UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

APPELLANT'S REPLY IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

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ARGUMENT IN REPLY

Defendants-Appellees' ("Defendants") response in opposition to Plaintiff-Appellant's ("Plaintiff") motion for an injunction pending appeal reinforces the need for the requested relief. Rather than disavowing any further prosecution of Plaintiff, the Oakland County Prosecutor steadfastly maintains that Plaintiff's speech constitutes a "terrorist threat" punishable under Michigan Compiled Laws § 750.543m and that Plaintiff remains subject to a renewed prosecution as a result.[1] Bear in mind that this is a *pure speech* case. There are no associated acts of violence or any other criminal acts.

In their response, Defendants make numerous factual misrepresentations. The material facts in this case are undisputed. This is confirmed by the sworn testimony of the Oakland County prosecutor's own witnesses. And this reaffirms the point that the First Amendment questions presented are for a court of law and not a jury. To begin, the only basis for the criminal charge against Plaintiff under § 750.543m was the off-hand comment of "hang Joe for treason" that was overheard by a secretary in a near-empty lobby and outside of the presence of any election officials, including Defendant Joe Rozell. Defendants' exhibits filed in the district court make this point.

[1] In their response, Defendants state, "Preventing Oakland County Prosecutor, Karen McDonald[,] from recharging Hess under a statute that remains constitutionally sound impermissibly impedes her broad prosecutorial discretion . . . ." (Defs.' Resp. at 14).

In the Sheriff's case report, it states, unequivocally, "The first video is not of the actual threat made." (Defs.' Ex. 2, Case Rep., ECF No. 16-3, PageID.251). The Oakland County Prosecutor's press release also confirms that the only alleged "threat" was the comment "*hang Joe for treason*." (ECF No. 1-3, PageID.38).

The most egregious misrepresentation is Defendants' assertion that "Hess walked into the lobby and *yelled* that *he* was going to 'hang Joe [Rozell] for treason.'" (Defs.' Resp. at 2 [emphasis added]). The undisputed evidence shows that Plaintiff's comment was made in a *conversational* tone (not "yelled,"), Plaintiff *never* said that "*he* was going" to do anything to Rozell,[2] let alone "hang him" (an absurd proposition to begin with), and this comment was simply overheard by a secretary who was admittedly not part of the conversation. (Prelim. Hr'g Tr. (Vol. I) at 76, 78, Ex. A, Doc. 9-4, pp. 81-83, ECF No. 12-2, PageID. 179, 181). Indeed, the Oakland County prosecutor *stipulated* to the fact that the comment was made in a conversational tone. (*Id*. at 71, p. 76, PageID.174 ["I'd stipulate that it was a

[2] The "threat" cases relied upon by Defendants are distinguishable (*see* Defs.' Resp. at 10) as Plaintiff *never* made a direct "threat" to Rozell or anyone else. Also, § 750.543m requires a threat to commit *an act of terrorism* (*i.e*., for the purpose of coercing the conduct of government). It is absurd to suggest that a comment made in conversational tone outside of the presence of government election officials was for the purpose of coercing *the conduct of* government. Further, there is zero evidence to demonstrate that Plaintiff "consciously disregarded a substantial risk that his communications [made in a near-empty lobby] 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 (Ct. App. July 21, 2025).

normal conversational tone."]). Further, the secretary who overheard the comment admitted that there was no threat of imminent harm. (*Id*. at 77, p. 82, PageID.180 ["Q. So you didn't perceive any imminent harm at that point, correct? A. Correct."]).

At no time did Plaintiff ever say *he* was going to hang anyone—let alone make any such direct threat to Rozell, as the sworn testimony of the prosecution's witnesses (including Rozell) proves. (Prelim. Hr'g Tr. (Vol. I) at 38-39["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."], at 76 ["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."], Ex. A to Mot., Doc. 9-4, pp. 43-44, 81, ECF No. 12-2, PageID.141-42, 179). Throughout the recount, Plaintiff expressed his political opinion that cheating on elections is a criminal offense (treason) and that those who commit this crime should be punished accordingly. (*See* Defs.' Resp. at 1-2 [confirming the political context of Plaintiff's speech]). This is not a punishable "threat" as a matter of law. *See Watts v. United States*, 394 U.S. 705 (1969).

Additionally, *after* this alleged "terrorist threat" was reported to the sheriffs present at the recount, and *after* Plaintiff was questioned about this "threat," Plaintiff was permitted to reenter the recount room with Rozell and the other election officials at which time Plaintiff made his speech about cheating on elections. And while this

was occurring, the deputies (who had already been told about this "terrorist threat") stood by with their arms folded listening to Plaintiff's political speech.

(Ex. C to Mot., Doc. 9-4, p. 93).

In other words, there is no *reasonable* person on this planet that would consider Plaintiff's comment in the near-empty lobby outside of the presence of any election officials to constitute a "serious expression of intent to commit *an act of terrorism*"—a crime punishable under a 20-year felony statute.

Finally, in the written statement made by Plaintiff to the deputy *at the scene*, Plaintiff made it clear that he "*never threatened the life of Joe*"; rather, he was accusing him of a crime. (*See* Defs.' Ex. 2 [Case Report], ECF No. 16-2, PageID.255).

At the end of the day, there was nothing uttered by Plaintiff on December 15, 2023, that was a "serious expression of intent *to commit an act of terrorism*." *See People v. Osantowski*, 274 Mich. App. 593, 606 (2007) (interpreting the statute to comport with *Virginia v. Black,* 538 U.S. 343 (2003), and affirming a conviction under this statute for multiple, direct, and explicit threats to kill, including

threatening a school shooting). Plaintiff's speech is beyond punishment under the First Amendment as a matter of law. The requested injunction should issue.[3]

I. Plaintiff's Speech Is Protected by the First Amendment as a Matter of Law.

As Defendants acknowledge, Plaintiff's speech was expressed in the context of a contentious election recount, and it was in reference to the director of elections for the County and the way in which the recount was being conducted. In other words, this is core political speech. As stated by the Supreme Court, "'speech 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). As the Court in *New York Times v. Sullivan* instructs, this Court must "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, "[t]he language of the political arena . . . is often vituperative, abusive, and inexact." *Watts*, 394 U.S. at 705.

[3] Defendants also assert that "[o]n March 6, 2025, Prosecutor McDonald dismissed the charge against Hess without prejudice based [on the *Kvasnicka I*] ruling." (Defs.' Resp. at 3). This is false. The Prosecutor opposed Hess's motion to dismiss, which the district court granted. (*See* Muise Supp. Decl. ¶ 2, Exs. A-C, at Ex. 1, ECF 19-2, PageID.326-42).

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), the Court did not allow convictions to stand because the trial judge charged that the defendants' speech could be punished as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." *Id.* at 3. In finding such a position unconstitutional, the Supreme Court famously stated,

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view.

Id. at 4; *see also NAACP v. Claiborne Hardware, Co*., 458 U.S. at 928 ("The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech. . . ."); *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); *Edwards v. S.C.*, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views.").

In *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982), the Court reversed the civil trial judgment and held that the violent threats at issue [Charles

Evers threatened members of the community by stating 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*.] could not serve as grounds for civil liability (and certainly not criminal liability). The Court held that the threats "did not transcend the bounds of protected speech." *Id*. at 928. The same is true here with regard to Plaintiff's comment. Per the Court,

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

Id. (internal quotations and citations omitted) (emphasis added).

And in *Watts v. United States*, 394 U.S. 705 (1969), the Court held that only a contextually *credible* threat to kill the President constitutes a "true threat." Communications which convey political hyperbole (even if they threaten the use of weapons or other acts of violence) are protected by the First Amendment. *Id*. at 707-08. In *Watts*, the Court concluded that the defendant was engaging in a political protest (as Plaintiff was doing here), and that his threatening speech was not a "true threat," but instead was mere "political hyperbole" immunized by the First Amendment. *Id*. at 706-08. The Court reached this conclusion *as a matter law* after

the jury convicted the defendant. Thus, per *Watts*, whether Plaintiff's speech is protected by the First Amendment is a question of law for the Court.[4]

Finally, whether someone doesn't "take kindly to [the] type of . . . language" (per Ms. Howard)[5] used by Plaintiff or is even frightened by it (per Rozell),[6] does not remove the speech from protection under the First Amendment. This Court, sitting *en banc*, properly rejected the argument expressed by Defendants (Defs.' Resp. at 10) that Howard's and Rozell's emotional reaction to overhearing or finding out about Plaintiff's comment in the lobby may serve as a basis for criminalizing Plaintiff's speech (a "heckler's veto"). *See Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*) (stating that "[t]he heckler's veto is [a] type of odious viewpoint discrimination" prohibited by the First Amendment); *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).

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[4] Defendants do not distinguish, let alone cite, *Claiborne Hardware Company* or *Watts*.

[5] 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.

(Prelim. Hr'g Tr. (Vol. I) at 75, Ex. A to Mot., Doc. 9-4, p.80, ECF No. 12-2, PageID.178).

[6] Rozell never asked the deputies at the recount to detain Plaintiff, nor did he ask for a security detail while leaving the recount that evening.

In sum, Plaintiff's political speech does not transcend the bounds of protected speech under the First Amendment.

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

Defendants (and the district court) fail to apprehend the holding of *Brandenburg v. Ohio,* 395 U.S. 444 (1969), and its application in this case. Section 750.543 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 (emphasis added). The Ohio syndicalism statute that was struck down in *Brandenburg*, which was similar to California's Criminal Syndicalism 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. 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 Supreme 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. Defendants' (and the district court's) dismissive treatment of *Brandenburg* as applying to only "incitement" statutes and not "true threats" misapprehends *Brandenburg* and the First Amendment. In fact, the Supreme 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 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. Section 750.543m, facially and as applied, violates the First Amendment.

CONCLUSION

The Court should grant the motion and issue the requested injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 27(d), the foregoing is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 2,587 words, excluding those accompanying documents identified in Fed. R. App. P. 27(a)(2)(B).

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

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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