STATE OF MICHIGAN
IN THE COURT OF APPEALS
(Riordan, PJ; Hood & Servitto, JJ)

TAMMY McGUIRE, Petitioner-Appellee, v MICHAEL ZORAN, Respondent-Appellant.	Court of Appeals No. 329190 St. Clair Circuit No. 15-001798-PH Hon. John D. Tomlinson

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BRIEF OF PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT AND PROF. AARON H. CAPLAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT-APPELLANT

ORAL ARGUMENT REQUESTED*

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* *Amici* are also filing a motion asking that Prof. Volokh be granted a portion of Respondent-Appellant's time at the September 11, 2018 oral argument.

** Counsel thank law student Ryan Vanderlip for his work on this brief.

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Interest of *Amici Curiae*

The Pennsylvania Center for the First Amendment is a leading national First Amendment research center housed in the Donald P. Bellisario College of Communications at Penn State University. Founded in 1992, the Center has continuously provided education programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics, and is a leader in education, research, and outreach concerning the fundamental rights of free expression and free press in the United States. It is particularly interested in the maintenance of proper First Amendment limits on injunctions, PPOs, and similar speech restrictions.

Aaron H. Caplan is a professor of law at Loyola Law School, Los Angeles, where he teaches First Amendment law. He is the author of, among many other articles, Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L J 781 (2013), which deals with the legal issues involved in this case.

Summary of Argument

Zoran wrote several Facebook posts and messages sharply criticizing McGuire, his neighbor and local political adversary. McGuire believed these messages were false and harmful to her reputation. If they were, Michigan law allows her a remedy: a tort action for damages if she prevails in a jury trial. Michigan law and the First Amendment do not authorize the order issued below—a vaguely worded injunction purporting to forbid future online criticism of McGuire, issued without any evidentiary showing or judicial finding that either Zoran's past speech or the enjoined future speech consisted of true threats, solicitation of crime, or any other category of constitutionally unprotected speech.

McGuire petitioned for an order against "stalking" under MCL 600.2950a. That statute defines "stalking" to include violations of MCL 750.411h ("unconsented contact" between petitioner and respondent), MCL 750.411i (aggravated stalking, consisting chiefly of threats by petitioner against respondent), or MCL 750.411s (posting of certain online messages without petitioner's consent). McGuire's allegations included no direct contact of any sort between Zoran and McGuire: not in person, over the telephone, in writing, via text message, via email, or any other person-to-person form of communication. Nor were there any allegations of threats. Only MCL 750.411s was at issue, with McGuire in essence alleging that Zoran violated that statute by saying uncomplimentary (and allegedly false) things about McGuire on Facebook to the public at large, and that those statements could lead others to say unwanted things to her, Speech to the public at large is, of course, strongly protected by the First Amendment, and also by the statute, which explicitly states: "This section does not prohibit constitutionally protected speech or activity." MCL 750.411s(6).

The judge did not find that Zoran's posts were falsehoods, threats, solicitations to commit crime, or speech within any constitutionally unprotected category—indeed, no evidence showed that Zoran's posts were anything but protected speech. Because Zoran's posts did not fall into any unprotected category of speech, they cannot violate MCL 750.411s. Therefore, the PPO was statutorily unauthorized, and also constitutes a constitutionally forbidden prior restraint on future speech.

Nor can the PPO be justified on the theory that Zoran's messages were false and defamatory. First, the judge made no such finding, and indeed concluded that the truth or falsity of the statements was irrelevant. App. 57a-58a. Second, the government's power

to restrict defamation is sharply constrained by constitutional principles flowing from both the First Amendment and the right to a jury trial, as Const 1963, art 1, § 19 expressly provides. The procedures for a PPO are entirely different from the constitutionally required procedures for cases that sound in defamation.

Argument

I. Because Zoran's speech was constitutionally protected, it did not violate MCL 750.411s, and the PPO was unauthorized

MCL 750.411s expressly provides that the law may not be used to "prohibit constitutionally protected speech." MCL 750.411s(6). Yet there is no basis for concluding that Zoran's speech was constitutionally unprotected. Speech loses First Amendment protection only it fits within a few limited and well-defined areas, such as obscenity, true threats, defamation, incitement, or solicitation of crime. *United States v Stevens*, 559 US 460, 468; 130 S Ct 1577; 176 L Ed 2d 435 (2010). There was no finding that Zoran's speech fell within any of these exceptions.

Section 411s may constitutionally be applied to unprotected speech, for instance solicitation of crime. If a defendant intentionally called on people to send someone death threats, for instance, that may well satisfy the four elements of MCL 750.411s(1): The defendant likely knew "the message could cause . . . acts of unconsented contact," the defendant "intended to cause conduct that would make the victim feel . . . threatened," the threats "would cause a reasonable person to suffer emotional distress and to feel . . . threatened," and the threats may have well actually caused such distress and feeling of threat. And the speech would fit within the First Amendment exception for solicitation, *United States v Williams*, 553 US 285, 297-298; 128 S Ct 1830; 170 L Ed 2d 650 (2008), because it would explicitly call for specific illegal behavior against a particular person. The

same would apply to, for instance, calls for criminal vandalism of a person's home or business, or perhaps to online impersonation of a person in a way that intentionally prompts strangers to approach her for sex, see, e.g., *People v Johnson*, 208 App Div 2d 1051; 617 NYS2d 577 (1994).

But speech that merely criticizes a person is constitutionally protected—and thus excluded from MCL 750.411s by Subsection (6) of the statute. That is true even if the speech "increases the chance an unlawful act will be committed at some 'indefinite future time.'" *Ashcroft v Free Speech Coalition*, 535 US 234, 253; 122 S Ct 1389; 152 L Ed 2d 403 (2002), quoting *Hess v Indiana*, 414 US 105, 108; 94 S Ct 326; 38 L Ed 2d 303 (1973). It is even more clearly true if it merely tends to lead some listeners to say unwanted things to the person being talked about.

For instance, in *NAACP v Claiborne Hardware Co*, the organizers of a boycott by blacks of white-owned business tried to pressure non-participants into complying by reading their names in black churches and publishing the names in mimeographed leaflets. *NAACP v Claiborne Hardware Co*, 458 US 886, 904-905; 102 S Ct 3409; 73 L Ed 2d 1215 (1982). Some of the named people were threatened, beaten, or had their property vandalized by third parties. *Id* at 905-906. Yet the Court held that boycott organizers could not be found liable for the illegal activity because there was no evidence they intended anything more than a peaceful boycott. *Id* at 924-925.

Moreover, the Court held, the fact that speech is intended to produce "social pressure and the 'threat' of social ostracism" does not strip speech "of its protected character." *Id* at 909-910. Doubtless the speech in *Claiborne Hardware* may have led some neighbors to speak sharply to those listed as not complying with a boycott. It was likely intended to

cause such personal condemnation as part of the "social pressure." And many people might well feel "harassed" or "molested" by being condemned by their neighbors as a result of this speech. Yet the speech remained constitutionally protected.

The Court took the same view in *Org for a Better Austin v Keefe*, 402 US 415, 419; 91 S Ct 1575; 29 L Ed 2d 1 (1971). In *Keefe*, community activists were accusing a real estate broker of allegedly racist sales practices, and distributed leaflets near where he lived, "request[ing] recipients to call respondent at his home phone number and urge him to sign [an] agreement [to stop the practices]." *Id* at 417. The leaflets were, among other things, "passed out to some parishioners on their way to or from respondent's church," and "left at the doors of his neighbors." *Id* The whole point of the leaflets was to pressure the broker through unconsented-to contact by his neighbors. Yet the Supreme Court held that the speech was protected and invalidated the injunction that banned the distribution of these leaflets. *Id* at 418.

Likewise, say someone with many Twitter followers posts a message reporting on how he was mistreated by a business. He may know that some people will e-mail the business to express their disapproval, thus producing "2 or more separate noncontinuous acts of unconsented contact" with the business. MCL 750.411s(1)(a). A prosecutor may infer that the poster intended the business owner to feel "harassed[] or molested," MCL 750.411s(1)(b), especially since "[h]arassment" is defined in MCL 750.411h(c) as including "repeated . . . unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." The speech may cause emotional distress to the business owner and to a reasonable person,

MCL 750.411s(1)(c)-(d)—a business owner may well be "significant mental[ly] . . . distress[ed]," MCL 750.411s(8)(g), by harsh criticism that he knows jeopardizes his business's economic viability.

Yet such public criticism is constitutionally protected, because it does not consist of solicitation of crime, and does not fit into any other unprotected category of speech. What keeps MCL 750.411s from unconstitutionally suppressing such criticism is precisely the Legislature's recognition in MCL 750.411s(6) that "constitutionally protected speech" cannot be covered. See also MCL 750.411h(c) (expressly excluding "constitutionally protected activity or conduct" from the definition of "harassment").

The same is true of an online newspaper article sharply criticizing a political official. Such criticisms may indeed foreseeably and intentionally lead other voters to reproach the official, thus causing "unconsented contact." Indeed, they might even expressly call on voters to, say, "call Councilman Smith and tell him what you think about his misconduct." The official may well feel distressed and harassed or molested by such public condemnation. Yet the speech is constitutionally protected, because it likewise falls outside any unprotected category.

And the same is also true of speech on everyday matters as well. Say that a woman leaves her husband because he has cheated on her, and she tells her friends on Facebook about it. That might lead some of her friends to tell her ex-husband what they think of his misbehavior. It may be intended to cause such speech to the ex-husband, and may deeply distress him, as he realizes that his friends are condemning him. But again this speech does not fall within any First Amendment exception, and is therefore excluded from MCL 750.411s. See Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal*

Harassment Laws, and "Cyberstalking," 107 Nw U L Rev 731, 784-788 (2013) (discussing why such speech about ordinary life is covered by the First Amendment).

Zoran's speech is similarly constitutionally protected. The circuit court did not find that the speech contains any threats of violence against McGuire. Nothing in the speech explicitly calls for any illegal action against McGuire. There is no evidence that Zoran intended his readers to engage in any illegal action against McGuire. Even if Zoran intended that people ostracize McGuire, or ask McGuire about his allegations, that would at most promote lawful speech, not be intentional solicitation of criminal conduct. There are no findings showing that Zoran's speech fits within any recognized First Amendment exception, such as for threats, incitement, or solicitation.

The Legislature wisely made clear that MCL 750.411s should not be used to restrict constitutionally protected speech; indeed, such a limitation helps keep the statute from being unconstitutionally overbroad, since otherwise it would "ban[] a substantial amount of protected speech," such as the examples given above. *Stevens*, 559 US at 489. Statutes should be "afforded a narrow and limiting construction" to avoid overbreadth. *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001). The court below erred in instead construing MCL 750.411s unconstitutionally broadly.

II. None of the lower court's rationales for the order suffice to show that Zoran's speech was constitutionally unprotected

The lower court offered or suggested several different arguments for why Zoran's speech supposedly violated MCL 750.411s and was thus unprotected. None of them is consistent with the First Amendment.

A. Zoran's speech was not found to be libelous

The circuit court asked Zoran's counsel, "So do you think that your First Amendment Right gives you the ability to subject a private citizen to comment in a public forum by other individuals for conduct that has not been conclusively established?" App. 30a. Indeed, the First Amendment secures precisely that right: The defamation exception covers only speech that involves "false statement[s]," *United States v Alvarez*, 567 US 709, 719; 132 S Ct 2537; 183 L Ed 2d 574 (2012) (plurality op); true statements and opinions are protected even if they have not been "conclusively established." Michigan libel law, unsurprisingly, follows the same view: People are free to accuse "private individual[s]" of misconduct, unless the speech contains "falsehood." MCL 600.2911(7).

And while the court suggested that Zoran's speech might "serve as the basis for a defamation claim," App. 40a, the court expressly declined to allow an evidentiary hearing at which Zoran could show that the statements were true, App. 57a. The court reasoned that, "because of Ms. McGuire's status," "truth is [not] an absolute defense to this." *Id.* But "[t]ruth is an absolute defense to a defamation claim," *Wilson v Sparrow Health Sys*, 290 Mich App 149, 155; 799 NW2d 224 (2010)—and because the court did not offer Zoran an opportunity to show his statements were true, it could not and did not make any findings sufficient to show that they were libelous.

The limitations on defamation law cannot be evaded simply by recharacterizing the claim as something else. *See, e.g., Cohen v Cowles Media, Inc*, 501 US 663, 671; 111 S Ct 2513; 115 L Ed 2d 586 (1991) (stating that "constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress"); *Lakeshore Community Hospital, Inc v Perry*, 212 Mich App 396,

401; 538 NW2d 24 (1995) (applying defamation law defenses to interference with business relations claim, when "the conduct allegedly causing the business interference is a defendant's utterance of negative statements concerning a plaintiff"); *Farah v Esquire Magazine*, 736 F3d 528, 540 (DC Cir 2013) (holding that "a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim") (internal quotation marks omitted). Likewise, when, as here, a PPO complaint rests on a claim that a speaker has said false things that supposedly harm reputation, the standards for defamation must be used, not the standards developed for the very different scenario of unlawful stalking.

B. Zoran's speech cannot be enjoined as "invasion of privacy"

The court suggested that Zoran's allegations constitute "invasion of [McGuire's] privacy," App. 33a; see also App. 56a, and stated that

> other countries have entered statutes that prohibit you from even sharing true facts about people. Japan, Germany have done statutes that say you can't do that unless they have some reason to do that. And I think that's part of the internet age is, gosh, you can't do this, you're not standing on the street corner talking about people.

App. 45a.

But whatever may or may not be the law in other countries, the U.S. Supreme Court has never held that future speech can be enjoined on the grounds that it would constitute "invasion of privacy." Indeed, it rejected, in *Keefe*, an injunction against public criticism that was justified as an attempt to prevent "invasion of privacy," *Keefe*, 402 US at 419-420.

Michigan does recognize a tort cause of action for disclosure of private facts, *e.g.*, *Doe v Henry Ford Health Sys*, 308 Mich App 592; 865 NW2d 915 (2014). But it has never

authorized injunctions against such speech; and in any event, statements about criminal conduct would not be actionable disclosure of private facts, because they would be of "legitimate public concern," *Swickard v Wayne County Med Examiner*, 438 Mich 536, 550-551; 475 NW2d 3041 (1991) (internal quotation marks omitted) (noting that "publications concerning . . . crimes" are not actionable).

C. PPOs cannot be used to "supplement" the existing narrow exceptions to First Amendment protection

The court also stated that the PPO was

> really kind of my way to help supplement the rules that we all live in society by. Sometimes if people have been too far or they've pushed things past the point that they are supposed to, the P.P.O. statute permits me to try to tailor, and it is an injunction, an order that says you should not engage in this activity.

App. 53a. But MCL 750.411s expressly does *not* allow judges to "supplement the rules" when it comes to First Amendment exceptions. Rather, MCL 750.411s(6) expressly says that it "does not prohibit constitutionally protected speech," with no latitude for a judge to restrict such speech.

III. The PPO enjoining repetitions of Zoran's criticism was an unconstitutional prior restraint

For the same reasons, the injunction in this case is an unconstitutional prior restraint. The injunction bans any future violations of MCL 750.411s, App. 10a. Given that the trial court concluded that Zoran's past speech violated MCL 750.411s, App. 56a-57a, the court was therefore forbidding Zoran from engaging in similar criticisms in the future, App. 56a.

Yet injunctions that prohibit such future speech about a person—which, as Part I explained, consists of constitutionally protected speech—are generally unconstitutional prior restraints, even when they are aimed at preventing unwanted public attention to the person. *Keefe*, 402 US at 415. Such "permanent injunctions, which actually forbid speech

activities, are classic examples of prior restraints," *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 622-623; 673 NW2d 111 (2003), and are unconstitutional when they are applied to speech that falls outside the First Amendment exceptions.

IV. Even if the circuit court concluded that the defendant's statements were libelous, and thus unprotected by the First Amendment, a PPO would violate the Michigan Constitution

As noted on page 8, the trial court never found that Zoran's speech was false and defamatory, and indeed refused to hold an evidentiary hearing to determine whether the speech was false. But in any event, a PPO cannot be used to enjoin libel, because such a proceeding offers "[n]one of the substantive and procedural limitations that have been carefully constructed around defamation law." Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L J 781, 822 (2013).

In particular, Const 1963, art 1, § 19, commands that "in all prosecutions for libels," the jury must decide whether the "matter charged as libelous is true." The Supreme Court has treated Section 19 as applicable to civil cases. *Howe v Detroit Press, Inc*, 440 Mich 203; 487 NW2d 374 (1992). Moreover, a PPO proceeding is quasi-criminal, in that violating a PPO can lead to criminal punishment, MCL 600.2950a(23). If a PPO were allowed based solely on allegations of defamatory falsehood, the result would be that a judge (without a jury) declares certain speech to be libelous and then threatens the defendant with criminal punishment for repeating the alleged libel. Such punishments, without a jury evaluation of the underlying truth of the matter, violate Section 19.

Conclusion

The trial court incorrectly held that Zoran's messages violated MCL 750.411s. This Court should therefore vacate the PPO and order it removed from LEIN.

Respectfully submitted,

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