

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

**RESPONSE TO EMERGENCY APPLICATION FOR WRIT OF
INJUNCTION**

Cynthia M. Filipovich
Counsel of Record
Robert N. Dare
CLARK HILL PLC
500 Woodward Ave, Ste 3500
Detroit, Michigan 48226
313-965-8300
cfilipovich@clarkhill.com
rdare@clarkhill.com

Counsel for Respondents

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INTRODUCTION

Applicant Andrew Hess (“Hess”) asks that this Court enjoin the Respondent Oakland County Prosecutor Karen McDonald (“Prosecutor McDonald”), from re-charging him under a Michigan criminal statute after he threatened to hang the Director of Elections during a contentious election proceeding. Hess’ First Amendment claim alleges that the applicable statute, Mich. Comp. Laws § 750.543m, is facially unconstitutional, and unconstitutional as applied to him. Hess’ Application should be denied because he is not likely to succeed on the merits of his claim.

Hess’ prior attempts to receive injunctive relief were correctly denied by the District Court and Sixth Circuit Court of Appeals. As set forth in more detail below, the District Court and Sixth Circuit Court of Appeals rightly rejected Hess’ argument that Mich. Comp. Laws § 750.543m is facially constitutional, as the principles of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) do not apply to this case. The District Court and Sixth Circuit also correctly held that Hess is unlikely to succeed on the merits of his as-applied challenge at this stage, as it is premature to rule on the question because the determination of whether his statement was a true threat is a question for a jury.

Hess’ Application contends that the Sixth Circuit and the District Court “misapprehend this Court’s ruling in *Brandenburg v. Ohio* and its application to this case.” Respondents disagree. Mich. Comp. Laws § 750.543m prohibits “true threats,” which differs from the “mere advocacy” and incitement of violence principles analyzed in *Brandenburg*. Indeed, this Court has noted that “incitement” and “true

threats” are two *different* categories of speech that states are permitted to restrict. *See Counterman v. Colorado*, 600 U.S. 66, 74 (2023). *Counterman* also made clear that a true threat requires a *mens rea* of recklessness, while incitement requires a showing of specific intent. *Counterman*, 600 U.S. at 79-81. Hess’ attempt to combine these constitutional concepts to invalidate the Michigan statute should be rejected.

As the Sixth Circuit correctly recognized in this case, consistent with *Counterman*, the Michigan Court of Appeals has specifically 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. Accordingly, given this construction, Hess is not likely to succeed on the merits of his *Brandenburg*-based facial challenge to the constitutionality of § 750.543m(1)(a).

With respect to his as-applied challenge, Hess argues that the Sixth Circuit improperly “disregard[ed] the fact that whether speech is protected by the First Amendment is a question of law for the court and not an issue to be left to the uncertainty of a jury.” Hess cites no law in support of this proposition. This is because courts have held that whether speech constitutes a true threat is a question for the jury. *See, e.g., Thames v. City of Westland*, 796 Fed Appx, 251, 262 (6th Cir. 2019). The Sixth Circuit correctly held that whether Hess’ statement was serious or political hyperbole, and whether he demonstrated a reckless disregard to substantial and unjustifiable risk that others would regard his statement as threatening violence,

are questions for the fact finder. Accordingly, at this stage, it is impossible to conclude that Hess is likely to succeed on the merits of his as-applied challenge.

The public interest and balance of equities also weigh in favor of denying Hess' Application. Defendant McDonald has a responsibility to the citizens of Oakland County to enforce the law, and she maintains broad prosecutorial discretion. She should not be prohibited from enforcing a constitutionally sound criminal law in a constitutional manner. Hess' Application for Writ of Injunction should be denied.

RELEVANT BACKGROUND

A. The Royal Oak Proposal B Recount

Royal Oak Proposal B was an initiative included on the November 7, 2023, voting ballot that permitted "ranked-choice voting," a system where, instead of selecting a single candidate, voters could rank candidates for an office. Proposal B passed by a slim margin. A recount on Proposal B was held on December 15, 2023, in the Elections Division, Board of Canvassers/Training Room ("Recount Room") inside the Oakland County Courthouse, and was overseen by Defendant-Appellee Joseph Rozell ("Rozell"), the Oakland County Director of Elections. [R. 1, PageID.5.] Deputies from the Oakland County Sheriff's Department were on-site during the recount. [Id.]

During the recount, members of the public were permitted to address the Board. [R. 1, PageID.5.] At this time, Hess gave an impassioned speech about his belief that Oakland County was "cheating" the election. During this speech, Hess stated that a group of canvassers was advised by the Director of Elections and by counsel who has "whatever rights he wants. . . [.]" [R. 12 & 13.] Hess then took aim at attorneys present

at the recount, noting that it was “bullshit” that they could sit on the other side of the table while he, an American citizen, could not. He concluded that “cheating elections is treason,” and stated to the room “what is the penalty for treason, I’ll let somebody else tell you what it is.” [R. 12 & 13.] A woman can be heard clapping and yelling “treason” in the background of the video during Hess’ speech. [Id.]

B. Hess’ Threat To Hang Rozell

Prior to Hess’ public pronouncement, he walked into the lobby and stated “hang Joe [Rozell] for treason.” [R. 1, PageID.5.] This statement was overheard by Kaitlyn Howard (“Howard”), the Receptionist. Howard approached Officer Lee Van Camp of the Oakland County Sheriff’s Office (“Officer Van Camp”) to report Hess’ statement. [R. 16-3, PageID.254.] Officer Van Camp then asked Hess to step into the lobby where he questioned Hess about the validity of Howard’s report. Officer Van Camp reported that when he notified Hess of Howard’s report, Hess “smirked [and] slightly nodded his head ‘yes.’” [R. 16, PageID.222.]

Notably, the video also shows that an individual overhears Officer Van Camp talking to Hess. The individual then walks into the frame and states, “are you admitting to saying that?” Hess attempts to respond but the individual interrupts Hess and pointedly repeats, “are you admitting to saying that?” implicitly signaling to Hess to deny it. [R. 18.] Officer Van Camp notified Rozell of Hess’ threatening statement that same day. Rozell communicated that he was in “fear of Hess, and he was in fear of his life due to Hess’ comments.” [R. 16-3, PageID.270.] Rozell notified the Huntington Woods Police Department of the potential threat to Rozell, and officers

were instructed to conduct extra patrols of Rozell's residence. [R. 16-3, PageID. 270.]. This was not the first time that Plaintiff threatened Rozell and accused him of committing a crime. At a separate recount at the Troy Community Center, Hess demanded that two sheriff's deputies arrest Rozell for interfering with the recount. [ECF No. 12-2, PageID.121.]

On January 18, 2024, Officer Van Camp was advised by the Oakland County Prosecutor's Office that it received a letter from Hess' attorney, Robert Muise, indicating that he had video evidence of the alleged threat. [R. 16-3, PageID.251.] Officer Van Camp contacted Mr. Muise to determine the identity of the individual that recorded Hess so that he could interview all potential witnesses. Surprisingly, Mr. Muise refused to identify this individual. [Id.] However, the video provided by Mr. Muise includes footage of Hess making the earlier threat against Rozell. In the video, Rozell approaches Hess to respond to a question Hess raised about precinct numbers listed on ballot containers. As the conversation concludes, Hess angrily states at Director Rozell, "treason is going to be tough." [R. 18-1, PageID.313.]

C. Hess Is Charged With Making A Terrorist Threat Under Mich. Comp. Laws § 750.543m

On or about April 1, 2024, Oakland County Prosecutor McDonald charged Hess with making a terrorist threat in violation of Mich. Comp. Laws § 750.543m. In relevant part, the statute provides that "(1) [a] person is guilty of making a terrorist threat . . . if the person . . . (a) [t]hreatens to commit an act of terrorism and communicates the threat to any other person." Mich. Comp. Laws § 750.543m(1)(a). An act of terrorism is defined as "a willful and deliberate act that is all of the following:

(i) [a]n act that would be a violent felony under the laws of this state, whether or not committed in this state; (ii) [a]n act that the person knows or has reason to know is dangerous to human life; (iii) [a]n 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.” Mich. Comp. Laws § 750.543b.

A warrant for Hess’ arrest was issued on April 4. [R. 1, PageID.13-14.] While the proceedings against Hess were pending, on February 13, 2025, the Michigan Court of Appeals addressed the validity of Mich. Comp. Laws § 750.543m in *People v. Kvasnicka*, No. 371542, 2025 WL 492469 (Mich. Ct. App. Feb. 13, 2025) (“*Kvasnicka I*”). The Court of Appeals held that the statute was unconstitutional because it did not address the defendant’s state of mind when he “threatens to commit an act of terrorism.” *Id.* at *4. Prosecutor McDonald sought a stay of the case against Hess based on the ruling, but the charge was instead dismissed without prejudice on March 6, 2025, over the Prosecutor’s objections.

In an Order dated March 28, 2025, the Michigan Supreme Court vacated the Michigan Court of Appeals’ ruling in *Kvasnicka I* and remanded the case to the Court of Appeals to consider: “the proper interpretation of MCL 750.543m in light of MCL 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 to the constitution of the United States in a manner that violates any constitutional provision’; and . . . the constitutional-doubt canon.” *People v. Kvasnicka*, 18 N.W.3d 308 (Mich. 2025). The Michigan Supreme Court likewise directed the Court of Appeals

to address “whether it is appropriate to adopt a limiting construction of MCL 750.543m to remedy any remaining constitutional deficiency” and, “if so, what that limiting construction should be . . . [.]” *Id.*

D. Hess Files A Complaint, A Motion For Preliminary Injunction, An Amended Complaint, And A Motion For Temporary Restraining Order, And Respondents Seek Dismissal

On March 10, 2025, while the status of Mich Comp. Laws § 750.543m’s constitutionality was under scrutiny, Hess filed a Complaint with the United States District Court for the Eastern District of Michigan asserting six causes of action, including a First Amendment claim (Count I). [R. 1.] Hess next filed a Motion for Preliminary Injunction on April 1, 2025. [R. 12.]

Respondents moved to dismiss Hess’ Complaint and filed a Response to Hess’ Motion for Preliminary Injunction. In lieu of responding to Defendants’ Motion to Dismiss, Hess filed a First Amended Complaint, which contained largely the same causes of action.¹ [R. 23.] Defendants likewise moved to dismiss the First Amended Complaint, which remains pending before the District Court. [R. 27.] A hearing on Respondents’ Motion to Dismiss is scheduled for November 17, 2025.

E. On Remand, the Michigan Court of Appeals Upholds the Constitutionality of Mich. Comp. Laws § 750.543m

On July 21, 2025, the Michigan Court of Appeals, on remand from the Michigan Supreme Court, reviewed the constitutionality of Mich. Comp. Laws § 750.543m. The

¹ Hess’ Amended Complaint asserts violations of the Second, Fourth (malicious prosecution and unlawful seizure), and Fourteenth Amendments (Counts I, II, III, V, and VI) and a claim for False Light/Invasion of Privacy (Count IV).

Court of Appeals first noted that in *Counterman v. Colorado*, 600 U.S. 66 (2023), the U.S. Supreme Court determined that “in a true-threats case, a subjective mental state was constitutionally required in order to avoid chilling constitutionally protected speech.” *People v. Kvasnicka*, No. 371542, 2025 WL 2045006, at *3 (Mich. Ct. App. July 21, 2025) (“*Kvasnicka II*”). Thus, the Court of Appeals explained that, according to the U.S. Supreme Court, in a true-threats case “[t]he state must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another.” *Id.*

Next, the Court of Appeals observed that the prior case law in Michigan addressing the constitutionality of Mich. Comp. Laws § 750.543m determined that the statute only applies to true threats, but that those cases were decided prior to *Counterman*, so they did not answer the question at issue in *Kvasnicka* – whether Mich. Comp. Laws § 750.543m was facially unconstitutional because it does not include an intent element. *Kvasnicka II*, 2025 WL 2045006, at *4. Relying on constitutional principles – many of which Hess relies on in this case – the Court of Appeals explained that “a statute is not unconstitutional merely because it is silent regarding the element of intent.” *Kvasnicka II*, 2025 WL 2045006, at *5 (citing *Elonis v United States*, 575 U.S. 723, 734 (2015)). The Court of Appeals concluded that under *Elonis*, the lack of an express *mens rea* requirement in Mich. Comp. Laws § 750.543m(1)(a) is not dispositive as to the statute’s constitutionality because the statute should be broadly interpreted to include a *mens rea* requirement even though

the statute is otherwise silent.” *Kvasnicka II*, 2025 WL 2045006, at *6. And, “under the constitutional-doubt canon of statutory interpretation, it is ‘fairly possible’ to construe MCL 750.543m(1)(a) as constitutional by interpreting MCL 750.543m(1)(a) to include a *mens rea* requirement that does not fall foul of the decision in *Counterman*.” *Kvasnicka II*, 2025 WL 2045006, at *6 (citing *Sole v. Michigan Econ. Dev. Corp.*, 983 N.W.2d 733 (Mich. 2022)). Accordingly, contrary to Hess’ claim, the Court of Appeals held that Mich. Comp. Laws § 750.543m is not facially unconstitutional. *Kvasnicka II*, No. 2025 WL 2045006, at *1. Hess subsequently filed a Motion for Temporary Restraining Order (“TRO”) seeking the same relief requested within his Motion for Preliminary Injunction. [R. 32.]

F. The District Court and Sixth Circuit Court of Appeals Deny Hess’ Motions for Injunctive Relief

On August 29, 2025, the District Court issued an Opinion and Order denying Hess’ Motion for Temporary Restraining Order and Motion for Preliminary Injunction. [R. 36.] In the Opinion and Order, the District Court concluded that Hess could not demonstrate a likelihood of success on the merits with respect to his First Amendment claim, and that the remaining preliminary injunction factors do not favor Hess. [R. 36, PageID. 885-894.]

First, the District Court determined that Hess was not likely to prevail on his argument that Mich. Comp. Laws § 750.543m(1)(a) was facially unconstitutional based on *Brandenburg* because the test articulated in *Brandenburg* applied to speech that constituted “incitement,” not “true threats.” [R-36.] Next, the District Court explained that it could not conclude that Hess was likely to prevail on his as-applied

challenge to Mich. Comp. Laws § 750.543m, explaining that “given the factual intricacy of this case,” both Hess and Respondents had raised credible arguments as to whether Hess’ threat could appropriately be categorized as a “true threat.” Specifically, the District Court noted that “[i]t cannot be doubted that [Hess] voiced a desire to see that Rozell is killed, a sentiment that has the potential to be highly threatening.” [R. 36, PageID.892.]

Further, the District Court observed that it could not discount the fact that Hess’ statement was made during a contentious recount and was not conditional, but rather, stated in absolute terms. Still, the highly fact-intensive inquiry of a First Amendment claim precluded the District Court from definitively ruling that Hess’ as-applied challenge was *likely* to succeed. [Id.]

On the same day that the Opinion and Order was issued, Hess filed a Notice of Interlocutory Appeal. [R. 37.] A few days later, on September 2, 2025, Hess filed a Motion for Injunction Pending Appeal in the District Court and the Sixth Circuit. [R. 39.] In an Order dated September 3, 2025, the District Court denied the Motion for the same reasons as articulated in its Opinion and Order on Hess’ Motion for Preliminary Injunction. [R. 40.]

On October 1, 2025, the Sixth Circuit denied Hess’ Motion for Injunction Pending Appeal, ruling that Hess is unlikely to succeed on his *Brandenburg*-based facial challenge to Mich. Comp. Laws § 750.543m(1)(a), and that Hess was unlikely to succeed on the merits of his as-applied challenge because the relevant questions, which turn on objective reasonableness and factual context, must be answered by a

fact finder. *Hess v. Oakland Cnty.*, No. 25-1784, 2025 WL 2848964, at *2 (6th Cir. Oct. 1, 2025). Hess’ Application for Writ of Injunction followed

ARGUMENT

I. Legal Standards

A party “seeking a preliminary injunction must establish 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.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A Circuit Justice’s issuance of a writ of injunction, which grants judicial intervention that has been withheld by lower courts, requires a significant justification. *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers). As Justice Scalia explained, “[t]he Circuit Justice’s injunctive power is to be used sparingly and only in the most critical and exigent circumstances, and only where the legal rights at issue are indisputably clear.” *Id.* (internal quotations and citations omitted). In addition, an applicant for writ of injunction must demonstrate that the injunctive relief sought is “necessary and appropriate in aid of [the Court’s] jurisdiction.” *Id.* (quoting 28 U.S.C. § 1651(a)). The Applicant here fails to make this showing.

II. The District Court and Sixth Circuit Court of Appeals Correctly Concluded That Hess is Not Likely to Succeed on the Merits

The alleged basis for Hess’ Application is that the enforcement of Mich. Comp. Laws § 750.543m violates his First Amendment rights. Hess argues that the applicable statute is unconstitutional because it is inconsistent with *Brandenburg v.*

Ohio. Hess also contends that the statute is unconstitutional as applied to him. The District Court and the Sixth Circuit Court of Appeals correctly concluded that Hess is not likely to succeed on the merits of his First Amendment claim on either theory. Hess' Application for Writ of Injunction should be denied for the same reasons.

A. Hess' Threat Is Not Protected Speech and Mich. Comp. Laws § 750.543m is Constitutional

Hess argues that his threat to “hang” Rozell is protected by the First Amendment. Hess asserts that § 750.543m is inconsistent with *Brandenburg* and thus facially unconstitutional because it criminalizes offending speech without requiring proof that the speech is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. However, as the Sixth Circuit panel explained in its denial of Hess' Motion for Injunction, § 750.543m prohibits “true threats,” which differs from the incitement of violence principles analyzed in *Brandenburg*, and the statute is consistent with the requirements of *Counterman*.

In *Brandenburg*, a Ku Klux Klan leader invited a reporter to attend a cross-burning rally and stated on camera that if the government continued to “suppress the white, Caucasian race” vengeance may be taken. *Brandenburg*, 395 U.S. at 446. It was further stated that the Klan would be “marching on Congress” on the Fourth of July. *Id.* The Ku Klux Klan leader was later tried and convicted under the Ohio Criminal Syndicalism Statute based on 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.

This Court analyzed the Ohio Criminal Syndicalism Statute and held that it was unconstitutional because it criminalized mere advocacy without requiring the advocacy to be directed at inciting imminent lawless action. The Court explained that “the mere abstract teaching of the moral propriety or even moral necessity for a resort to force or violence, is not the same as preparing a group for violent action and steeling it to such action.” *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-298 (1961)). The Court’s analysis in *Brandenburg* created 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 v. Wayne Cnty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015) (stating that “[t]he Supreme Court has repeatedly referred to *Brandenburg* . . . as establishing the test for incitement”) (citing *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 447 (1974) and *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982)).

That said, as this Court has recognized, “true threats” are conceptually distinct from speech that is “inciting.” *Counterman*, 600 U.S. at 74. This Court has explained that there are a limited number of categories of permitted restrictions on the content of speech. “One is incitement – ‘statements directed at producing imminent lawless action,’ and likely to do so.” *Id.* To determine whether speech is “inciting,” the focus is on whether the speech at issue is directed at and likely to spur imminent lawless action, i.e., “preparing a group for violent action and steeling it to such action.” *Brandenburg*, 395 U.S. at 447-448.

Another, separate, “historically unprotected category of communications” is “[t]rue threats of violence.” *Counterman*, 600 U.S. at 74. Whether speech constitutes a “true threat” looks to whether the speech communicates a “serious expression of an intent to commit an act of unlawful violence.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). “Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat.” *Counterman*, 600 U.S. at 74 (citing *Elonis*, 575 U.S. at 733). Moreover, “the existence of a threat . . . depends on ‘what the statement conveys’ to the person on the other end.” *Id.* Rather, this Court has held that the question is whether a reasonable observer would understand the communication to be “a serious expression of intent to harm.” *Counterman*, 600 U.S. at 79. Or, in other words, whether the speaker knew “that others may regard his statement[] as ‘threatening violence,’” but proceeded to utter it anyway. *Id.* To constitute a “true threat,” there is no requirement that the speaker actually intends to carry out his threat. *United States v. Dodson*, No. 22-3998, 2024 WL 712494, at *5 (6th Cir. Feb. 21, 2024).

This Court has made clear that a true threat requires a *mens rea* of recklessness, while incitement requires a showing of specific intent. *Counterman*, 600 U.S. at 79-81 (concluding that “[i]t is not just that our incitement decisions are distinguishable; it is more that they compel the use of a distinct standard here. That standard, again, is recklessness”). As noted by the Sixth Circuit in this case, consistent with *Counterman*, the Michigan Court of Appeals specifically 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.” *Hess*, No. 25-1784, 2025 WL 2848964, at *2 (quoting *Kvasnicka*, 2025 WL 2045007 at *6). Given this construction, Hess is not likely to succeed on the merits of his *Brandenburg*-based facial challenge to the constitutionality of § 750.543m(1)(a).

On Nov. 7, 2023, the day of the recount, Hess engaged in both protected *and* unprotected speech. Hess tries to contend that his criminal charge stemmed from the former, but objective evidence proves otherwise. During the recount, video footage submitted by Hess shows that while in the Recount Room, he addressed the Board and the public about his belief that Oakland County officials were “cheating” the election. During his speech, Hess directed his anger at attorneys present at the recount, stating that it was “bullshit” they were allowed on the other side of the table while he, an American citizen, was not. He concluded that cheating an election was treason and that he would let somebody else comment on what the penalty for treason was. These are not the statements that led to the criminal charge.

The unprotected speech at issue in this case stems from Hess’ statements *before* he entered the Recount Room. When Hess entered the lobby, he said, in a raised voice, “hang Joe for treason.” On a separate occasion, he directly told Rozell, in an agitated voice, that “treason is going to be tough.” In these instances, Hess was not articulating a political opinion or idea, however unpopular, nor were these remarks made in jest. They were direct, physical threats of violence against Rozell. Circuit courts have routinely held that similar threats of physical violence against an individual or group

of individuals amounts to “true threats” and is not protected speech. *See D.J.M. ex rel P.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 760–65 (8th Cir. 2011) (holding that a student’s statements on an instant messaging platform that he desired to obtain a gun to shoot himself and others were “true threats” and not protected speech under the First Amendment); *Torres v. Clark*, No. 12–3997, 2013 WL 1409327, at *1–2 (3d Cir. 2013) (holding that a prisoner’s statement in a letter that if a correctional officer “keeps acting like he is above policy/law somebody is going to break his jaw” constituted a “true threat”).

Hess argues that Howard did not consider the threat “to be a serious ‘expression of an intent’ to commit harm.” If that were true, Howard would not have reported the comment to the police. Rozell similarly viewed the threat as an intent to commit harm, as evidenced by his request to increase a police presence in and around his home after the recount. And even so, expressions of anger and “bad talk” can still amount to “true threats.” In *People v. Osantowski*, 736 N.W.2d 289, 294–96 (Mich. Ct. App. 2007), *rev’d in part, appeal denied in part*, 748 N.W.2d 799 (Mich. 2008), the defendant student expressed to another student that he had weapons at his disposal and labeled himself a “mass murderer.” *Id.* at 301. He was arrested and charged under Mich. Comp. Laws § 750.543m, among other statutes, for threats of terrorism. *Id.* at 294. The Michigan Court of Appeals affirmed that the defendant’s statements were “true threats” and not constitutionally protected speech because “true threats need not include an intent for direct intimidation. [E]ven those threats not intended to be conveyed to the potential victim can be criminalized because of the state’s overwhelming interest in preventing

the disruption that can result from such threats.” *Id.* at 299. Thus, Hess’ assertion that he did not seriously intend to commit harm and his peculiar focus on the fact that Rozell was not in the lobby when he uttered the threat are immaterial.

Hess is not likely to succeed on the merits of his facial challenge to the constitutionality of §750.543m(1)(a). Hess seeks to apply *Brandenburg* when it has no place here. He asks this Court to analyze the Michigan statute as criminalizing actions of incitement, but the statute criminalizes particular threats. This is precisely why the District Court and Sixth Circuit correctly concluded that Hess’ *Brandenburg* argument is misplaced. This Court should arrive at the same conclusion, and deny Hess’ Application.

Moreover, when considered in light of the surrounding circumstances, Hess’ statement regarding hanging the Director of Elections during a contentious recount is the exact type of speech that this Court has enabled states to curtail, and for good reason. There is simply no value to Hess’ direct threat to “hang Joe for treason” and Hess uttered this threat with no regard to who might hear it or how his statement might be interpreted. Hess cannot demonstrate this statement is protected speech.

B. Hess is Not Likely to Succeed on the Merits of his As-Applied Challenge

Hess’ as-applied challenge is premature. Plaintiff incorrectly contends that “whether Applicant’s speech is protected by the First Amendment is not an issue for the jury to decide. It is a question of law for the court.” [Application, p. 16]. However, as the District Court cogently explained:

[Hess] 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.

Hess v. Oakland Cnty., No. 2:25-CV-10665, 2025 WL 2491111, at *7, n.3 (E.D. Mich. Aug. 29, 2025).

Whether Hess’ statement was serious or political hyperbole, and whether he demonstrated a reckless disregard to substantial and unjustifiable risk that others would regard his statement as threatening violence, *see Counterman*, 600 U.S. at 79, are questions for the fact finder – and which demands an evaluation of the factual context and all surrounding facts and circumstances. As the District Court noted, in a true threat case, this includes but is not limited to, determining the reaction of those who hear the statement and those against whom the statement is directed, the location the statement is made, and whether the statement is made in conditional or absolute terms. *See Watts v. United States*, 394 U.S., 705, 708 (1969); *Thames v. City of Westland*, 796 F. App’x at 262; *United States v. Hankins*, 195 F. App’x 295, 301 (6th Cir. 2006). Accordingly, this Court should reach the same conclusion as the Sixth Circuit and the District Court – that additional factual development is required and that a jury must weigh fact-intensive considerations.

The parties have not engaged in discovery, nor has there been any fact finding whatsoever. Accordingly, “the factual circumstances of this case make it impossible for the Court to hold, at this juncture, that [Hess] has a likelihood of success on his as-applied constitutional argument.” *Hess*, No. 2:25-CV-10665, 2025 WL 2491111, at *9. Hess’ Application should be denied.

Here, Hess shared his wish for Rozell to be killed, an obviously threatening statement. It was made in absolute terms during a contentious recount after Hess accused Rozell of treason, and after Hess had demanded Rozell be arrested at prior election proceedings. Howard felt the statement was sincere enough to report it to police, and Rozell requested additional police presence around his home after learning about the statement, particularly given his past heated interactions with Hess. In Defendants’ view, the facts and circumstances here dictate that Hess’ statement was a true threat and the prosecution of Hess under Mich. Comp. Laws § 750.543m(1)(a) is constitutional, or else the Prosecutor would not have charged him. Hess’ Application relating to his as-applied challenge should be denied because he cannot show a likelihood of success on the merits.

III. The Public Interest and the Balance of the Equities Favors the Denial of Injunctive Relief

Preventing Prosecutor McDonald, from prosecuting Hess under a statute that remains constitutionally sound impermissibly impedes her broad prosecutorial discretion, which, in turn, negatively impacts others and the public. These factors therefore weigh in favor of denying Hess’ Application.

As chief law enforcement officer of Oakland County, Michigan, Prosecutor McDonald has a duty to investigate and prosecute individuals that violate the law. In our criminal justice system, the Government retains “broad discretion” as to whom to prosecute. *Wayte v. United States*, 470 U.S. 598 (1985). While that discretion is subject to constitutional restraints, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [her] discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

Given the finite resources at Prosecutor McDonald’s disposal, she must retain the ability to focus her efforts on cases that impact public safety. An award of injunctive relief barring Prosecutor McDonald from exercising her discretion to re-charge and prosecute Hess for acts he has all but admitted to would undoubtedly interfere with this objective and harm the public. Moreover, public confidence in Prosecutor McDonald and Oakland County will be severely undermined. This is especially true given that Hess has provided no grounds for this Court to limit Prosecutor McDonald’s well-established discretion. Accordingly, this factor likewise weighs in favor of denying Hess’ Application and request for injunctive relief.

The balance of equities also favors the denial of injunctive relief. Equitable remedies are a special blend of what is *necessary, what is fair, and what is workable*. *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (emphasis added). The relief Hess seeks is none of these. As this Court has indicated, courts must “consider the effect on each

party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24. Hess cannot show that the balance of harms weighs in his favor.

Hess claims that his First Amendment rights have been chilled. Once again, this factor only weighs in favor of Hess if he can establish that he engaged in protected speech, which he cannot. Likewise, it is undisputed that Hess, through his counsel, continues to engage in protected speech and has done so for the past year. But while Hess asserts that “if Respondents are restrained from unlawfully enforcing § 750.543m, they will suffer no harm,” his argument remains largely undeveloped. [Application, p. 23]. This is because Hess fails to distinguish the harm to the Defendant Oakland County Prosecutor from the harm to the individuals on the receiving end of his threats, like Defendant Rozell.

“True threats subject individuals to ‘fear of violence’ and to the many kinds of ‘disruption that fear engenders.’” *Counterman*, 600 U.S. at 74 (quoting *Black*, 538 U.S. at 360)(internal quotation marks omitted). And the government has a strong interest in “reducing the climate of violence to which true threats of injury necessarily contribute.” *United States v. Malik*, 16 F.3d 45, 51 (2d Cir. 1994). After Rozell learned of Hess’ threat, he told Officer Van Camp that he feared for his life and sought protection from the Huntington Woods Police Department by way of additional patrols around his residence. Hess’ threat harmed Rozell and his family by causing them to fear for Rozell’s life and by disrupting their daily activities. This, no doubt, was Hess’ intention when he threatened to hang Rozell because he was unhappy with the outcome of an election. This factor weighs in favor of denying Hess’ Application.

CONCLUSION

Writs of injunction are “to be used sparingly and only in the most critical and exigent circumstances, and only where the legal rights at issue are indisputably clear.” *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1312 (Scalia, J., in chambers). Hess has failed to establish that this extraordinary remedy is appropriate. This Court should deny the Application.

Respectfully submitted,

Cynthia Filipovich
Counsel of Record

Robert N. Dare
CLARK HILL PLC
500 Woodward Ave, Ste 3500
Detroit, Michigan 48226
313-965-8300
cfilipovich@clarkhill.com
rdare@clarkhill.com

DATE: October 17, 2025