Supreme Court of Ohio Clerk of Court - Filed June 21, 2021 - Case No. 2020-1131

IN THE SUPREME COURT OF OHIO

M.R., A CINCINNATI POLICE OFFICER,

Plaintiff–Appellee,

v.

JULIE NIESEN, et al.,

Defendant–Appellants.

Case No. 2020-1131

On Appeal from the Ohio Court of Appeals for the First Appellate District

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REPLY BRIEF OF APPELLANTS JULIE NIESEN AND TERHAS WHITE

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TABLE OF CONTENTS

Table of Authorities ii

Argument 3

I. Because The Trial Court's Order Restrains Speech, Immediate Appellate Review Is Required. 3

II. The Trial Court's Order Violated The First Amendment. 7

Conclusion 8

Certificate of Service 9

TABLE OF AUTHORITIES

Cases

Bey v. Rasawehr, 2020-Ohio-3301 .... 5, 7

Buckley v. Littell, 539 F.2d 882 (6th Cir. 1977) 1

Condit v. Clermont County Review, 110 Ohio App.3d 755, 675 N.E.2d 475 (12th Dist. 1996) 2

Dupler v. Mansfield Journal Co., 64 Ohio St.2d 116, 413 N.E.2d 1187 (1990) 2

Garrison v. Louisiana, 379 U.S. 64 (1964) 3

Herbert v. Lando, 441 U.S. 153 (1979) 3

Lennon v. Cuyahoga County Juv. Court, 2006-Ohio-2587 (8th Dist.) 2

Marquardt v. Carlton, 971 F.3d 546 (6th Cir. 2020) 4

National Socialist Party of America v. Skokie, 432 U.S. 43, 97 S. Ct. 2205 (1977) 1, 5, 6, 8

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) 2, 4

Raible v. Newsweek, 341 F. Supp. 804 (W.D. Pa. 1972) 2

Snyder v. Phelps, 562 U.S. 443, 131 S.Ct. 1207 (2011) 7

Steele v. Spokesman-Review, 138 Idaho 249 (Idaho 2002) 2

Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988) 2

United States v. Cook, 472 F.Supp.3d 326 (N.D. Miss. 2020) 4

Waterson v. Cleveland State Univ., 93 Ohio App.3d 792, 639 N.E.2d 1236 (10th Dist. 1994) 2

In this case, Appellants Julie Niesen and Terhas White seek immediate appellate review of the trial court's injunction silencing their criticism of a public official. That is why they filed the appeal below, and that is why they seek this Court's review now: to solidify the availability of the interlocutory appellate procedure outlined in *National Socialist Party of America v. Skokie*, 432 U.S. 43, 44, 97 S. Ct. 2205 (1977), when a trial court order functions as a prior restraint on speech. In his brief, M.R. repeatedly alleges that Ms. Niesen and Ms. White are somehow circumventing that appellate process, and suppressing their own speech in the process, but this is untrue. These women want to *avail* themselves of the specific judicial review procedure created by the Supreme Court for addressing court-imposed restraints on speech, not to circumvent it.

M.R. presents two primary arguments against immediate appellate review in this case. First, he contends that the trial court's order was not a prior restraint against speech, because it merely preserved the status quo and protected M.R. from so-called "doxing," a term that has no legal or constitutional significance. Second, he argues that, even if the trial court's order did in fact enjoin expression, that order was constitutionally proper, because it protected M.R. from unknown, hypothetical third parties who might attempt to harm him. As discussed below, both of these arguments are wrong.

In addition, in his brief, M.R. repeats many faulty arguments about the First Amendment that he advanced at various stages of the trial court proceeding below. For example, he contends that criticisms of his actions as "white supremacist" or "racist" are objectively false, a claim that ignores voluminous case law treating allegations of a person's belief system as constitutionally-protected statements of opinion not actionable in defamation cases. *See, e.g., Buckley v. Littell*, 539 F.2d 882, 891-95 (6th Cir. 1977) (noting that the word "fascist" is "loose[]" and "ambiguous and cannot be regarded as a

statement of fact because of the "tremendous imprecision" of meaning and usage of the term); *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (holding that the term "racist" is "hurled about so indiscriminately that it is no more than a verbal slap in the face" and "not actionable unless it implies the existence of undisclosed, defamatory facts"); *Raible v. Newsweek*, 341 F. Supp. 804, 807 (W.D. Pa. 1972) ("to call a person a bigot or other appropriate name descriptive of his political, racial, religious economic or sociological philosophies gives no rise to an action for libel"); *Steele v. Spokesman-Review*, 138 Idaho 249 (Idaho 2002) (rejecting attorney's claim against newspaper who reported that he was a white supremacist in part based upon the fact that a person's belief system is not provable); *Lennon v. Cuyahoga County Juv. Court*, 2006-Ohio-2587, at ¶ 31 (8th Dist.) ("appellant's being called a racist was a matter of one [person's] opinion and thus is constitutionally protected speech"); *Waterson v. Cleveland State Univ.*, 93 Ohio App.3d 792, 797-98, 639 N.E.2d 1236, 1239 (10th Dist. 1994) (holding that explicit allegation of racism against police officer is not actionable); *Condit v. Clermont County Review*, 110 Ohio App.3d 755, 760, 675 N.E.2d 475, 478 (12th Dist. 1996) (finding accusations of "fascist" and "anti-semite" to be protected statements of opinion).

In addition, M.R. argues that Ms. Niesen and Ms. White acted maliciously in criticizing M.R.'s conduct at the city council meeting, incorrectly using a definition of malice that more approximates hatred or ill will than the *New York Times* standard of malice required in free speech cases.[1] *See Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 119, 413 N.E.2d 1187, 1190 (1990) ("Actual malice may not be inferred from evidence

[1] In defamation cases involving a public official, the plaintiff must show that the person being sued spoke with actual malice, meaning knowledge of the falsity of his statement or with reckless disregard for its truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 726 (1964).

of personal spite ill-will or intention to injure on the part of the writer."); *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Herbert v. Lando*, 441 U.S. 153 (1979). And he virtually concedes that, insofar as the prior restraint applied only to limit the release of M.R.'s residential address, it was overbroad as to Ms. Niesen and Ms. White, neither of whom – by M.R.'s own admission – knew M.R.'s address or had threatened to expose it. (M.R. Brief, p. 13 (admitting Ms. Niesen and Ms. White "were not doxing [M.R.] in the first place").)

These points need not be addressed in detail at this stage, because they are not critical to the procedural question of whether parties whose speech are restrained by a trial court are entitled to immediate appellate review. But M.R.'s confusion as to important points of First Amendment law – including what kind of speech is protected, what standards apply to public officials in defamation cases, and how far a court may go in restricting speech that has not yet been uttered – are precisely the kinds of questions a court can address through appellate review. In fact, M.R.'s arguments about harm and the preservation of the status quo demonstrate precisely why an immediate appeal is required: so that the First Amendment interests of all parties can be resolved swiftly, fairly, and with accurate constitutional precision.

ARGUMENT

I. Because The Trial Court's Order Restrains Speech, Immediate Appellate Review Is Required.

The primary argument advanced by M.R. is that the trial court's order does not restrain speech and therefore does not trigger the immediate appellate review requirement for prior restraints. This contention, however, overlooks the order's breadth, scope, and core speech-silencing function. For starters, the order does not merely limit

so-called "doxing," which M.R. defines as publishing his name and address.[2] (M.R. Brief, pp. 2, 3, 10.) The order prohibits a wide range of speech about M.R. For example, because Ms. Niesen and Ms. White are prohibited by the trial court order from saying anything that might personally identify M.R., the order also limits them from referencing public records about M.R.'s job performance, about this lawsuit, and about events that took place in a public building during a public meeting before the citizenry in broad daylight.[3] (R. 2 Complaint ¶¶ 16-17, 25, 42-47; Appx. 10.) The order therefore silences them from discussing matters of public concern involving a public official. *See Marquardt v. Carlton*, 971 F.3d 546 (6th Cir. 2020) (holding that police officer misconduct is matter of public concern).

Contrary to M.R.'s argument, the order altered, rather than preserved, the status quo. Prior to the issuance of the restraining order, Ms. Niesen and Ms. White were actively engaged in public discourse regarding M.R. and his activities. (R. 2 Complaint ¶¶

[2] It is unclear if M.R. uses the term "doxing" to mean publishing someone's name and address in combination or merely publishing someone's name and/or someone's address separately. To the extent he means the latter, his argument runs into serious First Amendment problems. While this is not a case about "doxing," as the term "doxing" has no First Amendment or legal meaning, individuals undoubtedly have a constitutional right to criticize public officials performing official acts by using the public official's real name. *See, e.g., New York Times*, 376 U.S. at 283, 84 S.Ct. 710. Moreover, at least one federal court has recently found that individuals also have a First Amendment right to share publicly available information about government officials, including their addresses. *See United States v. Cook*, 472 F.Supp.3d 326, 335-6 (N.D. Miss. 2020). The record in this case makes clear that M.R.'s residential address is a matter of public record that is publicly available. (R. 55 July 24, 2020 Transcript, pp. 19, 23, 24.)

[3] The circumstances of the city council committee meeting undercut the seriousness of M.R.'s safety concerns. M.R. contends he is afraid of being targeted by anti-police protestors if his name is revealed, but he appeared in uniform at a meeting where these same protestors were present and his identity was plainly visible to them. (R. 2 Complaint ¶¶ 16-17.) And, while he claims on the one hand to take steps to conceal his personal information from the public, *see* R. 2 Complaint, at ¶ 15, his residential address is publicly available online. (R. 55 July 24, 2020 Transcript, pp. 19, 23, 24.)

25, 42-47.) Ms. White filed a complaint with the Citizen Complaint Authority and posted about M.R. on social media. (*Id.* at ¶¶ 42-47.) Ms. Niesen also posted about M.R. on Facebook. (*Id.* at ¶ 25.) Open and unrestrained speech – not court-imposed silence – was the therefore status quo. But the trial court's July 24, 2020 order changed all that. (Appx. 10.) As a result of that order, which was extended in duration on August 13, 2020, Ms. Niesen and Ms. White were no longer allowed to criticize M.R. by name or to discuss his activities as a public official, because doing so would involve personally identifying him. (Appx. 11; R. 56 August 11, 2020 Transcript pp. 116 ("The TRO is going to remain in effect until the resetting of this, just so we're all clear.")). The trial court's order therefore altered the status quo by prohibiting Ms. Niesen and Ms. White from speaking out about M.R.'s duties as a public official.

As this Court has noted, it is immaterial what a trial court entitles its order for free speech purposes, as both temporary restraining orders and preliminary injunctions can function as prior restraints. *Bey v. Rasawehr,* 2020-Ohio-3301, at ¶ 25 ("Temporary restraining orders and permanent injunctions—i.e., *court orders* that actually forbid speech activities—are classic examples of prior restraints."). And when a court restrains speech, immediate appellate review is required. *National Socialist Party*, 432 U.S. at 44. Curiously, M.R.'s brief mentions *National Socialist Party* only once, near the very end, and has only this to say about the seminal case that controls the sole question of law in this appeal: it "involved an injunction under Illinois law," as if Illinois injunctions of speech somehow differ from Ohio injunctions for First Amendment purposes. (M.R. Brief, p. 17.) But regardless of which state court issues the injunction, court-ordered prior restraints are eligible for immediate appellate review. *National Socialist Party*, 432 U.S.

at 44. This Court should solidify that principle here by reversing the court of appeals and remanding the case for review of the trial court's injunction.

One other point bears mention here. M.R. continually faults Ms. Niesen and Ms. White for the longevity of the trial court's order, in essence conceding that the order would have been lifted a mere six days later at the preliminary injunction hearing had the women not appealed to the First Appellate District. (M.R. Brief, pp. 3, 9, 13-15.) This position is curious for a few reasons. First, it implies that M.R. ultimately would have lost his case, which highlights the shaky basis upon which the trial court issued the order in the first instance. Second, it is factually wrong. The trial court did not extend the order suppressing Ms. Niesen and Ms. White's speech because they appealed; the trial court extended the order due to a continuance necessitated by M.R.'s counsel's errors in drafting and serving his motion for a preliminary injunction. (R. 56 August 11, 2020 Transcript pp. 98-102.) Moreover, parties and lawyers do not issue injunctions; courts do, and courts can similarly lift injunctions as well. Ms. Niesen and Ms. White appealed the trial court's order to the court of appeals in order to be relieved from restraint on their criticism of M.R., not to prolong it. Immediate appellate review is therefore critical to ensuring that injunctions do not restrain speech in violation of the First Amendment, and this Court should explicitly adopt that requirement here.

II. The Trial Court's Order Violated The First Amendment.

Perhaps conceding that the trial court's order in fact restrains expression, M.R. also argues that the injunction was warranted. Absent any authority, M.R. contends that the trial court acted properly in silencing Ms. Niesen and Ms. White, even though they never once discussed releasing his address, nor did they advocate anti-police violence against him or his family. Notably, there is no evidence in the record to support M.R.'s

speculative assertions of fear, and, in any event, M.R. offers no explanation of how his unfounded reaction to criticism operates to transform Ms. Niesen and Ms. White's speech from protected speech to unprotected speech. Moreover, under *Bey*, a court cannot enjoin future expression without first finding it to be unprotected, and no such finding occurred here. *Bey*, 2020-Ohio-3301, at ¶ 41 ("Speech may not be categorically suppressed by means of a prior restraint absent a judicial determination that the speech would be unprotected by the First Amendment."). To the contrary, the trial court held that the speech here was in fact protected by the First Amendment and nevertheless enjoined it anyways. (R. 55 July 24, 2020 Transcript, pp. 77-8.)

In any event, whether the speech in question is protected or unprotected – and here, it is clearly protected – is the precise type of question a reviewing court can take up during an interlocutory appeal. As a policy matter, this is why immediate appellate review is required, so that speech that is protected can be given the "breathing space" it needs, while those who are legitimately harmed by speech that falls into the very narrow categories of unprotected expression – obscenity, child pornography, incitement, true threats, fighting words, and the like – have access to civil judicial remedies that protect their interests. *Bey*, 2020-Ohio-3301, at ¶ 38; *Snyder v. Phelps*, 562 U.S. 443, 458, 131 S.Ct. 1207, 1219 (2011) ("in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment") (citations omitted). Immediate appellate review therefore promotes the interests of all parties in this case and preserves the constitutional ideals embodied in the First Amendment.

CONCLUSION

The trial court in this case enjoined Appellants Julie Niesen and Terhas White from identifying, criticizing, or otherwise speaking about M.R., a public official. It did so despite acknowledging that Ms. Niesen and Ms. White have a First Amendment right to engage in this kind of expression and without finding their speech to be constitutionally unprotected. What is worse, M.R. concedes that the order was unnecessary as to these two women, given that they were not the ones engaged in the speech that concerned M.R.

The trial court's order is a classic prior restraint. It silenced speech on a matter of public concern, and it altered the status quo by requiring Ms. Niesen and Ms. White to silence their ongoing dialogue about a public official's conduct. From the advent of the Supreme Court's prior restraint jurisprudence, immediate appellate review has been required under these circumstances, particularly when courts and not other branches of government impose the orders of restraint. *See National Socialist Party*, 432 U.S. at 44. The court of appeals departed from this requirement by hyperfocusing on the title of the order – a temporary restraining order, as opposed to a preliminary injunction – rather than its impact upon expression. As a result, the court of appeals erred in failing to provide Ms. Neisen and Ms. White the immediate appellate review to which they were constitutionally required.

In accordance with *National Socialist Party*, 432 U.S. at 44, and the First Amendment, this Court should reverse the decision of the court of appeals and remand the case for further review of the merits of the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under that a copy of the foregoing was served on counsel for all parties by email on the 21st day of June, 2021 and by the Court's electronic notification system on the day of filing.

/s/ Erik W. Laursen
Erik W. Laursen