STATE OF MICHIGAN
IN THE COURT OF APPEALS

DWJ,
Petitioner/Appellee,

v.

CLB,
Respondent/Appellant
_____/

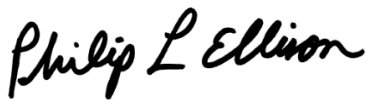
Court of Appeals Case No. 363324
Circuit Court Case No. 22-108559-PH

AMICI CURIAE MOTION FOR LEAVE TO FILE ATTACHED BRIEF OF PROFS. AARON CAPLAN, STEPHEN LAZARUS, KEVIN O'NEILL, AND EUGENE VOLOKH

NOW COME proposed amici Profs. Stephen Lazarus, Kevin O'Neill, Aaron Caplan, and Eugene Volokh, by counsel, and moves for leave to file the attached amici curiae brief pursuant to MCR 7.212(H) as an interested person regarding the proper resolution of certain First Amendment issues.

Date: April 2, 2023

RESPECTFULLY SUBMITTED:



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BRIEF OF PROFS. AARON CAPLAN, STEPHEN LAZARUS, KEVIN O'NEILL, AND EUGENE VOLOKH AMICI CURIAE IN SUPPORT OF RESPONDENT-APPELLANT

ORAL ARGUMENT REQUESTED

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INTEREST OF AMICI CURIAE[1]

- Aaron Caplan is Professor of Law at Loyola Law School (Los Angeles).
- Stephen Lazarus is Associate Professor of Law, Emeritus at Cleveland State University College of Law.
- Kevin O'Neill is Associate Professor of Law at Cleveland State University College of Law.
- Eugene Volokh is Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law.

All four have written or taught extensively on First Amendment Law. Profs. Caplan and Volokh are also the authors of law review articles that specifically discuss the First Amendment concerns raised by "harassment" or "stalking" restraining orders. *See* Aaron Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L. J. 781 (2013); Eugene Volokh, *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases)*, 45 Harv J L & Pub Pol'y 147 (2022); Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw U L Rev 731 (2013). Amici's interest in the case is solely in the sound development and application of the law, and the protection of First Amendment rights.

[1] Pursuant to MCR 7.212(H)(3), counsel for a party authored the brief in part with the direct assistance of the amici law professors. No counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION / SUMMARY OF ARGUMENT

This case is *Hustler Magazine v Falwell* come to small town politics. CLB publicly posted, displayed, and distributed rude and insulting condemnations of public figures—indeed, of public officials (the Appellant, Inkster City Attorney and Detroit Board of Ethics Member; his wife, a local judge; the Inkster and Detroit mayors; and the Detroit Board of Ethics Chair). Offensive as this speech may be, it is constitutionally protected, whether labeled "intentional infliction of emotional distress" (as in *Hustler Magazine*) or "stalking" or "harassment" (as in the case below), and whether said once or on several occasions. And even if some part of what CLB did is constitutionally unprotected, the Circuit Court's order should be reversed because of its overall reliance on the constitutionally protected speech.

ARGUMENT

I. *Hustler Magazine v Falwell* makes clear that offensive expressions of opinion (and even contempt) about public figures are constitutionally protected.

The speech in this case was understandably offensive to DWJ; but the speech in *Hustler Magazine* was likewise understandably offensive to Reverend Jerry Falwell:

> The inside front cover of the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, Hustler's editors chose respondent as the featured celebrity and drafted an alleged "interview" with him in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse.

Hustler Magazine, Inc v Falwell, 485 US 46, 48; 108 S Ct 876; 99 L Ed 2d 41 (1988). The

Court rightly concluded that this was "offensive to [Falwell], and doubtless gross and repugnant in the eyes of most." *Id.* at 50. And yet it held that such speech was constitutionally protected:

> The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." . . . "[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks." . . .

Id. at 51. And the Court held there was no exception for particularly outrageous material (such as material that outlandishly discusses obviously fictional sexual improprieties):

> Respondent contends, however, that the caricature in question here was so "outrageous" as to distinguish it from more traditional political cartoons. There is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant cousin of [such] political cartoons . . ., and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Id. at 55 (cleaned up). Precisely the same logic applies here.

Indeed, the Eighth Circuit recently held that even offensive speech *to* a political candidate cannot be treated as punishable "stalking":

> *Hustler Magazine, Inc v Falwell* held that the First Amendment protected a parody that depicted a prominent minister having drunken sex with his mother. *See also Saxe v State Coll Area Sch Dist*, 240 F3d 200, 204 (CA 3, 2001) (Alito, J.) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause."). For this reason, the cyberstalking statute cannot be applied constitutionally to a defendant who directs speech on a matter of public

> concern to a political candidate with intent merely to trouble or annoy the candidate.

United States v Sryniawski, 48 F4th 583, 587 (CA 8, 2022) (cleaned up) (dealing with mailing to a political candidate of sexually explicit photographs involving his wife and daughter). The same logic applies even more clearly to offensive speech to a sitting political official, and especially offensive speech *about* the official.

MCL 750.411s expressly provides that the law may not be used to "prohibit constitutionally protected speech." MCL 750.411s(6). Yet there is no basis for concluding that CLB's speech was constitutionally unprotected. Speech loses First Amendment protection only if it fits within a few limited and well-defined areas, such as obscenity, true threats, defamation, incitement, or solicitation of crime. *United States v Stevens*, 559 US 460, 468; 130 S Ct 1577; 176 L Ed 2d 435 (2010). And this Court has agreed with then-Judge Alito that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *TM v MZ*, 326 Mich App 227, 240; 926 NW2d 900 (2018). CLB's speech did not fall within any of the recognized First Amendment exceptions.

II. There is no First Amendment exception or a "right . . . to be let alone."

The Circuit Court's order was mainly based on petitioner's asserted "right to be left alone." App App'x 135. But the Supreme Court has never allowed offensive speech to be suppressed, based on its offensive content, simply on the grounds that it failed to leave someone alone. The precedent the Circuit Court cited, *Hill v Colorado*, expressly stressed that the law it upheld was "content-neutral," and targeted behavior because it involved unwanted "physical approach" of speakers to their targets, not the message of the speech. 530 US 703, 719, 725, 726, 729, 734; 120 S Ct 2480; 147 L Ed 2d 597 (2000).

In this case, the stalking law was applied precisely because of the offensive message that CLB was communicating. App App'x 135.

Hill also stressed that the content-neutral restriction in that case—a prohibition on approaching within eight feet of a person outside a medical facility in order to engage in speech with the person—was extremely narrow, and left speakers free to convey precisely the same messages from a slightly greater distance. The statute, the Court stressed, "simply establishes a minor place restriction." *Hill*, 530 US at 723. Any speaker was left free "to educate unwilling listeners on any subject, but without consent may not approach within eight feed to do so." *Id*. The order in this case is a far greater restriction.

III. The First Amendment protects repeated speech.

Nor can the Circuit Court's "right to be let alone" analysis be justified by the frequency of CLB's speech. The First Amendment protects repeated speech in public places, and repeated speech sent by e-mail to government offices. Repetition is often needed to reach new listeners, to get the attention of listeners who might have ignored the statements before, or to offer new information even to listeners who have heard the past criticism.

This is why political and ideological advertisers do not assume that one ad run once is enough (whether that ad praises a candidate or a cause, or criticizes the other side). It is also why labor picketers and leafletters generally show up repeatedly, though this costs a great deal in time and effort. Newspapers sometimes satisfy themselves with one story about a person, but newspapers have to worry about turning off some paying readers who might be annoyed by what they see as repetition (even when the repetition

successfully reaches other readers). Even so, newspapers may engage in a drumbeat of criticism, if they think it's warranted.

Unsurprisingly, the Supreme Court has often protected campaigns of criticism and not just individual statements. The critical leaflets in *Organization for a Better Austin v Keefe*, 402 US 415; 91 S Ct 1575; 29 L Ed 2d 1 (1971), were distributed on four days over the span of six weeks, *Keefe v Org for a Better Austin*, 115 Ill App 2d 236, 240; 253 NE2d 76 (1969). Those leaflets were distributed in Keefe's residential neighborhood, including on two occasions "to some parishioners on their way to or from respondent's church in Westchester," and "were also left at the doors of his neighbors." *Id*; *Organization for a Better Austin*, 402 US at 417. Yet the Court held that the injunction against such leaflets was unconstitutional, despite the lower court's conclusion that "petitioners' activities . . . had invaded respondent's right to privacy." *Organization for a Better Austin*, 402 US at 420. "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.

Speech in many other public protest, picketing, or leafleting cases has also been repeated. *See, e.g.*, *Edward J DeBartolo Corp v Florida Gulf Coast Building & Constr Trades Council,* 485 US 568, 571; 108 S Ct 1392; 99 L Ed 2d 645 (1988); *NAACP v Claiborne Hardware Co*, 458 US 886, 909; 102 S Ct 3409; 73 L Ed 2d 1215 (1982). Yet the Court has never suggested that such repetition would make the speech less protected, or a violation of the subject's right to be let alone.

IV. The PPO must be reversed even if some of the incidents did not constitute protected speech.

The Circuit Court attempted to justify the PPO on the grounds that CLB engaged in "making posters depicting Petitioner's wife laying in a bed with the Mayor of the City of Inkster," "creating a picture depicting Petitioner and Detroit Mayor Mike Duggan in a compromising embrace and sending it via email to the Michigan Board of Ethics," "creating a picture of Petitioner and the Michigan Board of Ethics Chair Kristin Lusn in a compromising position in a bed and sending it via email to the Michigan Board of Ethics," and "creating a picture of Petitioner's head on a female body and sending it via email to the Michigan Board of Ethics." App App'x 135-36.[2] For the reasons given above, all of these were protected speech. None fit within any First Amendment exception, such as obscenity; indeed, none of the supposedly "compromising" or "bed"-related images contained any sexual content. *See* App App'x 15, 45, 75, 78.

In particular, speech does not constitute fighting words, in particular, when "[n]one of the [viewers] reacted with violence or appeared to view [the speaker's] words as an invitation to exchange fisticuffs," *Wood v Eubanks*, 25 F4th 414, 425 (CA 6, 2022) (cleaned up); *see also Greene v Barber*, 310 F3d 889, 896-97 (CA 6, 2002). And speech is not fighting words when it is conveyed in an e-mail, as opposed to "a face-to-face setting" where a fight is likely to result. *State v Dugan*, 369 Mont 39, 51-54; 303 P3d 755 (2013) (so holding and collecting cases); *see also Chaplinsky v New Hampshire*, 315 US 568, 574; 62 S Ct 766; 86 L Ed 1031 (1942) (noting that the fighting words law upheld in that case was limited to "face-to-face words plainly likely to cause a breach of the peace

[2] The Board of Ethics was apparently actually the Detroit Board of Ethics; the Circuit Court mislabeled it.

by the addressee"). All the communications listed by the Circuit Court, except the display of the posters of the wife with the Mayor, were sent by e-mail.

But even if some of CLB's speech were constitutionally unprotected, the PPO must still be reversed, because a judgment cannot rest even in part on constitutionally protected speech. Thus, for instance, in *Street v New York*, 394 US 576, 590; 89 S Ct 1354; 22 L Ed 2d 572 (1969), the Court held that, even if certain nonspeech parts of petitioner's conduct were constitutionally unprotected, petitioner's conviction could not stand when "[the] record [was] insufficient to eliminate the possibility . . . that appellant was convicted for both his [First Amendment-protected] words and his [unprotected] deed."

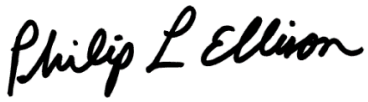
Likewise, in *NAACP*, 458 US at 915-16, 924 fn67, the Supreme Court invalidated a civil jury verdict and an injunction that were based in part on protected speech: Because "the nonviolent elements of petitioners' activities [were] entitled to the protection of the First Amendment," liability could not be imposed based on a combination of nonviolent speech and some violent conduct. And in *Mt Healthy City Sch Dist Bd of Ed v Doyle*, 429 US 274, 287; 97 S Ct 568; 50 L Ed 471 (1977), the Court held that a government decision to fire an employee would be unconstitutional if protected speech were a "motivating factor" for firing, even when other factors also existed, unless the government could show that it would have reached same decision without considering speech. Likewise, the Circuit Court injunction must be vacated unless the Circuit Court can conclude that it could be justified based solely on whatever unprotected conduct (if any) may have been present.

CONCLUSION

The trial court incorrectly held that CLB's messages violated MCL 750.411s. This Court should therefore vacate the PPO and order it removed from LEIN.

Date: April 2, 2023

RESPECTFULLY SUBMITTED:



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WORD COUNT STATEMENT

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