IN THE SUPREME COURT OF OHIO

JONI BEY, et al., Appellees, v. JEFFREY RASAWEHR, Appellant.	Case No. 2019-0295 On Appeal From the Mercer County Court of Appeals Third Appellate District Court of Appeals Case Nos. 10-18-02, 10-18-03

MERIT BRIEF OF APPELLEES JONI BEY AND REBECCA RASAWEHR

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I. Statement of the Facts and Case

A. This case requires the Court to determine whether provisions of civil stalking protection orders constitute an unconstitutional prior restraint on the speech of the offender.

Civil Stalking Protection Orders ("Protection Orders") issued to protect Joni Bey ("Joni") and Rebecca Rasawehr ("Becky")[1] from suffering continued fear of physical harm and actual mental distress caused by Appellant Jeffrey Rasawehr ("Rasawehr"). The Protection Orders were issued pursuant to Ohio's menacing by stalking statute and the relevant elements of the offense are as follows:

> (A)(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person…
>
> (A)(2) No person, through the use of any form of written communication or any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, r-computer system, or telecommunication device shall post a message or use any intentionally written or verbal graphic gesture with purpose to do either of the following:
>
> (a) Violate division (A)(1) of this section:
>
> (b) Urge or incite another to commit a violation of division (A)(1) of this section.

R.C. 2903.211. The Code provides that in addition to criminal enforcement, victims can obtain a protection order through a civil action which may be conducted ex parte or, "as in a normal civil action [following] a full hearing on the matter." R.C. 2903.214(D). The Protection Orders were issued following a full hearing. *Bey v. Rasawehr*, 3d Dist. Mercer, Nos. 10-18-02, 10-18-03, 2019-

[1] For ease of reading, Appellees will hereafter refer to Petitioner/Appellee Joni Bey as "Joni", Petitioner/Appellee Rebecca Rasawehr as "Becky" and Respondent/Appellant Jeffrey Rasawehr as "Rasawehr."

Ohio-57, ¶¶ 5-17. Rasawehr refused to testify, invoking his Fifth Amendment right against self-incrimination. *Id.* at ¶ 17. Following the full hearing, the trial court concluded that Rasawehr "engaged in a pattern of conduct which proximately caused each of the petitioners fear and mental distress, and respondent did so with the knowledge, if not the intent, that his posting of the information would cause each of the petitioners fear and mental distress" and that, "[t]he anxiety of each petitioner has risen to the extent that each fears physical harm may be inflicted upon them by respondent." *Id.* at ¶ 20.

The General Assembly provided for broad prospective relief to protect the victims of menacing by stalking from enduring future harms. "After an ex parte or full hearing, the court may issue *any protection order*, with or without bond, that contains terms *designed to ensure the safety and protection of the person to be protected*." (Emphasis added.) R.C. 2903.214(E)(1)(A). Utilizing this broad authority, the trial court issued the Protection Orders now before this Court.

In addition to standard no contact provisions, the Protection Orders included a sentence amounting to a "no-mention" order, recognizing that future references would necessarily inflict additional harm on Joni and Becky. *Id*. at ¶ 46. That sentence directed that Rasawehr "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 [Rasawehr's website] that relate to Petitioners." *Id*. at ¶ 20. The Protection Orders also directed that Rasawehr "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*.

Rasawehr appealed to the Mercer County Court of Appeals, Third Appellate District, asserting that the Protection Orders (a) constituted an impermissible prior restraint in violation of the First Amendment; (b) were void for vagueness; (c) were not rationally related to the facts of

the case; and (4) failed to meet the requirements of R.C. 2903.211. All assignments of error were rejected.

Upon Rasawehr's petition for a jurisdictional appeal, this Court granted review on the single issue of whether "prior restraints on the exercise of free speech are unconstitutional and presumptively invalid."

B. Rasawehr knowingly engaged in a pattern of conduct that caused his mother and sister to fear physical harm and suffer actual mental distress in violation of R.C. 2903.211.

Rasawehr is Becky's son and Joni's brother. *Bey*, 2019-Ohio-57 at ¶ 2. His relationship with his family deteriorated over a period of years, and in 2016 he began a pattern of harassment that caused Joni and Becky to experience mental distress and to fear for their physical safety. *Id.* at ¶ 12, 15. Joni and Becky eventually sought civil stalking protection orders, and their petitions for relief respectively identified nine and fourteen incidents of harassment by Rasawehr conducted largely, although not exclusively, through online media attacks. *Id.* at ¶ 3-4. An evidentiary hearing followed, at which the trial court took additional evidence and testimony about the incidents identified in Joni and Becky's petitions.

In one of Rasawehr's first postings, entitled "why I post by jeff rasawehr", he attacked Joni and Becky about the deaths of their husbands and also revealed his motivations for posting,

> I did grow up in Mercer County Ohio and did wish all the best for my family and friends. However, over the past five years I have come to see the true 'mess' mercer county is and YES MY OWN FAMILY IS WHITE TRASH. … In regards to my messed up relatives ---- airing family grievances only has value for a community if it points out greater issues. …
>
> Yes, it is a tragedy that my mother sat my father in a chair and left him to die instead of calling for help – but the county as usual did nothing and now daughter Joni Bey has done the same thing with her husband.
>
> The best revenge is one that creates a better day … and if my biological mother and her EVIL can be reduced---there has been to much damage by her—she placed her husband in a chair to die—her daughter did the same to her husband—enough is

> enough—BECKY RASAWEHR—is evil she will never get it—but if this evil can end—what a great revenge.

Trial Court Exhibit at 9 (June 4, 2016) (punctuation and errors as in original); *Bey* at ¶ 13.

Rasawehr repeated similar statements in other online forums. *See, e.g.,* Trial Court Exhibit 6 ("becky rasawehr she is not a sweet little grandma---she set my father ken rasawehr in a chair as he was hemorraging blood internally wanting him to die ….BECKY RASAWEHR IS NOT A SWEET LITTLE LADY -----she had my sister allow her husband ray bey to lay dying by a toilet"); *Id.* at Exhibit 8 ("Joni Bey let her husband die by a toilet as her mother becky rasawehr had set her husband in a chair to die.") (quotes are verbatim with errors and emphasis as in original).

In 2017, Rasawehr took out billboards in the community where Joni and Becky live that directed the public to CountyCoverUp.com. *Bey,* 2019-Ohio-57 at ¶ 7. The billboards included a large photo of Rasawehr and the text, "Jeff Rasawehr says, 'Learn About County CORRUPTION & Cover-ups At...' CountyCoverUp.com." *Id*. People that followed Rasawehr's direction to the website would have found a series of website postings alleging Joni and Becky were involved in the deaths of their husbands and involved in corrupt activities with Mercer County officials. *Id*. at ¶ 8-9, 14. Rasawehr's posts included explicit "Calls to Action," asking others to join in Rasawehr's efforts. *Id*. at ¶ 14.

Rasawehr's harassing conduct included additional and repeated acts calculated to deceive, intimidate, and strike fear in Joni. Rasawehr sent a private investigator, Jack Bastian, to Joni's home unannounced and under false pretenses to question Joni about her husband's death. *Id.*at ¶ 10. Bastian only left after Joni's initially polite demands turned to yelling. *Id*. Rasawehr also filed a false complaint with children services alleging that Joni's 13-year-old son was severely malnourished and living in a home where drugs were present. *Id.* at ¶ 11.

Joni testified that as a result of Rasawehr's actions, she was not able to maintain employment. Hearing Transcript at 41, 52 (December 4, 2017). On the afternoon following that testimony, Rasawehr called Joni's most recent employer and misrepresented himself as a potential employer of Joni. Rasawehr attempted to obtain what would otherwise be non-public information regarding her employment, adding further embarrassment and humiliation to Joni. *Bey* at ¶ 18-19.

Becky testified that Rasawehr continually wrote that she contributed to the death of her husband (Rasawehr's father). Rasawehr also referred to his mother as "white trash," "evil," and "corrupt". *Bey,* 2019-Ohio-57 at ¶ 13-14. Rasawehr engaged in other conduct designed to harass and intimidate Becky, including acts of vandalism and telling others that "Becky needs to die." Hearing Transcript at 84-87 (December 4, 2017).

Joni and Becky both suffered actual mental distress and fear of physical harm as a result of Rasawehr's conduct.

> Joni explained that the billboard was placed in such a location that she and her son could not avoid driving by it on a daily basis. She expressed fear that her son would see the website postings or be bullied at school. Joni further testified that the postings affected her mental health. Specifically, she testified that the website postings made her feel 'sick' and a 'nervous wreck,' and that she has trouble leaving the house due to the humiliation she felt living in a small community and knowing others living there had viewed the website postings. She further revealed that she attended weekly counseling sessions to cope with the situation, took an anti-depressant, and expressed that life had become a 'daily struggle.'

(Citations omitted.) *Bey* at ¶ 12. Similarly, Rebecca testified that

> Rasawehr's internet posts affected her on a daily basis, characterizing Rasawehr's conduct as bullying and harassment that never stops. Rebecca explained that Rasawehr's actions have caused her to 'go on blood pressure medicine' and required her to 'take antianxiety medicine.' She also stated that in the past Rasawehr had made her fear for her physical safety, which prompted her to install an alarm system and security lights.

(Citations omitted.) *Id.* at ¶ 15. In the nineteen months since the Protection Orders issued, Joni and Becky have experienced some relief from the badgering, embarrassment, and fear that

characterized the preceding years. Rasawehr remains free to, and still does, use his website to vent his frustrations about events in Mercer County that don't involve his mother and sister. The Protection Orders worked as the General Assembly intended.

II. Summary of Argument

The proposition of law accepted for review in this jurisdictional appeal, "Prior restraints on the exercise of free speech are unconstitutional and presumptively invalid," is not a proper statement of the law in this context nor does it represent a fair summary of the state of First Amendment jurisprudence.

The United States Supreme Court has stated that "any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Noting this heavy presumption, this Court has properly observed the necessary corollary that, "prior restraints are not unconstitutional per se." *State ex rel. Toledo Blade Co. v. Henry Cty. Ct. of Common Pleas*, 125 Ohio St. 3d 149, 2010-Ohio-1533, 926 N.E.2d 634, ¶ 21. The United States Supreme Court has also observed that, "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley v. Brown*, 354 U.S. 436, 441 (1957). The Protection Orders here are, within the context that they were issued, constitutional.

Certain speech and expressive conduct are categorically unprotected and therefore entitled to no First Amendment protection whatsoever. *See United States v. Alvarez*, *infra,* 567 U.S. 709 (2012) and *Giboney v. Empire Storage and Ice Co.*, *infra,* 336 U.S. 490 (1947). The Protection Orders here restrict unprotected speech integral to illegal conduct. Accordingly, no First Amendment rights are infringed, and no balancing test nor scrutiny of the restriction is required. But even if reviewed under a strict scrutiny or intermediate scrutiny standard, the Protection Orders

survive as they advance the compelling interest of the State of Ohio in protecting victims of menacing by stalking from enduring prospective harm from their abuser.

III. Prior restraints on the exercise of free speech in the context of protection orders are constitutional because speech integral to illegal conduct is categorically unprotected speech.

> When a statute or injunction restricts speech that has no First Amendment value a court assessing the constitutionality of the restriction need not conduct a balancing test. . . Any analysis of the constitutionality of a [] speech restriction should begin with an examination of the speech itself; for if it is not protected speech, any injunction would stand, regardless of the interests involved.

Kohn, *Why Doesn't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for the Victims of Domestic Violence*, 29 Hastings Const. L.Q. 1, 22 (2001).

A. Speech integral to illegal conduct is categorically unprotected speech.

Longstanding First Amendment precedent recognizes that some categories of speech are categorically unprotected. Those categories include "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, 'fighting words', child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent." (Citations omitted.) *Alvarez*, 567 U.S. at 717.

The speech integral to illegal conduct[2] exception has been part of American jurisprudence for at least seventy years. In 1949, the Supreme Court stated, "it has never been an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidence, or carried out by means of language." *Giboney* 336 U.S. at 502. As described further, *infra*, the exception has been applied consistently in the context of stalking and domestic violence statutes and "is now a standard item on lists of First Amendment exceptions."

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2 The exception is referred to often as "speech integral to criminal conduct" as well as "speech integral to illegal conduct." *See*, Volokh, The "Speech Integral to Criminal Conduct" Exception, 101 Cornell L. Rev. 981 (2016). We refer to it here as speech integral to illegal conduct.

Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 983 (2016). In practical application, especially in the context of laws akin to Ohio's menacing by stalking statute, "speech integral to engaging in criminal conduct does not warrant First Amendment protection." *United States v. Gonzalez*, 905 F.3d 165, 192 (3d Cir. 2018). And because such speech does not warrant First Amendment Protection, Rasawehr's challenge to the Protection Orders must fail.

B. The Protection Orders restrict speech integral to illegal conduct.

The Third District's opinion upholding the Protection Orders recognizes that, "although we all hold dear the First Amendment protections, we are all aware that freedom of speech is not absolute." *Bey,* 2019-Ohio-57 at ¶ 39 (*citing State v. Wieger*, 5th Dist. Stark, No. 2008CA00132, 2009-Ohio-1391, ¶ 19). The court also recognized the "speech integral to illegal conduct" as categorically unprotected speech and relied upon the exception to uphold the Protection Orders. *Id.* at ¶ 40 (*citing Giboney*, 336 U.S. at 502).

The court of appeals agreed with the trial court's assessment that Rasawehr's speech was not principally expressive but rather was part of his knowing, coherent pattern of conduct engaged in for the sole purpose of violating R.C. 2903.211:

> [T]he unrefuted evidence presented by the petitioners supported the trial court's finding that the specific conduct, for which Rasawehr now asserts is expressive of a public concern and protected by the First Amendment, was not engaged in for a legitimate reason, but instead for an illegitimate reason born out of a vendetta seeking to cause mental distress to his mother and sister and to exact personal revenge."

Bey at ¶ 42.

Amici Electronic Frontier Foundation, *et al*., seize on the use of the phrase "illegitimate reason" to suggest that Rasawehr is being punished for his viewpoint. *Amici* Br. at 3. Yet the fallacy of this mischaracterization is illustrated by the opinion of the United States Court of

Appeals for the Third Circuit in *United States v. Gonzalez*. There, Gonzalez was convicted under the federal stalking statute for actions that are hauntingly similar to Rasawehr's. Gonzalez (1) filed false complaints with youth and family services about her brother's ex-wife; (2) put up a website containing multiple allegations that her brother's ex-wife physically abused, sexually abused, and neglected her children; (3) posted YouTube videos taken by a private investigator interviewing the ex-wife about the abuse allegations; (4) contacted others in the community about these allegations; and (5) mailed cards and letters directly to the victim. *Gonzalez*, 905 F.3d at 175.

The Third Circuit reasoned that none of these actions were protected First Amendment expression and upheld Gonzalez's conviction under the federal stalking statute relying on the speech integral to illegal conduct exception. Directly relevant to the arguments of Rasawehr and *amici*, the Third Circuit held that speech integral to the violation of the federal stalking statute is not engaged in for a legitimate reason, "Even if it were not defamatory, this speech is still unprotected as it falls squarely into the 'speech integral to criminal conduct' exception. *The defendants' speech served no legitimate purpose other than to harass and intimidate Belford, conduct that is illegal under § 2261A.*" (Emphasis added.) *Id.* at 193.

In the case at bar, the court of appeals also reasoned that the Ohio Constitution imposes responsibilities commensurate with the rights of free speech, observing that, "This provision clearly contemplates that at some point a citizen's pattern of targeted, abusive and harmful exercise of the right, which we believe to be evident in the circumstances of this case, can constitutionally warrant an appropriate, limited and temporary forfeiture of the right such as the trial court has imposed in this instance." *Bey*, 2019-Ohio-57 at ¶ 47 (referencing Ohio Constitution, Article I, Section 11, "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of the right*. . ." (Emphasis added). In short, the Protection Orders

appropriately restrict Rasawehr's expressive conduct because Rasawehr used speech as a means to knowingly engage in an illegal pattern of conduct that he knew would cause his victims to fear for their physical safety and mental health.

C. Other courts considering the intersection of the First Amendment and protection orders recognize the applicability of the speech integral to illegal conduct exception.

The speech integral to illegal conduct exception has also been applied by federal courts in interpreting the federal stalking statute, 18 U.S.C. 2261A. *See Gonzalez*, 905 F.3d at 192-93; *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014); *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012). The federal stalking statute, like Ohio's menacing by stalking statute, prohibits conduct that places others in fear of physical harm or subjects them to mental distress, including harm that is perpetrated through the use of electronic communications and computer services. *Compare* R.C. 2903.211(A) *with* 18 U.S.C. 2261A and *See Osinger* at 944.

In *Osinger*, the perpetrator utilized text messages, emails, and a false Facebook page to unrelentingly pursue and harass his ex-girlfriend. Like Rasawehr, Osinger argued that his conduct was protected by the First Amendment. In rejecting his First Amendment defense, the Ninth Circuit held that, "Any expressive aspects of Osinger's speech were not protected under the First Amendment because they were 'integral to criminal conduct' in intentionally harassing, intimidating or causing substantial emotional distress to [the victim]." *Id.* at 947. *Accord Gonzalez*, 905 F.3d at 193 (holding that speech in violation of the federal stalking statute, even if not defamatory, is speech integral to illegal conduct); *Petrovic* at 856; *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir.2015); *United States v. Sayer*, 748 F.3d 425, 434 (1st Cir.2014); *United States v. Sergentakis*, S.D. NY No. 15-CR-0033-NSR, 2015 U.S. Dist. LEXIS 77719, *16 (June 15, 2015).

While the federal courts of appeal have consistently found that speech that violates the federal stalking statute is categorically unprotected as speech integral to illegal conduct, no decision of this Court (nor any decision of the Ohio District Courts of Appeal other than the decision below), have addressed the question in the context of Ohio's menacing by stalking statute. This Court has, however, held that where speech regulated is "incidental to the statute's regulation of the targeted conduct," there is no First Amendment violation. *State v. Batista*, 151 Ohio St. 3d 584, 2017-Ohio-8304, 91 N.E.3d 724 ¶ 17, 21 (*citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62, (2006) and *Giboney,* 336 U.S. at 502). The Court has also recognized that certain speech is categorically unprotected. *State v. Tooley*, 11th Dist. Portage, Nos. 2006-0105, 2006-0126, 2007-Ohio-3698, ¶ 8 ("not all speech has absolute constitutional protection, and obscenity and child pornography are but two categories of unprotected speech"); *State v. Thompson*, 95 Ohio St.3d 264, 767 N.E.2d 251 (2002) *citing State v. Thompson, 95 Ohio St.3d 264, 767 N.E.2d 251 (2002)State v. Phipps*, 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1977) (fighting words as unprotected speech).

A decision from this Court affirming that the Protection Orders enjoin categorically unprotected speech would conform Ohio's jurisprudence to that of the federal courts of appeal that have construed the federal stalking statute. Affirming the decision below would also reject the extraordinarily selective application of the exception urged by Rasawehr and professor Volokh, who expresses an unambiguous desire to minimize the exception's reach.

D. Neither Rasawehr nor the *amici* persuasively argue that Rasawehr's speech is protected by the First Amendment.

In the nearly ten pages of his brief devoted to the speech integral to illegal conduct exception, Rasawehr fails to explain why any of the cases applying the exception should be ignored. There is no argument about why *Petrovic*, *Osinger*, *Gonzalez*, *Sayer*, or any other decision

applying the exception in the context of menacing, stalking or domestic violence is inapplicable. At best, Rasawehr misstates and mischaracterizes the record below to argue that the underlying illegal conduct, menacing by stalking, is pure speech. But that simply is not true. The testimony and evidence presented below demonstrate that Rasawehr engaged in expressive activity as part of his pattern of conduct. But the record also includes testimony about vandalism, about unfounded reports to child services about Joni's son, about probing Joni's former employer the day after the hearing, and about using a private investigator to harass Joni under false pretenses. There is ample evidence to establish a "pattern of conduct" under the terms of R.C. 2903.211. The Protection Orders restrain the furtherance of that illegal act.

Professor Volokh wrote in his law review article, upon which Rasawehr relies, the following opinion, "I am not fond of *Giboney*, a broadly and imprecisely written decision that has often been misinterpreted. I wish that the Court hadn't revived it, and had instead dealt with these questions in some other way." Volokh, 101 Cornell L. Rev. at 1052. Professor Volokh is certainly entitled to his opinion. But his views as to what should be do not alter how the exception has, in fact, been articulated and applied in the very context of stalking and domestic violence statutes.

Similarly, Rasawehr's contention that his speech must be found to be libelous following a judicial determination of falsity before it can be constitutionally restrained is legally and factually incorrect. First, R.C. 2903.211(D)(7) specifically contemplates that some speech, even if it is true, can be part of a pattern of menacing conduct. It defines "post a message" as communicating or attempting to communicate "any message or information, whether truthful or untruthful, about an individual." *Id.* Accordingly, the determination of truth or falsity is not an element of the offense. Second, as illustrated by the opinion and analysis in *Gonzalez*, defamatory speech and speech integral to illegal conduct are two distinct classifications of categorically unprotected speech. The

Gonzalez court held that the First Amendment did not provide protection for the perpetrator's speech if it was defamatory or integral to illegal conduct. *Gonzalez*, 905 F.3d at 192-93. After concluding that Gonzalez's speech was defamatory, the court held that speech integral to illegal conduct was a fully independent basis for finding her speech to be unprotected by the First Amendment. *Id*. at 193. Rasawehr and the *amici* are incorrect in applying the construct of one exception from First Amendment protection to another.

E. Holding that speech integral to menacing by stalking is protected speech creates disastrous consequences.

The limitations Rasawehr and Professor Volokh attempt to graft onto the speech integral to illegal conduct exception would leave victims like Joni and Becky without an effective remedy. Accepted on its face, the result argued for would preclude a victim from pointing to any sort of expressive conduct as a basis for the issuance of protection orders under R.C. 2903.211 or R.C. 3113.31 (domestic violence protection orders). Their arguments also call into question the applicability of the exception in other contexts. *See, e.g., State v. Hart*, 12th Dist. Brown No. CA2011-03-008, 2012-Ohio-1896, ¶ 51 (applied to a violation of R.C. 2905.03 (unlawful restraint)); *State v. Robinson*, 12th Dist. Warren No. CA2008-08-102, 2009-Ohio-3673, ¶ 16 (applied to a violation of R.C. 2907.07 (importuning)); *State v. Worst*, 12th Dist. Butler No. CA200410254, 2005-Ohio-6550, ¶ 55 (importuning); *State v. Tarbay*, 1st Dist. Hamilton, No. C-030619, 2004-Ohio-2721, ¶ 19 (importuning). *See, also,* 1 Smolla & Nimmer on Freedom of Speech § 13:7 (October 2018) (noting that speech in the context of sexual harassment is "nothing more than the use of language to engage in criminal intent — it is the use of speech in aid of an illegal transaction" and raises no First Amendment concern); Kohn, 29 Hastings Const. L.Q. at 26-27 (comparing domestic violence protection orders to blackmail statutes that, "criminalize speech intended not to communicate any expressive content, but only to attain personal gain.").

In the wake of the Supreme Court's decision in *Giboney*, courts grappled with the intersection of picketing and free speech. This Court wrote then, "[I]t may fairly be said that it is difficult to rescue the principles of law decided from the ocean of words in which they are submerged." *Chucales v. Royalty*, 164 Ohio St. 214, 219, 129 N.E.2d 823 (1955). As the law around speech integral to illegal conduct receives revitalized interest, the ocean of words about the topic has perhaps obscured the legal principles once more. And while its application to protection orders is a case of first impression for this Court, the principle itself is as unobscured as it is sound. Speech integral to illegal conduct, here the menacing and stalking of family members, is unprotected speech.

IV. The Protection Orders survive judicial scrutiny as the State's interests outweigh those of Rasawehr.

Because speech integral to illegal conduct is categorically unprotected, no further balancing of interests or other analysis is required. Only if Rasawehr's speech is protected is it necessary for this Court to engage in some level of scrutiny of the Protection Orders. To the extent that the Protection Orders are a content-based restriction, they would be subject to strict scrutiny, wherein it must be determined if the State's compelling interests are advanced by the Protection Orders, and if the Protection Orders are the least restrictive means available to advance the State's interests. *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000), *Batista*, 151 Ohio St.3d 584, 2017-Ohio-8304, 91 N.E.3d 724 at ¶ 37 (DeWine, J., concurring).

Justice Breyer has written that proper First Amendment balancing blurs the distinction between "strict scrutiny" and "intermediate scrutiny":

> In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve

> those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications. Sometimes the Court has referred to this approach as 'intermediate scrutiny,' sometimes as 'proportionality' review, sometimes as an examination of 'fit,' and sometimes it has avoided the application of any label at all.

Alvarez, 567 U.S. at 730 (Breyer, J. concurring). *See, also, Konigsberg v. State Bar of California*, 366 U.S. 36, 51 (1961) (Citations omitted.) ("Whenever [First Amendment] protections are asserted against the exercise of a valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.").

Scholars, too, have articulated that, "[c]ontemporary First Amendment jurisprudence reflects a free form balancing of state interests against speech." Kohn, 29 Hastings Const. L.Q. at 20. *See also,* Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 S. Ct. Rev. 141, 197 (1997). In reality the oft quoted maxim "strict in theory, fatal in fact" is a substantial overstatement. Reflecting the murky "free form" balancing of reality, nearly one-third of applications of strict scrutiny result in the challenged law being upheld. Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 Vand. L. Rev. 793, 795-96 (2006). Regardless of the label attached to the review, the actual balancing of Rasawehr's speech against Ohio's interests dictates that the Protection Orders are constitutional.

A. The Protection Orders are narrowly tailored to advance Ohio's compelling interest in protecting its citizens.

1. Prevention of mental distress and physical harm are compelling state interests.

Under a strict scrutiny analysis, a restriction on protected speech must further a compelling state interest. *Playboy Entm't Group*, 529 U.S. at 813. The state has a compelling interest in protecting its citizens from physical and emotional harm. It is also evident that the statute is aimed principally at regulating the conduct of people that make others fear for their safety or suffer mental

distress. The purpose of Ohio's menacing by stalking statute is to protect victims of stalkers from those who perpetrate such abuse, with the primary goal of both *eliminating* and *preventing* mental distress and physical harm. To that end, the statute authorizes the Courts of Common Pleas to issue protection orders "that contains terms designed to ensure the safety and protection of the person to be protected by the protection order." R.C. 2903.214(E).

Protection orders are designed to provide victims with a tool to prevent the perpetrator from continuing abuse after a court has found statutory justification for the order to issue:

> On its face, the governmental interest being served by § 2903.211 is protecting society from individuals who knowingly cause another person to believe that the offender will cause him or her physical harm or mental distress. Such a purpose is a legitimate exercise of the state's police power and the statute, as drafted, bears a rational relationship to this interest.

State v. Werfel, 11th Dist. Lake Nos. 2002-L-101, 2002-L-102, 2003-Ohio-6958, ¶ 52, fn 5. Ohio's menacing by stalking statute "bears a real and substantial relation to public health, safety, morals, or the general welfare of the public." *Mottice v. Kirkpatrick*, 5th Dist. Stark No. 2001CA00103, 2001-Ohio-7042, *3.

Decisions from courts outside of Ohio have even more explicitly defined the compelling nature of the state's interest in protecting its citizens from stalking, menacing, and domestic violence. *See State v. Doyle*, 787 N.W.2d 254, 259 (Neb. App.2010) ("The State has a compelling interest in protecting victims of domestic violence from continuing harassment and abuse."); *Altafulla v. Ervin*, 189 Cal. Rptr. 3d 316, 323-324 (Cal. App.2014) (the protection of victims under California's domestic violence protection act is a compelling state interest).

2. The Protection Orders are narrowly tailored to achieve Ohio's compelling state interest.

Ohio's menacing by stalking statute requires a process designed to limit the exercise of free speech only as is necessary to protect the State's compelling interest in protecting the physical

and mental health of Ohioans. The statute includes a heightened *mens rea* requirement that the violation be committed "knowingly" and provides for a full hearing before the issuance of protection orders, subject to the Ohio Rules of Civil Procedure. R.C. 2903.211(A), 2903.214(D), (G). The civil rules permit the respondent to cross-examine witnesses (which Rasawehr did) and to testify in his own defense (which he did not).

One scholar contemplating an ideal procedural context for the issuance of domestic violence protection orders that comport with the contours of strict scrutiny articulates precisely the scenario before this Court:

> In the context of a domestic violence speech restriction, a court would have the opportunity to make a determination about the value of the speech prior to issuing the restraint. Protection order statutes would ensure that there would be a prior adjudication of the batterer's statutory violation. A victim requesting an order enjoining speech about her health, sexual orientation, or immigration status would be required to petition the court for such relief. The opposing party would be given an opportunity for an adversary hearing. In most jurisdictions, a judge would issue a protection order only if she had found that the batterer had violated a criminal statute. Once the court established a statutory violation, the caselaw indicates that the court would be able to issue a broad restriction to avoid both a recurrence of that conduct as well as future speech that is part and parcel of that conduct.

(Citations omitted.) Kohn, 29 Hastings Const. L.Q. at 55.

There is no less restrictive alternative to the Protection Orders that would be at least as effective in protecting Joni and Becky. Although it might appear that prohibiting Rasawehr from posting anything about his victims is not sufficiently narrow, the purpose is not to prohibit certain speech by Rasawehr based on his viewpoint, but to prohibit all speech that constitutes part of his abuse. As the *Lambert* court thoughtfully articulated, for the victims of abuse, any mention or contact by their abuser is a continued violation:

> For an adjudged abuser to refer to a victim in publicly trafficked electronic forums, for whatever reason, is to exercise control over the victim in public, thus perpetuating the abuse of the victim. Whether a remark is patently innocuous or

> offensive, informational or nonsensical is of no moment under the order as written; it is the mere reference to the victim, alone, that triggers the proscription.

Lambert, 147 A.3d at 1241.[3]

The opinion below similarly articulates why the Protection Orders are narrowly tailored to protect Joni and Becky:

> In reviewing the specific language chosen by the trial court in the condition at issue we find Rasawehr's arguments unconvincing. It is clear from the language chosen that the trial court narrowly tailored the condition to redress the specific pattern of conduct that it found Rasawehr engaged in to knowingly cause Joni and Rebecca mental distress. And as previously stated, we conclude that the trial court's findings with regard to Rasawehr's conduct meeting the elements set forth in R.C. 2903.211 were supported by the uncontroverted evidence in the record.

Bey at ¶ 44. Although the scope of the Protection Orders is not explicitly before the Court, the Third District's discussion of the fit between the scope and Rasawehr's pattern of conduct is relevant. "[G]iven Rasawehr's history of social media abuse toward Petitioners, which history we note contains no references to Petitioners that were not deemed to be harmful, we also find the entirety of the trial court's order to be appropriately limited, by reference to the Petitioners only and for a limited time period." *Id. at* ¶ 47. In essence, the Protection Orders operate as an extended no-contact order, enjoining Rasawehr from utilizing electronic means to accomplish what he patently cannot accomplish face-to-face.

3. The value of Rasawehr's speech is decidedly low, whereas the interest in upholding the Protection Orders is compelling.

The black-letter definition of strict scrutiny requires that the regulation must be "narrowly tailored to promote a compelling government interest." *Playboy Entm't Group*, 529 U.S. at 813 (*citing Sable Communications of California, Inc. v. FCC,* 492 U.S. 115, 126 (1989)). But

[3] The *Lambert* court addressed this matter in the context of intermediate scrutiny, as it found the protection orders before it to be content neutral.

establishing a definitive distinction between "strict scrutiny" and "intermediate scrutiny" is an imprecise exercise at best as most speech that is not categorically unprotected "falls somewhere along a continuum between protected and unprotected expression," and the specific individual determination as to whether some speech is ultimately protected is a function of "the weight a court allocates to the speech when balancing it against state interests in restraining the speech." Kohn, 29 Hastings Const. L.Q. at 22.

In considering the relative balance of the value of Rasawehr's speech against competing interests, the fact that this case involves matters of private concern is relevant. In *Snyder v. Phelps*, the Supreme Court's decision as to whether the First Amendment protected the speech of members of the Westboro Baptist Church protesting outside the funeral of a fallen U.S. soldier "turn[ed] largely on whether that speech is of public or private concern, as determined by all the circumstances of the case." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). *See, also,* Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and Cyberstalking,* 107 Nw. U. L. Rev. 731, 785 (2013) ("First Amendment Law offers lower protection for speech on matters of private concern.").

The Court ultimately found that the speech of the protestors was constitutionally protected because it (1) involved broad public issues; (2) was not motivated by a private grudge; and (3) took place on a public street. *Snyder*, 562 U.S. at 454-56. Here, in contrast, Rasawehr's speech (1) consists of a barrage of personal attacks blended with just enough public criticism to create an illusion of public debate; (2) is, by Rasawehr's own admission, motivated by a personal grudge against his family evidenced by the content of his writings; and (3) did not take place on a public street. Under the totality of the facts here, these Protection Orders should stand.

In a different case involving the federal stalking statute, a criminal indictment was dismissed principally on the basis that the person targeted through online postings and related conduct was an easily identifiable public figure. *United States v. Cassidy*, 814 F. Supp. 2d 574, 586 (D. Md. 2011). That the victim was a public figure rather than a private individual was a controlling fact, as criminalizing caustic attacks on public figures "sweeps in the type of expression that the Supreme Court has consistently tried to protect." *Id.*

Indeed, the hallmark of First Amendment protection is the promotion of the free exchange of ideas and full participation in the political process. *See e.g. Snyder*, 562 U.S. at 451-52; *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 686 (1989). Rasawehr's speech does not further those ends. Rather, it is of decidedly low value. It targets private individuals on private matters. The trial court found, and the court of appeals agreed, that Rasawehr's speech is repeated, targeted, and part of a pattern of conduct committed "with the knowledge, if not the intent, that his posting of the information would cause each of the petitioners fear and mental distress." *Bey*, 2019-Ohio-57 at ¶ 20 (*citing* Protection Orders), ¶ 34 (upholding the issuance of the Protection Orders). Professor Volokh argues that, "Whether speech that is connected to unlawful conduct can be punished turns on how valuable the speech is." Volokh, 101 Cornell L. Rev. at 1002. On that point, he is correct, and Rasawehr's speech connected to his abuse of Joni and Becky can be enjoined.

Under any form of strict scrutiny, the Protection Orders survive. They advance the state's compelling interest in preventing stalking and harassment of its citizens and are narrowly tailored to achieve those ends. The provisions of R.C. 2903.211 provide for ample procedural protections to guard against overzealous application of the statute. Under strict scrutiny, the Protection Orders

should be upheld. But certain aspects of the Protection Orders suggest intermediate scrutiny should be applied.

B. The Protection Orders were issued in contexts that suggest the application of intermediate scrutiny review.

The Supreme Court has identified two contexts where intermediate scrutiny applies. First, intermediate scrutiny is appropriate where the restriction on speech is a content neutral restriction. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Second, intermediate scrutiny is appropriate where speech and nonspeech elements are combined in a single course of conduct. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Protection Orders fit both of these categories and survive intermediate scrutiny review under each.

1. The first sentence of the Protection Orders is a content neutral restriction.

Content neutral restrictions on speech are subject to an intermediate scrutiny standard of review. *Rock Against Racism,* 491 U.S. at 791. A restriction on speech is content neutral if, "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* Such restrictions are content neutral even if they disproportionately affect some speakers. *Id*. And the restrictions are content neutral if they are "justifiable without reference to the content of the regulated speech." *Id.* at 791-92.

The first sentence of the Protection Orders is, on its face, a content neutral restriction. It states, "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 Petitioners." *Bey* at ¶20. In construing an analogous protection order, the Superior Court of Pennsylvania observed, "As written, therefore, the proscription is not concerned with the *content* of Appellant's speech but with, instead, the *target* of his speech,

namely, Plaintiff, whom the court has already deemed the victim of his abusive conduct." *Lambert*, 147 A.3d at 1229.

Once it is determined that the restriction on speech is content neutral, the Court must determine whether the government regulation is sufficiently justified. *O'Brien,* 391 U.S. at 377. Justification is found if (1) the promulgation of the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restrictions on First Amendment freedoms are no greater than essential to the furtherance of that interest. *Id*. at 377. *See, also, Lambert* at 1229.

Ohio has the power to regulate to protect its citizens from abuse and otherwise protect their safety. As described, *supra*, this interest is not only substantial but compelling. In the context of civil stalking protection orders, the interest of the government is not to suppress speech or limit any particular viewpoint. Rather, the purpose is to protect those that are abused. Finally, the incidental restrictions on First Amendment freedom is appropriately limited, as previously argued.

2. The Protection Orders restrict a course of action that combines speech and nonspeech elements.

Intermediate scrutiny is the proper standard of review where the conduct of an individual and matters of speech are intertwined. *O'Brien*, 391 U.S. at 376 ("When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."); *See, also, Cassidy*, 814 F.Supp.2d at 585.

The language of R.C. 2903.211 suggests that the legislature understood that menacing by stalking would occur through both speech and nonspeech conduct. The first clause of 2903.211 (A) establishes that no person may knowingly engage in a pattern of conduct to cause another to

fear for their physical safety or actually experience mental distress. The second clause of 2903.211(A) explicitly provides that no one may utilize written or electronic communication to commit the violations set forth in the first clause. In addition, the statute specifically comprehensively defines "pattern of conduct" to include speech and nonspeech conduct. R.C. 2903.211(D)(1). The careful drafting of 2903.211 demonstrates that the General Assembly clearly intended to proscribe conduct where speech and nonspeech elements would be intertwined.

Cases interpreting the federal stalking statute and Ohio's menacing by stalking statute consistently and properly hold that the respective statutes criminalize conduct rather than target speech. *See, e.g., Osinger*, 753 F.3d at 947; *Petrovic*, 701 F.3d at 855-56; *Werfel*, 2003-Ohio-6958 at ¶ 55 (*citing State v. Benner*, 96 Ohio App. 3d 327 (1st Dist. 1994)); *State v. Szerlip*, 5th Dist. Knox, No. 01-CA-05, 2002-Ohio-900, 2002 Ohio App. LEXIS 893 at *19 (finding that conduct, rather than speech, is regulated by the Ohio menacing by stalking statute).

Finally, the Court must bear in mind that the trial court found, after a full hearing, that all of the required elements for the issuance of the Protection Orders were met, including a determination that Rasawehr *knowingly* caused mental distress and fear of physical harm. *Bey*, 2019-Ohio-57 at ¶ 20. The implications of that finding are paramount. From Rasawehr's own perspective, the integrated whole of his conduct, including speech and nonspeech elements, were aimed at harming his sister and mother.

V. Conclusion

The Protection Orders are constitutionally sound, and Rasawehr's challenge to them must be rejected. The General Assembly, through the passage of R.C. 2903.211 and 2903.214, provided a meaningful remedy to victims of menacing by stalking. It recognized that such victimization would occur through patterns of conduct that included speech elements, including online speech. To ensure that the rights of victims and those accused of violating 2903.211 were equally

protected, the General Assembly provided for robust due process protections including a full civil hearing before protection orders issued under 2903.214, a heightened *mens rea* element, the requirement that a pattern of conduct be established, and a required finding that victims have experienced actual mental distress or an actual fear of physical harm. The Protection Orders issued to protect Joni and Becky only after these substantial prerequisites were met.

The Protection Orders do not infringe on Rasawehr's First Amendment rights because his speech is integral to his violation of 2903.211. If the Protection Orders were overturned, then Rasawehr would be free to continue much of the same pattern of conduct that has already been found to violate Ohio's menacing by staking statute. Accordingly, this Court should recognize that his speech is categorically unprotected as speech integral to illegal conduct. Even if this exception to general First Amendment rights does not apply, then the Protection Orders should still be upheld as the Protection Orders further Ohio's compelling interest in preventing the knowing infliction of mental distress or fear of physical harm and are narrowly tailored to advance that interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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APPENDIX

U.S. CONSTITUTION, AMENDMENT 1 RELIGIOUS AND POLITICAL FREEDOM.

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

OHIO CONSTITUTION, ARTICLE I, § 11 FREEDOM OF SPEECH AND OF THE PRESS; LIBEL

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. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

OHIO REV. CODE § 2903.211

Menacing by stalking

(A)

(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's family or household member or mental distress to the other person or the other person's family or household member, the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

(2) No person, through the use of any form of written communication or any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, computer system, or telecommunication device shall post a message or use any intentionally written or verbal graphic gesture with purpose to do either of the following:

(a) Violate division (A)(1) of this section;

(b) Urge or incite another to commit a violation of division (A)(1) of this section.

(3) No person, with a sexual motivation, shall violate division (A)(1) or (2) of this section.

(B) Whoever violates this section is guilty of menacing by stalking.

(1) Except as otherwise provided in divisions (B)(2) and (3) of this section, menacing by stalking is a misdemeanor of the first degree.

(2) Menacing by stalking is a felony of the fourth degree if any of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or a violation of *section 2911.211 of the Revised Code*.

(b) In committing the offense under division (A)(1), (2), or (3) of this section, the offender made a threat of physical harm to or against the victim, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message made a threat of physical harm to or against the victim.

(c) In committing the offense under division (A)(1), (2), or (3) of this section, the offender trespassed on the land or premises where the victim lives, is employed, or attends school, or as a result of an offense committed under division (A)(2) or

(3) of this section, a third person induced by the offender's posted message trespassed on the land or premises where the victim lives, is employed, or attends school.

(d) The victim of the offense is a minor.

(e) The offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person.

(f) While committing the offense under division (A)(1) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(1) of this section, the offender had a deadly weapon on or about the offender's person or under the offender's control. Division (B)(2)(f) of this section does not apply in determining the penalty for a violation of division (A)(2) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(2) of this section.

(g) At the time of the commission of the offense, the offender was the subject of a protection order issued under *section 2903.213* or *2903.214 of the Revised Code*, regardless of whether the person to be protected under the order is the victim of the offense or another person.

(h) In committing the offense under division (A)(1), (2), or (3) of this section, the offender caused serious physical harm to the premises at which the victim resides, to the real property on which that premises is located, or to any personal property located on that premises, or, as a result of an offense committed under division (A)(2) of this section or an offense committed under division (A)(3) of this section based on a violation of division (A)(2) of this section, a third person induced by the offender's posted message caused serious physical harm to that premises, that real property, or any personal property on that premises.

(i) Prior to committing the offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.

(3) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, menacing by stalking is either a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

(C) *Section 2919.271 of the Revised Code*applies in relation to a defendant charged with a violation of this section.

(D) As used in this section:

(1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents, or two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents, directed at one or more persons employed by or belonging to the same corporation, association, or other organization. Actions or incidents that prevent, obstruct, or delay the performance by a public official, firefighter, rescuer, emergency medical services person, or emergency facility person of any authorized act within the public official's, firefighter's, rescuer's, emergency medical services person's, or emergency facility person's official capacity, or the posting of messages, use of intentionally written or verbal graphic gestures, or receipt of information or data through the use of any form of written communication or an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device, may constitute a "pattern of conduct."

(2) "Mental distress" means any of the following:

(a) Any mental illness or condition that involves some temporary substantial incapacity;

(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

(3) "Emergency medical services person" is the singular of "emergency medical services personnel" as defined in *section 2133.21 of the Revised Code*.

(4) "Emergency facility person" is the singular of "emergency facility personnel" as defined in *section 2909.04 of the Revised Code*.

(5) "Public official" has the same meaning as in *section 2921.01 of the Revised Code*.

(6) "Computer," "computer network," "computer program," "computer system," and "telecommunications device" have the same meanings as in *section 2913.01 of the Revised Code*.

(7) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating, or attempting to transfer, send, post, publish, disseminate, or otherwise communicate, any message or information, whether truthful or untruthful, about an individual, and whether done under one's own name, under the name of another, or while impersonating another.

(8) "Third person" means, in relation to conduct as described in division (A)(2) of this section, an individual who is neither the offender nor the victim of the conduct.

(9) "Sexual motivation" has the same meaning as in *section 2971.01 of the Revised Code*.

(10) "Organization" includes an entity that is a governmental employer.

(11) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the person against whom the act prohibited in division (A)(1) of this section is committed:

(i) A spouse, a person living as a spouse, or a former spouse of the person;

(ii) A parent, a foster parent, or a child of the person, or another person related by consanguinity or affinity to the person;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the person, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the person.

(b) The natural parent of any child of whom the person against whom the act prohibited in division (A)(1) of this section is committed is the other natural parent or is the putative other natural parent.

(12) "Person living as a spouse" means a person who is living or has lived with the person against whom the act prohibited in division (A)(1) of this section is committed in a common law marital relationship, who otherwise is cohabiting with that person, or who otherwise has cohabited with the person within five years prior to the date of the alleged commission of the act in question.

(E) The state does not need to prove in a prosecution under this section that a person requested or received psychiatric treatment, psychological treatment, or other mental health services in order to show that the person was caused mental distress as described in division (D)(2)(b) of this section.

(F)

(1) This section does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection. In addition, any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control shall not be liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section.

(2) Division (F)(1) of this section does not create an affirmative duty for any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section except as otherwise provided by law.

(3) Division (F)(1) of this section does not apply to a person who conspires with a person actively involved in the creation or knowing distribution of material in violation of this section or who knowingly advertises the availability of material of that nature.

OHIO REV. CODE § 2903.214

Petition for protection order to protect victim of menacing by stalking or sexually oriented offense.

(A) As used in this section:

(1) "Court" means the court of common pleas of the county in which the person to be protected by the protection order resides.

(2) "Victim advocate" means a person who provides support and assistance for a person who files a petition under this section.

(3) "Family or household member" has the same meaning as in *section 3113.31 of the Revised Code*.

(4) "Protection order issued by a court of another state" has the same meaning as in *section 2919.27 of the Revised Code*.

(5) "Sexually oriented offense" has the same meaning as in *section 2950.01 of the Revised Code*.

(6) "Electronic monitoring" has the same meaning as in *section 2929.01 of the Revised Code*.

(7) "Companion animal" has the same meaning as in *section 959.131 of the Revised Code*.

(B) The court has jurisdiction over all proceedings under this section.

(C) A person may seek relief under this section for the person, or any parent or adult household member may seek relief under this section on behalf of any other family or household member, by filing a petition with the court. The petition shall contain or state all of the following:

(1) An allegation that the respondent is eighteen years of age or older and engaged in a violation of *section 2903.211 of the Revised Code* against the person to be protected by the protection order or committed a sexually oriented offense against the person to be protected by the protection order, including a description of the nature and extent of the violation;

(2) If the petitioner seeks relief in the form of electronic monitoring of the respondent, an allegation that at any time preceding the filing of the petition the respondent engaged in conduct that would cause a reasonable person to believe that the health, welfare, or safety of the person to be protected was at risk, a description of the nature and extent of that conduct, and an allegation that the respondent presents a continuing danger to the person to be protected;

(3) A request for relief under this section.

(D)

(1) If a person who files a petition pursuant to this section requests an ex parte order, the court shall hold an ex parte hearing as soon as possible after the petition is filed, but not later than the next day that the court is in session after the petition is filed. The court, for good cause shown at the ex parte hearing, may enter any temporary orders, with or without bond, that the court finds necessary for the safety and protection of the person to be protected by the order. Immediate and present danger to the person to be protected by the protection order constitutes good cause for purposes of this section. Immediate and present danger includes, but is not limited to, situations in which the respondent has threatened the person to be protected by the protection order with bodily harm or in which the respondent previously has been convicted of or pleaded guilty to a violation of *section 2903.211 of the Revised Code* or a sexually oriented offense against the person to be protected by the protection order.

(2)

(a) If the court, after an ex parte hearing, issues a protection order described in division (E) of this section, the court shall schedule a full hearing for a date that is within ten court days after the ex parte hearing. The court shall give the respondent notice of, and an opportunity to be heard at, the full hearing. The court shall hold the full hearing on the date scheduled under this division unless the court grants a continuance of the hearing in accordance with this division. Under any of the following circumstances or for any of the following reasons, the court may grant a continuance of the full hearing to a reasonable time determined by the court:

(i) Prior to the date scheduled for the full hearing under this division, the respondent has not been served with the petition filed pursuant to this section and notice of the full hearing.

(ii) The parties consent to the continuance.

(iii) The continuance is needed to allow a party to obtain counsel.

(iv) The continuance is needed for other good cause.

(b) An ex parte order issued under this section does not expire because of a failure to serve notice of the full hearing upon the respondent before the date set for the full hearing under division (D)(2)(a) of this section or because the court grants a continuance under that division.

(3) If a person who files a petition pursuant to this section does not request an ex parte order, or if a person requests an ex parte order but the court does not issue an ex parte order after an ex parte hearing, the court shall proceed as in a normal civil action and grant a full hearing on the matter.

(E)

(1)

(a) After an ex parte or full hearing, the court may issue any protection order, with or without bond, that contains terms designed to ensure the safety and protection of the person to be protected by the protection order, including, but not limited to, a requirement that the respondent refrain from entering the residence, school, business, or place of employment of the petitioner or family or household member. If the court includes a requirement that the respondent refrain from entering the residence, school, business, or place of employment of the petitioner or family or household member in the order, it also shall include in the order provisions of the type described in division (E)(5) of this section. The court may include within a protection order issued under this section a term requiring that the respondent not remove, damage, hide, harm, or dispose of any companion animal owned or possessed by the person to be protected by the order, and may include within the order a term authorizing the person to be protected by the order to remove a companion animal owned by the person to be protected by the order from the possession of the respondent.

(b) After a full hearing, if the court considering a petition that includes an allegation of the type described in division (C)(2) of this section, or the court upon its own motion, finds upon clear and convincing evidence that the petitioner reasonably believed that the respondent's conduct at any time preceding the filing of the petition endangered the health, welfare, or safety of the person to be protected and that the respondent presents a continuing danger to the person to be protected, the court may order that the respondent be electronically monitored for a period of time and under the terms and conditions that the court determines are appropriate. Electronic monitoring shall be in addition to any other relief granted to the petitioner.

(2)

(a) Any protection order issued pursuant to this section shall be valid until a date certain but not later than five years from the date of its issuance.

(b) Any protection order issued pursuant to this section may be renewed in the same manner as the original order was issued.

(3) A court may not issue a protection order that requires a petitioner to do or to refrain from doing an act that the court may require a respondent to do or to refrain from doing under division (E) (1) of this section unless all of the following apply:

(a) The respondent files a separate petition for a protection order in accordance with this section.

(b) The petitioner is served with notice of the respondent's petition at least forty-eight hours before the court holds a hearing with respect to the respondent's petition, or the petitioner waives the right to receive this notice.

(c) If the petitioner has requested an ex parte order pursuant to division (D) of this section, the court does not delay any hearing required by that division beyond

the time specified in that division in order to consolidate the hearing with a hearing on the petition filed by the respondent.

(d) After a full hearing at which the respondent presents evidence in support of the request for a protection order and the petitioner is afforded an opportunity to defend against that evidence, the court determines that the petitioner has committed a violation of *section 2903.211 of the Revised Code* against the person to be protected by the protection order issued pursuant to division (E)(3) of this section, has committed a sexually oriented offense against the person to be protected by the protection order issued pursuant to division (E)(3) of this section, or has violated a protection order issued pursuant to *section 2903.213 of the Revised Code* relative to the person to be protected by the protection order issued pursuant to division (E)(3) of this section.

(4) No protection order issued pursuant to this section shall in any manner affect title to any real property.

(5)

(a) If the court issues a protection order under this section that includes a requirement that the alleged offender refrain from entering the residence, school, business, or place of employment of the petitioner or a family or household member, the order shall clearly state that the order cannot be waived or nullified by an invitation to the alleged offender from the complainant to enter the residence, school, business, or place of employment or by the alleged offender's entry into one of those places otherwise upon the consent of the petitioner or family or household member.

(b) Division (E)(5)(a) of this section does not limit any discretion of a court to determine that an alleged offender charged with a violation of *section 2919.27 of the Revised Code*, with a violation of a municipal ordinance substantially equivalent to that section, or with contempt of court, which charge is based on an alleged violation of a protection order issued under this section, did not commit the violation or was not in contempt of court.

(F)

(1) The court shall cause the delivery of a copy of any protection order that is issued under this section to the petitioner, to the respondent, and to all law enforcement agencies that have jurisdiction to enforce the order. The court shall direct that a copy of the order be delivered to the respondent on the same day that the order is entered.

(2) Upon the issuance of a protection order under this section, the court shall provide the parties to the order with the following notice orally or by form:

NOTICE

As a result of this order, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition pursuant to federal

law under *18 U.S.C. 922(g)(8)* for the duration of this order. If you have any questions whether this law makes it illegal for you to possess or purchase a firearm or ammunition, you should consult an attorney.

(3) All law enforcement agencies shall establish and maintain an index for the protection orders delivered to the agencies pursuant to division (F)(1) of this section. With respect to each order delivered, each agency shall note on the index the date and time that it received the order.

(4) Regardless of whether the petitioner has registered the protection order in the county in which the officer's agency has jurisdiction pursuant to division (M) of this section, any officer of a law enforcement agency shall enforce a protection order issued pursuant to this section by any court in this state in accordance with the provisions of the order, including removing the respondent from the premises, if appropriate.

(G)

(1) Any proceeding under this section shall be conducted in accordance with the Rules of Civil Procedure, except that a protection order may be obtained under this section with or without bond. An order issued under this section, other than an ex parte order, that grants a protection order, or that refuses to grant a protection order, is a final, appealable order. The remedies and procedures provided in this section are in addition to, and not in lieu of, any other available civil or criminal remedies.

(2) If as provided in division (G)(1) of this section an order issued under this section, other than an ex parte order, refuses to grant a protection order, the court, on its own motion, shall order that the ex parte order issued under this section and all of the records pertaining to that ex parte order be sealed after either of the following occurs:

(a) No party has exercised the right to appeal pursuant to Rule 4 of the Rules of Appellate Procedure.

(b) All appellate rights have been exhausted.

(H) The filing of proceedings under this section does not excuse a person from filing any report or giving any notice required by *section 2151.421 of the Revised Code* or by any other law.

(I) Any law enforcement agency that investigates an alleged violation of *section 2903.211 of the Revised Code* or an alleged commission of a sexually oriented offense shall provide information to the victim and the family or household members of the victim regarding the relief available under this section and *section 2903.213 of the Revised Code*.

(J)

(1) Subject to division (J)(2) of this section and regardless of whether a protection order is issued or a consent agreement is approved by a court of another county or by

a court of another state, no court or unit of state or local government shall charge the petitioner any fee, cost, deposit, or money in connection with the filing of a petition pursuant to this section, in connection with the filing, issuance, registration, modification, enforcement, dismissal, withdrawal, or service of a protection order, consent agreement, or witness subpoena or for obtaining a certified copy of a protection order or consent agreement.

(2) Regardless of whether a protection order is issued or a consent agreement is approved pursuant to this section, the court may assess costs against the respondent in connection with the filing, issuance, registration, modification, enforcement, dismissal, withdrawal, or service of a protection order, consent agreement, or witness subpoena or for obtaining a certified copy of a protection order or consent agreement.

(K)

(1) A person who violates a protection order issued under this section is subject to the following sanctions:

(a) Criminal prosecution for a violation of *section 2919.27 of the Revised Code*, if the violation of the protection order constitutes a violation of that section;

(b) Punishment for contempt of court.

(2) The punishment of a person for contempt of court for violation of a protection order issued under this section does not bar criminal prosecution of the person for a violation of *section 2919.27 of the Revised Code*. However, a person punished for contempt of court is entitled to credit for the punishment imposed upon conviction of a violation of that section, and a person convicted of a violation of that section shall not subsequently be punished for contempt of court arising out of the same activity.

(L) In all stages of a proceeding under this section, a petitioner may be accompanied by a victim advocate.

(M)

(1) A petitioner who obtains a protection order under this section or a protection order under *section 2903.213 of the Revised Code* may provide notice of the issuance or approval of the order to the judicial and law enforcement officials in any county other than the county in which the order is issued by registering that order in the other county pursuant to division (M)(2) of this section and filing a copy of the registered order with a law enforcement agency in the other county in accordance with that division. A person who obtains a protection order issued by a court of another state may provide notice of the issuance of the order to the judicial and law enforcement officials in any county of this state by registering the order in that county pursuant to *section 2919.272 of the Revised Code* and filing a copy of the registered order with a law enforcement agency in that county.

(2) A petitioner may register a protection order issued pursuant to this section or *section 2903.213 of the Revised Code* in a county other than the county in which the court that issued the order is located in the following manner:

(a) The petitioner shall obtain a certified copy of the order from the clerk of the court that issued the order and present that certified copy to the clerk of the court of common pleas or the clerk of a municipal court or county court in the county in which the order is to be registered.

(b) Upon accepting the certified copy of the order for registration, the clerk of the court of common pleas, municipal court, or county court shall place an endorsement of registration on the order and give the petitioner a copy of the order that bears that proof of registration.

(3) The clerk of each court of common pleas, municipal court, or county court shall maintain a registry of certified copies of protection orders that have been issued by courts in other counties pursuant to this section or *section 2903.213 of the Revised Code* and that have been registered with the clerk.

(N)

(1) If the court orders electronic monitoring of the respondent under this section, the court shall direct the sheriff's office or any other appropriate law enforcement agency to install the electronic monitoring device and to monitor the respondent. Unless the court determines that the respondent is indigent, the court shall order the respondent to pay the cost of the installation and monitoring of the electronic monitoring device. If the court determines that the respondent is indigent and subject to the maximum amount allowable to be paid in any year from the fund and the rules promulgated by the attorney general under division (N)(2) of this section, the cost of the installation and monitoring of the electronic monitoring device may be paid out of funds from the reparations fund created pursuant to *section 2743.191 of the Revised Code*. The total amount of costs for the installation and monitoring of electronic monitoring devices paid pursuant to this division and *sections 2151.34* and *2919.27 of the Revised Code* from the reparations fund shall not exceed three hundred thousand dollars per year.

(2) The attorney general may promulgate rules pursuant to *section 111.15 of the Revised Code* to govern payments made from the reparations fund pursuant to this division and *sections 2151.34* and *2919.27 of the Revised Code*. The rules may include reasonable limits on the total cost paid pursuant to this division and *sections 2151.34* and *2919.27 of the Revised Code* per respondent, the amount of the three hundred thousand dollars allocated to each county, and how invoices may be submitted by a county, court, or other entity.