plaintiff voiced a desire to see that Rozell is killed.”¹³ (R.36, Op. & Order at 20, PageID.892). This “voiced . . . desire” was not “directed to inciting or producing imminent lawless action” nor was this “normal conversational tone” comment made in a near-empty lobby “likely to incite or produce such action.”

¹² And to be clear, the evidence is undisputed that Plaintiff did not say, “*I am going to hang Joe for treason*”—Plaintiff never said the he was going to take any violent action against Rozell. Ms. Howard was very clear during cross-examination as to the precise words she heard uttered by Plaintiff. (See R.12-2, Prelim. Exam. Hr’g Tr. (Vol. I) at 76, Ex. A, PageID.179). Accordingly, Defendants repeated attempts to change the content of the alleged threat must be rejected.

¹³ The way in which the district court had to contort the content and nature of the alleged threat further shows that the court at least tacitly understood that Plaintiff never made a direct threat to harm Rozell.

Moreover, and as noted previously, 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 Plaintiff’s statement was directed to inciting or producing imminent lawless action and likely to produce such action (and there is no such evidence), 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.

3. The Courts Have a Duty to Protect Plaintiff’s Right to Free Speech as a Matter of Law.

The lower court, the motions panel, and Defendants contend that Plaintiff’s right to free speech in this case—a case where there is no dispute of material fact as to the content and context of the speech¹⁴—must be subject to the biases and whims of a

¹⁴ The record here is well developed. There was a preliminary examination in which the prosecutor presented the testimony of the government’s material witnesses, and

jury that doesn't "take kindly" to such language (and that Plaintiff must first undergo the severe punishment associated with having to endure the process of a felony prosecution). Defendants and the district court essentially argue that there is no legal basis to ask a court to step in and stop the enforcement of § 750.543m against Plaintiff for exercising his right to free speech. They are wrong. Plaintiff cites and principally relies upon the Supreme Court's decision in *Watts v. United States*, 394 U.S. 705 (1969), for which Defendants (and the courts) have no good answer. And the reason for this is simple: *Watts* compels this Court to grant the requested relief. *See also 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.").

As noted, in *Watts*, the Supreme Court did not simply rely on a jury's determination as to whether the speech at issue was protected by the First Amendment. Rather, the Court *reversed* the jury's conviction for the alleged "true threat." As stated by 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

these witnesses were cross-examined by Plaintiff's counsel. There was only one percipient witness who came forward to complain about the alleged "threat," and that was Ms. Howard. Joe Rozell testified, but as his testimony demonstrates, he never witnessed Plaintiff stating that he (Plaintiff) was going to hang him (Rozell) or engage in any other violence against him (or any other election official)—because Plaintiff never did, as Rozell admits. *See supra*.

in by petitioner fits within that statutory term.”¹⁵ *Id.* at 708. The Court further noted that it must review the issue “against the background of a profound national commitment” to uphold the fundamental protections of the First Amendment. *Id.* The Court did not flee from its duty to say what the law is nor did it abdicate its responsibility to protect fundamental liberties from the overreach of government prosecutors. Rather, the Court defended the fundamental right to free speech and reversed the jury’s determination. Here, there is no dispute of material fact that requires a jury, and Plaintiff should not have to endure the punishment of prosecution in order to protect his rights under the First Amendment.

Furthermore, as argued previously, this is not an ordinary “true threats” statute. The felony statute at issue only punishes a “serious expression of intent to commit *an act of terrorism*.” *Osantowski*, 274 Mich. App. at 606 (emphasis added). 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.”¹⁶ Mich.

¹⁵ There can be no serious dispute that saying “hang [a government official] for treason” is political hyperbole, and a court should say so. What if the comment was “tar and feather Joe for treason,” or “imprison Joe for life for treason,” is there any doubt that these are political comments? Even today you can purchase online Trump “traitor” (<https://tinyurl.com/3bseuv9a>) or “Hang Biden for Treason” t-shirts (<https://www.redbubble.com/shop/biden+treason+t-shirts>).

¹⁶ As noted previously, the principle of law expressed in *Brandenburg* is that “the

Comp. Laws § 750.543b(a) (emphasis added). The district court entirely disregarded this aspect of the criminal statute. How can a comment made in a “normal conversational tone” in a near-empty lobby outside of the presence of any election official that was overheard by a secretary who was not part of the conversation be made with an “inten[t] to intimidate or coerce . . . or influence or affect the conduct of government or a unit of government through intimidation or coercion”? Defendants’ and the district court’s position is not credible on its face.¹⁷

When there is no evidence to support all of the elements of a criminal prosecution, particularly in a speech case, it is incumbent upon the court to dismiss the charge before sending the case to a jury (and before the defendant has to endure the punishment associated with a felony prosecution). *See United States v. Alkhabaz*, 104 F.3d 1492, 1493 (6th Cir. 1997) (concluding that the indictment failed “as a matter of

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 (emphasis added). Consequently, advocating for the use of force or law violation (*i.e.*, asserting that government officials who cheat on elections should hang for treason) in order to “influence or affect the conduct of government or a unit of government through intimidation or coercion” must be directed to inciting or producing such imminent lawless action and likely to produce such action. Otherwise, per *Brandenburg*, such speech is protected by the First Amendment. *See supra* § II.A.2.

¹⁷ Additionally, what evidence supports the constitutional requirement that Plaintiff “consciously disregarded a substantial risk that his communications would be viewed as threatening violence,” as required by *Counterman v. Colorado*, 600 U.S. 66 (2023), and *People v. Kvasnicka*, No. 371542, 2025 Mich. App. LEXIS 5764, at *16 (Ct. App. July 21, 2025)? There is none. Ms. Howard admits that she was not a party to any conversation with Plaintiff and that she simply overheard his comment.

law” to allege a violation of 18 U.S.C. § 875(c) in a case involving e-mails sent by the defendant to his online friend concerning a plan to torture, rape, and murder a third person); *United States v. Stock*, 728 F.3d 287, 298 (3d Cir. 2013) (“[W]e reaffirm that a court may properly dismiss an indictment as a matter of law if it concludes that no reasonable jury could find that the alleged communication constitutes a threat or a true threat.”); *see also Sandul v. Larion*, 119 F.3d 1250 (6th Cir. 1997) (shouting “f--k you” and extending middle finger to abortion protestors was protected speech and could not serve as a basis for criminal liability); *see generally United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177 (6th Cir. 1992) (“Whether an indictment adequately alleges the elements of the offense is a question of law subject to de novo review.”); *United States v. Maney*, 226 F.3d 660, 663 (6th Cir. 2000) (“We review de novo a district court’s determination that an indictment adequately alleges the elements of the offense charged.”). Here, there is no evidence (and thus no basis for a jury to be empaneled and for Plaintiff to suffer the harm caused by a felony prosecution) to conclude that the political comment uttered in the context of this case constitutes a “serious expression of intent to commit an act of terrorism.” None.

Michigan law confirms this result. For example, in *People v. Gerhard*, 337 Mich. App. 680 (2021), a case involving an appeal of a decision to bind a defendant over for violating the same offense at issue here (§ 750.543m), the defendant was being prosecuted for alleged threats made using Snapchat. The *Gerhard* court stated,

“Defendant is correct insofar as the district court was required to make a preliminary finding that there was some evidence that defendant intended to communicate a true threat when he made his Snapchat post.” *Id.* at 690. No such finding is possible in this case against Plaintiff as there is no evidence to support such a finding. Indeed, the evidence demonstrates otherwise (*i.e.*, Plaintiff did not intend to communicate a “true threat”—he made clear to the deputy who questioned him at the scene that he was accusing “Joe” of a crime as Plaintiff believes that people who cheat on elections should be prosecuted and punished for treason, the very point Plaintiff made during his public comments given immediately after this interrogation by the deputy). As the *Gerhard* court explained, “As a general matter, a person ‘may not be punished because [he or she] negligently overlooked the possibility that someone else would show [a person not intended as a recipient] the Snapchat contents [*i.e.*, the threat].” *Id.* at 692 (citation omitted). The *Gerhard* court ultimately found the existence of probable cause to bind the defendant over because “[t]his is clearly not a situation in which a person shares a private post with a limited number of known associates, only to discover that one of those associates breached his trust by sharing it further. Rather, defendant clearly intended his post to be essentially public.” *Id.* at 693 (emphasis added). Accordingly, the court concluded: “When all of these concerns are considered together and in context, there was ample basis for the district court to find probable cause that defendant knew, at the time he made his Snapchat post, that

recipients who fell into the category of persons he considered ‘snowflakes’ would receive and feel threatened by the post.” *Id.* at 695 (emphasis added).

In this case, there is zero evidence showing that Plaintiff knew, at the time he made his comment in the lobby—a lobby where Joe Rozell was not located—“that recipients who fell into the category of persons” who were the alleged target of the “terrorist threat” (*i.e.*, Joe Rozell) “would receive and feel threatened by the” comment. This lack of evidence requires the granting of the requested injunction.¹⁸ Here, Plaintiff never communicated any threat to Joe Rozell or any other election official at the recount, as Rozell himself testified during the preliminary examination. As the undisputed evidence shows, the alleged “threat” was simply overheard by a secretary who was admittedly not a party to the conversation and who reported the “threat” because she doesn’t “take kindly” to such language.

In reaching its conclusion, the *Gerhard* court relied expressly on *People v. JP* (*In re JP*), 330 Mich. App. 1 (2019) (“*JP*”). *JP* is a threat case involving a different criminal statute, but its holding is relevant here, as the *Gerhard* court’s reliance makes evident. In *JP*, the court stated, “Because the girls did not intend that S would see their texts, respondent argues, she cannot be adjudicated responsible based on the threatening or offensive language they employed. Respondent is correct.” *Id.* at 13. The court noted that “[n]o evidence supports that respondent specifically intended that

¹⁸ There is also no evidence that Plaintiff intended to threaten an “act of terrorism.” *See supra*.

S would ever read or learn of the [threatening] text messages.” *Id.* at 13. The same is true here in the case of Plaintiff’s comment. The injunction should issue.

Finally, Defendants and the district court completely ignore the statutory framework in which § 750.543m operates. Section 750.543z, which is part of this framework, expressly states, “a prosecuting agency *shall not* prosecute any person or seize any property for conduct *presumptively* protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision.” Mich. Comp. Laws § 750.543z (emphasis added). Accordingly, if the speech at issue is “presumptively” protected by the First Amendment, then no (“shall not”) prosecution is permitted.¹⁹ Therefore, the statute itself contemplates an initial determination as to whether the speech is protected by the First Amendment before a prosecution can proceed. Constitutional issues are ultimately issues for the court and not a jury. *Watts*, 394 U.S. at 707 (reversing conviction on First Amendment grounds and stating, “a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech”); *Hurley*, 515 U.S. at 567 (conducting an independent examination of the record in a First Amendment case because “we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional

¹⁹ See <https://dictionary.thelaw.com/presumptive/> (defining presumptive in the law to mean “inferred; assumed; supposed”).

protection”). An accused does not surrender his constitutional rights to the biases and uncertainties of a jury. *Watts* affirms this point, and so does § 750.543z. And the political nature and context of the speech at issue further affirm this point. *See Claiborne Hardware Co*, 458 U.S. at 913 (noting that speech “concerning public affairs” is the “essence of self-government”); *Bible Believers*, 805 F.3d at 243 (noting that the First Amendment protects “loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted”). Plaintiff is facing a felony prosecution because Kaitlyn Howard overheard a comment he uttered in a lobby that she didn’t “take kindly to.” The First Amendment does not permit this prosecution for political speech.

The first prosecution and the renewed 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* § II.D.

In the final analysis, the Oakland County Prosecutor is seeking to criminalize a political comment 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. Not only is this comment not a “serious expression of intent to commit an act of terrorism,” it is manifestly political hyperbole protected the First Amendment. *See Watts*, 394 U.S. 705. The injunction should issue.

B. Irreparable Harm to Plaintiff.

Process is punishment. Enduring the trials and tribulations of a felony charge causes significant harm well before a jury is empaneled. Consequently, Plaintiff will be irreparably harmed without the preliminary injunction.

As stated by this Court, “[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.” *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 (and possible conviction) under § 750.543m has arrived. And this prosecution 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.”); *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 as applied violates the First Amendment. As this Court noted, “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge v. Mich. Liquor*

Control Comm’n, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also 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 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, yet again, for engaging in political speech while this case proceeds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 10,821 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth 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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**ADDENDUM: DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

Record No.	PageID #	DESCRIPTION
R.1	1-38	Complaint
R.12	64-97	Motion for Preliminary Injunction with Exhibits
R.12-2	99-102	Exhibit 1: Declaration of Robert J. Muise w/Exhibits
R.12-2	103-87	Exhibit A: Preliminary Examination Hearing Transcript, Volume 1
R.12-2	189-90	Exhibit C: Defendant's Ex. C, Photograph of Public Comment (Photo of Public Comment)
R.12-2	191-92	Exhibit D: Defendant's Ex. D, Photograph of Public Comment (Photo of Public Comment)
R.12-2	194-95	Exhibit F: Plaintiff's Written Statement to Oakland County Deputy
R.12-2	196-97	Exhibit G: Arrest Warrant for Plaintiff
R.12-2	198-99	Exhibit H: Bond/Conditions for Plaintiff
R.12-2	200-01	Exhibit I: Letter from Wayne County Demanding that Plaintiff Surrender His CPL
R.12-2	202-04	Exhibit J: Michigan Supreme Court Order in <i>People v. Kvasnicka</i> , SC No. 168181 (Mar. 28, 2025)
R.19-2	324-26	Exhibit 1: Supplemental Declaration of Robert J. Muise with Exhibits A-C
R.19-2	327-28	Exhibit A: Email to County Prosecutor Demanding Dismissal of Criminal Charge
R.19-2	329-39	Exhibit B: Motion for Immediate Dismissal & Order of Dismissal filed by Andrew Hess
R.19-2	340-42	Exhibit C: People's Response to Defendant's Motion for Immediate Dismissal
R.23	511-63	First Amended Complaint with Exhibits 1 & 2
R.23-2	559-61	Exhibit 1: Letter to Oakland County Prosecutor
R.23-2	562-63	Exhibit 2: Oakland County Prosecutor Press Release
R.36	873-95	Opinion & Order Denying Plaintiff's Motion for Temporary Restraining Order and Motion for Preliminary Injunction
R.37	896-98	Notice of Interlocutory Appeal