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 BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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ISSUES PRESENTED[1]

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II. Whether Plaintiff has stated a plausible claim for relief for false-light/invasion of privacy under Michigan law when Defendant Rozell publicly broadcast false and highly objectional statements of and concerning Plaintiff with a reckless disregard for the truth.

III. Whether Defendant Rozell is immune from liability under the Government Tort Liability Act ("GTLA") for publicly broadcasting false and highly objectionable statements of and concerning Plaintiff with a reckless disregard for the truth (false-light/invasion of privacy tort) when Defendant Rozell was not acting within the scope of his employment nor discharging a governmental function when making the statements and the GTLA expressly does not apply to such torts.

IV. Whether Plaintiff has stated a plausible claim for relief for selective prosecution under the Fourteenth Amendment when he was targeted for

[1] The Court's order limiting Plaintiff's request to exceed the page limit (ECF No. 29) has had a detrimental impact on Plaintiff's ability to fully address each of these issues.

discriminatory and retaliatory prosecution based on the content and viewpoint of his speech.

V. Whether Plaintiff has stated a plausible claim for relief under the Equal Protection Clause of the Fourteenth Amendment when he was targeted for discriminatory treatment based on the content and viewpoint of his speech.

VI. Whether Plaintiff has stated a plausible claim for relief for malicious prosecution under the Fourth Amendment when Defendants made, influenced, or participated in the decision to prosecute Plaintiff; there was no probable cause for the prosecution; as a consequence of the legal proceedings, Plaintiff suffered a deprivation of liberty apart from the initial arrest; and the criminal proceeding was resolved in Plaintiff's favor.

VII. Whether Plaintiff has stated a plausible claim for relief for an unlawful seizure under the Fourth Amendment when he was arrested for engaging in speech protected by the First Amendment.

VIII. Whether Plaintiff has stated a plausible claim for relief under the Second Amendment and Article I, § 6 of the Michigan Constitution when Defendants set in motion a series of events that Defendants knew or reasonably should have known would cause a deprivation of Plaintiff's right to "bear arms."

IX. Whether Defendant McDonald is immune from all claims based on prosecutorial immunity when she is only sued for prospective relief in her official

capacity for the enforcement of Michigan Compiled Laws § 750.543 against Plaintiff and, when applying the "functional approach," prosecutorial immunity does not apply to her actions in her individual capacity that are not intimately associated with the judicial process, such as investigative efforts to seek warrants, advising law enforcement, and adopting policies to target political opponents.

X. Whether Defendants enjoy qualified immunity for violating clearly established constitutional rights of which a reasonable person would have known.

XI. Whether Defendant Peschke is immune from all claims based on testimonial immunity when this immunity does not apply and, nonetheless, testimonial immunity does not relate backwards to events that transpired prior to testifying, even if they are related to subsequent testimony.

XII. Whether Oakland County is liable when County policy, including decisions of policy makers for the County, and the County's failure to train, were moving forces behind the violations of Plaintiff's constitutional rights.

XIII. Whether *Pullman* abstention relieves this Court of its duty to rule on the important federal constitutional issues presented and to remedy the irreparable harm caused by Defendants' direct assault on the First Amendment when abstention is inappropriate for cases where no non-binding interpretation of state law is at issue and where statutes are justifiably attacked on their face as abridging free expression, as in this case.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Anderson v. Creighton, 483 U.S. 635 (1987)

Bell Atlantic v. Twombly, 550 U.S. 544 (2007)

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

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

Buckley v. Fitzsimmons, 509 U.S. 259 (1993)

Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807 (6th Cir. 2007)

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Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001)

Duran v. The Detroit News, 200 Mich. App. 622 (1993)

Hinchman v. Moore, 312 F.3d 198 (6th Cir. 2002)

Houston v. Hill, 482 U.S. 451 (1987)

Imbler v. Pachtman, 424 U.S. 409 (1976)

Lozman v. City of Riviera Beach, 585 U.S. 87 (2018)

Malley v. Briggs, 475 U.S. 335 (1986)

McDonald v. City of Chi., 561 U.S. 742 (2010)

McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005)

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INTRODUCTION

Defendants' assertion that Plaintiff's political speech is subject to criminal prosecution under Michigan Compiled Laws § 750.543m demonstrates a serious misapprehension of the First Amendment. This view of the law is not only wrong, it is "dangerously wrong." *Bible Believers v. Wayne Cty.*, 765 F.3d 578, 596, 600 (6th Cir. 2014) (Clay, J., dissenting), *rev'd en banc*, 805 F.3d 228 (6th Cir. 2015). Indeed, it is wrong as a matter of law to argue that an offhand comment, which was political hyperbole at best (where were the ropes and gallows?), that was made in a conversational tone and simply overheard by a secretary, who was admittedly not an intended recipient of the comment as she was not a party to the conversation and who perceived no imminent threat but simply did not "take kindly to that type of conduct or language," in a near empty lobby outside of the presence of any election official[1] can constitute a "*serious expression* of an intent *to commit an act of terrorism*," a 20-year felony. Defendants' motion should be summarily denied.[2]

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[1] (First Am. Compl. ["FAC"] ¶¶ 30-44, 64-71, 77-85). None of these facts were presented by Defendant Peschke when he sought the illegal warrant. He also lied by claiming that "one of the meetings got heated and one of the men got up and *loudly* said to hang Joe for treason," which also falsely implied that this statement was made in a meeting and directly to Defendant Rozell. He also failed to state, among other relevant facts, that neither the secretary (the only percipient witness) nor any deputy perceived *any* imminent threat that day. (FAC ¶¶ 33, 34, 39-41, 43, 44, 77, 78).

[2] State cases construing § 750.543m and other threat statutes also show that the arrest and prosecution were unlawful. *People v. Gerhard*, 337 Mich. App. 680, 690-95 (2021) (stating in a § 750.543m case that "[d]efendant is correct insofar as the district court was required to make a preliminary finding that there was some evidence that

STANDARD OF REVIEW

Defendants' motion to dismiss tests the legal sufficiency of the FAC. Pursuant to Rule 8(a), the pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive Defendants' motion, Plaintiff must allege facts that are sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When reviewing Defendants' motion, the Court must

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defendant intended to communicate a true threat when he made his Snapchat post," noting that "[a]s 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]," and ultimately finding 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," but "[r]ather, defendant clearly intended his post to be essentially public" and concluding that "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") (internal citations omitted); *People v. JP* (*In re JP*), 330 Mich. App. 1, 13 (2019) ("JP") (agreeing in a case relied upon by *Gerhard* that "[b]ecause the girls did not intend that S would see their texts . . . she cannot be adjudicated responsible based on the threatening or offensive language they employed," and concluding that "[n]o evidence supports that respondent specifically intended that S would ever read or learn of the [threatening] text messages").

construe the FAC in the light most favorable to Plaintiff, accept its factual allegations as true, and draw all reasonable inferences in Plaintiff's favor. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008). As the Court stated, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). Moreover, "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Nietzke v. Williams*, 490 U.S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (stating that a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").[3] The FAC satisfies this standard.[4]

ARGUMENT

I. Claims under the First Amendment.

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

Section 750.543m criminalizes statements that communicate "a serious expression of intent to commit *an act of terrorism*."[5] *People v. Osantowski*, 274

[3] The Federal Rules do not require a "heightened" pleading requirement as that "can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." *Twombly*, 550 U.S. at 569 n.14.

[4] The relevant facts are set forth in detail in the FAC. To remain within the Court's page restriction, the full statement of those facts will not be repeated here. Rather, certain facts/paragraphs will be cited as needed and for emphasis.

[5] The "threat" cases relied upon by Defendants are distinguishable as Plaintiff <u>never</u> made a direct "threat" to Defendant Rozell or anyone else. Also, § 750.543m requires a threat to commit *an act of terrorism* (*i.e.*, for the purpose of coercing the

Mich. App. 593, 606 (2007). This limiting construction was necessary to comport with *Virginia v. Black*, 538 U.S. 343 (2003).[6] To comply with the First Amendment, the prosecutor must also prove "that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman v. Colo.*, 600 U.S. 66, 69 (2023).[7] Additionally, § 750.543m criminalizes the "making of a terrorist threat" by threatening to "commit an act of terrorism."[8] Thus, the statute requires the existence of an intent to, *inter alia*, influence government through intimidation *when communicating the threat*. Mich. Comp. Laws § 750.543b(a). When applying this statute, "[t]he meaning of a particular speech must be considered in its context." *Gerhard*, 337 Mich. App. at 694. And to prevent criminal prosecutions such as the one at issue here, M Crim JI 38.4(3) was adopted in 2020, to prohibit prosecutions for making a "political comment," and requiring proof that the "threat" was "made under circumstances

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conduct of government). There is zero evidence of this.

[6] While the Michigan courts have upheld the validity of this statute under *Virginia v. Black*, the statute is nonetheless invalid under *Brandenburg v. Ohio*. *See infra*.

[7] 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. Nonetheless, under the First Amendment, this *Counterman* element remains a requirement to be proven in all threat cases.

[8] 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).

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). Accordingly, because the government can only proscribe speech with "narrow specificity," and only contextually credible "true threats" 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 facts here in light of controlling law demonstrate that the speech at issue could not possibly be considered a "true threat"—it is protected speech 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. Section 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."[9] The statute *strongly* favors the *protection* of speech and *presumes* the speech is protected and thus beyond the reach

[9] *See* https://dictionary.thelaw.com/presumptive/ (defining presumptive in the law to mean "inferred; assumed; supposed").

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 (*i.e.*, having a warrant issued for your arrest, 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. "[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). Thus, the first prosecution and the continued threat of prosecution not only violate Plaintiff's 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 enacted § 750.543z to limit the power of a "prosecuting agency" and carefully chose "*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.") (cleaned up). And this is particularly true when, as here, the government is seeking to criminalize *pure speech*.

"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." 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 Court:

> [T]he statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language . . . against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 708 (citations and internal quotations omitted). Applying these principles, the Court reversed, *as a matter of law*, 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. 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 the First Amendment as it was, at best, political hyperbole—a vehement, caustic, and unpleasantly sharp attack on a public official. *Watts*, 394 U.S. at 708; *see Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to . . . induce[] a condition of unrest . . . or even stir[] people to anger"). And whether or not the speech 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. A listener's reaction to speech is *not* a permissible basis for regulation, restriction, or punishment. *See Forsyth Cnty v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "The First Amendment knows no heckler's veto." *Lewis v. Wilson,* 253 F.3d 1077, 1082 (8th Cir. 2001). It is clearly established that "[t]he heckler's veto is [a] type of odious viewpoint discrimination" prohibited by the First Amendment. *Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*). Thus, the emotive impact of speech is *not* a permissible basis for punishing the speaker. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (O'Connor, J.) (observing that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" that would permit restricting the speech). Consequently, the fact that Ms. Howard may have been offended or even frightened by the words she claims were stated by Plaintiff in the lobby of the recount does not affect the First Amendment calculus. The same is true for Defendant Rozell's subjective feelings, fears, or reactions to hearing 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 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 Defendant McDonald waited until April 2024, nearly ***four months*** later, to charge Plaintiff.

Supreme Court precedent following *Watts* has both solidified the principle and provided more guidance about the kind of statements that are protected speech. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court reversed a criminal conviction based on a film of a gathering in which armed speakers made threatening statements and racial slurs. Despite the threatening and loathsome rhetoric, the Court reversed the conviction because the statute punished "mere advocacy not distinguished from incitement to imminent lawless action." *Id*. at 448-49. Thus, 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. Per the Court:

> [W]e are here confronted with a statute which, by its own words <u>*and as applied*</u>, 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" [*i.e.*, an act

of terrorism] 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. 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, concluding that the violent statements at issue 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," and they would "have their necks broken." *Id.* at 900 n.28.[10] These comments "did not transcend the bounds of protected speech." *Id*. at 928. Per the Court,

> effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate [] his audience . . . . When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.

Id. (internal quotations and citations omitted). Here, there are no statements that incited <u>*any*</u> lawless action. Thus, under the First Amendment (and § 750.543z), it is unlawful to use § 750.543m to punish Plaintiff's speech.

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

B. 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*:

> [Our] 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. . . . 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. 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 affect 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.

C. No Probable Cause to Arrest or Prosecute.

To begin, it is well established that a § 1983 action is not estopped by a state court's determination of probable cause if there is evidence to suggest that the probable cause determination was based upon false information or material omissions, as in this case. *Hinchman v. Moore*, 312 F.3d 198 (6th Cir. 2002) ("[T]he preliminary hearing determination does not preclude relitigation of the probable cause issue. The preliminary hearing concerned the sufficiency of the evidence to establish probable cause. Since the instant claim is more accurately characterized as a challenge to the integrity of the evidence than to its sufficiency, identity of the issues is lacking.") (citations and internal quotations omitted); *Schertz v. Waupaca*

Cnty., 875 F.2d 578, 581 (7th Cir. 1989) (same); *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001) ("[W]e hold that the state court's determination of probable cause at the preliminary hearing is not identical to the issue [plaintiff] argues today, that being whether [the defendant police officer] made materially false statements to the state judge that formed the basis of that court's probable cause determination."); *Sykes v. Anderson*, 625 F.3d 294, 310-11 (6th Cir. 2010) (same); *Hardesty v. City of Ecorse*, 623 F. Supp. 2d 855, 860 (E.D. Mich. 2009) ("Viewing the evidence in the light most favorable to Plaintiff as the nonmovant, Plaintiff has set forth sufficient evidence to preclude the application of collateral estoppel" in that "Plaintiff has set forth evidence suggesting that [the defendant] supplied false information to the state court. . . ."); *Taylor v. City of Detroit*, 368 F. Supp. 2d 676 (E.D. Mich. 2005) (finding that collateral estoppel would not apply to a probable cause determination based upon false information). As the Sixth Circuit stated, "Falsifying facts to establish probable cause to arrest and prosecute an innocent person is of course patently unconstitutional . . . ." *Hinchman*, 312 F.3d at 205-06.

Additionally, it is clearly established that a probable cause determination may not be based on an "unjustifiable standard," such as speech protected by the First Amendment. *Wayte v. United States,* 470 U.S. 598, 608 (1985); *see also Swiecicki v. Delgado,* 463 F.3d 489, 498 (6th Cir. 2006) ("[A]n officer may not base his probable-cause determination on speech protected by the First Amendment.");

Sandul v. Larion, 119 F.3d 1250, 1255-56 (6th Cir. 1997) (finding that the plaintiff's protected speech could not serve as basis for a law violation). Consequently, any finding of probable cause that runs afoul of the First Amendment, whether it be from a judge, a prosecutor, or a deputy sheriff, does not shield government officials from liability. *See Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (rejecting the argument that an officer who applied for a warrant without probable cause could escape liability for the ensuing arrest merely because the warrant was supplied by a judge).

D. Retaliatory Arrest and Prosecution.

Plaintiff was the subject of an official policy to target him for his criticism of County election officials.[11] *Lozman v. City of Riviera Beach*, 585 U.S. 87, 101 (2018) (concluding that the plaintiff "need not prove the absence of probable cause to maintain a claim of retaliatory arrest"). In *Lozman*, the plaintiff alleged that the City deprived him of his First Amendment rights by retaliating against him for his lawsuit against the City and his criticisms of public officials. The Court noted that "Lozman's speech is high in the hierarchy of First Amendment values," *id*., similar to Plaintiff's speech. And "[a]n official retaliatory policy is a particularly troubling and potent form of retaliation . . . . [W]hen retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate

[11] (*See* FAC ¶¶ 1, 2, 10, 11, 13, 27, 44, 50, 51, 56, 57, 59, 60, 63, 84, 98, 100, 104, 107, 11, 115, 117, 118).

avenues of redress." *Id*. at 100. Here, retaliation against Plaintiff for his speech critical of the conduct of elections has been "elevated to the level of official policy." (*See* n.11, *supra*). There is no basis for dismissing Plaintiff's claim, and this further demonstrates that the municipality (Oakland County) is liable. *See infra*, § VII.

II. Claim for Malicious Prosecution.

> To succeed on a malicious prosecution claim, a plaintiff must prove: (1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was no probable cause for the prosecution; (3) as a consequence of the legal proceedings, the plaintiff suffered a deprivation of liberty apart from the initial arrest; and (4) the criminal proceeding was resolved in the plaintiff's favor.

France v. Lucas, 836 F.3d 612, 625 (6th Cir. 2016). In *Thompson v. Clark*, the Court held that "a Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence." 596 U.S. 36, 49 (2022).[12] "A plaintiff need only show that the criminal prosecution ended without a conviction." *Id.* Here, Defendants Bouchard, Peschke, and Rozell *personally* "made, influenced, or participated in the decision to prosecute" Plaintiff for his speech.[13] (FAC ¶¶ 13-15, 112). And "'providing false information to the prosecutor that bore directly on whether there was probable cause' counts as 'influencing' a decision to prosecute,

[12] The Supreme Court has obviously *not* "avoided [the malicious prosecution] name altogether," as Defendants claim. (*See* Defs.' Br. at 24).

[13] Defendant Bouchard is liable for his *personal* acts and decisions made under the color of state law. This is not a *respondeat superior* situation.

at least when the officer reasonably could have foreseen that his actions would lead to the prosecutor bringing charges." *Parnell v. City of Detroit*, 786 F. App'x 43, 50 (6th Cir. 2019) (quoting *Sykes*, 625 F.3d at 314-15). And as set forth in § I.C. above, there was no probable cause to arrest or prosecute.

III. Claims under the Fourteenth Amendment.

A. Selective Prosecution.

A selective prosecution claim is premised upon denial of equal protection. *See Wayte*, 470 U.S. at 608. A plaintiff makes out a selective-enforcement claim if he shows that the government "based its enforcement decision on an 'arbitrary classification,' that is to say, a classification that gives rise to an inference that the state 'intended to accomplish some forbidden aim' against that group through selective application of the laws." *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997). In other words, "the decision to prosecute may not be deliberately based upon an unjustifiable standard . . . , *including the exercise of protected statutory and constitutional rights*," as in this case. *Wayte*, 470 U.S. at 608 (emphasis added) (internal citations and quotation marks omitted). Plaintiff has a First Amendment right to publicly challenge election procedures and election officials, including engaging in speech that expresses "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This clearly established law *should*

be well known by every government official, including prosecutors, sheriffs, and judges. Yet, Plaintiff remains a target of Defendants' abuse of government power. Meanwhile, political allies (Democratic Party operatives and anti-Trump protestors) can threaten to hang Trump supporters[14] and call for the assassination of President Trump ("8647")—*threats communicated in Oakland County*—without any fear of arrest or prosecution by Defendants. (FAC ¶¶ 44-50). Here, Defendants targeted Plaintiff for arrest and prosecution based on the exercise of his right to free speech with the intent to accomplish a "forbidden aim"—to silence those (particularly Republicans) who challenge elections and elections officials. (*See* n.11, *supra*). Finally, "[t]he courts have long held that a selective enforcement claim may be available even where there is probable cause for prosecution." *Stemler,* 126 F.3d at 872; *see United States v. Armstrong,* 517 U.S. 456, 464 (1996). Thus, regardless of

[14] The well-publicized threat to "hang" Trump supporters applies to residents of Oakland County as there are many residents and employees of the County that support and voted for Trump and the "threat" was conveyed in the County via social media. The person(s) making the terrorist threat need not be a resident of Oakland County for Defendant McDonald to take action. Plaintiff is not a resident of the County, and Defendant McDonald is seeking to prosecute him. Additionally, the individual declaring Trump a "traitor"—and thus threatening his life by accusing him of a crime per Defendants' view of the law—and the individual threatening to assassinate Trump ("8647") all communicated their threats in the County. Yet, they are not being investigated, arrested, and prosecuted by Defendants. *See Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) ("In determining whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek relevant similarity.") (internal quotation marks omitted). There is "relevant similarity" here.

whether there is/was probable cause to investigate, arrest, and prosecute Plaintiff (which there wasn't), Defendants are liable.

B. Equal Protection.

When the government treats an individual disparately and that "disparate treatment . . . burdens a *fundamental right*," such treatment violates the equal protection guarantee of the Fourteenth Amendment. *Bible Believers*, 805 F.3d at, 256 (internal quotations and citation omitted) (emphasis added). The right to freedom of speech is "fundamental," *id.* at 256, and disparate treatment that burdens this right violates the equal protection guarantee of the Fourteenth Amendment, *id.* at 256-57. By punishing Plaintiff for political speech based on the content and viewpoint of the speech, Defendants have deprived Plaintiff of the equal protection of the law. (FAC ¶ 120). The principle of law applicable here was articulated by the Court in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972): "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley* did not involve discrimination against a suspect class. It involved *discrimination* based on the content and viewpoint of speech, as in this case. As the Court noted, "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Id.* at

96. This principle was echoed by the Court in *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). In *Carey*, the Court held that discriminating among speech-related activities violates the Equal Protection Clause. The case did not involve a particular "class" of persons. It was a case involving *discrimination* based on the content and viewpoint of the speaker, as in this case. And Defendants' discriminatory use of law enforcement resources to target political opponents is, from a constitutional perspective, the same as if a statute decreed such discrimination. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that a school official's decision to permit prayer at the graduation was "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur").

IV. Claim for Invasion of Privacy/False Light.

Defendant Rozell claims immunity under the Government Tort Liability Act ("GTLA") for his recklessly false public statements made about Plaintiff during the course of an interview he did with CBS. He is mistaken. Defendant Rozell was not acting within the scope of his employment nor discharging a governmental function when he made his false statements. *See* Mich. Comp. Laws § 691.1407(2). Moreover, the GTLA does not apply to the alleged tort. *See id*. § 691.1407(3); *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 783 (6th Cir. 2015) ("WSU's President is not entitled to immunity [for defamation] under this subsection of the GTLA, which protects governmental actors against only negligent tort liability.");

Battaglieri v. Mackinac Ctr. for Pub. Policy, 680 N.W.2d 915, 921 (Mich. Ct. App. 2004) ("[T]his [false-light] cause of action is similar to a defamation claim."); *Reighard v. ESPN, Inc.*, 991 N.W.2d 803, 818 (Mich. Ct. App. 2022) ("[D]efamation and false-light . . . claims are governed by the same legal standards.").

"In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Duran v. The Detroit News,* 200 Mich. App. 622, 631-632 (1993). "[T]he defendant must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." *Detroit Free Press, Inc. v. Oakland Co. Sheriff*, 164 Mich. App. 656, 666 (1987). Here, Defendant Rozell broadcast to the general public through his CBS News interview information that was unreasonable and highly objectionable by attributing to Plaintiff characteristics, conduct, or beliefs that were false and that placed Plaintiff in a false position. More specifically, Defendant Rozell falsely claimed that Plaintiff directly threatened to hang him ("*he said that <u>he</u> was going to hang me"*) and further accused Plaintiff of criminal conduct ("When you come and *your goal is to intimidate and bully and threaten to harm the people who are doing*

these types of things, that's the wrong way to go about this, and it's a crime).[15] (FAC ¶¶ 52-55). These false and highly objectionable statements placed Plaintiff in a false position, and they were made with a reckless disregard for the truth. (FAC ¶¶ 79, 80; [admitting that Plaintiff "never told [him] directly that he was going to hang [him]" and that "[a]t no time while in the election recount room with [him] and the other election officials did [Plaintiff] state that he was going to hang anyone"]).

V. Claim Arising under the Second Amendment and Article I, § 6.

As a direct, intended, and foreseeable consequence of Defendants' unlawful arrest and prosecution of Plaintiff, Plaintiff suffered a depravation of his right secured by the United States and Michigan Constitutions to "bear arms." It was reasonably foreseeable that by falsely charging Plaintiff with a violent felony and then seeking a warrant for his arrest based on this false charge that Plaintiff would then be deprived of his constitutional right to bear arms. Section 1983 imposes liability on a government official who "subjects, or causes to be subjected, any citizen . . . . to the deprivation of any rights." 42 U.S.C. § 1983. For a § 1983 claim, "the requisite causal connection is satisfied if [Defendants] set in motion a series of events that [Defendants] knew or reasonably should have known would cause others

[15] Whether Defendant Rozell used Plaintiff's name or not is irrelevant as there is no dispute that the false statements were "of and concerning" Plaintiff. *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980) ("It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that (she) is the person meant.") (internal quotations and citation omitted).

to deprive [Plaintiff] of [his] constitutional rights." *Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012) (citation omitted). As described by the Sixth Circuit:

> Causation in the constitutional sense is no different from causation in the common law sense. Indeed, "section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Thus the Supreme Court rejected the proposition that a police officer who applied for a warrant without probable cause could escape liability for the ensuing arrest merely because the warrant was supplied by a judge. *Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986). In *Malley*, the defendant police officer argued that "the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest." *Id*. The Court said that the officer's "'no causation' rationale in this case is inconsistent with our interpretation of § 1983 . . . Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link."

McKinley v. City of Mansfield, 404 F.3d 418, 438-39 (6th Cir. 2005). By seeking the unlawful arrest and prosecution of Plaintiff for allegedly engaging in a felony, it was reasonably foreseeable (and Defendants admit as much in their brief) that Plaintiff would be ordered to surrender his weapons. The warrant and related bond conditions do not break the causal chain at issue here. It was Defendants who set in motion a series of events that they knew (or reasonably should have known) would deprive Plaintiff of his constitutional rights. And both the United States and Michigan Constitutions grant individuals a right to keep and bear arms for self-defense, the defense of one's home, and to ensure the security of a free State. U.S. Const. amend. II; Mich. Const. art. I § 6; *see also McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010); *Meeks v. Larsen*, 611 F. App'x 277, 286 (6th Cir. 2015);

People v. Deroche, 829 N.W.2d 891, 894 (Mich. Ct. App. 2013). At stake here is a "basic right," *McDonald*, 561 U.S. at 767, "that the Framers and ratifiers of the Fourteenth Amendment counted . . . among those fundamental rights necessary to our system of ordered liberty," *id*. at 778. Accordingly, governmental action "that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). Here, Defendants have no compelling reason to deprive Plaintiff of his fundamental right to bear arms for engaging in speech protected by the First Amendment.

VI. Claim for an Unlawful Seizure.

The Fourth Amendment guarantees private citizens the right to be free from unlawful seizures, such as being unlawfully jailed for two hours without probable cause that a crime was committed as in this case. As stated by the Court:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry v. Ohio, 392 U.S. 1, 9 (1968) (citation omitted). "[W]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [we may] conclude that a 'seizure' has occurred." *Id.* at 19, n.16. Accordingly, a "seizure" occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not

free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Here, Plaintiff was seized by Defendants within the meaning of the Fourth Amendment. Plaintiff was physically restrained and placed in the County jail for two hours based on an unlawful warrant.[16] *Terry*, 392 U.S. at 19, n.16. Consequently, "[w]hen an officer makes an arrest, it is a 'seizure' under the Fourth Amendment, and the arrest is a violation of a right secured by the amendment if there is not probable cause." *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987); *Alman v. Reed*, 703 F.3d 887, 901 (6th Cir. 2013) ("[Plaintiff] was arrested without probable cause, which is a violation of the Fourth Amendment, and it is 'clearly established that [an] arrest without probable cause violates the Fourth Amendment.'") (citation omitted). As discussed above, as a matter of law, there was no probable cause to arrest Plaintiff for speech protected by the First Amendment, *see Sandul,* 119 F.3d at 1256, and Defendants cannot hide behind an arrest warrant that was facially invalid and fraudulently obtained to avoid liability. *See supra; Malley*, 475 U.S. at 345 n.7. All Defendants "set in motion" the actions that resulted in the violation of Plaintiff's rights secured by the Fourth Amendment. (*See* § V, *supra*).

VII. Defendants Are Not Immune for Violating Clearly Established Rights.

A. Prosecutorial Immunity Claim Is Wrong.

[16] (FAC ¶ 73). Defendant Bouchard is responsible for the jail on behalf of the County (*i.e.*, he is the policymaker for actions related to the conduct of the jail). (FAC ¶ 14).

To begin, the FAC makes clear that Defendant McDonald is not being sued in her individual capacity for damages for her decision to unlawfully prosecute Plaintiff. Consequently, prosecutorial immunity is not triggered.[17] (FAC ¶¶ 10-12). Here, Defendant McDonald is being sued for prospective declaratory and injunctive relief in her official capacity for her unlawful enforcement of § 750.543m against Plaintiff.[18] (FAC ¶ 12). There is no basis for dismissing on immunity grounds these claims. As explained by the Court, "[p]rosecutors enjoy absolute immunity from damages liability, *Imbler v. Pachtman*, 424 U.S. 409 (1976), but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law." *Supreme Court v. Consumers Union of United States*, 446 U.S. 719, 736-37 (1980) (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Ex parte Young*, 209 U.S. 123 (1908)). Accordingly, Defendant McDonald in her official capacity does not enjoy immunity (prosecutorial or

[17] Plaintiff was careful to make the distinction. (*See* FAC ¶¶ 10-12).

[18] Technically, when a county prosecutor in Michigan is enforcing a state statute, as in this case, the prosecutor is acting as an agent of the state. *Howard v. Livingston Cty.*, No. 21-1689, 2023 U.S. App. LEXIS 1540, at *16 (6th Cir. Jan. 20, 2023) ("In Michigan, when a county prosecutor brings formal charges in the name of the People of the State of Michigan, he acts as an agent of the state rather than of his county.") (quotations and citations omitted). Since Plaintiff is only seeking declaratory and injunctive relief against her in this *state* official capacity, Eleventh Amendment immunity does not apply. *Ex parte Young*, 209 U.S. 123 (1908). Additionally, this enforcement of § 750.543m is separate and distinct from her actions as a county official (targeting and retaliating against individuals who challenge County elections and election officials), and these actions do not enjoy Eleventh Amendment immunity (nor prosecutorial immunity).

Eleventh Amendment) for Plaintiff's claims for declaratory and injunctive relief related to her decision to prosecute/enforce § 750.543m against him. However, as a County official and policy maker regarding the use (and abuse) of the County's law enforcement resources to target individuals for adverse and retaliatory treatment based on their political viewpoints (targeting policy), Defendant McDonald does not enjoy absolute immunity. (FAC ¶¶ 10-12).[19] For example, Defendant McDonald's statements in her press release—statements intended to chill free speech and which are evidence of this targeting policy (FAC ¶¶ 11, 60)—are not covered by prosecutorial immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277-78 (1993) ("Fitzsimmons' statements to the media are not entitled to absolute immunity. . . Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor."). Accordingly, Defendant McDonald is not immune from suit (and thus not immune from personal liability) for her actions causing harm to Plaintiff (and that set in motion foreseeable harms to Plaintiff) that are not

[19] "It is not a prosecutorial function to . . . silence protected speech, to retaliate against individuals for engaging in protected speech, or to chill private citizens from challenging or criticizing the conduct of elections . . . . Defendant McDonald is sued in her individual capacity for all actions set forth in this [FAC] that are not strictly prosecutorial functions. Such conduct that falls outside the cloak of prosecutorial immunity includes instances where Defendant's actions are not intimately associated with the judicial process, including investigative efforts to obtain an unlawful arrest warrant for Plaintiff, authorizing the investigation of Plaintiff, advising the County Sheriff on the investigation, using the media to promote her political agenda, and issuing press releases." (FAC ¶ 11).

intimately associated with the judicial process, and these actions include investigative efforts to obtain an unlawful arrest warrant for Plaintiff, authorizing the investigation of Plaintiff, advising the County Sheriff on the investigation, using the media to promote her agenda, and issuing press releases to chill free speech. And the policy decision to target individuals who challenge County elections and officials was the moving force behind the violations. *See infra* § VII (municipal liability).

B. "Testimonial Immunity" Does Not Apply.

To begin, Defendant Peschke is liable for violating Plaintiff's constitutional rights *independent* of the false information he provided to the district court judge to obtain an unlawful warrant for Plaintiff's arrest.[20] *Hinchman*, 312 F.3d at 205 ("Immunity regarding testimony, however, does not 'relate backwards' to events that transpired prior to testifying, even if they are related to subsequent testimony."); *Buckley v. Fitzsimmons*, 20 F.3d 789, 796 (7th Cir. 1994) ("[C]onstitutional wrongs completed out of court are actionable even if they lead to immunized acts."). Moreover, as noted, probable cause can never be based on speech protected by the First Amendment. *See Sandul*, 119 F.3d at 1255-56. Consequently, the warrant for Plaintiff's arrest was invalid. Indeed, the incompetence of a judge who issues an

[20] Defendants' assertion that "Plaintiff's allegations against Peschke solely relate to Peschke's testimony at the April 4, 2024, proceeding" (Defs.' Br. at 19) is a misrepresentation of the allegations in the FAC. Defendant Peschke was intimately involved in the decision to investigate, arrest, and prosecute Plaintiff independent of the false "testimony" he used to obtain a warrant for the unlawful arrest of Plaintiff.

unlawful warrant does not immunize the officer who sought the warrant (or those who were involved in the decision to pursue the warrant, such as Defendants Oakland County, McDonald, and Bouchard). This issue was decided decades ago by the Court in *Malley v. Briggs*, 475 U.S. 335 (1986). At issue in that case was whether a warrant issued by a judge immunized the officer. Per the Court:

> The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

Malley, 475 U.S. at 345-46. In sum, an officer (or other government official) cannot rely upon the error of a judge to shield him from liability for his bad acts. Additionally, Defendant Peschke was not "testifying" *per se* (and this was not an "adversarial judicial proceeding"). (Defs.' Br at 19). He was swearing out a warrant for Plaintiff's arrest. The fact that he did this orally rather than by way of submitting a written affidavit is a distinction without a difference. *Hinchman*, 312 F.3d at 205-06 ("Falsifying facts to establish probable cause to arrest and prosecute an innocent person is of course patently unconstitutional and has been so long before the

defendants arrested [the plaintiff].”). In short, there is no testimonial immunity that shields Defendant Peschke in this case for his unlawful actions.[21]

C. Defendants Do Not Enjoy Qualified Immunity.

> [I]t is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity. Although [a government official's] "entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point,"' that point is usually summary judgment and not dismissal under Rule 12.

Wesley v. Campbell, 779 F.3d 421, 433-34 (6th Cir. 2015) (citation omitted); *Singleton v. Ky.*, 843 F.3d 238, 242 (6th Cir. 2016) (same). Additionally, qualified immunity does not protect against claims for declaratory and injunctive relief, it does not apply to claims against a municipality, nor does it apply to claims against a defendant in his official capacity. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998); *Cannon v. Denver*, 998 F.2d 867, 876 (10th Cir. 1993); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989); *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997). And more to the point, the defense does not shield the officials from liability in their individual capacities for violating Plaintiff's' clearly established rights. *See infra*. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated the applicable standard as follows: government officials

[21] Defendants argue that "Plaintiff fails to identify what was 'materially false.'" (Defs.' Br. at 19). They are mistaken. Compare what Defendant Peschke told the court with what the facts show and what he didn't tell the court (material omissions) and the falsity is patent. (FAC ¶¶ 76-84; *see also* Intro. & n.1, *supra*).

are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. And "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful [which is the standard Defendants urge here], but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). In other words, it is the *objective application of the law* that matters and not the subjective (and incorrect) beliefs of the officials who engaged in the bad acts. "By defining the limits of qualified immunity essentially in *objective* terms, we provide no license to lawless conduct." *Harlow*, 457 U.S. at 819. As set forth above, case law clearly established Plaintiff's right to be free from retaliation (arrest and prosecution) for his protected speech, thereby negating any claim of qualified immunity. *See, e.g., Ctr. for Bio-Ethical Reform, Inc. v. City of*

Springboro, 477 F.3d 807, 821-25 (6th Cir. 2007) ("Because retaliatory intent proves dispositive of Defendants' claim to qualified immunity, summary judgment was inappropriate"); *Greene v. Barber*, 310 F.3d 889, 893 (6th Cir. 2002) ("'[A]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper. . . .'") (quoting *Bloch v. Ribar,* 156 F.3d 673, 681-82 (6th Cir. 1998)). Thus, "the existence of probable cause is not determinative of the constitutional question" and thus not determinative of the qualified immunity inquiry if, as the allegations show, Plaintiff "was arrested [and prosecuted] in retaliation for his having engaged in constitutionally protected speech." *Greene,* 310 F.3d at 894; *see Lozman*, 585 U.S. at 101 ("Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest"). Moreover, based on clearly established law (*see, e.g., Watts*, *Claiborne Hardware*, *Brandenburg*, *Sandul*),[22] Plaintiff's speech is protected by the First Amendment. Qualified immunity does not apply.

VIII. The County Is Liable.

In *Monell*, the Court affirmed that municipalities are liable under 42 U.S.C. § 1983 if municipal policy or custom was the "moving force" behind the alleged unconstitutional action. *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). And "when execution of a government's policy or custom, whether made

[22] Defendants do not cite these cases, let alone try to distinguish them.

by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." *Id*. at 694. "*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). Defendant McDonald is a policy maker for the County, and her decisions to pursue the investigation, arrest, and prosecution of Plaintiff are actions attributable to the County, as is the policy to target political opponents for selective prosecution. (FAC ¶ 10); *Christie v. Iopa*, 176 F.3d 1231, 1235-36 (9th Cir. 1999) (holding that a "municipality can be liable for an isolated constitutional violation when the person causing the violation has final policymaking authority" and that a prosecutor's filing of criminal charges could subject the municipality to liability under § 1983 for selective prosecution if the prosecutor "possessed final policymaking authority to decide whom to prosecute") (internal quotations omitted). The County is liable. *Meyers v. City of Cincinnati*, 14 F.3d 1115 (6th Cir. 1994) ("The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible."). Municipal liability may also be based on injuries caused by a failure to adequately train or supervise employees, so long as that failure results from "deliberate indifference" to the injuries that may be caused. *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989). And supervisorial liability may be imposed

under § 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury. *See Hopkins v. Andaya,* 958 F.2d 881, 888 (9th Cir. 1992). Here, the County's deficient training and supervision of Defendants, particularly with regard to Defendants' duty to safeguard and secure the First Amendment rights of private citizens, were done with deliberate indifference as to their known or obvious consequences and were a moving force behind the actions that deprived Plaintiff of his fundamental constitutional rights. (FAC ¶ 18). The County cannot escape liability in this case.

IX. Abstention Does Not Apply.

> Abstention is, of course, the exception and not the rule, and we have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment.[23] We have held that abstention is inappropriate for cases where statutes are justifiably attacked on their face as abridging free expression. In such cases to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.

Houston v. Hill, 482 U.S. 451, 467-68 (1987) (cleaned up). *Pullman* abstention only applies "where a litigant asks a federal court to reach a constitutional question predicated on the federal court's own, non-binding interpretation of state law." *Stein v. Thomas*, 672 F. App'x 565, 571 (6th Cir. 2016). In *Fowler v. Benson*, 924 F.3d 247, 255 (6th Cir. 2019), the court rejected the claim that *Pullman* abstention applied

[23] Plaintiff is also advancing a facial challenge. (*Compare* Defs.' Br at 26-27 [citing *Libertas Classical Ass'n*, which applied P*ullman* in an as-applied challenge"]).

because "state courts might interpret the challenged law in a way that would eliminate the constitutional question," noting that "the Supreme Court has rejected applying *Pullman* abstention on those grounds." *Id*. at 255 (citing *Zwickler v. Koota*, 389 U.S. 241, 251 (1967) ("[*Pullman*] abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim.")). As the court concluded in *Stein*, "Because we did not decide any state law questions, *Pullman* and *Burford* are inapposite." *Stein*, 672 F. App'x at 571. The inquiry here also involves only established federal standards and principles stemming from the First Amendment. There are *no* non-binding, state law issues for this Court to decide.[24] Abstention does not apply.

CONCLUSION

The Court should summarily deny Defendants' motion.

Respectfully submitted,

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[24] No Michigan court is deciding whether § 750.543m is unconstitutional as applied here or whether the statute is facially invalid under *Brandenberg*. This Court has a "duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803).

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 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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