No. 25A402

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)

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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INTRODUCTION

Process is punishment. Enduring the trials and tribulations of a felony charge (*i.e.*, having a warrant issued for your arrest, being subject to bond conditions that restrict your liberty, having to miss work to appear in court, enduring the stress placed on your young family over the uncertainty of your fate, facing social opprobrium associated with a felony charge, and impairing your ability to provide for your young family) causes significant harm. *See* Appl. 5-8. Such prosecutions destroy lives well before a jury is empaneled. Having to face this punishment (1) because of a political comment ("hang Joe for treason"), (2) made in a "normal conversational tone," (3) in a near-empty lobby, (4) outside of the presence of any election official (including the "Joe" referenced in the comment), (5) that was merely overheard by a secretary, (6) who was admittedly not part of the conversation, and (7) who believed there was no imminent threat of harm, (8) but who made the complaint because she doesn't "take kindly" to such language (Appl. 5-8) eviscerates the First Amendment. Make no mistake: this prosecution is a serious threat to 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). The requested injunction should issue.

REASONS FOR GRANTING THE APPLICATION

I. ABSENT AN IMMEDIATE INJUNCTION, APPLICANT FACES IRREPARABLE HARM.

There is no reasonable dispute that Applicant will suffer irreparable harm as a result of this punishment for exercising his right to free speech. As this Court has long held, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *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*). And there can also be no reasonable dispute that granting the requested injunction, which is limited to the enforcement of Michigan Compiled Laws § 750.543m against Applicant in this case, promotes the public interest. *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

II. THE COURTS HAVE A DUTY TO PROTECT APPLICANT'S RIGHT TO FREE SPEECH.

The lower courts and Respondents contend that Applicant's right to free speech in this case—a case where there is no dispute of material fact as to the content and

context of the speech[1]—must be subject to the biases and whims of a jury that doesn't "take kindly" to such language. *See* Resp. 17-19. Respondents argue that there is no legal basis to ask a court to step in and stop the prosecution of Applicant for exercising his right to free speech. Respondents also argue that Applicant has cited no case law that would permit such an act by a court of law. *See* Resp. 2. Respondents are wrong on all counts. Applicant cites and principally relies upon this Court's decision in *Watts v. United States*, 394 U.S. 705 (1969), for which Respondents (and the lower courts) have no good answer. And the reason for this is simple: *Watts* compels this Court to grant the requested relief.

In *Watts*, the Court did not simply rely on a jury's determination as to whether the speech at issue was protected by the First Amendment. Rather, the Court *reversed* the jury's conviction for the alleged "true threat." Per this 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.[2] For we must interpret the

[1] Respondents assert that there has not "been any fact finding whatsoever." Resp. 19. That assertion is demonstrably false. There was a preliminary examination in which the prosecutor presented the testimony of the government's witnesses, and these witnesses were cross-examined by Applicant's counsel. That is why the application contains direct quotes from the hearing transcripts of these material witnesses. *See* Appl. 5-8. The record is sufficiently developed. There was only one percipient witness who came forward to complain about the alleged "threat," and that was Ms. Howard. Joe Rozell testified, but as his testimony demonstrates, he never witnessed Applicant stating that he was going to hang him or engage in any other violence against him (or any other election official)—because Applicant never did, as Rozell admits. *See* Appl. 6.

[2] There can be no serious dispute that saying "hang [a government official] for treason" is political hyperbole, and a court should say so. What if the comment was "tar and feather Joe for treason," or "imprison Joe for life for treason," is there any doubt that these are political comments? Even today you can purchase online Trump

> language . . . against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 708 (citations and internal quotations omitted). The Court did not flee from its duty to say what the law is nor did it abdicate its responsibility to protect fundamental liberties from the overreach of government prosecutors. Rather, this Court defended the fundamental right to free speech and reversed the jury's determination. Here, there is no dispute of material fact that requires a jury, and Applicant should not have to endure the punishment of prosecution in order to protect his rights under the First Amendment. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), this Court similarly reversed a jury verdict in favor of protecting the free speech rights of the defendant—an individual who made threatening comments in public and with the intent that the persons to whom they were directed heard the threats, understood them, and were coerced by them.

Furthermore, this is not an ordinary "true threats" statute. The felony statute at issue only punishes "serious expressions of intent to commit *an act of terrorism*." *People v. Osantowski*, 274 Mich. App. 593, 606 (2007) (emphasis added). An "act of terrorism" is defined as a "willful and deliberate act" that would comprise a "violent felony," known to be "dangerous to human life," and which is specifically "*intended to intimidate or coerce a civilian population or influence or affect, the conduct of*

"traitor" (https://tinyurl.com/3bseuv9a) or "Hang Biden for Treason" t-shirts (https://www.redbubble.com/shop/biden+treason+t-shirts).

government or a unit of government through intimidation or coercion."[3] Mich. Comp. Laws § 750.543b(a) (emphasis added). Respondents (and the lower courts) entirely disregard this aspect of the criminal statute. How can a comment made in a "normal conversational tone" (Applicant did not make the comment with a "raised voice," as Respondents falsely assert, *see* Resp. 15; *but see* Appl. 8 [prosecutor stipulating it was "normal conversational tone"]) in a near-empty lobby outside of the presence of any election official that was overheard by a secretary who was not part of the conversation be made with an "inten[t] to intimidate or coerce . . . or influence or affect, the conduct of government or a unit of government through intimidation or coercion"? Respondents' position is not credible on its face.[4]

When there is no evidence to support all of the elements of a criminal prosecution, particularly in a speech case, it is incumbent upon the court to dismiss the charge before sending the case to a jury. *See United States v. Alkhabaz*, 104 F.3d

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[3] The principle of law expressed in *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 (emphasis added). Consequently, advocating for the use of force or law violation (*i.e.*, asserting that government officials who cheat on elections should hang for treason) in order to "intimidate or coerce a civilian population or influence or affect, the conduct of government or a unit of government through intimidation or coercion" must be directed to inciting or producing such imminent lawless action and likely to produce such action. Otherwise, per *Brandenburg*, such speech is protected by the First Amendment.

[4] Additionally, what evidence supports the constitutional requirement that Applicant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence," as required by *Counterman v. Colorado*, 600 U.S. 66 (2023), and *People v. Kvasnicka*, No. 371542, 2025 Mich. App. LEXIS 5764, at *16 (Ct. App. July 21, 2025)? There is none. Ms. Howard admits that she was not a party to any conversation with Applicant and that she simply overheard his comment. Appl. 7.

1492, 1493 (6th Cir. 1997) (concluding that the indictment failed "as a matter of law" to allege a violation of 18 U.S.C. § 875(c) in a case involving e-mails sent by the defendant to his online friend concerning a plan to torture, rape, and murder a third person); *United States v. Stock*, 728 F.3d 287, 298 (3d Cir. 2013) ("[W]e reaffirm that a court may properly dismiss an indictment as a matter of law if it concludes that no reasonable jury could find that the alleged communication constitutes a threat or a true threat."); *see also Sandul v. Larion*, 119 F.3d 1250 (6th Cir. 1997) (shouting "f--k you" and extending middle finger to abortion protestors was protected speech and could not serve as a basis for criminal liability); *see generally United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177 (6th Cir. 1992) ("Whether an indictment adequately alleges the elements of the offense is a question of law subject to de novo review."); *United States v. Maney*, 226 F.3d 660, 663 (6th Cir. 2000) ("We review de novo a district court's determination that an indictment adequately alleges the elements of the offense charged."). Here, there is no evidence (and thus no basis for a jury to be empaneled and for Applicant to suffer the harm caused by a felony prosecution) to conclude that the political comment uttered in the context of this case constitutes a "serious expression of intent to commit an act of terrorism." None.

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

finding that there was some evidence that defendant intended to communicate a true threat when he made his Snapchat post." *Id*. at 690. No such finding is possible in this case against Applicant as there is no evidence to support such a finding. Indeed, the evidence demonstrates otherwise (*i.e.*, Applicant did not intend to communicate a "true threat"—he made clear to the deputy who questioned him at the scene that he was accusing "Joe" of a crime as Applicant believes that people who cheat on elections should be prosecuted and punished for treason, the very point Applicant made during his public comments given immediately after this interrogation by the deputy, Appl. 5, n.1). As the *Gerhard* court explained, "As a general matter, a person 'may not be punished because [he or she] negligently overlooked the possibility that someone else would show [a person not intended as a recipient] the Snapchat contents [*i.e.*, the threat]." *Id*. at 692 (citation omitted). The *Gerhard* court ultimately found the existence of probable cause to bind the defendant over because "[t]his is clearly not a situation in which a person shares a private post with a limited number of known associates, only to discover that one of those associates breached his trust by sharing it further. Rather, defendant clearly intended his post to be essentially public." *Id*. at 693 (emphasis added). Accordingly, the court concluded: "When all of these concerns are considered together and in context, there was ample basis for the district court to find probable cause that defendant knew, at the time he made his Snapchat post, that recipients who fell into the category of persons he considered 'snowflakes' would receive and feel threatened by the post." *Id*. at 695 (emphasis added).

In this case, there is zero evidence showing that Applicant knew, at the time he made his comment in the lobby—a lobby where Joe Rozell was not located—"that recipients who fell into the category of persons" who were the alleged target of the "terrorist threat" (*i.e.*, Joe Rozell) "would receive and feel threatened by the" comment. This lack of evidence requires the granting of the requested injunction.[5] Here, Applicant never communicated any threat to Joe Rozell or any other election official at the recount, as Rozell himself testified during the preliminary examination. *See* Appl. 6. As the undisputed evidence shows, the alleged "threat" was simply overheard by a secretary who was admittedly not a party to the conversation and who reported the "threat" because she doesn't "take kindly" to such language. Appl. 6-8.

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

[5] There is also no evidence that Applicant intended to threaten an "act of terrorism." *See supra.*

Finally, Respondents and the lower courts completely ignore the statutory framework in which § 750.543m operates. Section 750.543z, which is part of this framework, expressly states, "a prosecuting agency *shall not* prosecute any person or seize any property for conduct *presumptively* protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision." Mich. Compl Laws § 750.543z (emphasis added). Accordingly, if the speech at issue is "presumptively" protected by the First Amendment, then no ("shall not") prosecution is permitted.[6] Therefore, the statute itself contemplates an initial determination as to whether the speech is protected by the First Amendment before a prosecution can proceed. Constitutional issues are ultimately issues for the court and not a jury. *Watts*, 394 U.S. at 707 (reversing conviction on First Amendment grounds and stating, "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995) (conducting an independent examination of the record in a First Amendment case because "we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection"). An accused does not surrender his constitutional rights to the biases and uncertainties of a jury. *Watts* affirms this point, and so does § 750.543z. And the political nature

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

and context of the speech at issue further affirm this point. As stated by this Court, "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *NAACP v. Claiborne Hardware Co,* 458 U.S. 886, 913 (1982) (internal quotations and citations omitted). As observed by the Sixth Circuit, sitting *en banc*:

> The First Amendment offers sweeping protection that allows all manner of speech to enter the marketplace of ideas. This protection applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted. The protection would be unnecessary if it only served to safeguard the majority views. In fact, it is the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment.

Bible Believers v. Wayne Cnty., 805 F.3d 228, 243 (6th Cir. 2015). We are here today because Kaitlyn Howard overheard a comment uttered by Applicant that she didn't "take kindly to." Appl. 8. The First Amendment does not permit this prosecution for political speech.

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. *G & V Lounge, Inc.*, 23 F.3d at 1079; *Dayton Area Visually Impaired Persons, Inc.*, 70 F.3d at 1490. 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). This is a pure speech case. There is no violent conduct involved. The Oakland County Prosecutor is seeking to criminalize a political

comment 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. Not only is this comment not a "serious expression of intent to commit an act of terrorism," it is manifestly political hyperbole protected the First Amendment. *See Watts*, 394 U.S. 705. The injunction should issue.

CONCLUSION

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

Respectfully submitted,

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