Case No. 2019-0295

IN THE OHIO SUPREME COURT

Joni Bey and Rebecca Rasawehr, Petitioners-Appellees, v. Jeffrey Rasawehr, Respondent-Appellant	ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEALS App. Case Nos. 10-18-02, -03

Reply Brief *Amici Curiae* of Electronic Frontier Foundation, 1851 Center for Constitutional Law, and Profs. Jonathan Entin, David F. Forte, Andrew Geronimo, Stephen Lazarus, Kevin Francis O'Neill, Margaret Tarkington, Aaron H. Caplan, and Eugene Volokh in Support of Respondent-Appellant

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Introduction[1]

1. The injunction in this case is similar to the injunction held unconstitutional in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). In *Keefe*, the Organization had passed out leaflets in Keefe's town accusing him of allegedly racist real estate practices. The Organization had even left leaflets for Keefe's neighbors, and handed them out to his fellow parishioners going to and from church. The lower court responded by enjoining the Organization from further leafletting in Keefe's town; but the U.S. Supreme Court vacated the injunction, holding that even accusatory speech designed to coerce the target was still protected.

In our case, Rasawehr posted his criticisms of the Appellees and the local government on a website and on billboards. As disturbing as Rasawehr's speech may be, it is fully protected by the First Amendment, just as the speech in *Keefe* was.

2. The injunction is also content-based, and thus subject to the most demanding level of First Amendment scrutiny. The injunction forbids mentioning Appellants' names, and forbids any language expressing, implying, or suggesting that Appellees are connected to the murders Rasawehr believes have been covered up. This prohibition is content-based on its face. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2228, 192 L.Ed.2d 236 (2015). And it requires enforcing

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[1] Prof. Raymond Ku, who signed the initial *amicus* brief in this case, declined to join this reply brief. All other signatories to the initial *amicus* brief have joined this one as well.

authorities to examine the content of the speech to determine whether the restriction has been violated, which further shows that it is content-based. *McCullen v. Coakley*, 573 U.S. 464, 479, 134 S.Ct. 2518, 2531, 189 L.Ed.2d 502 (2014).

3. The restriction does not fall into any of the "few historical and traditional" exceptions recognized by the U.S. Supreme Court, *United States v. Alvarez*, 567 U.S. 709, 717, 132 S.Ct. 2537, 2544, 183 L.Ed. 2d 574 (2012), including the "speech integral to criminal conduct" exception. That exception only applies when the speech is "a mechanism or instrumentality in the commission of a separate unlawful act." *People v. Relerford*, 2017 IL 121094, ¶ 44, 104 N.E.3d 341, 352 (2017). This "proximate link" to a crime separate from the speech is necessary for a speech restriction to be justified under this exception. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002); *United States v. Stevens*, 559 U.S. 460, 471, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). Rasawehr's speech was restricted without being found integral to a separate crime; rather, the trial court at most viewed the speech as itself being a crime. But speech cannot be enjoined or punished simply because a law treats the speech as criminal (or else many leading First Amendment cases would have come out the other way).

Argument in Support of Proposition of Law

I. This injunction is contrary to U.S. Supreme Court precedent that protects even offensive, emotionally distressing, and financially harmful speech.

The First Amendment protects even offensive speech, including speech that can cause significant emotional distress or business harm. There are a few narrow exceptions to this principle: Threats of violence, for instance, can be restricted. Speech proven to be libelous can be subject to liability and, under Ohio law, to narrow injunctions. *See* Brief *Amici Curiae* of EFF et al. at 12-14. Speech said *to* a particular person, rather than just *about* the person, might be restrictable if the restrictions are sufficiently clear and narrow. *See id.* at 6, 8-9. (The broad injunction in this case is thus distinct from the typical civil stalking protection order that restricts unwanted speech said to a particular petitioner.) But broad bans on all online speech about a person cannot fit within any of these exceptions.

For example, in *Keefe*, the U.S. Supreme Court vacated an injunction that restricted an organization's speech regarding the allegedly improper business practices of a local realtor. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971). The Organization accused Keefe of "panic peddling": warning white homeowners that black residents were moving in, and then profiting from the resulting "white flight." *Id.* at 416. The Organization distributed leaflets in Keefe's home town of Westchester outlining these allegations, aiming to publicly shame Keefe into stopping his practice. Leaflets were distributed to Keefe's neighbors and to parishioners going

to and from Keefe's church; the leaflets even included Keefe's home phone number. An Illinois court enjoined the Organization from passing out leaflets and picketing in Westchester. *Id.* at 417.

Yet the U.S. Supreme Court held that such speech was protected, regardless of its coercive tendencies, and of its offensiveness. *Id.* at 419. "[A]s long as the means are peaceful, the communication need not meet the standards of acceptability." *Id.*

Likewise, in *Hustler Magazine, Inc. v. Falwell*, the U.S. Supreme Court overturned a jury verdict for intentional infliction of emotional distress because the speech that caused the harm was protected by the First Amendment. 485 U.S. 46, 57, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Hustler published a parody of Falwell, in which it insinuated that he had engaged in a "drunken incestuous rendezvous with his mother in an outhouse." *Id.* at 48. The U.S. Supreme Court rejected the claim that, because the speech was intended to inflict emotional distress, it lost First Amendment protection. *Id.* at 53.

And in *NAACP v. Claiborne Hardware Co.*, the U.S. Supreme Court vacated an injunction against the NAACP's speech, as well as a damages verdict. 458 U.S. 886, 934, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). The NAACP had led a boycott by black residents against white merchants. *Id.* at 900. In the process, the NAACP handed out leaflets with the names of black residents who were not complying with the boycott, and had their names read out in church. *Id.* at

904. The lower courts held that the NAACP and the other defendants could be held liable for the harm caused by this. *Id.* at 895-96.

But the U.S. Supreme Court held that the speech was constitutionally protected. *Id.* at 908-09. "Speech does not lose its protected character . . . simply because it may embarrass others . . . ." *Id.* at 910. Indeed, the speech remained protected even though there had been some violence by third parties directed at the noncomplying black residents. *Id.* at 904-05.

Thus, neither bad intentions, nor offensiveness, nor emotional or financial harm strip speech of First Amendment protection. That is true for speech about public figures, as in *Hustler*, but equally true for speech about private figures, as in *Keefe* and *Claiborne*. *See also Snyder v. Phelps*, 562 U.S. 443, 458, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) (applying *Hustler* to an intentional infliction of emotional distress claim brought by a private figure). Rasawehr's speech was on a subject of public concern—an alleged government coverup, and alleged killings perpetrated by local residents. "'Murder is a heinous crime that affects the public because of its disruption of society.' Accordingly, murder is generally a matter of public concern." *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 744, 756 N.E.2d 1263 (9th Dist.2001) (quoting and following *Talley v. WHIO TV-7*, 131 Ohio App.3d 164, 722 N.E.2d 103 (2d Dist.1998)).

Under Appellees' approach to this case, the speech in *Keefe*, *Claiborne*, and *Hustler* would have been easily enjoinable, so long as it had been banned by a

statute that made the speech a crime. The First Amendment cannot be dismissed so easily.

II. The injunction is a content-based speech restriction.

The injunction issued by the lower court is a content-based speech restriction. The court ordered that Rasawehr

1. refrain from posting about the Appellees on "any social media service, website, discussion board, or similar outlet or service," and "remove all such postings from CountyCoverUp.com [Rasawehr's website] that relate to [Appellees]," Decision Below at ¶ 20, and
2. "refrain from posting about the deaths of Petitioners' husbands in any manner that expresses, implies, or suggests that the Petitioners are culpable in those deaths." *Id.*

This injunction "on its face" draws distinctions based on the "communicative content" of what a speaker conveys. *Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2228, 192 L.Ed.2d 236 (2015). The injunction restricts mention of Appellees, which is a content-based restriction. *See, e.g.*, *Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir.2016) (holding that California's misappropriation tort, which restricts "use of [a person's] identity" without that person's permission "clearly restricts speech based upon its content"). The order defines the forbidden speech based on "the topic discussed" (Appellees) and based on "the idea or message expressed" (that Appellees are culpable in their husbands' deaths). *Reed*, 135 S.Ct. at 2227. And it was "adopted by the government because of

disagreement with the message [the speech] conveys," a "separate and additional" basis for finding the restriction to be content-based. *Id.*

The order is also content-based for yet another reason: determining whether Rasawehr is violating the order requires "'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479, 134 S.Ct. 2518, 2531, 189 L.Ed.2d 502 (2014). Here, any investigator would need to read Rasawehr's posts, website and billboards to see if they name the Appellees, or to see if they "express[], impl[y], or suggest[] that the Petitioners are culpable for [their husbands'] deaths."

Nor does it matter that the speech may be covered by a stalking statute that applies generally to "a pattern of conduct," R.C. 2903.211 (A)(1). Speech does not lose its First Amendment protection simply because it is restricted as part of a broader conduct restriction, at least when (as here) the conduct restriction applies to the speech precisely because of what it communicates.

The leading case on this is *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28, 130 S.Ct. 2705, 2724, 177 L.Ed.2d 355 (2010), where a federal statute forbade providing "material support" to foreign terrorist organizations. The statute restricted providing money, goods or soldiers to such organizations, but in the process also covered speech such as training the organizations in international law or advising them on petitioning the United Nations. *Id.* at 27. The government sought to categorize the speech restriction as merely incidental,

because it was part of a restriction on a broad course of conduct. *Id.* at 27-28. But the Court disagreed: "The law here may be described as directed at conduct, . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. The law therefore had to be treated as a speech restriction, not merely a conduct restriction. (The Court ultimately upheld this "content-based regulation of speech," but only because it was "carefully drawn to cover only a narrow category of speech" that implicated "the Government's interest in combating terrorism[, which] is an urgent objective of the highest order." *Id.*)

The same was true in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.E.2d 284 (1971), the main precedent relied on by *Humanitarian Law Project* on this point. "*Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace." *Holder* at 28. "But when Cohen was convicted for wearing a jacket bearing an epithet," "we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message." *Id.* Likewise, even if Rasawehr's speech violated the Ohio stalking statute, it did so because of what the speech communicated; the injunction must therefore be treated as a content-based speech restriction.

Of course, even content-neutral injunctions against speech are subject to "a somewhat more stringent application of general First Amendment principles" than are ordinary "content-neutral, generally applicable statute[s]." *Madsen v.*

Women's Health Center, Inc., 521 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). The "standard time, place, and manner analysis is not sufficiently rigorous" for evaluating the injunctions, and a court "must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* But a content-based injunction such as the one in this case is subject to strict scrutiny, which it cannot pass, as the precedents in Part I illustrate: The injunction is far too broad to be narrowly tailored to a compelling government interest.

III. The speech covered by the injunction does not fall into the "speech integral to criminal conduct" exception.

A. The speech covered by the injunction is not integral to a separate crime.

The injunction in this case is not limited to "speech integral to criminal conduct," *United States v. Alvarez*, 567 U.S. 709, 717, 132 S.Ct. 2537, 2544, 183 L.Ed.2d 574 (2012), a category that covers speech that, for instance, solicits crimes or is produced through criminal sexual abuse. *See United States v. Williams*, 553 U.S. 285, 299, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (solicitation); *New York v. Ferber*, 458 U.S. 747, 762, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (child pornography). To fall within this exception, speech must be "a mechanism or instrumentality in the commission of a separate unlawful act." *People v. Relerford*, 2017 IL 121094, ¶ 44, 104 N.E.3d 341, 352 (Ill. 2017). There must be a separate crime, and the speech must be closely connected to that separate crime.

For example, in the case often cited as developing this exception (*Giboney v. Empire Storage & Ice Co.*), a union picketed outside an ice distributor to force it to agree not to sell its ice to non-union peddlers. 336 U.S. 490, 492-93, 69 S.Ct. 684, 93 L.Ed. 834 (1949). Had the distributor agreed, that would have been a violation of the Missouri Restraint of Trade law. *Id.* at 491 fn. 1 (citing Mo.Rev.Stat.Ann. 8301 (1939)). The U.S. Supreme Court upheld an injunction against the picketing, because the picketing was soliciting the commission of a separate crime—it was deliberately aimed at procuring this independently criminal agreement—and was thus not protected by the First Amendment. *Id.* at 498.

Similarly, in *Williams*, the U.S. Supreme Court upheld a federal statute that criminalized offers to provide or obtain child pornography. The Court concluded that "laws against conspiracy, incitement and solicitation," as well as laws against non-commercial offers to engage in illegal transactions, are constitutionally permissible. *Williams* at 298-99.

In these cases, the unprotected speech was integral to committing another separate act, a criminal act that was itself clearly constitutionally unprotected. "[W]ithout this link between the unprotected speech and a separate crime, the exception would swallow the first amendment whole: it would give the legislature free rein to criminalize protected speech, then permit the courts to find that speech unprotected simply because the legislature criminalized it." *Flood v. Wilk*, 2019 IL App (1st) 172792, ¶ 39, 125 N.E.3d 1114 (2019).

Thus, in *People v. Relerford*, the Illinois Supreme Court held that Illinois stalking law could not be justified under the "speech integral to criminal conduct" exception, because it was not limited to speech "'proximate[ly] link[ed]'" to "some other criminal act." 2017 IL 121094, ¶ 45, 104 N.E.3d 341, 352 (Ill.2017). Instead, the court concluded, "[i]n light of the fact that a course of conduct [under the Illinois law] can be premised exclusively on two communications to or about a person," the stalking law "is a direct limitation on speech that does not require any relationship—integral or otherwise—to unlawful conduct." *Id.* Under the Illinois law, "the speech [was] the criminal act," *id.*, and the speech integral to criminal conduct exception therefore did not apply.

Similarly, in *Matter of Welfare of A.J.B.*, the Minnesota Supreme Court rejected the government's argument that a stalking by mail statute was valid under the "speech integral to criminal conduct" exception. 929 N.W.2d 840, 859 (Minn.2019). The court held the argument was "circular," since "the speech covered by the statute is integral to criminal conduct because the statute itself makes the conduct illegal." *Id.* Thus, the restriction was invalid, because it was not limited to speech aimed "to induce or commence a separate crime." *Id.* at 852.

In *State v. Doyal*, the Texas high court for criminal cases likewise wrote:

> The State also contends that any speech that is implicated by the statute is unprotected because it constitutes "speech integral to criminal conduct." But the cases that involve this form of unprotected speech involve speech that furthers *some other activity* that is a crime.

__ S.W.3d __, 2019 WL 944022, *4 (Tex.Crim.App. Feb. 27, 2019) (emphasis added). And in *State v. Shackelford,* the North Carolina Court of Appeals held that a stalking statute was unconstitutional as applied to defendant's social media posts because,

> Here, all four of Defendant's indictments were premised either entirely or in part upon social media posts referencing Mary—posts that he wrote *about* Mary but did not send directly *to* her (or, for that matter, to anyone else). Pursuant to the language of [the statute], no additional conduct on his part was needed to support his stalking convictions. Rather, his speech itself was the crime.
>
> For this reason, the First Amendment is directly implicated by Defendant's prosecution . . . . We therefore reject the State's argument that Defendant's posts fall within the "speech integral to criminal conduct" exception. *See United Food & Commer. Workers Local 99 v. Bennett*, 934 F.Supp.2d 1167, 1208 (D. Ariz. 2013) ("[The statute] does not incidentally punish speech that is integral to a criminal violation; the speech itself is the criminal violation.").

825 S.E.2d 689, 698-99 (N.C.App. 2019).

The reasoning of these cases applies fully here. Rasawehr's website and billboards were not speech that solicited or facilitated or was otherwise linked to some separate crime. Rather, the speech itself was treated as criminal. Expanding the "speech integral to criminal conduct" exception to cover speech whenever the law declares that speech to itself be a crime would sharply undermine well-established First Amendment protections.

Legislatures are free to punish nonspeech conduct, as well as narrow categories of constitutionally unprotected speech, such as threats of violence. But they cannot label speech that mentally distresses people "stalking" and then punish all such speech—and courts cannot use stalking laws as a justification for injunctions that ban all online speech about a person.

B. The federal decisions relied on by Appellees are not controlling.

The federal cases on which Appellees rely, *United States v. Petrovic*, 701 F.3d. 849 (8th Cir.2012), *United States v. Osinger*, 753 F.3d 939 (9th Cir.2014), and *United States v. Gonzalez*, 903 F.3d 165 (3d Cir.2018), all involved criminal punishments for specific statements said "with the intent to kill, injure, harass, [or] intimidate," 18 U.S.C. 2261A(1)-(2), and that caused "substantial emotional distress," 18 U.S.C. 2261A(1)(B). In each case, a jury found these elements to be present as to each statement, beyond a reasonable doubt. The cases did not uphold broad injunctions issued by judges in civil cases outlawing *all* future online speech about a person, or for that matter outlawing all accusations that the person was involved some crime.

Indeed, one of the cases, *Petrovic*, involved speech that genuinely was integral to a separate crime (extortion). Petrovic threatened to publish nude photos of M.B. and other personal information about her if she ended their relationship; when she ended it, he mailed postcards to her family, workplace and local businesses with a link to a website where he posted the photos and information. *Petrovic* at 852-53. A jury found Petrovic guilty of extortion in violation of 18 U.S.C. 875(d), as well as violating the interstate stalking statute, 18 U.S.C. 2261A(2)(A). *Id.* at 854. The Eighth Circuit held that "[t]he communications for which Petrovic was convicted under § 2261A(2)(A) were integral to this criminal conduct as they constituted the *means of carrying out his extortionate threats*." *Id.* at 855 (emphasis added).

The second case, *Osinger,* did appear to involve speech that was punished without a connection to a separate crime; the court concluded that the speech there—posting revenge porn of an ex-girlfriend—was integral to his criminal conduct "in intentionally harassing, intimidating or causing substantial emotional distress to V.B." *Id.* at 947. But in this the Ninth Circuit erred. Two of the cases it cited to support its holding, *Petrovic* and *United States v. Meredith*, 685 F.3d 814 (9th Cir.2012), involved speech integral to the commission of a separate crime (extortion in *Petrovic*, fraud in *Meredith*). The third, *United States v. Shrader*, 675 F.3d 300 (4th Cir.2012), did not even apply or address the "speech integral to criminal conduct" exception, but dealt only with a vagueness challenge. *Shrader* at 311. (In *Gonzalez*, the Third Circuit made a similar mistake to that in *Osinger*, applying the "integral to criminal conduct" exception to speech that was not connected to a separate crime.)

Judge Watford's concurrence in *Osinger* notes this weakness in the majority opinion. Judge Watford concurred because he saw the speech as continuing a course of harassment that began by Osinger physically stalking V.B. *Osinger* at 952 (Watford, J., concurring). Judge Watford noted that "[c]ases in which the defendant's harassing 'course of conduct' consists entirely of speech that would otherwise be entitled to First Amendment protection" raise "a question whose resolution we wisely leave for another day." *Id.* at 954 (Watford, J., concurring). This case involves precisely that question: Appellant's "conduct" con-

sisted almost entirely of speech (the exception being hiring a private investigator to question Appellees, which is itself a form of information gathering that is generally protected by the First Amendment, *e.g. Tichinin v. City of Morgan Hill*, 177 Cal.App.4th 1049, 1074, 99 Cal.Rptr.3d 661 (2009)). And the injunction is expressly and entirely focused on restricting speech.

This Court should thus follow the state appellate decisions discussed in Part III.A, and not these federal appellate decisions. But even if this Court is uncertain about whether the federal decisions are sound, it can avoid resolving the question. Those federal cases deal entirely with criminal convictions for specific past statements about people—not broad prior restraints on all future online statements about people. The cases that consider the future statements are discussed in detail in Part III of *amici*'s opening brief in this Court, and they hold that such broad injunctions against all speech (or all online speech) about plaintiffs are unconstitutional.

Conclusion

The injunction issued by the lower court is an unconstitutional, content-based restriction on speech. It is inconsistent with U.S. Supreme Court precedents, especially *Keefe*, *Claiborne*, and *Hustler*. It is inconsistent with the appellate precedents from other states discussed in *amici*'s opening brief. And it cannot be justified under the "speech integral to criminal conduct" exception, which is limited to speech that solicits other crimes or is otherwise proximately linked to those other crimes. The injunction should therefore be vacated.

Respectfully submitted,

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Certification

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