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Brief Amici Curiae of Electronic Frontier Foundation, 1851 Center for Constitutional Law, and Profs. Jonathan Entin, David F. Forte, Andrew Geronimo, Raymond Ku, Stephen Lazarus, Kevin Francis O'Neill, Margaret Tarkington, Aaron H. Caplan, and Eugene Volokh in Support of Respondent-Appellant, Joni Bey and Rebecca Rasawehr v. Jeffrey Rasawehr, Supreme Court of Ohio (Case No. 2019-0295)

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Case No. 2019-0295

IN THE OHIO SUPREME COURT

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

Brief *Amici Curiae* of Electronic Frontier Foundation, 1851 Center for Constitutional Law, and Profs. Jonathan Entin, David F. Forte, Andrew Geronimo, Raymond Ku, Stephen Lazarus, Kevin Francis O'Neill, Margaret Tarkington, Aaron H. Caplan, and Eugene Volokh in Support of Respondent-Appellant

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Interest of *Amici Curiae*

Most of the academic signatories are current or former Ohio professors who teach or have taught First Amendment law, many of them for decades:

- Jonathan L. Entin (Case Western Reserve University).
- David F. Forte (Cleveland-Marshall College of Law).
- Andrew Geronimo (Case Western Reserve University School of Law).
- Raymond Ku (Case Western Reserve University School of Law).
- Stephen R. Lazarus (Cleveland-Marshall College of Law).
- Kevin Francis O'Neill (Cleveland-Marshall College of Law).
- Margaret Tarkington (currently Indiana University McKinney School of Law, but formerly University of Cincinnati College of Law).

The other two academic signatories are Aaron H. Caplan (Loyola Law School, Los Angeles) and Eugene Volokh (UCLA School of Law), who are the authors of two articles that deal directly with the legal issues involved in this case, Caplan's *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. 781 (2013), and Volokh's *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw.U.L.Rev. 731 (2013).

Recognizing the Internet's power as a tool of democratization, the Electronic Frontier Foundation (EFF) has worked for more than 25 years to protect the rights of users to transmit and receive information online. EFF is a non-profit civil liberties organization with more than 30,000 dues-paying members, bound together by a mutual and strong interest in helping the courts ensure

that such rights remain protected as technologies change, new digital platforms for speech emerge and reach wide adoption, and the Internet continues to re-shape governments' interactions with their citizens. EFF often files *amicus* briefs in courts across the country, including in *Packingham v. North Carolina*, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017), and has often submitted amicus briefs regarding the availability of injunctive relief in online defamation cases, *see, e.g., Kinney v. Barnes,* 443 S.W.3d 87 (Tex.2014).

The 1851 Center for Constitutional Law is a nonprofit, nonpartisan law firm dedicated to protecting Ohioans' constitutional rights, including their freedom of speech.

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

Statement of Facts

Amici adopt the Statement of Facts from appellant-respondent's brief.

Summary of Argument

1. The decision below upholds a strikingly overbroad injunction, which bans Mr. Rasawehr from posting *anything* online about petitioners. This is inconsistent with the First Amendment, with U.S. Supreme Court precedent, and with precedent from other appellate courts. And even to the extent that courts may enjoin repetition of speech that fits within some narrow First Amendment

exceptions, those exceptions cannot justify barring *all* speech by the defendant about plaintiffs.

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

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

3. The decision below also upholds a narrower provision barring Rasawehr from accusing petitioners online of being culpable in their husbands' death. Such a provision could be constitutional following a finding on the merits that such specific statements are libelous, but it cannot be imposed before such a finding. That is what this Court concluded in *O'Brien v. Univ. Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); and, again, appellate courts in other jurisdictions have reached the same result.

Indeed, petitioners might well be entitled to prevail in a defamation lawsuit against Rasawehr, assuming they can prove his allegations are false; and an injunction barring Rasawehr from repeating those statements might then be

constitutionally permissible. But any such injunction must comply with *O'Brien*, *Keefe*, and other precedents that properly take into account speakers' First Amendment rights; the injunction in this case does not.

Argument in Support of Proposition of Law

I. Injunctions barring all online speech about a person are prior restraints that violate the First Amendment.

An injunction against speech about a person is an unconstitutional prior restraint absent a finding that the speech falls within a First Amendment exception. Even if narrow restrictions on speech that is intended to cause severe emotional distress are constitutional, they cannot apply to *all* speech by the defendant about plaintiffs.

Yet the Order covers all "posting about Petitioners on any social media service, website, discussion board, or similar outlet or service." Decision Below at ¶ 20. The dissent below notes the injunction's overbreadth: "[P]otential harmless posts . . . (i.e. birthday greetings, holiday invitations, condolences, days of special meaning, family events, etc. etc.) are impacted." *Id.* at ¶ 53 (Zimmerman, P.J., concurring in part and dissenting in part). And the requirement that Rasawehr "remove all such postings from CountyCoverUp.com that relate to Petitioners," *id.* at ¶ 21, also extends to *all* speech, not just *unprotected* speech.

In *O'Brien v. Univ. Comm. Tenants Union, Inc.*, this Court made clear that only specific restrictions on speech that track the narrow exceptions to the First Amendment may be upheld. "Once speech has judicially been found libel-

ous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that *same* speech may be proper." 42 Ohio St.2d 242, 244, 327 N.E.2d 753 (1975) (emphasis in original). Perhaps speech may also be enjoined if it fits within another one of the "narrow classes of speech [that] are unprotected by the First Amendment." *Id.* But the Order here unconstitutionally bans all online speech Rasawehr might make about his mother and his sister, regardless of whether the speech fits within one of those "narrow [unprotected] classes of speech."

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

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

Id. at 419-20. "[An] injunction, like a criminal statute, prohibits conduct under fear of punishment. Therefore, we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it

should be struck down." *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 581, 91 S. Ct. 1076, 28 L.Ed.2d 339 (1971).

To be sure, some unwanted speech *to* an unwilling recipient may be restricted—but, as *Keefe* indicates, this cannot justify restrictions on speech *about* an unwilling subject. The government may be able "to stop the flow of information into [an objecting person's] household," but it may not attempt to stop the flow of such information about a person "to the public." 402 U.S. at 420; *see also* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw.U.L.Rev. 731, 745-46 (2013).

Other jurisdictions' appellate decisions, as well as a recent Eleventh District decision, have similarly struck down such overbroad injunctions against speech about a person. Here are some examples:

1. In *Puruczky v. Corsi*, 110 N.E.3d 73 (Ohio Ct.App.2018), the Eleventh District concluded that an order that "Corsi cannot contact anyone *about or in relation to* Puruczky" was an unconstitutional prior restraint. *Id.* at 81. Because "the trial court did not make a specific finding that speech which had already taken place constituted libel or defamation and cannot assume that future speech will fall into such a category," *id.* at 82, the blanket injunction forbidding Corsi's speech about Puruczky violated the First Amendment; the same applies to Rasawehr's speech here.

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

3. In *Ellerbee v. Mills*, the Georgia Supreme Court vacated an injunction that barred the defendant from making 27 specific statements about the plaintiff. 422 S.E.2d 539, 540 (Ga.1992). The court "reverse[d] the injunction because the jury did not find all of those statements defamatory in its verdict and because the order sweeps more broadly than necessary." *Id.* at 540-41.

4. In *McCarthy v. Fuller*, the Seventh Circuit reversed an overbroad injunction on similar grounds: "An injunction against defamatory statements, if permissible at all, must not through careless drafting forbid statements not yet determined to be defamatory, for by doing so it could restrict lawful expression. . . . As illustrative of the injunction's resulting excessive breadth, notice

that it orders Hartman to take down his website, which would prevent him from posting any nondefamatory messages on his blog; it would thus enjoin lawful speech." 810 F.3d 456, 462 (7th Cir.2015).

5. In *TM v. MZ*, the Michigan Court of Appeals reversed an overbroad protective order obtained against a respondent who posted "highly inflammatory and negative comments" about petitioner and her family online, including allegations that she was involved in a kidnapping. 323 Mich.App. 227, 926 N.W.2d 900 (2018) (print page numbers not yet available). The order, the court held, was an unconstitutional prior restraint. *Id.* And the respondent's words were constitutionally protected even if they "amounted to harassment or obnoxiousness." *Id.*

6. In *Flood v. Wilk*, the Appellate Court of Illinois struck down as unconstitutional an order prohibiting the respondent from "communicating in any form any writing naming or regarding [petitioner], his family, or any employee, staff or member of [the petitioner's congregation]." __ N.E.3d __, 2019 IL App. (1st) 172792, ¶ 1 (Feb. 7, 2019) (precedential). "It is all but impossible," the court held, "to imagine a factual record that would justify this blanket restriction on respondent's speech." *Id.* at ¶ 35.

7. In *David v. Textor,* the Florida Court of Appeal struck down an injunction barring "text messages, e[-]mails, . . . tweets[, or] . . . any images or other forms of communication directed at John Textor without a legitimate purpose." 189

So.3d 871, 874 (Fla.Ct.App.2016), This injunction, the court held, was a forbidden "prior restraint" because it prevented "not only communications *to* Textor, but also communications *about* Textor." *Id.* at 876 (emphasis in original). *See also Fox v. Hamptons at Metrowest Condominium Ass'n, Inc.*, 223 So.3d 453, 457 n.3 (Fla.Ct.App.2017) (striking down, as an unconstitutional prior restraint, an injunction that "prohibited Fox from making any statements whatsoever pertaining to the Hamptons or to the Association on his websites, blogs, and social media websites"); *O'Neill v. Goodwin*, 195 So.3d 411, 414 (Fla.Ct.App.2016) (concluding that an order "that Appellant shall not post on the internet regarding Appellee" was an unconstitutional "prior restraint" because it "prevent[ed] not only communications *to* [the petitioner], but also communications *about* [the petitioner]" (citations and internal quotation marks omitted)).

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

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

II. Speech cannot be restrained just because it is believed to have an "illegitimate reason."

The court below rested its decision on Rasawehr's speech being "for an illegitimate reason born out of a vendetta seeking to cause mental distress." Opinion Below at ¶ 20. But "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (Roberts, C.J., joined by Alito, J.) (alteration and internal quotation marks omitted); *id.* at 492 (Scalia, J., concurring in part and in the judgment, joined by Kennedy and Thomas, JJ.) (taking the same view). Speech cannot be stripped of protection on the grounds that it lacks "good motives" or "justifiable ends." *State v. Turner*, 864 N.W.2d 204, 209 (Minn.Ct.App.2015). And "there is no categorical 'harassment exception' to the First Amendment,'" *State v. Burkert*, 231 N.J. 257, 281, 174 A.3d 987 (2017) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir.2001) (Alito, J.)), nor a "vendetta" exception.

Indeed, even in cases where speech likely stemmed from the speaker's personal vendetta or some other "illegitimate reason," the U.S. Supreme Court has treated such speech as broadly constitutionally protected. For example, *Hustler Magazine, Inc. v. Falwell* upheld *Hustler*'s right to criticize Jerry Falwell, even in a harsh, vulgar, and deeply emotionally distressing way. 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). There, *Hustler* had published a parodic advertisement which "portrayed respondent as having engaged in a drunken

incestuous rendezvous with his mother in an outhouse." *Id.* at 877. The Court never suggested that the speech lost its protection because it stemmed from a personal vendetta or was motivated by an "illegitimate reason." And in *Near v. Minnesota*, the Supreme Court made clear that a speaker's past libelous speech cannot justify broad restrictions on nonlibelous speech in the future, even when the injunction is limited to speech said without "good motives." 283 U.S. 697, 713, 51 S.Ct. 265, 75 L.Ed. 1357 (1931).

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

Similarly, in *Henry v. Collins*, the petitioner had issued press releases calling his arrest "'a diabolical plot'" driven by the County Attorney and police chief. 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965), *rev'g Henry v. Pearson*, 253 Miss. 62, 158 So.2d 695 (1963) (which offers more factual details). But the

Court agreed to hear the case despite that, and held that the petitioner's speech was protected by the *New York Times v. Sullivan* rule, with no suggestion that it was less protected on the grounds that it may have stemmed from a personal vendetta or an "illegitimate reason."

III. Injunctions against making specific factual allegations are unconstitutional prior restraints absent a finding on the merits that those allegations are false.

Though Ohio law allows injunctions against speech once particular statements have been found unprotected by the First Amendment, such injunctions are unconstitutional prior restraints unless they are imposed only after a trial on the merits:

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

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

> [T]he modern rule [is] that defamatory speech may be enjoined only after the trial court's final determination by a preponderance of the evidence that the speech at issue is, in fact, false, and only then upon the

> condition that the injunction be narrowly tailored to limit the prohibited speech to that which has been judicially determined to be false.

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

Many courts have in particular recognized that it is improper to enjoin libels through procedures that "deprive [the defendant] of the right to a jury trial concerning the truth of his or her allegedly defamatory publication." *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 730, 559 N.W.2d 740 (1997); *see also McFadden v. Detroit Bar Ass'n*, 4 Mich.App. 554, 558, 145 N.W.2d 285 (1966) ("[T]he defendant in a defamation action has the right to a jury trial which would be precluded by granting of an injunction"). Court decisions upholding injunctions barring continued publication of libels have stressed that the injunction was issued only after a "jury determination of the libelous nature of specific statements." *Kramer v. Thompson*, 947 F.2d 666, 678 (3d Cir.1991); *see also Advanced Training Sys., Inc. v. Caswell Equip. Co., Inc.*, 352 N.W.2d 1, 11 (Minn.1984) (same); Ohio Const. art. I, § 11 (requiring a jury trial before allegedly libelous speech can be criminally punished). Yet here there was no jury trial justifying this injunction, even though the injunction could be enforced through the threat of criminal punishment for contempt of court.

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

Conclusion

Injunctions against repeating statements are unconstitutional prior restraints unless they are entered after a trial in which the statements are found to be constitutionally unprotected (for instance, libelous). Both challenged parts of the injunction are therefore prior restraints: One part covers all speech about the plaintiffs, not just libelous speech, and the other covers specific statements that had not yet been found libelous at trial. This Court should reverse the dangerous precedent set by the court below.

Respectfully submitted,

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Certification

I, Karin L. Coble, hereby certify that a copy of the foregoing was sent via electronic mail this 1st day of July, 2019 to:

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