Case No. 2019-0295

IN THE OHIO SUPREME COURT

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

JURISDICTIONAL MEMORANDUM OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION AND PROFS. AARON H. CAPLAN AND EUGENE VOLOKH IN SUPPORT OF ACCEPTING THE JURISDICTIONAL APPEAL

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Interest of *Amici Curiae*

Recognizing the Internet's power as a tool of democratization, the Electronic Frontier Foundation (EFF) has worked for more than 25 years to protect the rights of users to transmit and receive information online. EFF is a non-profit civil liberties organization with more than 39,000 dues-paying members, bound together by a mutual and strong interest in helping the courts ensure that such rights remain protected as technologies change, new digital platforms for speech emerge and reach wide adoption, and the Internet continues to re-shape governments' interactions with their citizens. EFF often files *amicus* briefs in courts across the country, including in *Packingham v. North Carolina*, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017), and has often submitted amicus briefs regarding the availability of injunctive relief in online defamation cases, *see, e.g., Kinney v. Barnes,* 443 S.W.3d 87 (Tex.2014).

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Eugene Volokh is a professor of law at UCLA School of Law, where he teaches First Amendment law. He is the author of, among many other articles, Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw.U.L.Rev. 731 (2013), which likewise deals with the legal issues involved in this case.

No party or party's counsel has authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money intended to fund preparing or submitting the brief, except that UCLA School of Law paid filing expenses.

This Case Is of Great General Interest and Involves a Substantial Constitutional Question

1. The decision below upholds a strikingly overbroad injunction, which bans Mr. Rasawehr from posting *anything* online about petitioners. This is inconsistent with the First Amendment, with U.S. Supreme Court precedent, and with precedent from appellate courts in other states. And even to the extent that courts may enjoin repetition of speech that fits within some narrow First Amendment exceptions, those exceptions cannot justify barring *all* speech by the defendant about plaintiffs.

2. The decision below reasons that Mr. Rasawehr's speech is enjoinable because it stems from "an illegitimate reason born out of a vendetta seeking to cause mental distress." Yet there is no "vendetta speech" exception to the First Amendment, and no exception for speech that judges believe has an "illegitimate reason."

3. The decision below also upholds a narrower provision barring Rasawehr from accusing petitioners online of being culpable in their husbands' death. Such a provision could be constitutional following a finding on the merits that such specific statements are libelous, but it cannot be imposed before such a finding. That is what this Court concluded in *O'Brien v. Univ. Comm. Tenants*

Union, Inc., 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); and, again, appellate courts in other jurisdictions have reached the same result.

4. Mr. Rasawehr might appear to some to be obsessed and even perhaps delusional. But the decision below is not limited to speech by people who come across this way. Rather, it sets a precedent for enjoining speech by anyone who sharply and repeatedly criticizes others—whether government officials, businesspeople, or, as here, family members.

At least five Ohio courts have already issued similar speech-restrictive injunctions in other cases, including cases involving political and consumer disputes. Now that there is a published decision endorsing such injunctions, such broad speech restrictions will likely become even more common.

And such restrictions will often arise where the defendant cannot fight the case all the way up to this Court. This case, in which the defendant was willing and able to fight the case all the way up, therefore offers an excellent opportunity for this Court to instruct lower courts about First Amendment restraints on anti-speech injunctions.

Argument in Support of Propositions of Law

Proposition of Law I: Injunctions barring all online speech about a person violate the First Amendment.

Speech about a person cannot be enjoined absent a finding that the speech falls within a First Amendment exception. Even if narrow restrictions on speech that is intended to cause severe emotional distress are constitutional, they cannot apply to *all* speech by the defendant about plaintiffs.

Yet the Order covers all "posting about Petitioners on any social media service, website, discussion board, or similar outlet or service." *Id.* at ¶ 20. The dissent below notes the injunction's overbreadth: "[P]otential harmless posts . . . (i.e. birthday greetings, holiday invitations, condolences, days of special meaning, family events, etc. etc.) are impacted." *Id.* at ¶ 53 (Zimmerman, P.J., concurring in part and dissenting in part). And the requirement that Rasawehr "remove all such postings from CountyCoverUp.com that relate to Petitioners," *id.* at ¶ 21, also extends to *all* speech, as opposed to *unprotected* speech.

In *O'Brien v. Univ. Comm. Tenants Union, Inc.*, this Court made clear that only specific restrictions on speech that track the narrow exceptions to the First Amendment may be upheld. "Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that *same* speech may be proper." 42 Ohio St.2d 242, 244, 327 N.E.2d 753 (1975) (emphasis in original). Perhaps speech may also be enjoined if it fits within another one of the "narrow classes of speech [that] are unprotected by the First Amendment." *Id.* But the Order here unconstitutionally bans all online speech Rasawehr might make about his mother and his sister, regardless of whether the speech fits within one of those "narrow [unprotected] classes of speech."

U.S. Supreme Court precedent likewise forbids injunctions against all speech about a person. For instance, in *Organization for a Better Austin v.*

Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971), activists who disapproved of a real estate agent's (apparently lawful) behavior repeatedly leafleted near where he lived and went to church, demanding that he change his practices. *Id.* "Two of the leaflets requested recipients to call respondent at his home phone number and urge him to sign the 'no solicitation' agreement." *Id.* at 417. Yet the Court struck down an injunction against such leafleting:

> No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record.

Id. at 419-20.

To be sure, some unwanted speech *to* an unwilling recipient may be restricted—but, as *Keefe* indicates, this cannot justify restrictions on speech *about* an unwilling subject. The government may be able "to stop the flow of information into [an objecting person's] household," but it may not attempt to stop the flow of such information about a person "to the public." *Id.* at 420; *see also* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw.U.L.Rev. 731, 745-46 (2013).

Other states have similarly struck down such overbroad injunctions against speech about a person. Here are five examples:

1. In *In re Marriage of Suggs*, the Washington Supreme Court set aside a civil harassment restraining order that barred "knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties

which are designed for the purpose of annoying, harassing, vexing, or otherwise harming [plaintiff] and for no lawful purpose." 152 Wash.2d 74, 78, 93 P.3d 161 (2004). The order, the court held, was an "unconstitutional prior restraint," in part because it "chill[ed] all of [defendant's] speech about [the beneficiary of the order], including that which would be constitutionally protected, because it is unclear what she can and cannot say." *Id.* at 84. In this case, the order is even more chilling, because it *is* clear to Mr. Rasawehr that he cannot say anything about plaintiffs, "including that [speech] which would be constitutionally protected," *id.*

2. In *TM v. MZ*, the Michigan Court of Appeals reversed an overbroad protective order obtained against a respondent who posted "highly inflammatory and negative comments" about petitioner and her family online, including allegations of involvement in a kidnapping. __ Mich.App. __, No. 329190, 2018 WL 7377288, *1 (Oct. 23, 2018) (precedential). The order, the court held, was an unconstitutional prior restraint. *Id.* at *7. And the respondent's words were constitutionally protected even if they "amounted to harassment or obnoxiousness." *Id.* at *6.

3. In *Flood v. Wilk*, the Appellate Court of Illinois struck down as unconstitutional an order prohibiting the respondent from "communicating in any form any writing naming or regarding [petitioner], his family, or any employee, staff or member of [the petitioner's congregation]." __ N.E.3d __, Ill.App. No. 172792, ¶ 1 (Feb. 7, 2019) (precedential). "It is all but impossible," the court held, "to

imagine a factual record that would justify this blanket restriction on respondent's speech." *Id.* at ¶ 35.

4. In *David v. Textor,* the Florida Court of Appeal struck down an injunction barring "text messages, e[-]mails, . . . tweets[, or] . . . any images or other forms of communication directed at John Textor without a legitimate purpose." 189 So.3d 871, 874 (Fla.App.2016), This injunction, the court held, was a forbidden "prior restraint" because it prevented "not only communications *to* Textor, but also communications *about* Textor." *Id.* at 876 (emphasis in original).

5. In *Evans v. Evans,* the California Court of Appeal struck down a preliminary injunction prohibiting an ex-wife from posting "false and defamatory statements" and "confidential personal information" about her ex-husband online because the injunction was not limited to statements that had been found to be constitutionally unprotected. 162 Cal.App.4th 1157, 1161, 76 Cal.Rptr.3d 859 (2008).

The upshot of these cases is consistent and simple: Injunctions against speech about a person are unconstitutional if they go beyond constitutionally unprotected categories of speech (such as defamation or true threats).

Proposition of Law II: Speech cannot lose constitutional protection just because it is believed to have an "illegitimate reason."

The court below rested its decision on Rasawehr's speech being "for an illegitimate reason born out of a vendetta seeking to cause mental distress." *Bey v. Rasawehr*, 3rd Dist. Mercer Nos. 10-18-02, 10-18-03, 2019-Ohio-57, ¶ 20. But

"under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (Roberts, C.J., joined by Alito, J.) (alteration and internal quotation marks omitted); *id.* at 492 (Scalia, J., concurring in part and in the judgment, joined by Kennedy and Thomas, JJ.) (taking the same view). Speech cannot be stripped of protection on the grounds that it lacks "good motives" or "justifiable ends." *State v. Turner*, 864 N.W.2d 204, 209 (Minn.Ct.App.2015). And "there is no categorical 'harassment exception' to the First Amendment,'" *State v. Burkert*, 231 N.J. 257, 281, 174 A.3d 987 (2017) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir.2001) (Alito, J.)), nor a "vendetta" exception.

Indeed, even in cases where speech likely stemmed from the speaker's personal vendetta or some other "illegitimate reason," the U.S. Supreme Court has treated such speech as broadly constitutionally protected. For example, *Hustler Magazine, Inc. v. Falwell* upheld *Hustler*'s right to criticize Jerry Falwell, even in a harsh, vulgar, and deeply emotionally distressing way. 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). There, *Hustler* had published a parodic advertisement which "portrayed respondent as having engaged in a drunken incestuous rendezvous with his mother in an outhouse." *Id.* at 877. The Court never suggested that the speech lost its protection because it stemmed from a personal vendetta or was motivated by an "illegitimate reason." And in *Near v. Minnesota*, the Supreme Court made clear that a speaker's past libelous speech

cannot justify broad restrictions on nonlibelous speech in the future, even when the injunction is limited to speech said without "good motives." 283 U.S. 697, 713, 51 S.Ct. 265, 75 L.Ed. 1357 (1931).

Likewise, in *Tory v. Cochran*, the Court considered a case challenging the constitutionality of an injunction barring a disgruntled litigant from picketing outside his former lawyer's office "holding up signs containing various insults and obscenities" (apparently as a means of pressuring the lawyer to pay the litigant money). 544 U.S. 734, 735, 125 S.Ct. 2108, 161 L.Ed.2d 1042 (2005). The Court ultimately vacated the injunction on narrow grounds: The lawyer had died while the case was pending, so "the grounds for the injunction [were] much diminished, if they have not disappeared altogether." *Id.* at 738. But the Court agreed to hear the case despite the defendant's likely bad intentions or his "vendetta" against the lawyer; and it never suggested that these factors stripped the speech of First Amendment protection.

Similarly, in *Henry v. Collins*, the petitioner had issued press releases calling his arrest "'a diabolical plot'" driven by the County Attorney and police chief. 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965), *rev'g Henry v. Pearson*, 253 Miss. 62, 158 So.2d 695 (1963) (which offers more factual details). But the Court agreed to hear the case despite that, and held that the petitioner's speech was protected by the *New York Times v. Sullivan* rule, with no suggestion that it was less protected on the grounds that it may have stemmed from a personal vendetta or an "illegitimate reason."

Proposition of Law III: Injunctions against making specific factual allegations are unconstitutional absent a finding on the merits that those allegations are false.

Though Ohio law allows injunctions against speech once particular statements have been found unprotected by the First Amendment, such injunctions can only be imposed after a trial on the merits:

> Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that *same* speech may be proper. The judicial determination that specific speech is defamatory must be made prior to any restraint.

O'Brien v. Univ. Comm. Tenants Union, Inc., 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). And "'[t]he presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties.'" *Id.* at 246 (citation omitted). Therefore, the law may allow only a "'limited injunctive remedy'" against the "continued publication" of material "'found after due trial'" to be constitutionally unprotected. *Id.* (citation omitted). In the words of the Kentucky Supreme Court dealing with the same question,

> [T]he modern rule [is] that defamatory speech may be enjoined only after the trial court's final determination by a preponderance of the evidence that the speech at issue is, in fact, false, and only then upon the condition that the injunction be narrowly tailored to limit the prohibited speech to that which has been judicially determined to be false.

Hill v. Petrotech Resources Corp., 325 S.W.3d 302, 309, 313 (Ky.2010) (reversing an injunction that was issued before a trial on the merits); *see also Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal.4th 1141, 1156, 57 Cal.Rptr.3d 320, 156 P.3d 339 (2007) (concluding that an injunction against libel can be "issued

only following a determination at trial that the enjoined statements are defamatory").

Many courts have in particular recognized that it is improper to enjoin libels through procedures that "deprive [the defendant] of the right to a jury trial concerning the truth of his or her allegedly defamatory publication." *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 730, 559 N.W.2d 740 (1997); *see also McFadden v. Detroit Bar Ass'n*, 145 N.W.2d 285, 287, 4 Mich.App. 554 (1966) ("[T]he defendant in a defamation action has the right to a jury trial which would be precluded by granting of an injunction"). Court decisions upholding injunctions barring continued publication of libels have stressed that the injunction was issued only after a "jury determination of the libelous nature of specific statements." *Kramer v. Thompson*, 947 F.2d 666, 678 (3d Cir.1991); *see also Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 11 (Minn.1984) (same). Yet here there was no jury trial justifying this injunction.

More broadly, order of protection proceedings offer "[n]one of the substantive and procedural limitations that have been carefully constructed around defamation law." Aaron Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. 781, 822 (2013). "A petitioner should not be able to evade the limits on defamation law (many of them constitutionally mandated) by redesignating the claim as civil harassment." *Id.* The right to be free from injunctions against speech until the speech is found to be false and defamatory at a full trial, before a jury, is one such important limit on defamation law.

Argument in Support of the Importance of This Case

This Court should especially consider this issue because other Ohio courts are making the same mistake as did the court below

This case especially merits this Court's attention because other Ohio courts have also issued these sorts of unconstitutional, overbroad orders.

A. In *Kleem v. Hamrick*, the court banned all online speech by Johanna Hamrick about Norma Kleem—a city commissioner and organizer of the July 4 parade—and Kleem's family, including her brother, mayor Cyril Kleem:

> [Hamrick] is prohibited from posting any information/comments/ threats/or any other data on any internet site, regarding the petitioner and any member of her immediate or extended family; . . . she is prohibited from blogging/posting on any site [about] petitioner including but not limited to these blogs.

Kleem v. Hamrick, Cuyahoga C.P. No. CV 11 761954, at 3 (Aug. 15, 2011), *rev'd*, Journal Entry, *id.* (Aug., 22, 2011), both available at http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf; *see* Volokh, *supra*, 107 Nw.U.L.Rev. at 734-35. Hamrick had posted various items critical of Kleem; one of these posts included comments about Kleem's control over the city's July 4 parade, and alluded to throwing tomatoes at her: "Please Sunday July 3rd, DO NOT FORGET YOUR TOMATOES!!! I truly would love to chuck one right at someone in THAT camp. It would be quite enjoyable. Happy Independence Day Berea." Volokh, *supra*, 107 Nw.U.L.Rev. at 734-35. Even if this post could somehow be seen as a threat of actual tomato-throwing, surely it could not justify a categorical ban on all online speech about the commissioner and the mayor. Yet the court imposed such a ban.

B. In *W.6 Restaurant Group Ltd. v. Bengtson*, two popular YouTube speakers created a video which criticized a restaurant. The restaurant owner was granted a strikingly overbroad order barring the speakers from "publishing on social media platforms *any* statements, videos, or images concerning [owners of an Ohio restaurant], their employees, their related entities, and their patrons." (emphasis added). *W.6 Restaurant Group Ltd. v. Bengtson*, Cuyahoga C.P. No. CV 17 889784, at 2 (Nov. 30, 2017), available at http://volokh.com/wp-content/uploads/2018/03/W6vBengston.pdf. The case was later removed to federal court, and settled.

C. In *Aukerman v. Adams*, the court ordered the defendant to "immediately cease and desist from making further comments of any nature referencing [plaintiff] Garner Ted Aukerman." *Aukerman v. Adams*, Knox C.P. No.14ST08-0272, at 2 (Sept. 5, 2014), available at http://law.ucla.edu/volokh/ac/rasawehr/AukermanOrder.pdf. The plaintiff at whose behest the order was issued had earlier been found guilty of forging a different court order, aimed at trying to get certain material about him removed from Google searches.[1] Unsurprisingly, if overbroad injunctions become available, they can be used by all

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[1] *See Aukerman v. Adams*, Fla.Cir.Ct. Volusia Cnty. No. 2013-33765-FMCI (Feb. 5, 2014), available at https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2017/04/AukermanProsecution.pdf; Eugene Volokh, *Two Past Prosecutions for Forged Court Orders in Libel Takedown Cases*, Reason, Apr. 21, 2017, https://reason.com/volokh/2017/04/21/two-past-prosecutions-for-forg.

sorts of litigants—some sympathetic, as the plaintiffs in the case before this Court might be, and some less so.

D. In *A Plus Expediting & Logistics, Inc. v. Harris*, a court issued a temporary restraining order requiring defendant to "[i]mmediately cease and desist from making any defamatory, reckless or false statement about plaintiff or any of plaintiff's officers, owners, employees agents or representatives." Montgomery C.P. No. 2011 CV 4409, at 1 (Sept. 28, 2011), available at http://law.ucla.edu/volokh/ac/rasawehr/APlusOrder.pdf. This order was expressly not limited to false *and* defamatory statements, but included any statements that were false *or* defamatory. And this too was issued before any trial on the merits or any jury finding that particular statements were defamatory.

E. In *U.S. Diamonds & Gold, Inc. v. Snyder*, the court issued a temporary restraining order requiring a defendant "to secure the immediate removal of any post [she] has made on Facebook or any other social media site concerning Plaintiff." Montgomery C.P. No. 2015 CV 06344, at 1 (Dec. 10, 2015), available at http://law.ucla.edu/volokh/ac/rasawehr/USDiamondsOrder.pdf. This too was not limited to defamatory material, and was issued before any trial on the merits and without any jury finding.

These are just the orders that *amici* are aware of; doubtless there are many similar Court of Common Pleas orders that are just not easily findable. Indeed, the published opinion below, which validates such injunctions, will encourage courts to enter similar orders.

And most such orders will not reach this Court, because the speakers will be unable or unwilling to spend the money, time, and effort to take the case all the way up to this Court. This case thus provides an excellent opportunity to set lower courts straight on this subject.

Conclusion

Injunctions against repeating libelous statements may be constitutional, if they are entered after a trial in which they are found to be libelous. But neither challenged part of the injunction in this case qualifies: One part covers all speech about the plaintiffs, not just libelous speech, and the other covers specific statements that had not yet been found libelous at trial. This Court should hear the case, and reverse the dangerous precedent set by the court below.

Respectfully submitted,

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February 27, 2019

Certification

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