No. 25A _____

IN THE

Supreme Court of the United States

ANDREW HESS,

Applicant,

v.

OAKLAND COUNTY, MI; KAREN MCDONALD, IN HER OFFICIAL CAPACITY AS OAKLAND COUNTY PROSECUTOR, OAKLAND COUNTY, MI; MICHAEL J. BOUCHARD, IN HIS OFFICIAL CAPACITY AS OAKLAND COUNTY SHERIFF, OAKLAND COUNTY, MI; MATTHEW PESCHKE, IN HIS OFFICIAL CAPACITY AS SEARGEANT, OAKLAND COUNTY SHERIFF'S OFFICE, OAKLAND COUNTY, MI,

Respondents.

To the Honorable Brett Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

Application from the United States Court of Appeals for the Sixth Circuit (No. 25-1784)

APPLICATION TO STAY

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PARTIES TO THE PROCEEDING

Applicant, who is Plaintiff-Appellant in the Sixth Circuit, is Andrew Hess.

Respondents, who were Defendants-Appellees in the Sixth Circuit, are Oakland County, Michigan; Karen McDonald, in her official capacity as Oakland County Prosecutor, Oakland County, Michigan; Michael J. Bouchard, in his official capacity as Oakland County Sheriff, Oakland County, Michigan; and Matthew Peschke, in his official capacity as Sergeant, Oakland County Sheriff's Office, Oakland County, Michigan.

RELATED PROCEEDINGS

Andrew Hess v. Oakland County, MI, et al., No. 2:25-cv-10665-GAD-KGA, U.S. District Court for the Eastern District of Michigan. Order denying preliminary injunction entered on August 29, 2025, and order denying injunction pending appeal entered September 3, 2025.

Andrew Hess v. Oakland County, MI, et al., No. 25-1784, U.S. Court of Appeals for the Sixth Circuit. Order denying injunction pending appeal entered October 1, 2025.

Andrew Hess v. Oakland County, MI, et al., 174 F.4th 981 (6th Cir. 2026) Opinion denying preliminary injunction for lack of irreparable harm entered on May 5, 2026.

Andrew Hess v. Oakland County, MI, et al., No. 25-1784, 2026 LEXIS 270556 (6th Cir. May 27, 2026). Order denying petition for rehearing or rehearing en banc entered on May 27, 2026.

Andrew Hess v. Oakland County, MI, et al., No. 25-1784, U.S. Court of Appeals for the Sixth Circuit. Order denying motion to stay the mandate and for an injunction pending U.S. Supreme Court review entered on June 9, 2026.

TABLE OF CONTENTS

Page

INDEX OF APPENDIX

TABLE OF AUTHORITIES

Cases **Page**

Constitution

Statutes/Rules/Instructions

To the Honorable Brett Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Sixth Circuit:

Pursuant to Rule 23 of the Rules of this Court, 28 U.S.C. § 2101(f), and the All Writs Act, 28 U.S.C. § 1651(a), Applicant Andrew Hess respectfully files this application to stay the mandate of the U.S. Court of Appeals for the Sixth Circuit. Applicant also seeks an injunction prohibiting enforcement of Michigan Complied Laws § 750.543m against him pending the filing and disposition of a petition for a writ of certiorari seeking review of the denial of his motion for a preliminary injunction, which is based on his First Amendment challenge to § 750.543m, facially and as applied to his political speech. Accordingly, Applicant also respectfully requests that this Court treat this application as a petition for a writ of certiorari before judgment and grant the petition.

The Oakland County Prosecutor is seeking to reinstate a criminal prosecution of Applicant under this 20-year felony statute, which prohibits the "serious expression of intent to commit an act of terrorism." The Sixth Circuit denied Applicant's request for a preliminary injunction on May 5, 2026. Applicant's petition for panel rehearing or rehearing en banc was denied on May 27, 2026. And Applicant's request to stay the mandate and issue an injunction pending this Court's review was denied by the Sixth Circuit on June 9, 2026.

At a contentious election recount held in Oakland County, Michigan ("County") on December 15, 2023, Applicant made an offhand comment ("*Hang Joe for Treason*," which is political speech protected by the First Amendment), in 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 Applicant was questioned by a deputy sheriff about the alleged threat (Applicant denied threatening to harm Joe Rozell—he told the deputy he was accusing him of a crime), Applicant was permitted to return to the recount room where Joe Rozell was located, at which time Applicant 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 Applicant for allegedly making a "terrorist threat" in violation of Michigan Compiled Laws § 750.543m. The charge was previously dismissed. And now the County is seeking to reinstate this 20-year felony charge against Applicant for his political comment.

Applicant sought a preliminary injunction. The U.S. Court of Appeals for the Sixth Circuit found that Applicant had demonstrated a substantial likelihood of succeeding on his claim that his speech is protected by the First Amendment. However, the panel denied the requested injunction, concluding that the pending felony prosecution did not constitute irreparable harm. The Sixth Circuit denied Applicant's petition for rehearing or rehearing en banc, and the court denied

Applicant's motion to stay the mandate and for an injunction pending this Court's review.

This request arises from the Sixth Circuit's decision that while Applicant can demonstrate a likelihood of success on his claim that his speech is not a "terrorist threat," but rather political speech protected by the First Amendment, Applicant cannot demonstrate irreparable harm caused by the pending felony prosecution for engaging in this speech. The Sixth Circuit's decision is contrary to well-established law, and it undermines the protections afforded Applicant by the First Amendment, specifically including the right not to be prosecuted for protected speech. *See Watts v. United States*, 394 U.S. 705 (1969). Moreover, the Sixth Circuit (and the district court) misapprehend this Court's ruling in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its application to this case. Michigan Compiled Laws § 750.543m is not simply a threat statute. It is a "terrorist" threat statute which closely resembles the syndicalism law struck down in *Brandenburg*. Yet, § 750.543m does not have the constitutionally mandated prohibition on punishing the advocacy of the use of force or of law violation unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. The claim that this criminal statute only applies to "true threats" and not incitement misses the point. Here, Respondents are seeking to punish Applicant for speech that they claim advocates for the "use of force or law violation" (hang someone for treason) without the constitutionally mandated requirements of *Brandenburg*. Indeed, the criminal statute at issue, similar to the syndicalism statute at issue in *Brandenburg*, requires

the speaker to intend by his speech 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*.

Absent immediate judicial intervention, Applicant will suffer irreparable harm as he will have to endure, yet again, a felony prosecution and the deprivation of his liberties that are associated with such prosecutions, such as restrictions on his right to travel, restrictions on his right to bear arms, as well as the social opprobrium that accompanies a felony prosecution, the agony and stress the prosecution places upon his wife and young children, and its negative impact on his ability to provide for his family.

Applicant is also likely to obtain certiorari review in this Court and succeed on the merits of his First Amendment claim as the lower courts' decisions are contrary to *Watts*, *Brandenburg*, *NAACP v. Claiborne Hardware Co,* 458 U.S. 886 (1982), and *Elrod v. Burns*, 427 U.S. 347 (1976), and they run afoul of our "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). At least four Justices are likely to grant certiorari on the important First Amendment question presented in this application.

Finally, the public interest and equities strongly favor the requested relief. This Court has long stated that "[t]he loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. And "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

Alternatively, as noted, Applicant respectfully requests that the Court treat this application as a petition for a writ of certiorari before judgment, grant certiorari, and issue an injunction pending review.

OPINIONS BELOW

The opinion of the Sixth Circuit denying Applicant's request for a preliminary injunction is reported at 174 F.4th 981, and it is reproduced at App.4-21.

The district court's order denying Applicant's motion for a preliminary injunction is available at *Hess v. Oakland Cnty.*, No. 2:25-cv-10665, 2025 U.S. Dist. LEXIS 169422 (E.D. Mich. Aug. 29, 2025), and it is reproduced at App.26-48.

JURISDICTION

The district court denied Applicant's motion for a preliminary injunction on August 29, 2025. App.26-48. Consistent with Rule 23.3, Applicant sought an injunction pending appeal from the Sixth Circuit. The Sixth Circuit denied the motion for an injunction pending appeal on October 1, 2025. App.22-25. Applicant filed an emergency application for writ of injunction in this Court on October 3, 2025, which was denied on October 20, 2025. Applicant's appeal was argued before the Sixth Circuit on March 19, 2026, and the court issued its opinion denying the preliminary injunction on May 5, 2026. App.4-21. Applicant filed a petition for

rehearing or for rehearing en banc, which the court denied on May 27, 2026. App.2. Applicant then filed a motion to stay the mandate and for an injunction pending U.S. Supreme Court review, which the court denied on June 9, 2026. App.1. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) & 1651, and it may grant the requested relief under 28 U.S.C. § 1651(a) and 28 U.S.C. § 2101(f).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions (Mich. Comp. Laws §§ 750.543b, 750.543m, & 750.543z) are reproduced at App.49-51.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

On March 6, 2025, the criminal charge against Applicant for allegedly violating § 750.543m was dismissed without prejudice. On March 10, 2025, Applicant commenced this civil action. (R-1, Compl.). On April 1, 2025, Applicant filed a motion for a preliminary injunction (R-12), which the district court denied on August 29, 2025 (R-36, App.26--21). The district court concluded that Applicant was not likely to succeed on the merits of his First Amendment claim. (*Id*. at 11-22, App.36-47). That same day, Applicant filed his notice of appeal. (R-37). On September 2, 2025, Applicant 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, Applicant filed a motion for an injunction pending appeal in the Sixth Circuit. That motion was denied on October 1, 2025. (App.22-25). In its Order, the motions panel stated, in relevant part:

> We consider four factors when deciding whether to grant an injunction pending appeal: (1) the likelihood that the movant will succeed on the merits of the appeal; (2) the likelihood that the movant will suffer irreparable harm absent a stay; (3) whether a stay will cause substantial harm to others; and (4) whether a stay serves the public interest. *Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.3d 150, 153 (6th Cir. 1991)). The last two factors balance each other out; Defendants' interests in prosecutorial discretion are neutralized by the public's interest in protecting fundamental rights. *See McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (explaining the importance of prosecutorial discretion); *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"). *And the Supreme Court has long recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Thus, the motion boils down to Hess's likelihood of success in appealing the district court's denial of a preliminary injunction*. And because preliminary injunctions are subject to the same four-factor test applicable here, *Hess's success on appeal turns on the merits of his First Amendment claim*. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("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.'" (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)).

(Order at 2-3, App.23-24) (emphasis added). The panel ultimately concluded that Applicant cannot establish a likelihood of success on the merits of his First Amendment claim, and thus denied the motion. (*See id.* at 3-4, App.24-25).

Oral argument was held on March 19, 2026, and the merits panel issued its opinion on May 5, 2026. (Op., App.4-21). In the opinion, the panel held that "[c]ontrary to the district court, we find that Hess's likelihood of success on the merits of his as-applied true-threat argument is far better than 'neutral.' . . . Because most listeners would likely consider Hess's comment hyperbole rather than 'a serious expression of an intent to commit an act of unlawful violence,' . . . *Hess is likely to*

succeed on the merits of his claim that he engaged in protected speech." (Op. at 13 [citations omitted], App.16) (emphasis added). In so ruling, the panel affirmed that "this case implicates the 'profound national commitment' to public debate that 'may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" (Op. at 11 [citations omitted], App.14). However, the panel denied the requested injunction, claiming that Applicant will not suffer irreparable harm by the pending felony prosecution. (Op. at 13-18, App.16-21). Applicant's petition for panel rehearing or rehearing en banc was denied on May 27, 2026. (App.2). And Applicant's motion to stay the mandate and request for an injunction pending U.S. Supreme Court review was denied on June 9, 2026. (App.1). This application follows.

B. STATEMENT OF FACTS.

On December 15, 2023, an election recount was held in Oakland County at the Election Division Training Room ("Recount Room") inside the County Courthouse. Joseph Rozell, the Director of Elections, was overseeing the recount. Deputies from the County Sheriff's Office were present to provide security. Several members of the public attended as observers. At times, the recount became heated as some of the observers complained that cheating was taking place, and challenges were filed. Applicant was one of the challengers. (R.12-2, Muise Decl. ¶ 2, Ex. A [Hr'g Tr. (Vol I) at 6-14, 23, 28, 29, 46-48, 53-60]). Applicant is an outspoken critic of the way elections are conducted in Michigan, particularly in Oakland County. (*See id*. at 15-18).

At one point, Applicant departed the Recount Room and went out into the near-empty lobby. While in the lobby, a receptionist for the county, Kaitlyn Howard, claims to have overheard Applicant state, "*Hang Joe for treason*." The statement was made in conversational tone, and Ms. Howard was admittedly not an intended party to this conversation. No other witness came forward regarding the making of this alleged "terrorist threat." Neither Rozell nor any other election official was in the lobby at the time. Rozell never heard this statement from Applicant. Ms. Howard eventually reported the alleged "threat" to the County deputies, who then proceeded to question Applicant. Following this questioning, Applicant was permitted to reenter the Recount Room where Rozell and the other election officials were located. Applicant was not arrested, searched, detained, nor was he told to leave the recount. During the public comment period, Applicant proceeded to make a speech about cheating on elections while deputies stood by listening with their arms folded. (*See id*. *supra* & *infra*; *id*. at 28, 34, 51, 54, 58; Exs. B [Photo], C [Photo]).[1]

During the preliminary examination, the prosecution presented two witnesses: Joe Rozell and Kaitlyn Howard. The 50th District Court judge denied Applicant's request to call as witnesses the deputy sheriffs present at the recount.[2] (R.12-2, Muise Decl. ¶ 4). The deputy witnesses would have provided further evidence that there was no serious threat to anyone. (*Id*. ¶¶ 3, 4). Nonetheless, this point is

[1] At the recount, Applicant provided a written statement to the County deputy in which he affirmed 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, Muise Decl., Ex. F).

[2] The Michigan circuit court remanded the case to the state district court for the deputies' testimony to be taken, but the case was dismissed prior to this happening. (R.12-2, Muise Decl. ¶ 4).

demonstrated by the photographs of the deputies standing with their arms folded and listening to Applicant's speech, which he made *after* he was questioned by the senior County deputy about the alleged "threat." (*See id.*).

Joe Rozell testified 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, Hr'g Tr (Vol I) at 38-39, Ex A).[3] Ms. Howard testified as follows:

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[3] The district court's opinion denying Applicant's motion for a preliminary injunction asserts that Rozell *was told by a deputy* (*i.e.*, *not* Applicant) "that [Applicant] 'said that *he* was going to hang [him],'" and that this "threat" is what caused Rozell fear. (App.31) (emphasis added). But, of course, that is *not* what Applicant said as a matter of undisputed fact. Rozell's fear was an important factor for the district court's opinion denying the preliminary injunction (and the Sixth Circuit's order denying Applicant's motion for an injunction pending appeal, *see* App.24 [stating that "[t]he existence of a

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).

* * * *

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).

* * *

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).[4]

* * *

Q. When Mr. Hess made the statement, quote, "Hang Joe for treason," per your testimony, he wasn't having a conversation with you, correct?
A. Correct.
Q. You simply overheard that statement, correct?
A. Correct.

(*Id*. at 78).

* * * *

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.

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threat depends primarily on the understanding of the hearer: 'what the statement conveys' to the person on the other end.'"]). Yet, Rozell's fear is based upon a demonstrably false claim. The record shows that Applicant never uttered the words the deputy told Rozell.

[4] 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. No member of the Board of Canvassers was there, as far as you recall?
A. As far as I recall, no.

(*Id*. at 82).

* * * *

MR. HALL:[5] I'd stipulate that it was a normal conversational tone.
(*Id*. at 71).

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).

On April 4, 2024, nearly *four months* after the alleged threat, a warrant issued for Applicant's arrest. (R.12-2, Ex. E). Applicant was held on a $20,000 personal recognizance bond (R.12-2, Ex. F), 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. Applicant was ordered to surrender his CPL, which he did. (*See* R.12-2, Ex. G). Following his initial appearance, Applicant 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. ¶ 6).

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, that § 750.543m was facially

[5] Mr. Hall was the Special Prosecutor assigned by County Prosecutor McDonald.

unconstitutional based on *Counterman v. Colorado*, 600 U.S. 66 (2023). As a result of this decision, Applicant's counsel promptly filed a motion to dismiss the criminal case against Applicant. (R.12-2, Muise Decl. ¶ 1). On March 6, 2025, the district court dismissed the case without prejudice. (*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 ruling (R.12-2, Ex. H), in which it "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 *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. H).

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 facial constitutional deficiencies of § 750.543m in light of *Brandenburg*, nor did the court opine on the application of § 750.543m to the facts in this case and the impact of *Brandenburg*, *Watts*, and *Claiborne Hardware*. These cases are discussed in greater detail below, and the proper application of their holdings compels the granting of this application.

Because the Michigan Court of Appeals reinstated the constitutionality of § 750.543m, the County Prosecutor has informed counsel that the criminal charge against Applicant will be reinstated.

MICHIGAN COMPILED LAWS § 750.543m

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."

Section 750.543m criminalizes the "making of a *terrorist* threat" by threatening to "commit an act of terrorism" and communicating, *with the requisite intent*, that

"threat to any other person." An "act of terrorism" is defined as a "willful and deliberate act" that would comprise a "violent felony," known to be "dangerous to human life," and which is specifically "*intended to intimidate or coerce a civilian population or influence or affect, the conduct of government or a unit of government through intimidation or coercion*." *Id.* (emphasis added). Mich. Comp. Laws § 750.543b(a); *Osantowski*, 274 Mich. App. 593. To prevent criminal prosecutions such as the one against Applicant, 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, Applicant's speech cannot be criminalized as it is protected political speech *as a matter of law*. The requested injunction should issue.

REASONS FOR GRANTING THE APPLICATION

"In deciding whether to issue a stay," this Court considers: "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. EPA*,

603 U.S. 279, 291 (2024). Justices of this Court have also considered whether there is "'a reasonable probability' that this Court will grant certiorari [and] . . . will then reverse the decision below." *Md. v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, J.) (quoting *Conkright v. Frommert,* 556 U.S. 1401, 1402, (2009) (GINSBURG, J., in chambers)).

The Sixth Circuit denied Applicant's motion to stay the mandate and to issue an injunction pending review in this Court. The opinion of the Sixth Circuit denying Applicant's request for a preliminary injunction is contrary to well-established law and it seriously undermines the First Amendment. This Court should stay the mandate and issue the requested injunction pending review by the Court. As set forth below, Applicant can demonstrate a substantial likelihood of succeeding on the merits of his First Amendment claims.

The All Writs Act, 28 U.S.C. § 1651(a), authorizes a Circuit Justice or the Court to issue the requested injunction. In the context of constitutional claims, an injunction is appropriate when an applicant faces irreparable harm, when he is likely to obtain certiorari review and succeed on the merits of his claims, and when the public interest would not be harmed. *See Tandon v. Newsom*, 593 U.S. 61, 63-64 (2021) (per curiam) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)); *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (citing same factors and considering whether there is a likelihood of granting certiorari and "fair prospect" of reversal). The Court also has discretion to issue an injunction "based on all the circumstances of the case," without the injunction "be[ing]

construed as an expression of the Court's views on the merits" of the case. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014).

Applying these factors, the Court should grant a stay of the mandate and grant an injunction pending review because Applicant faces imminent, irreparable harm (being prosecuted for committing a 20-year felony for engaging in political speech); he is likely to obtain certiorari review and succeed on the merits; and an injunction will preserve the status quo, thereby allowing this Court time to decide the merits without Applicant suffering the grave and irreparable harm that a felony prosecution under Michigan's "terrorist threat" statute will inflict on him and his family (and on others who want to engage in political speech that sharply criticizes election or other government officials).

I. ABSENT IMMEDIATE RELIEF, APPLICANT FACES IRREPARABLE HARM.

Absent an immediate stay and injunction, Applicant will have to endure, yet again, an unlawful prosecution for engaging in political speech. In short, Applicant will be irreparably harmed without the requested relief. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod,* 427 U.S. at 373; *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). And this injury is sufficient to justify the requested injunction. *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*).

Here, the threat of prosecution under § 750.543m hangs over Applicant's head (and the collective head of his family and others who seek to engage in political speech that may be "vehement, caustic, and sometimes [include] unpleasantly sharp attacks on government and public officials) like a sword of Damocles, causing ongoing and irreparable harm. *See 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."); *see also Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) ("[T]he value of a sword of Damocles is that it hangs—not that it drops.").

II. APPLICANT IS LIKELY CORRECT ON THE MERITS OF HIS CLAIMS.

A. THE APPLICATION OF § 750.543M VIOLATES THE FIRST AMENDMENT.

As the Sixth Circuit merits panel properly concluded, controlling law demonstrates that Applicant's speech is protected by the First Amendment *as a matter of law*. Applicant has a fundamental right <u>not</u> to be *prosecuted* for political speech, even if it is caustic or unpleasant. This right is protected by the First Amendment *and* state law. *See, e.g.,* Mich. Comp. Laws, § 750.543z ("[A] prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment . . . ."). Pursuant to § 750.543z, if the speech is presumptively protected by the First Amendment, then <u>no</u> ("shall not") prosecution is permitted under § 750.543m. 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. *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."). Process (*e.g.*, having a warrant issued for your arrest, having to retain an attorney, being subject to bond conditions that restrict fundamental liberties, and having to appear in court and stand trial) is punishment. And the right to freedom of speech is an essential right in our constitutional republic. *NAACP v. Claiborne Hardware Co,* 458 U.S. at 913 ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'") (citations omitted); *N.Y. Times Co.*, 376 U.S. at 270. In sum, the first prosecution and the renewed prosecution not only violate Applicant'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.

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). 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 Applicant 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.[6]

"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 *as a matter of law*. 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 advocate for 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 Applicant 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

[6] It is not possible as a matter of undisputed facts 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).

> 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, <u>*as a matter of law*</u>,[7] 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 Applicant cannot be punished as a "true threat" under binding First Amendment jurisprudence as it was, at best, political hyperbole.

As *Watts* instructs, this Court must "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co.*, 376 U.S. at 270; *see also Watts*, 394 U.S. at 708 (observing

[7] Whether Applicant's speech is protected by the First Amendment is <u>*not*</u> an issue for the jury to decide. It is a question of law for the court. This principle of law is made clear by *Watts*, *Brandenburg*, and others. Moreover, there are no material fact disputes in this case. In this respect, the Sixth Circuit merits panel was correct. (*See* Op. at 10 ["[A]s in any setting, courts retain the power to remove a true-threat question from the jury's consideration, or override its verdict, if the evidence shows that the speech was protected as a matter of law." (citing *Watts*, 394 U.S. at 706, 708)], App.13).

that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact") (citations omitted).

And whether or not the speech at issue is protected by the First Amendment does not depend *at all* upon the sensitivities of the listener. Allowing a listener who may be offended (or even frightened) by the speech to be the catalyst for punishing the speaker is known as a "heckler's veto," which is impermissible. Under the First Amendment, a listener's reaction to speech is <u>not</u> a permissible basis for regulation, restriction, or punishment. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "The First Amendment knows no heckler's veto." *Lewis v. Wilson,* 253 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 <u>not</u> 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 Applicant 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 Applicant allegedly said in the lobby. It is quite evident that nothing Applicant said or did on December 15, 2023, was an actual, imminent, or serious "threat" to anyone. Applicant was not arrested (nor should he have been) on December 15, 2023.

After being interviewed by a deputy following the alleged "terrorist threat," Applicant was permitted (rightfully so) to return into the Recount Room. And upon returning, Applicant was permitted (rightfully so) to give a speech during a public comment period expressing his opinions and concerns about cheating on elections. Applicant was not arrested for this speech (nor should he have been). Indeed, the incident occurred in December of 2023, yet the County Prosecutor waited until April 2024, nearly *four months* later, to charge Applicant. This was an abuse of the legal process to punish speech protected by the First Amendment.

This Court's precedent following *Watts* has both solidified the principle and provided more guidance about the kind of statements that are protected speech—speech which cannot provide the grounds for criminal or civil liability. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), decided the same year as *Watts*, the Court reversed a criminal conviction based on a film of a gathering in which armed speakers made derogatory and threatening statements. 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, 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. Consequently, even if the Court were to conclude that the alleged "terrorist threat" in this case was not political hyperbole or rhetoric but a serious expression advocating for the "use of force or of law violation," the statement in the lobby was plainly not directed to inciting or producing imminent lawless action nor likely to incite or produce such action (where were the ropes or gallows?). As noted, Applicant 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. Applicant's speech is protected by the First Amendment.

In *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982), the Court applied these same principles to threatening rhetoric employed to ensure compliance with a boycott against racial discrimination and held those statements were protected by the First Amendment. In other words, the violent statements could not serve as grounds for civil liability (let alone criminal liability). In that case, Charles Evers told members of the community that "blacks who traded with white merchants would be answerable to him" *id*. at 900 n.28, and they would "have their necks broken," *id.*[8] 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 such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise

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

> would ignore the profound 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, in light of clearly established First Amendment jurisprudence (and § 750.543z), it is unlawful to punish Applicant's speech under § 750.543m.

B. *BRANDENBURG* APPLIES TO § 750.543M AS THE STATUTE PROHIBITS ADVOCATING VIOLENCE TO INFLUENCE OR AFFECT THE CONDUCT OF GOVERNMENT.

The lower courts misapprehend 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 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 this 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. To argue that the statute does not apply to "incitement" doesn't justify the prosecution of Applicant. Rather, it demonstrates the point that Applicant's speech cannot be punished under this statute consistent with *Brandenburg*. The lower courts' 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 Applicant'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.

"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 more like the statute at issue in *Brandenburg* ("advocating" violent means to influence government) and the speech at issue in *Claiborne Hardware* than the cross-burning statute at issue in *Black*. As explained in *Brandenburg*:

> In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act . . . , the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. . . . But Whitney has been thoroughly discredited by later decisions. . . . These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, 367 U.S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Brandenburg, 395 U.S. at 447-48. The same is true here. As noted, 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 Applicant'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. 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.

III. THE PUBLIC INTEREST AND EQUITIES FAVOR THE REQUESTED RELIEF.

The harm to Applicant is substantial because the deprivation of his right to freedom of speech constitutes irreparable injury. *Elrod*, 427 U.S. at 373; *Connection Distrib. Co.*, 154 F.3d at 288; *Newsome,* 888 F.2d at 378. On the other hand, if Respondents are restrained from unlawfully enforcing § 750.543m *against Applicant while this appeal proceeds*, they will suffer no harm because the exercise of constitutionally protected rights can never harm any of Respondents' or others' legitimate interests. *See Connection Distributing Co.*, 154 F.3d at 288.

Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079; *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 . . . protection of First Amendment liberties"). Because the enforcement of § 750.543m to punish political speech violates the First Amendment, it is in the public interest to issue the injunction.

IV. ALTERNATIVELY, THIS COURT SHOULD TREAT THIS APPLICATION AS A PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT, GRANT CERTIORARI, AND ISSUE AN INJUNCTION PENDING REVIEW.

In the alternative, this Court should treat this application as a petition for writ of certiorari before judgment, grant certiorari, and issue an injunction pending review. *See* S. Ct. R. 11 (citing 28 U.S.C. § 2101(e)). All the ordinary factors favor certiorari review. The Sixth Circuit's opinion of the merits panel conflicts with this Court's precedents (indeed, the Sixth Circuit decisions of the merits panel and the motions panel are conflicting). In addition, this case implicates issues of imperative public importance regarding the application of the First Amendment, and it provides a clean vehicle for addressing these issues as the record is sufficiently developed through witness testimony, and there are no material disputes of fact. Immediate determination in this Court is needed because the County Prosecutor is moving to reinstate the criminal charge against Applicant.

CONCLUSION

This Court should grant this application, stay the mandate, and issue the requested injunction. Alternatively, the Court should grant certiorari and issue an injunction pending resolution of the merits.

Respectfully submitted,

ROBERT J. MUISE, ESQ.
Counsel of Record
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Counsel for Applicant

APPENDIX

INDEX OF APPENDIX

Page

Case No. 25-1784

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

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

BEFORE: BOGGS, READLER, and DAVIS, Circuit Judges.

Upon consideration of the appellant's motion to stay mandate,

It is **ORDERED** that the motion is **DENIED**.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens, Clerk

Issued: June 09, 2026

No. 25-1784

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW HESS,

Plaintiff-Appellant,

v.

OAKLAND COUNTY, MICHIGAN; KAREN MCDONALD, Oakland County Prosecutor, Oakland County, Michigan; MICHAEL J. BOUCHARD, Oakland County Sheriff, Oakland County, Michigan; MATTHEW PESCHKE, Sergeant, Oakland County Sheriff's Office, Oakland County, Michigan,

Defendants-Appellees.

O R D E R

BEFORE: BOGGS, READLER, and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Kelly L. Stephens
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
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Filed: May 27, 2026

Mr. Robert Joseph Muise
American Freedom Law Center
P.O. Box 131098
Ann Arbor, MI 48113

Re: Case No. 25-1784
Andrew Hess v. Oakland County, MI, et al
Originating Case No. 2:25-cv-10665

Dear Mr. Muise,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Kelly Stephens
En Banc Coordinator: Beverly
Direct Dial No. 513-564-7077

cc: Mr. Robert Nathan Dare
Mr. Zachary C. Larsen
Mr. David Yerushalmi

Enclosure

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 26a0131p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ANDREW HESS,

Plaintiff-Appellant,

v.

OAKLAND COUNTY, MICHIGAN; KAREN MCDONALD, Oakland County Prosecutor, Oakland County, Michigan; MICHAEL J. BOUCHARD, Oakland County Sheriff, Oakland County, Michigan; MATTHEW PESCHKE, Sergeant, Oakland County Sheriff's Office, Oakland County, Michigan,

Defendants-Appellees.

No. 25-1784

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:25-cv-10665—Gershwin A. Drain, District Judge.

Argued: March 19, 2026

Decided and Filed: May 5, 2026

Before: BOGGS, READLER, and DAVIS, Circuit Judges.

COUNSEL

ARGUED: Robert Joseph Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellant. Zachary C. Larsen, CLARK HILL PLC, Lansing, Michigan, for Appellees. **ON BRIEF:** Robert Joseph Muise, AMERICAN FREEDOM LAW CENTER, Ann Arbor, Michigan, for Appellant. Robert N. Dare, CLARK HILL PLC, Lansing, Michigan, for Appellees.

OPINION

BOGGS, Circuit Judge. In December 2023, Andrew Hess attended an election recount conducted in an office at the Oakland County, Michigan, courthouse. He raised allegations of ballot-box tampering to the county's director of elections, Joseph Rozell. Unsatisfied with Rozell's assurances, Hess exited the recount room and entered the lobby of the courthouse, where he said "hang Joe for treason" to a fellow member of the public. Although Hess was allowed to remain at the recount, Oakland County prosecutors charged him with a felony months later under Michigan's terrorist-threat statute based on that comment. Hess's charge was dismissed after the Michigan Court of Appeals, in a different case, held the state's terrorist-threat statute facially unconstitutional. Hess then filed a 42 U.S.C. § 1983 suit in the Eastern District of Michigan, including a claim that the attempted prosecution violated his First Amendment rights.

The Michigan Supreme Court reversed the Court of Appeals, however, and state-court litigation continues to define the boundaries of the terrorist-threat statute's constitutionality. That reversal revived the possibility that Oakland County could prosecute Hess under the terrorist-threat statute after all. Seeking to forestall this possibility, Hess requested one of the most dramatic remedies in a federal court's arsenal: a preliminary injunction against a threatened criminal prosecution by a separate sovereign. The district court denied his motion. We agree with Hess that he is likely to succeed on the merits of his claim that his "hang Joe for treason" statement constituted protected speech, not a true threat. But because the threatened prosecution targets only his *past* speech, as opposed to his *future* speech, and because state-court procedures afford expeditious opportunities to litigate a First Amendment defense, he has failed to show irreparable harm. We therefore affirm the denial of his requested preliminary injunction.

I

A

We recite the facts based on the record presented to the district court, drawing primarily on police reports and testimony from preliminary hearings in Hess's state prosecution.

The 2023 local elections in Royal Oak, Michigan, included a ballot question about whether to adopt ranked-choice voting to elect certain municipal positions. A close tally prompted a recount, supervised by Oakland County Director of Elections Joseph Rozell. The recount occurred on December 15, 2023, at the Oakland County Courthouse. Andrew Hess attended the recount, having been "selected as an observer," according to Rozell. (Rozell did not specify who selected Hess as an observer, or under what procedures.) R. 12-2, PageID 126. Other county employees, sheriff's officers, and members of the public also were present. R. 23, PageID 522.

Hess and Rozell had met before. In late 2022, Hess attended the Oakland County recount for two state constitutional propositions. Hess, along with two other individuals, confronted Rozell during the recount to request changes to ballot-examination procedures. When Rozell declined, citing state law, Hess "demanded" that sheriff's officers arrest Rozell "for interfering with the conduct of the recount." Officers declined to take any action, and Rozell resumed supervising the recount without further incident. R. 12-2, PageID 112–13, 118–121.

Hess and Rozell would not meet again until the December 2023 recount, when Hess alleged that someone had tampered with one of the ballot boxes. Rozell's confirmation that the ballot box had remained within the county's chain of custody did not assuage Hess's concerns, prompting Hess to tell Rozell: "Treason is going to look very good on you." *Id.* at PageID 128. Rozell later would testify that Hess "seemed agitated when I told him that we were going to move forward with the recount," but Rozell did not seek Hess's arrest or removal. *Id.* at PageID 130, 156–57. Hess remained at his observer's table, and Rozell walked away. *Id.* at PageID 128. Shortly afterwards, one of the county's attorneys relocated to a restricted-access table in the recount room, leading Hess to question why the attorney "gets to be there, but I don't." *Id.* at PageID 129. Once again Rozell dismissed Hess's objection, and the conversation ended. *Ibid.*

At some point following these interactions, but while the recount continued, Hess exited the recount room and entered the lobby, where Kaitlyn Howard was on duty as a receptionist. The doors between the lobby and the recount room remained open. *Id.* at PageID 170–71. It appears that only three people were in the lobby at this time: Hess, Howard, and a third

individual who Howard recognized as Braden Giobachi,[1] a member of the public who frequently contacted the Oakland County elections office. *Id.* at PageID 172–73. Rozell remained in the recount room, as did all members of the Board of Canvassers. *Id.* at PageID 142, 185. Howard alleged that she overheard Hess tell the third individual "[h]ang Joe for treason" in what a prosecutor stipulated as a "normal conversational tone." *Id.* at PageID 172–74. According to Howard, Giobachi responded, "[t]hat's too much." *Id.* at PageID 176. No other witness to this exchange has emerged.

Hess returned to the recount room. Howard refrained from taking immediate action, explaining that she "couldn't leave [her] position at the front desk" because she "was the only one guarding it." *Id.* at PageID 176. Although Howard would concede that she did not perceive "any imminent harm" and that Hess had not directed his comment toward her, Howard eventually reported Hess's comment to Sheriff's Officer Lee Van Camp because she did not "take kindly to that kind of behavior or language." *Id.* at PageID 178–181.

Officer Van Camp asked Hess to speak with him in the lobby. Hess agreed and nodded when the officer asked whether he had said "hang Joe for treason." Hess explained that "all [he] did was accuse [Rozell] of a crime" and that hanging is the penalty for treason. R. 16-3, PageID 249. Officer Van Camp allowed Hess to reenter the recount room, where Hess addressed Rozell during a public-comment period. Hess concluded by stating: "what is the penalty for treason[?] I'll let somebody else tell you what it is." R. 16, PageID 221. Hess then departed the premises voluntarily; neither Rozell nor any official ever requested Hess's removal. R. 12-2, PageID 156–60.

At some point after Hess left, Officer Van Camp approached Rozell to inform him that Hess had said "hang Joe for treason" in the lobby. R. 16, PageID 222. Although Rozell never heard that comment firsthand nor observed any visible signs of a threat, he later testified that he felt "in shock" and notified police in his home jurisdiction to request extra patrols by his residence. R. 12-2, PageID 137–38, 162. Hess and Rozell have not interacted since the recount.

[1]The preliminary-examination transcript cautions that this is a phonetic spelling of this individual's name.

B

On April 1, 2024, more than three months after the recount proceedings, Oakland County Prosecuting Attorney Karen McDonald charged Hess under Michigan's terrorist-threat statute based on his "hang Joe for treason" statement. R. 1-3, PageID 38. The statute provides that a person "is guilty of making a terrorist threat" if he "[t]hreatens to commit an act of terrorism and communicates the threat to any other person." Mich. Comp. Laws § 750.543m(1)(a). It defines an "[a]ct of terrorism" as "a willful and deliberate act" that "would be a violent felony" under Michigan law, that "the person knows or has reason to know is dangerous," and that "is intended to intimidate or coerce a civilian population or influence or affect the conduct of government . . . through intimidation or coercion." *Id.* § 750.543b(a)(i)–(iii). Violations are punishable by a maximum 20 years of imprisonment and $20,000 fine. *Id.* § 750.543m(3).

An arrest warrant for Hess issued on April 4. Hess was released pending trial on a personal-recognizance bond with conditions requiring him to refrain from contacting Rozell, abstain from drugs and alcohol, and surrender his firearms. R. 12-2, PageID 199. The state trial court conducted a preliminary examination on May 30, 2024, where Rozell and Howard testified. The court continued the examination to September 6, 2024, where it found probable cause after hearing argument from counsel. R. 22-3, PageID 449.

While Hess's prosecution continued, the Michigan Court of Appeals struck down § 750.543m(1)(a) as facially unconstitutional because "there is no statutory language suggesting that the prosecutor must prove that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *People v. Kvasnicka (Kvasnicka I)*, No. 371542, 2025 WL 492469, at *4 (Mich. Ct. App. Feb. 13, 2025). It reached this conclusion by applying the Supreme Court's most recent true-threat precedent, which requires prosecutors to prove that "the defendant had some understanding of his statements' threatening character" by at least a standard of recklessness. *Counterman v. Colorado*, 600 U.S. 66, 72–73 (2023).

Kvasnicka I prompted Hess to move to dismiss his charge. Prosecutors opposed Hess's motion to dismiss, filing instead a motion to stay proceedings against Hess pending further

developments in the *Kvasnicka* litigation. The state trial court sided with Hess and dismissed the charge on March 6, 2025. D. 20 at 14.

On March 10, Hess filed the instant § 1983 suit in the Eastern District of Michigan, naming Oakland County, McDonald, Rozell, Oakland County Sheriff Michael Bouchard, and Oakland County Sergeant Matthew Peschke as defendants. Seeking declaratory and injunctive relief and monetary damages, he brought claims for violations of his rights under the First, Second, Fourth, and Fourteenth Amendments, plus state-law tort claims.

Soon after filing his federal complaint, Hess began to fear that McDonald might try to revive the case against him. On March 28, 2025, the Michigan Supreme Court vacated the appellate court's judgment and remanded with instructions to interpret § 750.543m(1)(a) in light of § 750.543z, which provides that "a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected" by the First Amendment. *People v. Kvasnicka (Kvasnicka II)*, 18 N.W.3d 308, 308–09 (Mich. 2025) (mem.). Perceiving "the continuing threat of arrest and prosecution under § 750.543m for his political speech," Hess requested that the federal district court "enjoin the enforcement of [the statute] as applied to [Hess's] political speech while [Hess's civil] case proceeds." R. 12, PageID 64–67. Before the district court ruled on Hess's motion, the Michigan Court of Appeals changed course to uphold § 750.543m(1)(a) as facially constitutional by implying a recklessness mens rea. *People v. Kvasnicka (Kvasnicka III)*, No. 371542, 2025 WL 2045006, at *6 & n.2 (Mich. Ct. App. July 21, 2025).

Hess's motion for a preliminary injunction "relie[d] solely on his First Amendment claim" and argued "that prosecution under § 750.543m(1)(a) is facially unconstitutional under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) [(per curiam)], and unconstitutional as applied to him because his speech did not constitute a 'true threat' under the circumstances." R. 36, PageID 881. The district court denied Hess's motion on August 29, 2025, concluding that Hess could not demonstrate a likelihood of success on the merits of his First Amendment claims. Specifically, the district court found that Hess is "not likely to succeed" on his *Brandenburg* claim, *id.* at PageID 886, and that "the likelihood of success factor is neutral" regarding his true-threat argument, *id.* at PageID 893.

Three important developments have since occurred. First, on October 6, McDonald filed a motion with the Michigan trial court to "reinstate" the charge against Hess. D. 20 at 13–15. That motion remains outstanding, because the parties have agreed to a "stipulation of adjourning all state-court proceedings" until this interlocutory appeal concludes. Argument Tr. 1:00–2:10. Second, on October 24, the district court denied in part the civil defendants' motion to dismiss, allowing Hess's First Amendment claim to proceed "against Defendants McDonald, Bouchard, and Peschke for declaratory and injunctive relief, and Defendant Rozell for all relief."[2] R. 43, PageID 911. Both of Hess's theories for obtaining a preliminary injunction—that § 750.543m(1)(a) is facially unconstitutional under the Supreme Court's incitement precedents, and unconstitutional as applied to him because he did not communicate a true threat—survived the motion to dismiss. *Id.* at PageID 927–33. Finally, on December 29, the Michigan Supreme Court announced that it would hold oral argument to review the interpretation of § 750.543m(1)(a) adopted in *Kvasnicka III*. *People v. Kvasnicka (Kvasnicka IV)*, 28 N.W.3d 710 (Mich. 2025) (mem.).

II

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). We review the district court's denial of the preliminary-injunction motion for abuse of discretion, although we review its underlying First Amendment analysis de novo. *O'Toole v. O'Connor*, 802 F.3d 783, 788 (6th Cir. 2015).

As with any preliminary-injunction motion, Hess bears the burden of making a "clear showing that 'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Starbucks Corp. v. McKinney*, 602 U.S. 339, 345 (2024) (quoting *Winter*, 555 U.S. at 20, 22). But although the traditional four factors apply, Hess faces an especially demanding gauntlet because "[i]t is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions." *Trump v. United States*, 54 F.4th 689, 697 (11th Cir.

[2]The district court also dismissed Oakland County as a defendant. R. 43, PageID 911. Accordingly, we refer to the requested injunctive relief as running against McDonald.

2022) (per curiam) (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 163 (1943)); *see also Fischer v. Thomas*, 78 F.4th 864, 869 (6th Cir. 2023).

Adding to his burden, Hess asks us to restrain not merely a prosecution by a coordinate branch of government, but rather by a separate sovereign. Such a request raises special concerns for "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971). To be sure, we need not abstain from exercising our jurisdiction, because Hess initiated his § 1983 action in federal court *after* the Michigan trial court dismissed the criminal case against him, and because "proceedings of substance on the merits have taken place in the federal court" *before* state criminal proceedings recommenced. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). McDonald did not move to reinstate the charge until after the district court resolved Hess's preliminary-injunction motion on a reasonably well-developed record, which suffices for a proceeding of substance on the merits. *See Fischer*, 78 F.4th at 869 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984)). But although Hess is entitled to have his claim "considered without regard to *Younger*'s restrictions," the requested injunction nevertheless would "seriously impair[] the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

Hess asserts, in part, that he is likely to succeed on the merits because his "hang Joe for treason" statement did not constitute a true threat. He claims that a revived prosecution for that past statement—which would expose him to restrictive bail conditions and, potentially, decades in prison—would inflict irreparable harm. We agree with his assessment of the merits but disagree with his irreparable-harm analysis, based on (1) the distinction between threatened enforcement against *past* speech as opposed to *future* speech and (2) the availability of expeditious state-court procedures to litigate his First Amendment defense.

A

Hess presses two theories explaining why prosecution for his "hang Joe for treason" comment would violate his freedom of speech. First, Hess argues that Michigan's terrorist-threat statute is facially unconstitutional under *Brandenburg* because the statute does not require prosecutors to prove that the speech "be directed to inciting or producing imminent lawless

action and likely to incite or produce such action." Appellant Br. 16. Second, Hess asserts an as-applied constitutional challenge that his speech did not constitute a true threat. *See id.* at 18. His first theory will likely fail, but his second will likely succeed.

Starting with Hess's facial challenge, "a statute is facially invalid under the First Amendment only if its 'unconstitutional applications' are 'substantially disproportionate to the statute's lawful sweep.'" *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 481 n.7 (2025) (quoting *United States v. Hansen*, 599 U.S. 762, 770 (2023)). Incitement and true threats represent two of the "few limited areas" where the First Amendment permits content-based speech restrictions. *Counterman*, 600 U.S. at 73 (citation omitted). Incitement refers to "statements 'directed [at] producing imminent lawless action,' and likely to do so." *Ibid.* (alteration in original) (quoting *Brandenburg*, 395 U.S. at 447). True threats, in contrast, are "'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Id.* at 74 (alteration in original) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

Incitement receives greater protection than true threats because "incitement to disorder is commonly a hair's-breadth away from political 'advocacy.'" *Id.* at 81 (citation omitted). To obtain a conviction under a theory of incitement, prosecutors must prove not only that the speech is directed at producing imminent lawless action and likely to do so, but also that the speaker acted with "specific intent, presumably equivalent to purpose or knowledge," to produce such lawless action. *Ibid.* True threats, however, are sanctionable even if the speech is not directed at producing, or likely to produce, imminent lawless action and require prosecutors to prove only a mental state of recklessness. *Id.* at 81–82. In other words, while both incitement and true threats can facilitate a threat of violence, a true threat does not require that the speaker "prepar[e] a group for violent action and steel[] it to such action." *Brandenburg*, 395 U.S. at 447–48 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)). The absence of group advocacy, with its often-political character, justifies the lower mens rea in the true-threats context, *see Counterman*, 600 U.S. at 81–82, even though true threats can arise from political disputes that test the boundaries of protected "political hyperbole," *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

Hess's facial challenge fails because Michigan's terrorist-threat statute criminalizes true threats, not incitement. However much some speech might straddle these categories, Michigan courts have never interpreted § 750.543m(1)(a) as anything other than a true-threats statute. *See People v. Osantowski*, 736 N.W.2d 289, 302–04 (Mich. Ct. App. 2007), *rev'd on other grounds*, 748 N.W.2d 799 (Mich. 2008); *Kvasnicka III*, 2025 WL 2045006, at *4 (collecting cases). This dooms Hess's claim that the statute is facially unconstitutional under *Brandenburg*, because the statute's "lawful sweep" only encompasses circumstances that do not require prosecutors to prove imminent lawlessness and specific intent. *Free Speech Coal.*, 606 U.S. at 481 n.7; *see Speet v. Schuette*, 726 F.3d 867, 871–72 (6th Cir. 2013). Although the statute would require prosecutors to prove that Hess made his statement with the intent to "affect the conduct of government or a unit of government through intimidation or coercion," Mich. Comp. Laws § 750.543b(a)(iii), that element supports a true-threat theory of liability. After all, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360. The district court correctly found Hess unlikely to succeed on his facial *Brandenburg* argument.

We agree with Hess, however, that he will likely succeed on his alternative claim that he did not express a true threat by saying "hang Joe for treason" in a "normal conversational tone" made outside of Rozell's presence, in what Hess believed was a private remark to Giobachi. R. 12-2, PageID 174. Before explaining that conclusion, we pause to address our authority to decide this question.

McDonald emphasizes that juries, not judges, typically decide whether speech constitutes a true threat. *See, e.g.*, *United States v. Howard*, 947 F.3d 936, 947–49 (6th Cir. 2020); *Thames v. City of Westland*, 796 F. App'x 251, 262 (6th Cir. 2019); *Osantowski*, 736 N.W.2d at 302. But as in any setting, courts retain the power to remove a true-threat question from the jury's consideration, or override its verdict, if the evidence shows that the speech was protected as a matter of law. *Watts*, 394 U.S. at 706, 708 (reversing a draft-eligible protester's conviction for his statement, made on the grounds of the Washington Monument, that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). And the potential empaneling of

a jury, in either Hess's federal civil case or in a revived state prosecution, does not prevent us from assessing Hess's likelihood of success on the merits based on the evidence available now—even if the jury might reach a contrary verdict. *Compare, e.g.*, *ACT, Inc. v. Worldwide Interactive Network, Inc.*, 46 F.4th 489, 499–503 (6th Cir. 2022) (finding the *plaintiff* likely to succeed on the merits of its copyright-infringement claim) *with* Jury Verdict, *ACT, Inc.*, No. 3:18-cv-00186 (E. D. Tenn. Sep. 9, 2022), Dkt. No. 718 (subsequently finding for the *defendant*).

Returning to Hess's speech, this case implicates the "profound national commitment" to public debate that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). But just as the First Amendment permits a wide range of "political hyperbole," *ibid.*, it also "protects individuals from the fear of violence and from the disruption that fear engenders," as well as "from the possibility that the threatened violence will occur," *Black*, 538 U.S. at 360 (citation modified).

A true threat is "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359. "The speaker need not actually intend to carry out the threat." *Id.* at 359–60. Rather, whether a statement rises to a true threat depends on its "objective content" and what it conveys to the recipient. *Counterman*, 600 U.S. at 72–74; *see also Elonis v. United States*, 575 U.S. 723, 733 (2015). The speaker must make the statement recklessly, "mean[ing] that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Counterman*, 600 U.S. at 79 (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)).

Many factors inform whether a statement counts as a true threat. The statement's context, express or conditional nature, and the listeners' reactions matter. *See Watts*, 394 U.S. at 708; *Howard*, 947 F.3d at 947–48 (affirming a defendant's conviction for leaving a threatening voicemail to a former government official because the statement, "'I'm going to kill you. I am going to murder you[,]' . . . could not have been any clearer in [its] threat"). Although the "listener's subjective fear alone is not enough to turn an innocuous statement into a true threat," a statement is more likely to count as a true threat if the listener is "alarmed enough" to

immediately alert authorities. *Thames*, 796 F. App'x at 262 (emphasis removed). Other variables include the statement's specificity, audience (intended or otherwise), location, and tone, in addition to any history of prior "conflict" between the speaker and the statement's target. *See ibid.*; *United States v. Censke*, 449 F. App'x 456, 467 (6th Cir. 2011). The target of the speech need not hear it first-hand for the statement to count as a true threat, *United States v. Houston*, 683 F. App'x 434, 438–39 (6th Cir. 2017), but distance between the speaker and recipient may tend to diminish a statement's threatening nature, *see Watts*, 394 U.S. at 705–06.

Hess's "hang Joe for treason" statement likely did not constitute a true threat. He spoke in a highly charged political atmosphere, which heightens the need to distinguish between true threats and mere hyperbole. *See id.* at 708. His invocation of an archaic form of punishment rather than a common, modern device suggests the latter. *See Thames*, 796 F. App'x at 262 (distinguishing between someone who threatens with "bombs" rather than "brimstone"). Although not dispositive, Rozell never heard the threat directly. By removing himself to the lobby, speaking in a "normal conversational tone," and directing his comment only to Giobachi, Hess lowered the statement's temperature and the likelihood that it would reach Rozell, directly or secondhand. R. 12-2, PageID 174; *see Thames*, 796 F. App'x at 262. By removing himself from direct contact with Rozell and other recount officials, Hess likely did not consciously disregard a substantial and unjustifiable risk that his statement would be viewed as endangering Rozell. *See Counterman*, 600 U.S. at 79.

Additionally, neither of the individuals who directly heard Hess's comment seemed especially concerned. *See Thames*, 796 F. App'x at 262. Giobachi replied, "[t]hat's too much," but took no action. R. 12-2, PageID 176. Howard, the secretary, *did* relay the comment to officers, but not immediately, and she reported only because she took offense (she did not "take kindly to that kind of behavior or language"), not because she feared violence. *Id.* at PageID 178. The officers did not perceive a threat either; after interviewing Hess, they allowed him to return to the recount room and address Rozell during public comment. And Rozell himself never felt threatened by anything Hess said to him directly, either during the 2022 or 2023 recounts.

To be sure, some facts cut against Hess. None do so forcefully, however. Rozell and Hess had a history of conflict, *see Censke*, 449 F. App'x at 467, but their interactions always

resolved peacefully and Rozell never sought to eject Hess from official proceedings. Rozell also testified that he felt in "shock" and requested police protection upon later learning of Hess's comment. Yet, even though an "alarmed" and "sincere" reaction is "meaningful," it cannot suffice "to turn an innocuous statement into a true threat." *Thames*, 796 F. App'x at 262 (emphasis removed). And, although Hess chose to speak in a courthouse lobby, a sensitive place where Rozell, other officials, or the public could have overheard his speech, Hess apparently intended to address Giobachi privately. Thus, Hess has a strong case, on balance, that his comments did not constitute a true threat.

Contrary to the district court, we find that Hess's likelihood of success on the merits of his as-applied true-threat argument is far better than "neutral." R. 36, PageID 893. Because most listeners would likely consider Hess's comment hyperbole rather than "a serious expression of an intent to commit an act of unlawful violence," *Black*, 538 U.S. at 359, Hess is likely to succeed on the merits of his claim that he engaged in protected speech.

B

Hess must also demonstrate that he would likely incur irreparable harm, an essential prerequisite for obtaining preliminary injunctive relief. *EOG Res., Inc. v. Lucky Land Mgmt., LLC*, 134 F.4th 868, 883 (6th Cir. 2025). He claims that he would suffer irreparable harm from the threatened prosecution based on, in his view, protected speech. But while the threat of prosecution based on *future* speech risks irreparable harm, the threat of prosecution based on *past* speech does not. And Hess has made no showing, at least not with any specificity, that the terrorist-threat statute will chill his future speech. Perhaps the threat of prosecution based on past speech could risk irreparable harm in some contexts, but not so here, because Hess can avail himself of expeditious state-court procedures to litigate his First Amendment defense against a good-faith prosecution.

Generally, injunctive relief is available only when the threat of enforcement chills *future* speech. *See Bays v. City of Fairborn*, 668 F.3d 814, 818, 825 (6th Cir. 2012) (granting preliminary injunction to plaintiffs who challenged an anti-pamphleting policy at a local festival rather than forcing plaintiffs to challenge the policy by pamphleting and risking arrest). A mere

fear of enforcement based on *past* speech does not risk causing irreparable harm to the speaker's First Amendment rights because it does not impair his future conduct. *Fischer*, 78 F.4th at 868–69 (denying a preliminary injunction to former political candidates who failed to show an "immediate" risk of chill but rather sought to enjoin threatened state investigation into speech that they made during a prior election (citation omitted)). This distinction between future and past speech in the preliminary-injunction context comports with the notion that even a minimal infringement of First Amendment freedoms constitutes irreparable harm. *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 760 (6th Cir. 2025) (en banc). When the government chills speech *ex ante*, it deprives the speaker of the opportunity to timely express his political views and deprives the community of the opportunity to timely consider his perspective. *See Elrod v. Burns*, 427 U.S. 347, 373–74 & n.29 (1976) (plurality opinion). When the government attempts to punish speech *ex post*, however, the speaker has still expressed himself, the community has still received his wisdom, and the legal process can compensate him for any unlawful enforcement. *Fischer*, 78 F.4th at 869 (explaining that if a court ultimately "finds that the past speech was protected, then the appropriate remedy is damages, not an injunction"); *cf. Blackwell v. Nocerini*, 123 F.4th 479, 488–89, 492 (6th Cir. 2024) (affirming the denial of qualified immunity to city officials who allegedly "induced" the prosecution of a plaintiff for charges that the plaintiff alleged reflected retaliation against his political speech).

Hess fears punishment solely for his past speech. The "only speech threatened by the [state's] proceedings [here, 'hang Joe for treason'] has already occurred." *Fischer*, 78 F.4th at 869. So the threat of prosecution for past speech has not impaired his "ability to speak 'at the time relief was sought.'" *Id.* at 868–69 (quoting *Elrod*, 427 U.S. at 373). In other words, Hess need not choose "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

Indeed, Hess has failed to identify speech that he wishes to make in the future but for the threat of prosecution of that *future* speech. He offers only a generalized desire to continue criticizing perceived election irregularities in the future, leaving us to speculate about what he might say and how the terrorist-threat statute might proscribe it. Hess hypothesizes far more

uncertain downstream effects than those confronting pamphleteers who know exactly where they want to canvass and exactly how an ordinance forbids their plans. *See id.* at 455–56; *Bays*, 668 F.3d at 818. True, prosecution for his remarks at the 2023 recount might trigger pretrial restrictions against contacting Rozell, as the state court once imposed. Hess, however, does not clearly raise that argument in his briefs, let alone suggest that he otherwise would contact Rozell in the future. *See Kuhn v. Washtenaw Cnty.*, 709 F.3d 612, 624–25 (6th Cir. 2013). Nor does that tailored restraint against contacting an alleged victim likely differ from the type of restriction inherent in any prosecution. *See Younger*, 401 U.S. at 46. Should the state trial court impose more restrictive conditions on his speech, or if Hess musters a more concrete example of how the terrorist-threat statute deters his future speech, he "can renew [his] request for preliminary relief then." *Fischer*, 78 F.4th at 868.

Because Hess cannot identify a risk of irreparable harm to his ability to speak prospectively, he instead invokes "the trials and tribulations" that a felony charge inflicts "well before a jury is empaneled." Appellant Br. 40. But even though we assess this case "without regard" to *Younger* abstention, the Supreme Court has nonetheless stated that any attempt to enjoin state criminal proceedings "implicates the concerns for federalism which lie at the heart of *Younger*." *Doran*, 422 U.S. at 931. For that reason, "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution alone do not constitute 'irreparable injury' in the 'special legal sense of that term.'" *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) (quoting *Younger*, 401 U.S. at 46). This general rule permits at least three exceptions—including when the criminal forum would provide inadequate procedures to litigate constitutional defenses, when the prosecution acts in bad faith, or when the prosecution appears flagrantly unconstitutional—but none applies here. *See Trainor v. Hernandez*, 431 U.S. 434, 442–43 & n.7 (1977) (explaining that these circumstances can justify injunctive relief even in a context when a federal court should ordinarily abstain).

First, Michigan courts "provide[] the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler*, 421 U.S. at 124. They have demonstrated sensitivity to the Supreme Court's true-threat precedents and defendants' First Amendment rights when interpreting § 750.543m(1)(a). *See, e.g.*, *People v. Burkman*, 15 N.W.3d 216, 333 (Mich.

2024) (holding that defendants' comments were not true threats); *Kvasnicka III*, 2025 WL 2045006, at *6 (construing § 750.543m(1)(a) in light of *Counterman* to imply a mens rea of recklessness); *People v. Johnson*, 986 N.W.2d 672, 679–80 (Mich. Ct. App. 2022) (remanding for a new trial where the trial court gave a jury instruction that "lack[ed] language necessary to avoid infringement of the First Amendment"). They have even granted expedited appellate review to resolve First Amendment defenses early in true-threat cases. *See, e.g.*, *People v. Gerhard*, 976 N.W.2d 907, 909 (Mich. Ct. App. 2021) (accepting interlocutory appeal of a denial of the defendant's motion to quash a § 750.543m(1)(a) charge). The Michigan Supreme Court could hold § 750.543m(1)(a) facially unconstitutional. *See Kvasnicka IV*, 28 N.W.3d at 710 (ordering oral argument on that issue). Hess will have ample opportunity to litigate a First Amendment defense long before ever reaching a jury.

Second, Hess has failed to make the "exceedingly rare" showing of prosecutorial bad faith. *Tindall v. Wayne Cnty. Friend of Ct.*, 269 F.3d 533, 539 (6th Cir. 2001). Mustering an argument that he did not include in his preliminary-injunction motion below (but that he did present in his since-dismissed Equal Protection Clause claim), Hess decries what he perceives as inconsistent enforcement against "rough and tumble" speech. Reply Br. 14–17. This selective-prosecution argument alleges that McDonald (an elected Democrat) has refused to enforce the terrorist-threat statute against her likeminded fellow citizens. It requires Hess to prove selective targeting, discriminatory purpose, and discriminatory effect. *Rieves v. Town of Smyrna*, 959 F.3d 678, 700 (6th Cir. 2020). The first element asks whether "similarly situated organizations and individuals, of a different political viewpoint, have not been subject to the same alleged treatment by Defendants." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011). The second element assesses the prosecution's motives, and the third considers whether the selective targeting has produced a discriminatory effect on the defendant's "identifiable group." *See Rieves*, 959 F.3d at 700 (quoting *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997)).

Even assuming that we can consider this delayed theory premised on a dismissed claim, it fails. Hess offered two comparator groups: social-media posts from the Lenawee County Democratic Party calling President Donald Trump a "traitor who deserves the full measure of

punishment as outlined in the Constitution," and protestors displaying signs accusing the president of being a "traitor" and reading "86 47." Reply Br. 15–16; R. 43, PageID 944–45. Dismissing Hess's Equal Protection claim, the district court found neither group similarly situated, terminating the selective-prosecution analysis at the first step. R. 43, PageID 944–45. The distinction between Hess and the social-media posters was certainly appropriate because Michigan law more clearly authorizes venue in Oakland County for Hess's within-jurisdiction statement than for the out-of-county posts. *See People v. McBurrows*, 934 N.W.2d 748, 751–53 (Mich. 2019). The distinction between Hess and the protesters may present a closer call, but even assuming that they are similarly situated, Hess has offered no evidence suggesting that McDonald acted with discriminatory purpose or that Hess's own political group (which he makes no effort to define) has suffered discriminatory effects.

Third, we cannot categorically exclude the possibility that the law and facts will ultimately support McDonald's true-threats theory. The ongoing *Kvasnicka* litigation prevents us from declaring the terrorist-threat statute "flagrantly and patently" unconstitutional such that we must rescue Hess from prosecution. *Younger*, 401 U.S. at 53–54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). The statute's unsettled construction, combined with a factual record that sufficed for the earlier state court to find probable cause in Hess's case, indicates that the state does not utterly lack "a reasonable expectation of obtaining a valid conviction" despite our skepticism. *Kugler*, 421 U.S. at 126 n.6.

An infringement upon an individual's right to speak in the future is irreparable harm; good-faith enforcement against past speech, even if protected, is not. *Fischer*, 78 F.4th at 868–69. Hess has not pointed to any speech that he wishes to express but for § 750.543m(1)(a)'s chilling effect. Because Hess fears only the ordinary inconveniences of defending a single, non-bad-faith prosecution based on a prior statement, the district court did not abuse its discretion in denying the requested relief. "The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity." *Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 49 (1941).

III

We need not consider the remaining *Winter* factors because Hess has failed to demonstrate a likelihood of irreparable harm, a "dispositive" prerequisite for obtaining preliminary injunctive relief. *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019). With confidence in the capacity of Michigan courts to justly resolve Hess's First Amendment defenses, if necessary, we **AFFIRM** the district court's denial of the requested preliminary injunction.

No. 25-1784

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW HESS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	O R D E R
	)	
OAKLAND COUNTY, MI, et al.,	)	
	)	
Defendants-Appellees.	)	

Before: MOORE, COLE, and GRIFFIN, Circuit Judges.

Plaintiff Andrew Hess appeals the district court's denial of a temporary restraining order in this civil rights suit challenging the constitutionality of Michigan Compiled Laws § 750.543m(1)(a), both facially and as applied to Hess's conduct. He moves for an injunction pending appeal. Defendants Oakland County, Michigan; Prosecutor Karen McDonald; Director of Elections Joe Rozell; Sheriff Michael J. Bouchard; and Sergeant Matthew Peschke oppose Hess's motion.

While serving as an observer of an election recount run by Defendant Joe Rozell, Oakland County's Director of Elections, Hess was overheard saying to an associate, "hang Joe for treason." When the comment was reported to law enforcement who were on hand for security, Hess was questioned but ultimately allowed to return to the recount room. Months later, Oakland County prosecutors charged Hess under § 750.543m(1)(a) with making a terrorist threat. The charge was dropped when the Michigan Court of Appeals, in a separate proceeding, declared the terrorist-

threat statute facially unconstitutional because it did "not require the prosecution to prove that [the defendant] acted recklessly." *People v. Kvasnicka*, No. 371542, 2025 WL 492469, at *2 (Mich. Ct. App. Feb. 13, 2025), *vacated and remanded*, 18 N.W.3d 308 (Mich. 2025). But the Michigan Supreme Court vacated and remanded the decision for further consideration by the Michigan Court of Appeals, and the statute was reinstated. *See People v. Kvasnicka*, No. 371542, 2025 WL 2045006, at *6–7 (Mich. Ct. App. July 21, 2025). In the interim, Hess filed this civil rights suit and sought a temporary restraining order and preliminary injunction barring his prosecution under § 750.543m(1)(a). The district court denied injunctive relief. Hess appealed, and he now moves this court for an injunction while his appeal is pending.

We consider four factors when deciding whether to grant an injunction pending appeal: (1) the likelihood that the movant will succeed on the merits of the appeal; (2) the likelihood that the movant will suffer irreparable harm absent a stay; (3) whether a stay will cause substantial harm to others; and (4) whether a stay serves the public interest. *Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.3d 150, 153 (6th Cir. 1991)). The last two factors balance each other out; Defendants' interests in prosecutorial discretion are neutralized by the public's interest in protecting fundamental rights. *See McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (explaining the importance of prosecutorial discretion); *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"). And the Supreme Court has long recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, the motion boils down to Hess's likelihood of success in appealing the district court's denial of a preliminary injunction. And

because preliminary injunctions are subject to the same four-factor test applicable here, Hess's success on appeal turns on the merits of his First Amendment claim. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("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.'" (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)))

The statute at issue, § 750.543m(1)(a), makes it a crime to "[t]hreaten[] to commit an act of terrorism and communicate[] the threat to any other person." Hess argues that § 750.543m(1)(a) is facially unconstitutional because it criminalizes offending speech without requiring proof that it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *see also N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Hess's *Brandenburg* argument is misplaced, however, because § 750.543m(1)(a) prohibits "true threats," not incitement to violence. *See Kvasnicka*, 2025 WL 2045006, at *4; *People v. Osantowski*, 736 N.W.2d 289, 298 (Mich. Ct. App. 2007) (holding that § 750.543m(1)(a) only prohibits "true threats"), *rev'd in part on other grounds*, 748 N.W.2d 799 (Mich. 2008).

Like incitement, true threats "lie outside the bounds of the First Amendment's protection." *Counterman v. Colorado*, 600 U.S. 66, 72 (2023). The existence of a threat depends primarily on the understanding of the hearer: "'what the statement conveys' to the person on the other end." *Id.* at 74 (quoting *Elonis v.* United States, 575 U.S. 723, 733 (2015)). A true threat also requires a mens rea of recklessness, as opposed to incitement, which demands a showing of specific intent. *Id.* at 79–81. In line with *Counterman*, the Michigan Court of Appeals on remand construed § 750.543m(1)(a) "as requiring that the prosecution prove (1) that the defendant *recklessly* threatened (2) to commit an act of terrorism and (3) that the threat was communicated to another

person." *Kvasnicka*, 2025 WL 2045006, at *6. This construction renders Hess unlikely to succeed on his *Brandenburg*-based facial challenge.

Hess next argues that § 750.543m(1)(a) is unconstitutional as applied to his statement here: "hang Joe for treason." He asserts that the court can determine, as a matter of law, that his comment is not a true threat because "no *reasonable* person on this planet" would consider it to be a "serious expression of intent to commit *an act of terrorism*." We disagree. Whether Hess's statement was a serious statement or mere political hyperbole, *see Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), and whether his actions demonstrate reckless disregard to a substantial and unjustifiable risk that others would regard his statement as threatening violence, *see Counterman*, 600 U.S. at 79, are both questions for the fact finder. *See Thames v. City of Westland*, 796 F. App'x 251, 262 (6th Cir. 2019). Hess himself recognizes that the answers to these questions turn on objective reasonableness and factual context. Because there are arguments and evidence on both sides of these questions, Hess has not demonstrated a likelihood of success on the merits of his as-applied challenge.

Accordingly, the motion for injunction pending appeal is **DENIED** and the motion for an expedited decision is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANDREW HESS,

Plaintiff,

v.

OAKLAND COUNTY *et al.*,

Defendants.

Case No. 2:25-cv-10665
Hon. Gershwin A. Drain

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER [ECF No. 32] AND MOTION FOR PRELIMINARY INJUNCTION [ECF No. 12]

On March 10, 2025, Plaintiff Andrew Hess filed the instant action against Oakland County, Oakland County Prosecutor Karen McDonald, Oakland County Director of Elections Joseph Rozell, Oakland County Sheriff Michael Bouchard, and Oakland County Sergeant Matthew Peschke. Plaintiff alleges that Defendants violated the First Amendment, Fourth Amendment, Fourteenth Amendment, Second Amendment, and Michigan state law by prosecuting him for his speech at a contentious election recount on December 15, 2023, in Oakland County, Michigan. The case against Plaintiff was ultimately dismissed without prejudice because the Michigan Court of Appeals found the statute under which Plaintiff was prosecuted—Michigan Compiled Laws § 750.543m(1)(a)—facially unconstitutional. However,

the Michigan Supreme Court vacated and remanded the Michigan Court of Appeals' decision, and the Michigan Court of Appeals ultimately concluded on remand that § 750.543m(1)(a) is, in fact, facially constitutional.

Presently before the Court is Plaintiff's motion for a temporary restraining order ("TRO") and motion for preliminary injunction. Plaintiff argues that an injunction is necessary because there is nothing to prevent Defendant Karen McDonald from renewing her prosecution of Plaintiff under Mich. Comp. Laws § 750.543m(1)(a) now that the Michigan courts have found the statute constitutional. Defendant responded in opposition to both motions. The Court concludes that a hearing will not aid in the disposition of these motions and will determine the outcome on the briefs. *See* E.D. Mich. L.R. 7.1(f)(2).

For the following reasons, Plaintiff's motion for a TRO [ECF No. 32] and motion for a preliminary injunction [ECF No. 12] are DENIED.

I. BACKGROUND

a. The Election Recount

On December 15, 2023, Oakland County held an election recount at the County Courthouse regarding Royal Oak Proposal B. ECF No. 16, PageID.220. Royal Oak Proposal B—which passed by a "slim margin"—introduced ranked choice voting, allowing voters to rank candidates for office rather than selecting a single candidate. *Id.* Defendant Joseph Rozell, Oakland County's Director of

Elections, oversaw the recount, and Oakland County Sheriff's Deputies were on-site to provide security. *Id.* In addition, several members of the public attended as observers. ECF No. 12, PageID.72. Plaintiff Andrew Hess was one of those observers. *Id.*

During the event, Plaintiff was critical of the recount process and questioned the chain of custody for the ballots. *Id.* At one point, Plaintiff confronted Rozell about the seal on a ballot box that Plaintiff believed was tampered with. *See* ECF No.12-2, PageID.126–27. When Rozell explained that the broken seal was not a problem because a new seal number was added and recorded, Plaintiff responded: "Treason. Treason's going to be tough, Joe." *Id.* at PageID.127–28; Exhibit 5, Plaintiff's Video 3, 00:40–42. At some point, Plaintiff briefly left the recount room and went into the lobby. A receptionist for the County, Kaitlyn Howard, alleges that she overheard Plaintiff say "hang Joe for treason" in a private conversation with another individual in the lobby. ECF No. 12, PageID.73; ECF No. 16-3, PageID.254. Howard reported Hess's statement to Officer Lee Van Camp of the Oakland County Sheriff's Office. ECF No. 16, PageID.221.

After receiving this report, Officer Van Camp retrieved Plaintiff out of the recount room to question him in the lobby. *See generally* Exhibit 5, Plaintiff's Video 2. During questioning, Officer Van Camp stated: "So it was reported to me that somebody overheard you saying you were going to hang Mr. Rozell for treason." *Id.*

at 01:21–28. In response, Plaintiff slightly smirked and said "okay." *Id.* at 01:28–29. Officer Van Camp explained that he has to "take that kind of stuff very seriously" and make a report about it. *Id.* at 01:30–44. Plaintiff then asked Officer Van Camp what the penalty is for treason, and Officer Van Camp responded with "hanging." *Id.* at 01:44–48. Plaintiff stated, "so all I did was accuse him of a crime. And so, it would be like saying if somebody murders somebody, they get to go to jail for the rest of their life." *Id.* at 01:50–55. Officer Van Camp responded that it is "still a threat against a county employee." *Id.* at 01:56–02:00. Ultimately, Officer Van Camp completed the report and permitted Plaintiff to return to the recount room. ECF No. 12, PageID.73.

Back in the recount room, Plaintiff gave an impassioned speech to the attendees about the value of voting and the treasonous nature of cheating an election. *See generally* Exhibit 5, Plaintiff's Video 1. Plaintiff ended his speech by saying: "The penalty for treason? I'll let somebody else tell you what it is." *Id.* at 01:03–07.

b. The Prosecution

On April 1, 2024, Defendant Karen McDonald, the Oakland County Prosecutor, charged Plaintiff with making a terrorist threat in violation of Mich. Comp. Laws § 750.543m(1)(a) when he made the statement, "Hang Joe for treason." ECF No. 16, PageID.223. That statute makes it a crime to "[t]hreaten[] to commit an act of terrorism and communicate[] the threat to any other person." Mich. Comp.

Laws § 750.543m(1)(a). A person convicted of violating § 750.543m is guilty of a felony and faces up to 20 years in prison and a fine up to $20,000. *Id.*(3).

At Plaintiff's preliminary evaluation, the prosecution and defense counsel questioned Rozell and Howard about the events at the election recount on December 15, 2023. Rozell testified that the recount petition at issue involved contentious allegations such as voting equipment not being certified, using voting equipment that was contrary to state law, and absentee ballots that were mailed and never received. ECF No. 12-2, PageID.112. Rozell also testified that the elections environment had become "pretty polarized" in general, noting that he had experienced "issues with challengers behaving badly at the absent voter counting board." *Id.* at PageID.113. As such, Rozell testified that the elections team requested security for the December 15 recount. *Id.* Rozell also noted that he was familiar with Plaintiff prior to December 15 because Plaintiff had confronted Rozell at a prior recount and requested that Rozell be arrested there as well. *Id.* at PageID.119.

Regarding the day in question, Rozell explained how Plaintiff told Rozell that "treason's going to be tough,"[1] and described Plaintiff as "agitated." *Id.* at PageID.128, 130. Rozell admitted that he did not personally hear Plaintiff say "hang Joe for treason" and that he was not in the lobby when Plaintiff uttered these words.

[1] Rozell testified that Plaintiff said, "treason is going to look very good on you." ECF No. 12-2, PageID.128. Video recording of this interaction between Plaintiff and Rozell confirms that the actual statement was "treason's going to be tough, Joe."

Id. at PageID.141–42. However, Rozell testified that when a deputy informed him that Plaintiff "said that he was going to hang [him]," Rozell "felt [his] heart drop," and described the situation as "very intimidating," "very scary," and nothing he had ever experienced in his professional career. *Id.* at PageID.138. Rozell testified further that he requested police patrols around his home and informed his alarm company about the possible threat to his welfare, advising the company to alert the police immediately upon suspicious activity around his home. *Id.* at PageID.138–39.

The parties also questioned Howard at the preliminary evaluation. When asked, Howard admitted that she did not perceive any imminent threat of harm when she heard Plaintiff say "hang Joe for treason." *Id.* at PageID.180. She testified that she felt the need to tell a deputy about his statement because she does not "take kindly to that kind of behavior or language." *Id.* at PageID.178.

c. The Kvasnicka Case

While Plaintiff's prosecution was ongoing, the Michigan Court of Appeals rendered a decision in *People v. Kvasnicka ("Kvasnicka I")*, No. 371542, 2025 WL 492496 (Mich. Ct. App. Feb. 13, 2025). In *Kvasnicka I*, the Court of Appeals discussed the constitutionality of § 750.543m(1)(a). Because the statute is "silent as to what state-of-mind the defendant must have when he 'threatens to commit an act of terrorism,'" the Court of Appeals concluded that the statute was unconstitutional under *Counterman v. Colorado*, 600 U.S. 66 (2023), which held that criminal

prosecutions for true threats must prove that the defendant had a *mens rea* of at least recklessness. *Id.* at *4. After the statute was ruled unconstitutional under *Counterman*, the charges against Plaintiff were dismissed without prejudice. ECF No. 12, PageID.65.

The *Kvasnicka I* decision was appealed, however, and the Michigan Supreme Court vacated the decision and remanded for further consideration. *People v. Kvasnicka ("Kvasnicka II")*, 18 N.W.3d 308 (Mich. 2025). The Michigan Supreme Court instructed the Michigan Court of Appeals to reevaluate the proper interpretation of § 750.543m(1)(a) in light of (1) Mich. Comp. Laws § 750.543z, which provides that a prosecuting agency shall not prosecute any person for conduct presumptively protected by the First Amendment in a way that violates any constitutional provision, and (2) the constitutional-doubt canon. *Id.* at 308–09. The Michigan Supreme Court further instructed the Michigan Court of Appeals to determine whether a limiting construction of § 750.543m(1)(a) could be adopted to address any constitutional deficiency and what that construction should be. *Id.* at 309.

On remand, the Michigan Court of Appeals found that § 750.543m(1)(a) is facially constitutional. In doing so, the Court of Appeals noted that a court can interpret a statute to have a *mens rea* element even if the statute is silent as to *mens rea*. *People v. Kvasnicka ("Kvasnicka III")*, No. 371542, 2025 WL 2045006, at *6

(Mich. Ct. App. July 21, 2025). Thus, under the constitutional-doubt canon, an interpretation of § 750.543m(1)(a) with a *mens rea* element that does not run afoul the Supreme Court's holding in *Counterman* was "fairly possible." *Id.* As such, the Court of Appeals held that, when prosecuting a case under § 750.543m(1)(a), a prosecutor must also prove that the defendant made the alleged threat recklessly. *Id.*

d. The Lawsuit

On March 10, 2025, Plaintiff filed the instant lawsuit against Oakland County, Karen McDonald, Joseph Rozell, Michael Bouchard, and Matthew Peschke. ECF No. 1. Plaintiff brings claims for violation of his right to free speech under the First Amendment, malicious prosecution under the Fourth Amendment, violation of equal protection under the Fourteenth Amendment, invasion of privacy/false light under Michigan law, violation of his right to bear arms under the Second Amendment, and unlawful seizure under the Fourth Amendment. *See* ECF No. 23. Plaintiff seeks declaratory and injunctive relief along with monetary damages.

The Michigan Supreme Court rendered its *Kvasnicka II* decision later that month, on March 28, 2025. *See Kvasnicka II*, 18 N.W.2d at 308–09. Thereafter, Plaintiff filed a motion for a preliminary injunction, requesting that the Court prohibit McDonald from renewing the prosecution of Plaintiff for the statement he made at the election recount. *See* ECF No. 12. While the preliminary injunction motion was pending before the Court, the Michigan Court of Appeals rendered its

decision in *Kvasnicka III*, ruling definitively that § 750.543m(1)(a) does not violate the Constitution. *See Kvasnicka III*, 2025 WL 2045006, at *6. Thereafter, Plaintiff filed a motion for a TRO with notice to Defendants. *See* ECF No. 32. Plaintiff argued that the *Kvasnicka III* decision made the need for an injunction even more urgent and requested the Court immediately enter a TRO, and upon issuing the TRO, hold a hearing on the preliminary injunction motion. *Id.* at PageID.827–28, 831–32.

For both motions, Plaintiff relies solely on his First Amendment claim as the reason that he is entitled to an injunction. Specifically, Plaintiff claims that prosecution under § 750.543m(1)(a) is facially unconstitutional under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and unconstitutional as applied to him because his speech did not constitute a "true threat" under the circumstances. *Id.* at PageID.87, 92.

II. LAW & ANALYSIS

TROs and preliminary injunctions are "extraordinary measure[s]" that have been characterized as "the most drastic tools in the arsenal of judicial remedies." *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001) (quoting *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 273 (2d Cir. 1986)). These remedies are "never awarded as of right." *Beckerich v. St. Elizabeth Med. Ctr.*, 563 F. Supp. 3d 633, 638 (E.D. Ky. 2021) (quoting *Munof v. Geren*, 553 U.S. 674, 690 (2008)). In determining whether to grant a TRO or preliminary injunction, a court must balance

the following four factors: (1) whether the movant has a likelihood of success on the merits, (2) whether the movant would suffer irreparable injury without the injunction, (3) whether the injunction would cause substantial harm to others, and (4) whether the injunction serves the public interest. *Bonnell*, 241 F.3d at 809.

In the context of the First Amendment, "the likelihood of success on the merits often will be the determinative factor." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). This is because the balance of the other factors is necessarily dependent on the likelihood of success determination. *See id.* For example, "it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Likewise, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Moreover, the government (and its citizens) would not be harmed if the government were prevented from enforcing an unconstitutional law. *See id.* However, the applicability of these considerations can only be determined once the likelihood of success on the First Amendment claim is established. *See id.* In sum, "because the questions of harm to the parties and the public interest generally cannot be addressed properly in the First Amendment context without first determining if

there is a constitutional violation, the crucial inquiry often is… whether the statute at issue is likely to be found constitutional." *Id.*

A. Likelihood of Success on the Merits

Plaintiff argues that he is likely to succeed on his First Amendment claim because § 750.543m(1)(a) is facially unconstitutional under *Brandenburg v. Ohio*, and unconstitutional as applied to him because his speech was not a true threat. Plaintiff claims that § 750.543m(1)(a) violates *Brandenburg* because it fails to include as an element that the alleged threat is "directed to inciting or producing imminent lawless action and [] likely to produce such action." ECF No. 12, PageID.92. Further, Plaintiff claims that his statement "hang Joe for treason" was not a "true threat" unprotected by the First Amendment, but rather mere political hyperbole. ECF No. 12, PageID.86. Plaintiff highlights how the Sheriff's Deputies did not arrest him on the recount day, and even permitted him to return to the recount room to give a speech after he made the statement, as evidence that his statement could not possibly be serious enough to constitute a true threat. *Id.* at PageID.88.

In response, Defendants argue that Plaintiff's facial constitutionality argument is no longer viable after the Michigan Court of Appeals' *Kvasnicka III* decision, which found the statute facially constitutional. ECF No. 34, PageID.857. Furthermore, Defendants claim that Plaintiff's statement is a true threat, asserting

that Howard and Rozell both considered the threat serious. ECF No. 16, PageID.229–31.[2]

a. First Amendment Principles

"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." *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 243 (6th Cir. 2015); *see also United States v. Alvarez*, 567 U.S. 709, 716 ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. 460, 468

[2] Defendants also argue that their entitlement to qualified immunity may be considered in determining likelihood of success on the merits, and that qualified immunity bars liability in this case. *Id.* at PageID.858–59. However, "Sixth Circuit precedent dictates that the defense of qualified immunity protects officials only from suit for monetary damages." *Mumford v. Zieba*, 4 F.3d 429, 435 (6th Cir. 1993). In this case, in addition to monetary damages, Plaintiff also seeks declaratory relief that Defendants violated his First Amendment rights and permanent injunctive relief barring Defendants from prosecuting him under § 750.543m(1)(a). ECF No. 23, PageID.554. Therefore, even presuming Defendants may be entitled to qualified immunity regarding Plaintiff's request for money damages, they still must face the merits of Plaintiff's claim. *See Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001). As such, the Court will address the merits of Plaintiff's claim here.

(2010) (cleaned up). These traditional limitations include incitement of imminent lawless action, obscenity, defamation, speech integral to criminal conduct, "fighting words," child pornography, "true threats," and "speech presenting some grave and imminent threat the government has the power to prevent." *Alvarez*, 567 U.S. at 717.

Of relevance here, "[t]rue threats are serious expressions conveying that a speaker means to commit an act of unlawful violence." *Counterman*, 600 U.S. at 74 (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)) (cleaned up). "The speaker need not actually intend to carry out the threat." *Black*, 538 U.S. at 359–60. Rather, "[t]he existence of a threat depends not on the mental state of the author, but on what the statement conveys to the person on the other end." *Counterman*, 600 U.S. at 74 (quotation marks omitted). "When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. True threats subject individuals to fear of violence and to the many kinds of disruption that fear engenders." *Id.* (quotation marks omitted). Although the speaker need not have a certain mental state to make his statement a true threat, the government is required to prove a *mens rea* of at least recklessness in order to prosecute a speaker for a true threat. *Id.* at 79.

b. Plaintiff Does Not Have a Likelihood of Success on His Facial Unconstitutionality Claim

Plaintiff first argues that § 750.543m(1)(a) is facially unconstitutional because it is inconsistent with the Supreme Court's decision in *Brandenburg v. Ohio*. ECF No. 12, PageID.91. Plaintiff is not likely to succeed on this theory.

In *Brandenburg*, the appellant was a Ku Klux Klan leader and invited a reporter to attend a cross-burning rally so that it could be televised and documented. *Brandenburg*, 395 U.S. at 445–46. The reporter attended the rally with a cameraman, and the appellant stated on camera that if the Government continued to "suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446. The appellant further stated that the Klan would be "marching on Congress" on the Fourth of July. *Id.* The appellant was later tried and convicted under the Ohio Criminal Syndicalism Statute for making these statements. That statute proscribed advocating for the propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. *Id.* at 444–45, 447.

The appellant argued on appeal that the Ohio Criminal Syndicalism Statute was unconstitutional under the First and Fourteenth Amendments. *Id.* at 445. Ultimately, the Supreme Court agreed. The Court held that:

> [T]he 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 except where such advocacy is (1) directed to inciting or producing imminent lawless action and is (2) likely to incite or produce such action.

Id. at 447 (numbering added). Because the Ohio Criminal Syndicalism Statute criminalized mere advocacy without requiring that the advocacy be directed at inciting imminent lawless action and likely to do so, the Court concluded that it was unconstitutional. *Id.* at 448–49.

The Supreme Court's *Brandenburg* decision provided the test that courts use today to determine whether speech constitutes incitement, a category of speech that is not protected under the First Amendment. *See Bible Believers*, 805 F.3d at 246; *see also Alvarez*, 567 U.S. at 717. But in this case, incitement is not at issue. Section 750.543m(1)(a)—the statute under which Plaintiff was prosecuted—does not purport to sanction speech that constitutes incitement, but rather, speech that constitutes "true threats." *See People v. Osantowski*, 736 N.W.2d 289, 298 (Mich. Ct. App. 2007), *rev'd for resentencing*, 748 N.W.2d 799 (2008) (holding that § 750.543m prohibits "only 'true threats'" as understood under constitutional law); *see also Thames v. City of Westland*, 796 F. App'x 251, 261–62 (6th Cir. 2019) (discussing § 750.543m and the Michigan Court of Appeals' *Osantowski* decision).

True threats are conceptually distinct from incitement. While the incitement category focuses on whether the speech at issue is directed at and likely to spur imminent lawless action, *Brandenburg*, 395 U.S. at 447, the true threat category focuses on whether the speech at issue communicates a "serious expression of an intent to commit an act of unlawful violence" against a particular person or group.

Black, 538 U.S. at 359. In other words, incitement focuses on the effect of the speech on a broader audience, whereas true threats are personal to the speaker. The rationales for excluding these distinct categories of speech from the protection of the First Amendment are different: while incitement is excluded to prevent the immediate harm, violence, and lawlessness caused by incendiary language, *Brandenburg*, 395 U.S. at 447, true threats are excluded so that individuals may be free "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

As such, Plaintiff's argument that § 750.543m(1)(a) is unconstitutional because it does not contain the *Brandenburg* elements is misguided. The statute need not contain those elements because it criminalizes true threats, not incitement.

c. Whether Plaintiff Has a Likelihood of Success on His As-Applied Unconstitutionality Claim Is Neutral

Plaintiff next argues that it is unconstitutional to prosecute him under § 750.543m(1)(a) because his statement, "hang Joe for treason," was not a true threat. While Plaintiff has a credible argument, so do Defendants. The Court cannot conclude that Plaintiff is likely to succeed on the merits of this theory or that this factor favors Plaintiff. *See Novak v. Federspiel*, 649 F. Supp. 3d 562, 573 (E.D. Mich. 2023) ("For an unclear likelihood of success, [this] factor is neutral.").

Notably, Plaintiff claims that whether a statement constitutes a "true threat" is a legal question for the Court to determine as a matter of law. ECF No. 12, PageID.86 n.12. However, the Sixth Circuit has consistently stated that whether a statement is a "true threat" is a factual question for the jury to decide.[3] *Thames*, 796 F. App'x at 262 ("The jury determines whether a statement is a true threat."); *United States v. Hankins*, 195 F. App'x 295, 301 (6th Cir. 2006) (same); *see also United States v. Polson*, 154 F. Supp. 2d 1230, 1235 (S.D. Ohio 2001) (stating that the defendant's statement falls "well within the wide spectrum of prosecutable threat cases, and, therefore, should be submitted to the jury to determine whether the message… constitutes a 'true threat.'"); *United States v. Censke*, No. 2:08-cr-19, 2009 WL 10681232, at *6 (W.D. Mich. Apr. 29, 2009) ("It is up to the jury to decide at trial whether a communication is a true threat applying the objective standard."); *Osantowski*, 736 N.W.2d at 612 ("As an issue of fact, the determination whether a statement was a true threat is generally a question for the jury.").

[3] Plaintiff seeks both legal and equitable relief on his First Amendment claim. Of course, actions that *solely* seek equitable relief (such as injunctive relief) are not entitled to be heard by a jury. However, "when legal and equitable actions are tried together, the right to a jury trial in the legal action encompasses the issues common to both." *In re Lewis*, 845 F.2d 624, 629 (6th Cir. 1988). Because the factual questions for Plaintiff's legal and equitable claims overlap entirely, the Court will be bound by the jury's determination of the facts as they relate to Plaintiff's First Amendment claim when determining the scope of equitable relief that he seeks. *See id.* As such, whether Plaintiff's statement is a true threat is a jury question.

Determining whether a statement constitutes a true threat is a factually-intensive and context-driven inquiry that is "determined objectively from all the surrounding facts and circumstances." *Censke*, 2009 WL 10681232, at *6; *see also Hankins*, 195 F. App'x at 301 ("A statement's context must be considered in determining whether it is a true threat."); *United States v. Jeffries*, No. 3:10-CR-100 (Phillips), 2011 WL 13186518, at *17 (E.D. Tenn. May 24, 2011) (stating that in the context of summary judgment, the question is whether a "reasonable juror… would view the communication as a 'true threat,' having considered the content of the communication, and the context in which it was sent.").

Many contextual factors are relevant when determining if a statement is a true threat. The reaction of those who hear the statement and those against whom the statement is directed is relevant. *See Thames*, 796 F. App'x at 262 (noting that the person who heard the alleged true threat was "alarmed enough" and "sincere enough" to report it; stating that this response is "meaningful" in determining whether the statement was a true threat); *Hedrick v. W. Mich. Univ.*, No. 1:22-cv-308, 2022 WL 10301990, at *8 (W.D. Mich. Oct. 17, 2022) (discussing the reactions of those who heard the alleged "true threats"). Whether the statement has a political dimension is also highly relevant. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that true threats must be distinguished from mere "political hyperbole"); *Hankins*, 195 F. App'x at 301 (stating that "[t]here was no political

context to Mr. Hankins' statements" in its analysis of the alleged true threat); *Jeffries*, 2011 WL 13186518, at *17 (stating that a court must be mindful that there is a "profound national commitment" to the principle of open political speech about public officials). The location the statement is made, to whom the statement is uttered, and whether the statement is made in conditional or absolute terms are also important considerations. *See Watts*, 394 U.S. at 708; *Thames*, 796 F. App'x at 262; *Hankins*, 195 F. App'x at 301; *United States v. Baker*, 890 F. Supp. 1375, 1381 (E.D. Mich. 1995).

Given the factual intricacy of this case, the Court cannot conclude that Plaintiff is likely to prevail on his First Amendment claim. Both parties raise good arguments on this issue. As Plaintiff explains, the Supreme Court has stated that "[t]he language of the political arena… is often vituperative, abusive, and inexact," and may "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708. As such, "political hyperbole" is protected, even if it is crude and offensive. *Id.* It cannot be doubted that Plaintiff's speech in this case regarded a political issue of public concern—he was voicing his anger over his belief that Rozell, a public official, may have been tampering with the votes in the recount.

However, "a person may not escape prosecution for uttering threatening language merely by combining the threatening language with issues of public

concern." *Polson*, 154 F. Supp. 2d at 1235–36 (quoting *United States v. Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993)). It also cannot be doubted that Plaintiff voiced a desire to see that Rozell is killed, a sentiment that has the potential to be highly threatening. Plaintiff points out that the deputies present at the recount allowed him to remain on the premises after he made the alleged "true threat," and even allowed him to give a speech to attendees, which arguably suggests that his statement was not perceived as truly threatening. ECF No. 12, PageID.88. On the other hand, Rozell testified at length about the fear he felt after learning of Plaintiff's statement and the precautions he took to protect himself and his home immediately thereafter. ECF No. 12-2, PageID.138–39. And while Howard admitted that she did not feel there was any threat of imminent harm after hearing Plaintiff's statement, *id.* at PageID.180, she was clearly "alarmed enough" and "sincere enough" to make a police report about the statement. *Thames*, 796 F. App'x at 262.

Moreover, Plaintiff's statement was not conditional—he said, in absolute terms, "hang Joe for treason," and made the statement at a contentious election recount where tensions were already running high. *See Watts*, 394 U.S. at 708 (finding a statement mere political hyperbole where it was "expressly conditional"). The history of the relationship between Plaintiff and Rozell was also strained and somewhat hostile. Plaintiff had attended prior recounts, had requested Rozell be arrested on prior occasions, and had accused Rozell of treason multiple times during

the recount in question. *See Censke*, 2009 WL 10681232, at *6 ("The alleged threatening statement must be viewed from the objective perspective of the recipient, which frequently involves the context of the relationship between the [speaker] and the recipient."). And while Plaintiff made his statement in a public location—which could support a finding that his statement was not a true threat—he also made the statement in a private conversation to someone else, which could support a finding that he was making a true threat. *See Hankins*, 195 F. App'x at 301 (the fact that the speaker was in his own home when he made his threatening statement and spoke it privately to a friend were relevant considerations in finding that his statement was a true threat, not protected political expression).

In sum, the factual circumstances of this case make it impossible for the Court to hold, at this juncture, that Plaintiff has a *likelihood* of success on his as-applied unconstitutionality argument. There are facts for and against all parties. While Plaintiff offers compelling arguments in his favor, Defendants offer compelling arguments in defense. The Court cannot anticipate how the jury will weigh these fact-intensive considerations. Therefore, the likelihood of success factor is neutral and weighs against granting a preliminary injunction. *See FCCI Ins. Co. v. Nicholas Cnty. Library*, No. 5:18-cv-038-JMH, 2019 WL 1048838, at *3 (E.D. Ky. Mar. 5, 2019) ("At present, both parties have made strong legal arguments indicating that

they may be correct… As a result, the likelihood of success on the merits is neutral, which weighs against granting a preliminary injunction.").

B. The Remaining Preliminary Injunction Factors

Because the Court cannot conclude that Plaintiff has a likelihood of success on the merits, the remaining preliminary injunction factors do not favor Plaintiff. *Connection Distrib. Co.*, 154 F.3d at 288. For example, if Plaintiff's statement was protected speech, being criminally prosecuted for that speech would constitute irreparable harm. *See Elrod*, 427 U.S. at 373 (stating that the loss of First Amendment freedoms constitutes irreparable injury). But it is not clear that Plaintiff's speech was protected, such that prosecution for that speech is an irreparable harm.

Moreover, while an injunction would not harm the government if it was attempting to enforce § 750.543m(1)(a) in an unconstitutional manner, "the government presumably would be substantially harmed" if it were prevented from enforcing § 750.543m(1)(a) against a defendant who made a true threat. *Connection Distrib. Co.*, 154 F.3d at 288. Finally, while the public interest lies in "prevent[ing] the violation of a party's constitutional rights," *G & V Lounge, Inc.*, 23 F.3d at 1079, the public interest would certainly not lie in preventing the state government and Defendant McDonald from enforcing a criminal law in a constitutional manner. Indeed, "prosecutorial discretion is a fundamental part of our criminal justice system

and… should not be infringed upon without 'exceptionally clear proof' of abuse." *United States v. Edelin*, 134 F. Supp. 2d 59, 83 (D.D.C. Mar. 9, 2001) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987)).

Thus, because the likelihood of success of Plaintiff's First Amendment claim is uncertain, the remaining TRO and preliminary injunction factors are also uncertain. TROs and preliminary injunctions are "extraordinary and drastic remed[ies]" that should only be awarded on "a clear showing that the plaintiff is entitled to such relief." *Fowler v. Benson*, 924 F.3d 247, 256 (6th Cir. 2019). Plaintiff has not made that showing.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction [ECF No. 12] and motion for a temporary restraining order [ECF No. 32] are **DENIED**.

IT IS SO ORDERED.

Dated: August 29, 2025

/s/Gershwin A. Drain
GERSHWIN A. DRAIN
United States District Judge

STATUTORY PROVISIONS INVOLVED

§ 750.543b. Definitions.

Sec. 543b.

As used in this chapter:

(a) "Act of terrorism" means a willful and deliberate act that is all of the following:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that the person knows or has reason to know is dangerous to human life.

(iii) An act that is 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.

(b) "Dangerous to human life" means that which causes a substantial likelihood of death or serious injury or that is a violation of section 349 or 350.

(c) "Harmful biological substance", "harmful biological device", "harmful chemical substance", "harmful chemical device", "harmful radioactive material", and "harmful radioactive device" mean those terms as defined in section 200h.

(d) "Material support or resources" means currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance.

(e) "Person" means an individual, agent, association, charitable organization, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee, trustee in bankruptcy, unincorporated organization, or any other legal or commercial entity.

(f) "Renders criminal assistance" means that the person with the intent to avoid, prevent, hinder, or delay the discovery, apprehension, prosecution, trial, or sentencing of a person who he or she knows or has reason to know has violated this chapter or is wanted as a material witness in connection with an act of terrorism pursuant to section 39 of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.39, does any of the following:

(i) Harbors or conceals that other person.

(ii) Warns that other person of impending discovery or apprehension.

(iii) Provides that other person with money, transportation, a weapon, a disguise, or false identification, or any other means of avoiding discovery or apprehension.

(iv) Prevents or obstructs, by means of force, intimidation, or deception, anyone from performing an act that might aid in the discovery, apprehension, or prosecution of that other person.

(v) Suppresses, by any act of concealment, alteration, or destruction, any physical evidence that might aid in the discovery, apprehension, or prosecution of that other person.

(vi) Engages in conduct proscribed under section 120, 120a, or 122 or chapter XXXII.

(g) "Terrorist" means any person who engages or is about to engage in an act of terrorism.

(h) "Violent felony" means a felony in which an element is the use, attempted use, or threatened use of physical force against an individual, or the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device.

§ 750.543m. Making terrorist threat or false report of terrorism; intent or capability as defense prohibited; violation as felony; penalty.

Sec. 543m.

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) Threatens to commit an act of terrorism and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

§ 750.543z. Constitutionally protected conduct; prosecution prohibited.

Sec. 543z.

Notwithstanding any provision in this chapter, 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.