Case No. _____

SUPREME COURT
OF THE STATE OF OHIO

Jeffrey Rasawehr,
Respondent - Appellant

v.

Rebecca Rasawehr
Petitioner - Appellee

and

Joni Bey
Petitioner – Appellee

On Appeal of Third District Court of Appeals Decision
in Case Number 10-18-02 decided January 14th, 2019

MEMORANDUM IN SUPPORT OF JURISDICTION

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JURISDICTIONAL STATEMENT

> Every Citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." Ohio Constitution Article 1, Section 11

This case presents this Court with the opportunity to decide the critical issue of whether the government can - under the Laws of the State of Ohio and the United States Constitution - categorically prohibit a broad and indiscriminate category of free speech by using the State of Ohio's Civil Stalking Protection Order statute.

Further, this case provides the Court the opportunity to reaffirm long held precedent that prohibits the use of injunctions to ban the exercise of free speech – expect in narrow circumstances wherein the enjoined party is both afforded a "due trial" and upon which there is a finding that such statements are constitutionally unprotected. As the Amici properly pointed out in it's brief in the Third District Appellate case, the impermissible use of injunctions to prohibit the exercise of critical speech in Ohio is not idiosyncratic. To the contrary, this issue arises often in Ohio Courts, including with regard to political and business disputes. Lower Courts – and the legal community writ large - needs guidance. A published opinion from this Honorable Court would be largely beneficial to remind trial courts that only the narrowest of injunctions on free speech are allowed, and only in the narrowest of circumstances.

More specifically, this case presents the Court with an opportunity to consider whether an injunction can withstand Constitutional scrutiny if it requires that a citizen refrain from posting about someone on any social media service, website, discussion board or similar outlet or service without regard for the nature of the content, orders that a Citizen remove all postings on a website that relate to a person and further prohibits a Citizen from posting about a specific matter of public import without any finding as to the truth or falsity of said matter.

Two of this Country's most cherished founding principles are the freedom of the press and the freedom of speech. If permitted to stand, the Lower Court's decision would represent a significant erosion of both freedoms. The chilling effect this decision would have on these most cherished rights cannot be overstated. The Appellant in this matter enjoys significant presumptions in his favor, presumptions that only this Honorable Court can reaffirm and uphold. In 1969, the Court in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.E.2d 430 (1969), declared that even inflammatory speech - such as racist language by a leader of the Ku Klux Klan - should generally be protected unless it is likely to cause imminent violence. As Supreme Court Justice Anthony Kennedy stated in the seminal Free Speech case, *United States v. Alverez*, 567 U.S. 709, 727, 132 S.Ct. 2537, L.Ed.2d 574 (2012):

> "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."

In summation, the Appellant asks this Court to consider whether Justice Kennedy was mistaken in this regard - and instead - that the proper remedy in Ohio for speech that is inflammatory or unpopular is to categorically prohibit all speech on a broad and undefined topic for half a decade.

STATEMENT OF FACTS

The Appellant and Appellees are family members with a long and often acrimonious history. This case revolves around several internet postings allegedly authored by the Appellant and published on a website, www.countycoverup.com - as well as comments made on various online news stories. The stated purpose of said website is to expose potential corruption in Mercer County, Ohio and educate the public about matters of public interest. According to the Appellees, they have appeared as persons of interest in editorial content on www.countycoverup.com from September 7th,

2017 to November 8th, 2017, as well as various anonymous message board posts on www.craigslist.com. The petitions filed by the Appellees requested that the Court grant an order that:

> 1) Required Appellant not to abuse the Appellees by harming, attempting to harm, threatening, following, stalking, harassing, contacting, forcing sexual relations upon them, or by committing sexually oriented offenses against them; and
>
> 2) Required Appellant not to abuse the Appellees and the family or household members named in the Petition by harming, attempting to harm, threatening, following, stalking, harassing, contacting, forcing sexual relations upon them, or by committing sexually oriented offenses against them; and
>
> 3) Required Appellant to refrain from entering the residence, school, business, place of employment, or day care centers of Appellees and the family or household members named in the Petition, including the buildings, grounds and parking lots at those locations.
>
> 4) Required Appellant not to possess, use, carry, or obtain any deadly weapon; and
>
> 5) Required Appellant to refrain from posting about Appellees on any social media service, website, discussion board, or similar outlet or service; from sending text messages and emails to Appellees.

In making said petition, the Appellees outlined several published online articles that they sought to attribute to the Appellant and believed entitled them to a broad prohibition on Appellant's right to future speech. These included things such as the accurate publication of Appellee Bey's felony warrant in the State of Florida, suggestions of favoritism in local policing, improper influence on local law enforcement and politicians and evidence of potential foul play involving the death of Appellant's family members.

On or about December 4th, 2017, the Court held a hearing on the matter. At said hearing, two prosecuting Attorneys – Matthew Fox and Amy Ikerd - appeared to observe the proceedings. Said prosecutors have been involved in a protracted and constitutionally concerning analog criminal proceeding attempting to criminalize Appellant's free speech in the Celina Municipal Court. Said case involves a 26-count criminal complaint alleging that the Appellant has committed various

crimes merely by exercising his constitutionally protected rights to freedom of speech and expression. Due to their appearance in the underlying CPO proceedings, the need for the invocation of the Fifth Amendment protections was made that much more pressing. As such, Appellant did not testify at said hearing.

Appellees, on the other hand, testified at some length, but were notably unable to directly attribute the authorship to Appellant and admitted that the content of the speech was at issue – namely that should the Appellant have said "nice things" about them, they wouldn't have minded. *Transcript pg. 58*. As one of the primary concerns voiced by the Appellees was regarding the implication that they may have been involved in the death of one Raymond Bey, Appellant sought to introduce testimony from a private investigator – Jack Bastian – to support this contention. The Court declined to hear said testimony and determine the truthfulness or reasonableness of the statements it was being asked to silence. On or about January 18th, 2018, the Court issued an order that read:

> Respondent shall refrain from posting about Petitioners on any social media service, website, discussion board or similar outlet or service and shall remove all such postings from countycoverup.com that relate to the petitioners. Respondent shall refrain from posting about the deaths of Petitioner's husbands in any manner that expresses, implies, or suggests that the Petitioners are culpable in those deaths.

Further, the order prohibited direct contact with the Appellees, prohibited Appellant from being within 500 feet of Appellees, and prohibited Appellant from entering Appellees' residence, business, place of employment, etc. despite there being no evidence of said direct contact precipitating the petition. The order is to remain in effect until January 15th, 2023 – absent relief on appeal.

ARGUMENT I

> Ohio and Federal law prohibit injunctions as broad as the one used to limit appellant's free speech in this matter.

PROPOSITION OF LAW I

> An injunction on speech is only permissible when that speech has "judicially been found libelous," and is limited to the extent that the injunction restricts "continued publication of the same".

O'Brien v. Univ. Comm. Tenants Union, Inc., 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

There is no doubt that the facts of this case are troubling – and the allegations leveled by Appellant are caustic at times. Allegations of criminal behavior can certainly lead to "unwanted communication" and "questions by others who have viewed the [accusatory information]." These types of statements can naturally lead to feelings of embarrassment or worry. For these reasons, Ohio law has always allowed for civil libel remedies – and more recently, injunctions against the republication of information found to be libelous. This is what is meant by the phrase "being responsible for the abuse of the right" contained in the Ohio Constitution. However, the expansive and all-encompassing injunction in this case is improper, as it was not founded on a finding that the speech was libelous. To the contrary, at trial, the Appellant was denied the opportunity to present testimony as to the truthfulness of the allegations made.

This very Court has held that an injunction on speech is only permissible when that "speech has judicially been found libelous," and is limited to the extent that the injunction restricts "continued publication of the same". *Id.* Notably, in this case, there has been absolutely no judicial finding that the speech prohibited is libelous. To the contrary, the Trial Court would not allow the presentation of evidence as to the truthfulness of the allegations over the objection of Appellant. More troubling, however, is that the injunction goes further to prohibit not just speech about culpability surrounding the death of an individual, but prohibits any "posting about Petitioners on

any social media service, website, discussion board or similar outlet or service." In his dissent, Justice Zimmerman expressed his trepidation with the broadness of the injunctive language:

> In the case before us, the trial court's order directing Rasawehr to "refrain from posting about Petitioners on any social media service, website, discussion board, or similar outlet service and shall remove all such postings from CountyCoverUp.com that relate to Petitioners" is **problematic**. This order, directing Rasawehr to "refrain from posting about Petitioners" is ambiguous. Clearly, although not set forth in the record, potential harmless posts (from the Appellee to the Petitioners) (i.e. birthday greetings, holiday invitations, condolences, days of special meaning, family events, etc. etc.) are impacted by this portion of the trial court's order. With the safety of Petitioners being primary, such seemingly innocuous posts (by Rasawehr about the petitioner) would be a violation of the trial court's order. As such, the interpretation of the context of postings "about Petitioners" that are prohibited is ambiguous. Similarly, the trial court's order directing Rasawehr to "remove all such postings… that relate to Petitioners" is also ambiguous for similar reasons.

ARGUMENT II

> The Trial Court's order exceeds the court's discretion because it is an unconstitutional prior restraint and restriction on the exercise of the Appellant's first amendment right to free speech.

PROPOSITION OF LAW II

> Prior Restraints on the exercise of free speech are unconstitutional and presumptively invalid.
>
> > "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."

Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

It has been said that prior restraints on media publication are presumptively unconstitutional and the U.S. Supreme Court has held that "[a]ny prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 723, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). Even where the free exercise of speech is abhorrent in some way to society at large, the U. S. Supreme Court has explained that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all

others beforehand." *Southeastern Promotions, Ltd. v. Conra*, 420 U.S. 546, 559, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). *See also Freedman v. Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907). The order of the trial Court endeavors to prohibit a broad, indefinite universe of speech – much of which is wholly protected – before it is even uttered. As stated by the U.S. Supreme Court, "it has been generally, if not universally, considered that it is the *chief* purpose of the [first amendment] guaranty to prevent *previous restraints* upon publication." *Near v. Minnesota*, 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

The Court in *Near* explained the concern that giving the government the power to order prior restraints on speech is akin to giving it the power to censor unpopular ideas before they are even spoken." *Id.* The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected." *Id* at 697. As such, the First Amendment demands that the court systems of the several states provide challengers of such restraints with immediate judicial remedies. *Natl. Socialist Party of Am. v. Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977). Prior restraints are "simply repugnant to the basic values of an open society in that they tend to encourage indiscriminate censorship in a way that subsequent punishments do not." *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas*, 125 Ohio St.3d 149, 2010-Ohio-1533, 926 N.E.2d 634, ¶ 21.

Technically speaking, the relief in this case is an unconstitutional way of establishing a limitation on Appellant's speech. If there were even any remote culpability or available restriction on an individual's speech under Supreme Court precedent, it would almost always only apply to speech that has *already occurred.* Perhaps in such cases an action may lie in the classic categories of freedom of speech exceptions such as defamation, libel, or slander actions – actions wherein the veracity and truthfulness of alleged communications are of almost determinative legal consequence. Notably, in this case, the Appellant was *not permitted* to address the truth or veracity of the statements in the trial

court proceedings and was prevented from introducing testimony of a witness to this end. In most of those types of cases, truth is an affirmative defense. Of course, all journalists or citizens, whether associated with massive publishing companies or operating as independent investigative journalists publishing digital newspapers, are limited in some respects in what they can publish. However, in such circumstances, standards of falsity, actual malice, prior knowledge of falsity, or some proof of actual damages would all apply. All of these critical elements of the offense would be hotly contested and would require adjudication before culpability or liability could be imposed and the exercise of First Amendment rights could be constitutionally punished.

Of particular note is that *none* of those established remedies would involve an unconstitutional prior restraint on future publication before any of the foregoing litigated elements could conceivably have been established. Those actions only lie *after* speech has been made. Furthermore, in such a case, the truth of the alleged assertions would govern whether they were actionable and such First Amendment rights could *only* be restricted, if at all, after publication and only after the elements of a First Amendment exception were proven. The trial court simply should not have imposed a prior restraint through a CSPO order *prior to publication.* The burden of supporting an injunction against a future exhibition of free expression is "even heavier than the burden of justifying the imposition of a criminal sanction for a past communication." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-316, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). The trial court has effectively done just that. The trial court has effectively circumvented other established legal pathways and couched what is really a dispute as to the veracity of these claims under an injunction preventing all future expression "about the Petitioners."

Not only does such an order violate the U.S. Constitution, but such an order also runs afoul of the Ohio Constitution as well. Freedom of press is similarly protected by the Ohio Constitution. Article I Section 11 of the Ohio Constitution guarantees that "every citizen may freely speak, write,

and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." Under the Ohio Constitution, Appellant cannot be permanently banned from speaking regarding all subjects that may or may not relate to either of the Petitioners. It would deny Appellant the protection of the Ohio Constitution as a citizen to freely speak, write and publish his sentiments on all subjects. Such a court order would amount to a law restraining this liberty. The Ohio Supreme Court has held consistently with the U.S. Supreme Court precedent regarding prior restraints. Prior restraints are particularly disfavored and bear a heavy presumption of unconstitutionality, as "a free society prefers to punish the few who abuse the right of free speech after they break the law, rather than to suppress all speech before hand." *Columbus v. Meyer*, 152 Ohio App.3d 46, 2003-Ohio-1270, 786 N.E.2d 521, ¶ 35 (10th Dist.), citing *Southeastern Promotions, Ltd.*, 420 U.S. 546 at 559.

Conclusion

The Trial Court and Appellate Court violated the constitutional protections afforded to Appellate when confronted with an injunction prohibiting the exercise of free speech – prior to a finding that the statements at issue were libelous and seeking to prohibit a far broader category of speech that what is constitutionally permissible. The injunction at issue represents an attempt to erode the basic freedoms at the foundation of the United States of America. No American citizen should be silenced – but for the narrowest situations – none of which are present in this case. The injunction should be stricken in its entirety. Alternatively, the injunction should be remanded for additional consideration within the bounds of Constitutional Law.

Respectfully Submitted,

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CERTIFICATION

I, Dennis E. Sawan, Esq., hereby certify that a copy of the foregoing was sent via electronic mail this 27th day of February, 2019 to:

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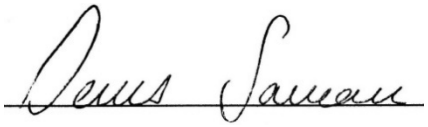

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