STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF NEWAGO

CHERYL L. MCCLOUD

Petitioner — Case No. 17-55485-PH

v.

Ho. Graydon W. Dimkoff

LORI A. SHEPLER a/k/a LORIE A. SHEPLER

Respondent

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

A. STATEMENT OF INTEREST.

B. STATEMENT OF FACTS.

The position of the ACLU is based on its understanding of the facts as follows. Petitioner, Cheryl McCloud, operates a non-profit animal rescue shelter in Newago County, Michigan. Respondent, Lori Shepler, is a California resident and, for some time , has actively opposed the declawing of cats. Shepler operates a web site and Facebook page that advocate opposition to declawing cats. Shepler contacted McCloud and expressed her opposition to McCloud's practice of declawing cats. There is no allegation that Shepler threatened McCloud or her animal shelter. Other persons, some of whom follow Shepler's web site of Facebook page, contacted McCloud and her associates, expressing their opposition to declawing cats, sometimes with inflammatory language.

ARGUMENT

1. **The issuance of the injunction prohibiting speech is a clear violation of defendant's right to free speech under the first amendment.**

When it enacted the anti-stalking statute, MCL 750.411h, the legislature was aware of the danger that the vague definition of "harassment" could be read to include constitutionally protected activity and expressly sought to avoid such a result. "Harassment does not include constitutionally protected activity" The present case is a misuse of the statute to suppress speech that is clearly protected by the First Amendment to the U.S. Constitution.

A 1927 Minnesota statute declared that the publication of a "malicious, scandalous and defamatory newspaper, magazine or other periodical" was a nuisance and authorized lawsuits to abate the nuisance. On appeal from the issuance of an injunction under the statute, the U.S. Supreme Court held that such an injunction was a prior restraint offensive to the concept of freedom of the press.

> " In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. n4 The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889." *Near v Minnesota,* 283 U.S. 697, 713 - 14; 51 S.Ct 625; 75 L.Ed. 1357 (1931)

Ever since that landmark case, "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v Sullivan,* 372 US 58, 70; 9 L. Ed. 2d 584; 83 S.Ct. 631 (1963).

> "The Supreme Court, in a plethora of cases, has held that prior restraints come before the Court with a "heavy presumption" against their constitutional validity. When the content of pure speech is restrained and prohibited, the restraint bears a heavy presumption

against its validity and mandates the closest scrutiny. See, *Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981); Police Department of the City of Chicago v. Mosley , 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968)*" *Turner Advertising Co. v National Service Corporation,* 742 F.2d 859, 862 *(CA 5, 1984)*

Cf. *In Re King World Productions Inc.* 898 F.2d 56, 59 - 60 (CA 6, 1990):

> "Protection of the right to information that appeals to the public at large and which is disseminated by the media is the cornerstone of the free press clause of the first amendment. No matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect. Consequently, even prior restraint of the dissemination of national security information has been denied. *New York Times v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971)***]** (the Pentagon Papers case). Any prior restraint bears "a heavy presumption against its constitutional validity." *New York Times Co. v. United States, 403 U.S. at 714* (quoting *Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963)*

2. **Shepler's advocacy against declawing is entitled to the highest rung of First Amendment protection.**

This case concerns Shepler's speech about an issue of significant public concern and debate. "[S]peech on public issues occupies the highest rung of hierarchy of First Amendment values and is entitled to special protection." *Snyder v Phelps,* 562 US 443, 452 (2011) citing *Connick v Myers,* 461 US 138, 145 (1983). Speech concerns a public issue when it can "be fairly considered as relating to any matter of political, social, or other concern in the community . . . Or when it is a subject of legitimate news interest; that is, the subject of general interest and of value and concern to the public." *Snyder,* 562 US at 453.

The heightened protection for speech on public issues does not depend on the identity of the petitioner. Statements about private individuals and business constitute "speech on public issues" if the statements are of general interest in the value of concern to the public. See *Obsidian Fin Grp, LLC v Cox,* 740 F.3d 1284, 1292 (CA 9, 2014). It makes no difference if some statements relate specifically to the petitioner or her business. Under *Snyder*, Shepler's speech is

entitled to specific protection because it furthers a debate about declawing of cats and not merely a private debate about Ms. McCloud or Lake Haven.

3. Shepler's speech cannot be enjoined based on the possible reactions of others.

The "inflammatory" emails submitted in support of McCloud's petition all come from other persons who were allegedly motivated by Ms. Shepler's speech. However, it is clear as a matter of law that restriction of speech cannot be justified by listeners reactions to the speech. "Whatever "secondary effects" means, I agree that it cannot include listeners' reactions to speech. Cf. *Hustler Magazine, Inc. v. Falwell, 485 U. S. 46 (1988)*." *Boos v Barry, 485 US 312,* 333 (1988), Brennan concurring. In *Bible Believers v Wayne County,* 805 F.3d 228, 244 (CA6 2015), the Sixth Circuit rejected the argument that speech could be suppressed because it might cause listeners to engage in violence.

> The right to freedom of speech provides that a state cannot "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." B*randenburg , 395 U.S. at 447* (footnote omitted). Advocacy for the use of force or lawless behavior, intent, and imminence, are all absent from the record in this case. The doctrine of incitement has absolutely no application to these facts. . . .
>
> It is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot. And unsurprisingly, "[t]here will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime."

4. The First Amendment protects even offensive speech.

> As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 56 (1988). See also, e. g., *New York Times Co. v. Sullivan*, 376 U. S., at 270. A "dignity" standard, like the "outrageousness" standard that we rejected in Hustler, is so inherently subjective that it would be inconsistent with "our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience." *Hustler Magazine*, 485 U. S., at *55.Boos v. Barry*, 485 U.S. 312 *, 108 S. Ct. 1157, 99 L. Ed. 2d 333, (1988)

In this case, Petitioner asks the Court to enjoin core protected speech based on email communications from persons who are not parties to this action that are not themselves subject to proscription consistent with the First Amendment.

C9NCLUSION

For these reasons, The American Civil Liberties Union submits that the personal protection order in this action should be set aside.