BEREA MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO/CITY OF BROOK PARK *Plaintiff,* v. **GINA CRISCIONE** *Defendant.*	Case No.: 20CRB01262 Judge Mark A. Comstock
DEFENDANT GINA CRISCIONE'S MOTION TO DISMISS	

Defendant Gina Criscione respectfully moves the Court to dismiss the complaints against her. The State is attempting to imprison Ms. Criscione because she gave a local business a bad review. As discussed below, the State's case runs afoul of the First Amendment on multiple theories, so the Court is obligated to end it before it chills any more speech.

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ISSUES PRESENTED

1. A law's overbreadth violates the First Amendment when it outlaws a substantial amount of protected speech, measured against its plainly legitimate uses. Ohio Rev. Code § 2903.211(A)(2) and § 2917.21(B)(2) outlaw written speech that could cause another person mental distress, but *Snyder v. Phelps* protects that same speech. Are the statutes unconstitutionally overbroad?
2. A law's vagueness violates the First Amendment when it fails to put ordinary people on notice of what it prohibits or when it invites discriminatory enforcement. Ohio Rev. Code § 2903.211(A)(2) and § 2917.21(B)(2) are written so broadly that no lay person can discern their limits, leaving police free to apply them consistent with their own discriminatory predilections. Are the statutes void for vagueness?
3. A law is unconstitutional as applied if it is enforced against a protected activity. The State is enforcing Ohio Rev. Code § 2903.211(A)(2) and § 2917.21(B)(2) to punish Ms. Criscione for speaking about a matter of public concern. Are the statutes unconstitutional as applied to her speech?
4. A trial court's jurisdiction to hear a criminal case requires a complaint, supported by probable cause, approved by a neutral and detached magistrate. The complaints against Ms. Criscione are premised on her speech, leaving them unsupported by probable cause, and they were signed by a member of the police department charged with enforcing the law. Do the complaints satisfy the requirements to invoke the Court's jurisdiction?

FACTS[1]

Ms. Criscione's mother, Dorothy Mandanici, was a resident at the East Park Care Center from April 2017 to May 2020.[2] During that period, Sara Thurmer became the administrator at East Park.[3] After her arrival, the quality of Ms. Mandanici's care began to rapidly deteriorate.[4] The facility's owner, Laura DiVincenzo, admits that after Ms. Thurmer took over, East Park "could no longer provide the level of care required for Ms. Mandanici."[5] Ms. Mandanici eventually moved out of the facility,[6] but she had already lost more than 30 pounds in her final weeks at East Park.[7]

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[1] Ms. Criscione presents and accepts for purposes of this motion the facts as alleged in Brook Park Police Department incident report #20-077559 and the complaints (attached as Ex. A, Ex. B, and Ex. C).

[2] Report #20-077669 at DEFT00033.

[3] *Id.* at DEFT00032.

[4] *Id.* at DEFT00042.

[5] *Id.* at DEFT00033.

[6] *Id.* at DEFT00033.

[7] *Id.* at DEFT00042.

Malnourished and still suffering from various wounds East Park claimed to have addressed before her departure, Ms. Mandanici died shortly after leaving the facility.[8]

After her mother's death, Ms. Criscione began posting about Ms. Thurmer's negligence and incompetence on Facebook.[9] She explained to her friends that under Ms. Thurmer's watch, her mother was left bruised, dehydrated, and injured, and that she rapidly lost more than 30 pounds in her last weeks at East Park.[10] She noted that some staff member's paychecks had bounced, which Ms. Criscione cited as further evidence of a "failing administration" under Ms. Thurmer.[11] She said East Park had put her through "drama and despair and pain."[12] She warned her friends to "never put your parents in here" because it is "scum of the earth," and she warned that Ms. Thurmer was a liar and a "bitch."[13] She left a review for East Park on Google, warning potential customers that her mother's care "went downhill fast with the horrible [new] administration."[14] Amidst this online activity, Ms. Criscione occasionally picketed *outside* East Park, and on September 20, 2020, she actually came on the grounds of East Park, driving on the property on a Sunday morning.[15]

Ms. Criscione never directed any comments to her, but Ms. Thurmer reported to police that those Facebook posts caused her "great distress." And although Ms. Criscione never made any threats, Ms. Thurmer reported that she felt "very threatened."[16]

Upon receiving this complaint of criminal negativity, the Brook Park Police Department sprang into action, collecting statements, compiling Ms. Criscione's Facebook records, and issuing a

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[8] *Id.* at DEFT00042.
[9] *Id.* at DEFT00036–48.
[10] *Id.* at DEFT00038.
[11] *Id.* at DEFT00039.
[12] *Id.* at DEFT00040.
[13] *Id.* at DEFT00041.
[14] *Id.* at DEFT00042.
[15] *Id.* at DEFT00034.
[16] *Id.*

pair of first-degree misdemeanor charges, accusing her of menacing by stalking and telecommunications harassment.

LEGAL STANDARD

Crim. R. 12(C) permits a defendant to "raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." This includes defenses based on "defects in the institution of the prosecution,"[17] defenses based on "defects in the … complaint,"[18] and motions "involving a constitutional determination."[19] "The court may adjudicate a motion and dismiss charges based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means."[20]

LAW & ARGUMENT

I. Because they could be used to punish substantial amounts of protected speech, the statutes charged are overbroad in violation of the First Amendment.

"[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'"[21] An overbreadth analysis moves in two steps: "The first step … is to construe the challenged statute."[22] The second step asks whether the statute, as construed, "criminalizes a substantial amount of protected expressive activity."[23] If it does, it is invalid under the First Amendment.[24]

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[17] Crim. R. 12(C)(1).

[18] Crim. R. 12(C)(2).

[19] *State v. Kalman*, 84 N.E.3d 1088, ¶ 25 (Ohio Ct. App. 2017).

[20] Crim. R. 12(F).

[21] *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).

[22] *United States v. Williams*, 553 U.S. 285, 293 (2008).

[23] *Williams*, 553 U.S. at 297.

[24] *Williams*, 553 U.S. at 292 ("According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.").

For example, the U.S. Supreme Court has identified laws construed to prohibit "opprobrious words or abusive language"[25] "obscene or opprobrious language,"[26] or any words that "oppose, molest, abuse or interrupt any policeman"[27] as criminalizing substantial amounts of protected speech, and therefore struck those laws down as overbroad.

1. Ohio Rev. Code § 2903.211 (Menacing by stalking)

a. Using ordinary rules of grammar and usage, Subsection (A)(2) outlaws any written communication that causes someone emotional distress.

Under Ohio law, statutory interpretation is to be done with "words and phrases … read in context and construed according to the rules of grammar and common usage," and giving "effect to all of the statute's words."[28] "If the meaning of the statute is unambiguous and definite, it must be applied as written and … without resorting to subtle and forced constructions."[29]

Ohio Rev. Code § 2903.211(A)(2) is clear on its face. It applies only to speech, i.e., "any form of written communication or any electronic method of remotely transferring information" and outlaws any writing that the speaker knows will "cause mental distress to the other person."[30]

b. Construed using ordinary rules of grammar and usage, Subsection (A)(2) criminalizes a substantial amount of protected activity.

Based on this plain language, the statute runs head-first into longstanding precedent from the United States Supreme Court. In *Hustler Magazine, Inc. v. Falwell*, a magazine published an article

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[25] *Gooding v. Wilson*, 405 U.S. 518, 519 (1972)

[26] *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974)

[27] *City of Houston, Tex. v. Hill*, 482 U.S. 451, 455 (1987)

[28] *Buddenberg v. Weisdack*, No. 2018-1209, 2020 WL 4341889, at *2 (Ohio July 29, 2020) (quoting Ohio Rev. Code § 1.42, cleaned up).

[29] *Buddenberg*, 2020 WL 4341889, at *2.

[30] The statute similarly outlaws communications that "cause another person to believe that the offender will cause physical harm to the other person." Because the complaint only charges Ms. Criscione with acting with a purpose to cause mental distress, the physical-harm provision is not at issue in this case.

purporting to be a first-person account of a televangelist's experience of losing his virginity to his mother. A jury awarded the televangelist hundreds of thousands of dollars in damages for the emotional distress he suffered as a result of the article, but the Supreme Court reversed, holding that the First Amendment protects speech against claims for emotional distress:

> "Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.' But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. … [W]e think the First Amendment prohibits such a result in the area of public debate about public figures."[31]

But that rule goes far beyond debate about public figures. In *Snyder v. Phelps*,[32] the father of a Marine killed in action brought a claim for intentional infliction of emotional distress against a pastor who picketed the son's funeral with signs saying "Thank God for Dead Soldiers" and "You're Going to Hell." Again, a jury awarded a verdict based on the emotional distress inflicted by the defendant's writings, and again, the Supreme Court reversed, holding that speech can't be outlawed just because it makes someone very sad: "Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt."[33]

But Subsection (A)(2) makes no allowance for speech about public figures that causes them emotional distress. It makes no allowance for speech about matters of public concern that cause someone emotional distress. It makes no allowance for any protected speech whatsoever.

The statute therefore prohibits any writing that causes anyone any mental distress about anything, including the writings at issue in *Hustler* and *Snyder*, cases where a jury found that the

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[31] *Hustler Magazine, Inc.*, 485 U.S. at 53.

[32] 562 U.S. 443 (2011).

[33] *Snyder*, 562 U.S. at 458.

defendants acted not just knowingly but intentionally. And the statute outlaws far more. If the father in *Snyder* received a letter from the Marines informing him of his son's death, the person who wrote it—knowing it would cause him mental distress—could also be convicted under Subsection (A)(2). Therapists who practice via text message[34] are likewise in danger, as they know that the questions they need to ask are apt to cause mental distress to their clients. If a failed presidential candidate is having trouble accepting the outcome of an election, Subsection (A)(2) makes it illegal to send him a tweet calling him a loser.

These are only a few of the potential applications that the Court must balance against the applications within the Subsection (A)(2)'s "plainly legitimate sweep." But what is left in that latter category? Very little, given the language limiting the statute to pure speech and excluding any other means of inflicting mental distress. Perhaps the statute could be used to punish written communications between two parties on a matter of purely private concern, but even that application would not be "plainly" legitimate, given the long line of precedent with dicta pointing in the opposite direction.[35]

Because there are almost no circumstances under which it is "plainly legitimate" to outlaw pure speech based on its potential effect on its recipients, Subsection (A)(2) is unconstitutionally overbroad.

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[34] *See, e.g.*, Shannon Palus, *What Is Text Therapy, and Does It Work*?, New York Times (May 7, 2018) (https://www.nytimes.com/wirecutter/blog/text-therapy/).

[35] *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction."); *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967) ("[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political."); *Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. … Great secular causes, with small ones, are guarded.").

2. Ohio Rev. Code § 2917.21 (Telecommunications harassment)

a. Using ordinary rules of grammar and usage, Subsection (B)(2) criminalizes all online speech that is alarming, harmful, or cruel.

Subsection B(2) is written using plain language:

> No person shall knowingly post a text or audio statement or an image on an internet web site or web page for the purpose of abusing, threatening, or harassing another person.

Ohio courts have never struggled to decipher the meaning of these words. Most recently, the First District laid out definitions for "abusing, threatening, or harassing" in *In re C.W.*[36] Relying on Black's Law Dictionary and Webster's Third New International Dictionary, it held that courts should use the following definitions:

- "Harassment" means that the accused "intended to alarm or to cause substantial emotional distress to the recipient."[37]
- "Threaten" means to make "an expression of an intention to inflict evil, injury, or damage on another usually as retribution or punishment for something done or left undone. … It connotes almost any expression of intent to do an act of harm against another person irrespective of whether that act is criminal."[38]
- "Abuse" means "cruel or violent treatment of someone; specifically physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury."[39]

Subsection (B)(2) therefore imposes criminal liability for all of the following speech, assuming it occurs online:

- Statements intended to "alarm" or "distress" their recipients.
- Statements of an intent to inflict any harm on another, regardless of whether inflicting that harm would be criminal.
- Statements that amount to "cruel … treatment" of another person.

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[36] No. C-180677, 2019 WL 6977924, at ¶ 16 (Ohio Ct. App. Dec. 20, 2019).

[37] *Id.* (cleaned up).

[38] *Id.* (cleaned up).

[39] *Id.* (cleaned up).

Subsection (B)(2) therefore criminalizes any online speech that a recipient would find alarming, harmful, or cruel, regardless of whether it otherwise inflicts any legally cognizable harm. In short, it imposes a six-month jail sentence on anyone who uses the Internet to say anything very scary or mean.

b. Construed using ordinary rules of grammar and usage, Subsection (B)(2) criminalizes a substantial amount of protected activity.

Construed using ordinary rules of English language, Subsection (B)(2) is a "a criminal prohibition of alarming breadth."[40] It outlaws pure speech on the basis of its content: messages with "harassing, threatening, or abusing" content are forbidden, but messages with content that is reassuring or comforting or encouraging are not. But the government is generally forbidden from imposing such content-based restrictions, which are only permitted "when confined to the few historic and traditional categories of expression long familiar to the bar," such as defamation, obscenity, and incitement.[41] None of the categories of speech outlawed in Subsection (B)(2) fall into any of those categories:

- The Supreme Court has already held that the government may not impose liability for "harassing" speech—i.e., speech that causes "substantial emotional distress to the recipient"—as it remains protected under the First Amendment.[42]
- Nor may it broadly prohibit "threatening" speech; while it may outlaw the very narrow category of "true threats,"[43] the vast majority of threatening communications—such as threats of a lawsuit, criminal charges, discipline, electoral defeat, or withheld affection—remain fully protected.

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[40] *United States v. Stevens*, 559 U.S. 460, 474 (2010).

[41] *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (cleaned up).

[42] *Snyder*, 562 U.S. at 460 ("[T]he First Amendment bars Snyder from recovery for intentional infliction of emotional distress.").

[43] *Virginia v. Black*, 538 U.S. 343, 359 (2003) (""True threats' [are] statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

- The same is true of "abusing" speech; while the government may punish "'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction,"[44] the First Amendment continues to protect "the language of the political arena, [which] is often vituperative, *abusive*, and inexact."[45]

None of Subsection (B)(2)'s categories of content-based restrictions are constitutional. It makes no exception for the kinds of harassing and distressing speech the Supreme Court held to be protected in *Hustler* and *Snyder*. Its ban on "threatening" statements is not limited to true threats of violence; it prohibits threats of *any* harm to another, "irrespective of whether that act is criminal."[46] And its ban on statements "abusing" another are not limited to fighting words; it includes any "cruel … treatment" of another.[47]

Indeed, the statute permits only two exceptions: for statements by the press[48] and for statements made in compliance with the Fair Debt Collection Practices Act and the Telephone Consumer Protection Act.[49]

On one side of the scale then, the Court must place virtually endless applications of the law to fully protected speech. The State could jail a political activist who harasses Senator Portman by calling his office every day to demand a $2,000 stimulus check. It could jail a car dealer for "threatening" economic injury by cutting his prices so low his competition will go out of business. It could jail divorcing spouses for "abusing" each other by cruelly enumerating each other's inadequacies. And, come January 20, the police would be free to haul President Trump in front of a judge to account for his Twitter feed, which is rife with statements harassing and abusing people by

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[44] *Cohen v. California*, 403 U.S. 15, 20 (1971).
[45] *Watts v. United States*, 394 U.S. 705, 708 (1969) (emphasis added).
[46] *Id.* (cleaned up).
[47] *Id.* (cleaned up).
[48] Ohio Rev. Code § 2917.21(F).
[49] Ohio Rev. Code § 2917.21(H).

calling them "horseface,"[50] "crazy,"[51] "a stone cold loser,"[52] "dumb and incompetent,"[53] and "extremely unattractive."[54]

It is tempting to dismiss these possibilities as too far-fetched to merit discussion, but if the State could be trusted to resist the tendency to censorship, this case wouldn't exist, and we wouldn't need a First Amendment to put an end to it. Ms. Criscione's case is hardly unique. Before attempting to shut her up, it targeted many other speakers, using § 2917.21 to convict a girl who warned her Facebook friends about a child molester,[55] an employer who used profanities while disciplining a subordinate,[56] a woman who called her ex-husband to discuss their children,[57] a husband who called his wife to beg her not to divorce him,[58] and a boy who used Instagram to invite imaginary clowns to his school district.[59] None of those convictions survived appeal.

What, then, is left to balance out these patently unconstitutional applications? Subsection (B)(2) targets pure speech alone, so there is no harmful conduct to weigh against its infringements on speech. The only thing within the statute's "legitimate sweep," then, are true threats and fighting words, which are already outlawed under separate statutes for menacing and incitement.[60]

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[50] @RealDonaldTrump, TWITTER (Oct. 16, 2018, 11:04 AM), https://twitter.com/realDonaldTrump/status/1052213711295930368.

[51] @RealDonaldTrump, TWITTER (Mar. 22, 2018, 6:19 AM), https://twitter.com/realDonaldTrump/status/976765417908776963.

[52] @RealDonaldTrump, TWITTER (Jun. 3, 2019, 3:51 AM), https://twitter.com/realDonaldTrump/status/1135453891326238721.

[53] @RealDonaldTrump, TWITTER (Jun. 3, 2019, 3:51 AM), https://twitter.com/realDonaldTrump/status/1135453895277203458.

[54] @RealDonaldTrump, TWITTER (Oct. 28, 2012, 11:59 AM), https://twitter.com/realDonaldTrump/status/262584296081068033.

[55] *State v. Ellison*, 178 Ohio App. 3d 734 (2008)

[56] *State v. Patel*, No. 03 BE 41, 2004 WL 614986 (Ohio Ct. App. Mar. 24, 2004)

[57] *State v. Davidson*, No. CA2009-05-014, 2009 WL 4895668 (Ohio Ct. App. Dec. 21, 2009)

[58] *Parma Hts. v. Barber*, No. 93005, 2010 WL 2783705 (Ohio Ct. App. July 15, 2010)

[59] *In re C.W.*, 2019 WL 6977924

[60] Ohio Rev. Code §§ 2903.22 and 2917.01.

Judged in relation to the statute's plainly legitimate sweep, then, the unconstitutional applications of Subsection (B)(2) are not just substantial, they are virtually limitless. While the Supreme Court warns that American courts "are unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects,"[61] that is just the sort of conviction the State is asking for here. The Court should find Subsection (B)(2) overbroad and dismiss the charge.

Because both subsections target pure speech, leave no exceptions for speech that is categorically protected under the First Amendment, and have few—if any—plainly legitimate applications, they Court should find that they are overbroad.

II. Because they fail to provide notice of what conduct is forbidden and invite discriminatory enforcement, the statutes charged are void for vagueness.

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."[62] A law is void for vagueness if "it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[63]

This case highlights the danger of such vague criminal laws. The General Assembly's draftsmanship created a pair of statutes that broadly criminalize any electronic communication that bothers anyone else. Ordinary people have no way to know what speech they must censor to avoid legal peril. A Twitter user who wants to avoid criminal prosecution in Brook Park, for instance, is responsible for censoring herself to ensure she says not only nothing that any of the platform's 340

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61. *Street v. New York*, 394 U.S. 576, 594 (1969).

62 *Morales*, 527 U.S. at 56.

63 *Giaccio v. State of Pa.*, 382 U.S. 399, 402–03 (1966).

million users will find distressing, abusing, threatening, or harassing, but nothing that the Brook Park Police Department decides meets its low bar for probable cause to believe her speech was distressing, abusing, threatening, or harassing. There is no way for users to meet that standard, and even if there were, there is no way the First Amendment would allow it.

Given the State's aggressive interpretation of the statute in this case, it takes only a moment's exposure to social media to realize that virtually anyone could be the State's next victim. The Brook Park Police Department, for instance, serves up a bounty of potentially criminal speech on its Facebook page. When a mother responded to a post about a warrant being issued for her son, Bryan L. Morris, the police permitted a digital lynch mob to attack and harass her, expressing their hope that "he gets his ass beat and those pretty teeth knocked out of his head,"[64] blaming her for "how you raised this little thug POS,"[65] and offering their predictions about how fellow prisoners will "[m]ake him kill himself."[66] After Mr. Morris turned himself in, the sister of a Brook Park Police Department officer told a man who criticized the police that he was a "little b****."[67]

Of course, no criminal charges were forthcoming for causing the mother mental distress, nor for abusing, threatening, or harassing critics of the police, because Ohio Rev. Code §§ 2903.211 and 2917.21 "encourage arbitrary and discriminatory enforcement."[68] If speech undermines Sara Thurmer's reputation and business interests, the police will investigate and bring charges; if it supports their agenda, the police are on the sidelines with popcorn.

But if the First Amendment is to have any value, the government may not enact sweeping restrictions on speech and leave the rest of us to hope the police don't take offense to anything we

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[64] Ex. D at DEFT00051.

[65] *Id.*

[66] *Id.* at DEFT00054.

[67] Ex. E at DEFT00057.

[68] *Morales*, 527 U.S. at 56.

say, but that is what these two sections do. Because they fail to provide notice of what conduct is criminalized and because they encourage discriminatory enforcement, Ohio Rev. Code §§ 2903.211 and 2917.21 are void for vagueness.

III. Because the State is attempting to prosecute Ms. Criscione for the content of her speech, the statutes charged are unconstitutional as applied.

"An ordinance which is not overbroad on its face may nevertheless be unconstitutional as applied if it is enforced against a protected activity." *Felix v. Young.*[69]

A. Because the State invaded the province of First Amendment protection, the Court must dismiss the charges, regardless of whether the charges are content-based.

More than simply sorting different types of speech into protected and unprotected categories, the First Amendment provides robust protection against the use of government power to suppress speech based on the State's assessment of its effects.

In *Terminiello v. City of Chicago*,[70] for instance, Chicago police charged a man with disorderly conduct for giving a speech that "vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare."[71] State courts upheld his conviction after determining his speech consisted of unprotected "fighting words," but the Supreme Court reversed, holding that their analysis skipped over the threshold question of whether the government "invaded the province" of protected speech by predicating criminal charges on speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[72] Police and prosecutors may not round up citizens who say things that upset their neighbors, the Court held, because the entire point of the First Amendment is to "invite dispute":

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[69] 536 F.2d 1126, 1134 (6th Cir. 1976).

[70] 337 U.S. 1 (1949).

[71] *Terminiello*, 337 U.S. at 3.

[72] *Terminiello*, 337 U.S. at 4.

> It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute … is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[73]

But inconvenience, annoyance, and unrest are just the conditions the State relies on here. It alleges Ms. Criscione caused "distress" and "annoy[ed]" someone, but it does not allege that her speech poses a clear and present danger of some serious substantive evil. The police report leading to the charges suggests reputational damage to the State's alleged victim, but damaging the reputation of a negligent and incompetent nursing-home administrator is not a substantive evil, let alone one that rises "far above" annoyance and unrest.

Because the State is attempting to procure a conviction based on the tendency of pure speech to cause unrest, the content of that speech is immaterial to the question of First Amendment protection; the charges against Ms. Criscione invaded the province of First Amendment protection, so the Court must dismiss the charges.

B. Because the State's case is retaliation based on the content of protected speech, the Court must dismiss the charges.

"[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech."[74] "[A] prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful."[75]

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[73] *Terminiello*, 337 U.S. at 4.

[74] *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)).

[75] *United States v. P.H.E., Inc.*, 965 F.2d 848, 853 (10th Cir. 1992).

Establishing a retaliatory arrest moves in two steps: First, the arrestee must establish that retaliation was a substantial or motivating factor for her arrest, then the government may overcome the presumption of retaliation by proving that it would have arrested her even without that motive.[76]

For instance, in *Cohen*, 403 U.S. 15, police charged a defendant with disturbing the peace because he walked into a courthouse wearing a jacket that said "Fuck the Draft." State courts affirmed the conviction, reasoning that even if the words on his jacket were protected speech, his "premeditated intent of attracting the attention of others to the message on his jacket" was unprotected conduct.[77] The Supreme Court reversed and vacated the conviction; because inciting lawlessness is the only intent that can independently strip words of First Amendment protection,[78] there was nothing left for the state to rely on to justify the prosecution: "The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech.'"[79]

1. Because the complaints admit they are based on Ms. Criscione's speech, First Amendment retaliation is a substantial factor motivating her arrest.

Here, the complaints make no secret about the reason the State wants to put Ms. Criscione in jail. The telecommunications-harassment complaint relies exclusively on speech, saying only that Ms. Criscione "did knowingly post several text and video/audio messages to a social media website." The menacing complaint makes the same admission. It explicitly acknowledges that the State is

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[76] *Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019).

[77] *People v. Cohen*, 1 Cal. App. 3d 94, 103 (Cal. Ct. App. 1969), *rev'd sub nom. Cohen v. California*, 403 U.S. 15 (1971).

[78] *Cohen*, 403 U.S. at 18 ("At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.").

[79] *Cohen*, 403 U.S. at 18.

seeking to jail Ms. Criscione because of her speech, saying she violated the law by engaging in a "pattern of conduct" consisting of "posting multiple negative messages to a website" and "trespassing." Law enforcement's desire to punish speech is therefore a substantial factor motivating Ms. Criscione's prosecution.

2. Because the complaints allege only one act other than speaking as a basis for the charges, the State cannot establish that it would have prosecuted Ms. Criscione for some reason other than her speech.

There is nothing that the State could rely on to demonstrate that it would prosecute Ms. Criscione for telecommunications harassment regardless of her speech, as Subsection (B)(2) applies to nothing other than communications through statements and images.

The menacing charge, meanwhile, alleges a "pattern of conduct," most of which consists of posting "negative messages." But as in *Cohen*, negative messages are speech, not conduct, so the state cannot rely on them to make out a *pattern* of conduct. The only thing left, then, is the allegation that Ms. Criscione trespassed on September 20, but a single act is legally insufficient to establish a pattern of conduct.[80] The State may not conjure up more conduct using Ms. Criscione's alleged mental state at the time of her speech, as *Cohen* bars it from relying on any mental state other than an "intent to incite,"[81] which is neither an element of the offense nor alleged in the complaints. Even if the State spun the charges as criminalizing the conduct of inflicting mental distress through speech, it would still fail, because the First Amendment likewise forbids outlawing speech based on its effect on those who hear it: "Listeners' reaction to speech is not a content-neutral basis for regulation. … This Court has held time and again: 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'"[82]

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[80] *State v. Hersh*, 974 N.E.2d 161, 164 (Ohio Ct. App. 2012) ("'Pattern of conduct' is defined as 'two or more actions or incidents closely related in time…'").

[81] *Cohen*, 403 U.S. at 18.

[82] *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992).

Because the State relies on the content of Ms. Criscione's speech to justify its prosecution, it cannot avoid dismissal for retaliation unless it can demonstrate that it would have charged her regardless of that content. But because it cannot rely on either her motives or her audience's reaction to make that showing, and because a single act of alleged trespassing is neither a "pattern of conduct" under Ohio Rev. Code § 2903.211 nor a "text or audio statement" under Ohio Rev. Code § 2917.21, it has no way of satisfying its burden. The prosecution is First Amendment retaliation, and the Court may not allow it go any further.

C. The Court must dismiss the case because the State is selectively prosecuting Ms. Criscione based on First Amendment–protected activity.

"Although prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is ... subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification … including the exercise of protected statutory and constitutional rights."[83]

A selective-prosecution defense requires a defendant to make a *prima facie* showing "(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights."[84]

Here, the Bryan Morris case discussed above—along with even the most cursory peek at the Internet—demonstrates that the City routinely tolerates comments like those Ms. Criscione is

[83] *Wayte v. United States*, 470 U.S. 598, 608 (1985) (cleaned up).

[84] *Cleveland v. Trzebuckowski*, 85 Ohio St. 3d 524 (1999).

alleged to have made, yet the State does not bring charges against those who cause "mental distress" to people other Sara Thurmer, nor does it charge those who post comments "abusing, threatening, or harassing" people other than Sara Thurmer. Ms. Criscione has therefore been "singled out for prosecution," satisfying the first element, and the State admits in the complaints that it has selected her for prosecution based on her speech, which is protected by the First Amendment and therefore an exercise of her constitutional rights.

The charges thus constitute selective prosecution in violation of Ms. Criscione's rights to free speech and equal protection.

IV. Because they rely on protected speech to satisfy the elements of the charged offenses, the complaints are not supported by probable cause.

Under Crim.R. 4, the case may not proceed unless it is based on a complaint supported by probable cause, as determined by a neutral and detached magistrate. The defendant's right to "an independent interpretation of probable cause by the judge, magistrate, clerk of court, or officer of the court designated by the judge … is separate and apart from the responsibility of the executive branch (city prosecutor's office) to prosecute violations of the law."[85]

Here, the complaints are not supported by probable cause. As discussed above, the menacing complaint relies on protected speech to establish a pattern of conduct, but the First Amendment bars it from doing so. Because the only actual conduct alleged is a single incident of trespassing, there is no probable cause to believe Ms. Criscione engaged in a "pattern of conduct," and thus no probable cause to believe she committed menacing by stalking. Likewise, the telecommunications-harassment complaint relies on nothing but protected speech to satisfy the elements of the offense, and there is therefore no probable cause to believe Ms. Criscione violated that statute, either.

[85] *State v. Moss*, No. 2003CA00218, 2003 WL 22672018, at *2 (Ohio Ct. App. Nov. 10, 2003).

Further, neither the complaints nor the summonses were approved by a neutral and detached magistrate. Instead, both were signed by the alleged victim and notarized by a member of the police department. But they must be approved by a neutral and detached magistrate, which requires "severance and disengagement from activities of law enforcement."[86] Because the investigating officer is fully involved and engaged in the activities of law enforcement, the complaints and summonses are invalid and insufficient to trigger the Court's jurisdiction.

Because the complaints and summonses were neither supported by probable cause nor approved by a neutral and detached magistrate, the Court must dismiss the charges against Ms. Criscione.

CONCLUSION

The State has launched an ill-conceived effort to criminalize saying mean things on the Internet. But it has targeted protected speech and charged it as an offense under facially unconstitutional laws. The case must be dismissed immediately to avoid any further chill on Ms. Criscione's protected speech.

[86] *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

Respectfully submitted,

THE CHANDRA LAW FIRM LLC

/s/ Brian D. Bardwell

Brian D. Bardwell (0098423)
The Chandra Law Building
1265 W. 6th St., Suite 400
Cleveland, OH 44113-1326
216.578.1700 Phone
216.578.1800 Fax
Brian.Bardwell@ChandraLaw.com

Attorney for Defendant Gina Criscione

CERTIFICATE OF SERVICE

I certify that on January 6, 2021, this document was served on opposing counsel as provided by Civ. R. 5(B)(2)(b)(i).

/s/ Brian D. Bardwell
Attorney for Defendant Gina Criscione