

(Digitally Recorded on 01/10/2019 -- at 9:13 a.m.)

STATE OF MICHIGAN

IN THE 15TH DISTRICT COURT FOR THE COUNTY OF WASHTENAW

PEOPLE OF THE STATE OF MICHIGAN,

Case No. 18-0703-SM

v

ANUJA RAJENDRA,

Defendant.

/

MOTION TO DISMISS HEARING

BEFORE THE HONORABLE ELIZABETH P. HINES, DISTRICT COURT JUDGE

Ann Arbor, Michigan - Thursday, January 10, 2019

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None.	

1 Ann Arbor, Michigan

2 Thursday, January 10, 2019, at 9:13 a.m.

3 THE COURT: We'll go on the record in the case of
4 People versus Anuja Rajendra, 18-0703. Good morning.

5 MR. MILLER: Good morning, Your Honor, Darren Miller
6 on behalf of the People.

7 MR. SHEA: Good morning, Judge, John Shea, along
8 with Michael Steinberg, David Blanchard, Dan Korobkin, Frances
9 Hollander, on behalf of Anuja Rajendra --

10 THE COURT: A team.

11 MR. SHEA: -- who's present. Yes.

12 THE COURT: Okay. Thank you, good morning.

13 MR. SHEA: And it has been a team effort. Um --

14 THE COURT: And you're welcome to have a seat, Ms.
15 Rajendra.

16 MR. SHEA: Your Honor, this is our Motion to
17 Dismiss.

18 THE COURT: If I can interrupt you just for one
19 minute.

20 MR. SHEA: Oh, I'm actually -- Mr. --

21 THE COURT: Just to say, I have read everything,
22 including the prosecutor sent a case late yesterday afternoon.
23 And I had received yours. Um, I was out of the office, you
24 can tell by my voice here. Um --

25 MR. SHEA: I have the same problem.

1 THE COURT: I received the responsive pleading you
2 filed, as well, Mr. Shea. I've read everything. I've spent
3 hours on this case. Having said that, you're free to argue
4 and state whatever you want, but I just want you to know, I
5 have read everything.

6 MR. SHEA: I don't wanna belabor anything, Judge.

7 THE COURT: Okay.

8 MR. SHEA: So, I'll, I'll, I'll launch into what I
9 had to say.

10 THE COURT: Okay.

11 MR. SHEA: But feel free to --

12 THE COURT: And I may have a couple questions for
13 both of you, so --

14 MR. SHEA: That would be fine.

15 THE COURT: Okay.

16 MR. SHEA: And, and, and if I'm, and if I'm talking
17 about things that you are fully cognizant of already and, and
18 you think that, um, it's unnecessary of me to continue --

19 THE COURT: Okay.

20 MR. SHEA: -- just, just say, John, I, I, I know
21 that.

22 THE COURT: Okay.

23 MR. SHEA: Um --

24 THE COURT: Well, I know what you have in your
25 briefs, so --

1 MR. SHEA: Okay.

2 THE COURT: If you wanna highlight whatever you
3 wanna make and make your record --

4 MR. SHEA: Let me --

5 THE COURT: -- that's fine.

6 MR. SHEA: Let me, let me try to do that.

7 THE COURT: Okay.

8 MR. SHEA: Um, there are three, uh -- we believe the
9 statute, of course -- the Motion to Dismiss is based on our
10 belief that the statute is unconstitutional.

11 THE COURT: Correct.

12 MR. SHEA: And regardless of what anybody thought
13 about its constitutionality when it was enacted, um, it just
14 doesn't come up very often. And so, you know, in 2019, now
15 we're arguing about a decade's old statute that I believe,
16 under the U. S. Supreme Court jurisprudence of the last 20
17 years, is, is clearly unconstitutional, on its face and as
18 applied.

19 There are three reasons why we think it should be,
20 it should be found unconstitutional. First, it's facially
21 invalid under the First Amendment. Second, it's facially
22 unconstitutionally vague under the Fourteenth Amendment. And
23 third, even if it were constitutional under the First and the
24 Fourteenth on its face, it's unconstitutional as applied to
25 Ms. Rajendra in these circumstances.

1 Um, there's -- there could, there could be no doubt
2 it's a content-based restriction; right? I mean, the First
3 Amendment, all kinds of government restrictions. We try to
4 lump them into categories. You got the content-based, and you
5 got the non-content-based. Or when we were in law school,
6 they called them time, place and manner restrictions. Um,
7 yes, that was a long time ago.

8 Um, this is a content-based restriction because it's
9 the government telling people what they can and cannot say.
10 And it doesn't matter how laudable the government goal was at
11 the time the statute was enacted, or what was, you know,
12 motivating it. Um, what we, what we say now, or at least what
13 the United States Supreme Court says now, is content-based
14 restrictions, no matter what the motive was for enacting it,
15 are presumptively unconstitutional. They are only
16 constitutional if they survive strict scrutiny. And strict
17 scrutiny is defined as serving a compelling state interest,
18 and the restriction itself is necessary and narrowly tailored
19 to serve that compelling state interest, regardless of what
20 the state interest is, even if it's compelling. If the
21 restriction isn't necessary and isn't narrowly tailored, then
22 the content-based restriction must fall; it's unconstitutional
23 on its face. And --

24 THE COURT: And if I can interrupt you there just
25 for a second.

1 MR. SHEA: Yes.

2 THE COURT: And you're using the strict scrutiny not
3 only from the *Alvarez* case, but, um, and that's a plurality,
4 but the concurring, um, concurring justices had, um,
5 intermediate standard. And then, you cite the *Reed* case, is
6 that right, for why strict scrutiny is the standard to apply?

7 MR. SHEA: *Reed* succeeded *Alvarez*.

8 THE COURT: Right.

9 MR. SHEA: Actually, I don't believe that the
10 concurring opinions in *Alvarez* used intermediate scrutiny at
11 all. Um, I believe that --

12 THE COURT: They did. They had a -- they come to
13 the same result, but they used in intermediate standard, which
14 they referred to also as proportionality.

15 MR. SHEA: Well, then, then, *SBA List* disagrees with
16 Your Honor, because *SBA List* said that, um, of, of -- out of
17 all of the opinions -- there were certainly fractured
18 opinions coming out of *Alvarez*, but *SBA List*, the Sixth
19 Circuit said that they were unanimous on the point that there,
20 um, is no -- I wanna be careful, because we both --

21 THE COURT: They find --

22 MR. SHEA: -- may be right.

23 THE COURT: They come to the same result, but they
24 use a different standard, two justices, but *Reed* settles that;
25 is that correct?

1 MR. SHEA: *Reed* settles it, that's correct.

2 THE COURT: Okay. Well, we're on board, we agree.

3 MR. SHEA: *Reed* settles it. And what *Alvarez* said
4 is there is no carve out for false speech. Content-based
5 restrictions are evaluated on -- there's no, the old tests
6 from 50, 60 years ago that said there's no constitutionally
7 protected false speech, *Alvarez* said that's just not true.
8 That's, that's where, I think, all of the justices in *Alvarez*
9 were, were in agreement.

10 Um, *Reed*, of course, confirms that, and talks about
11 it in the strict scrutiny sense. Now, *Reed*'s not a political
12 speech case. It's a sign ordinance case, which I think even
13 makes the position that we're arguing stronger, because U. S.
14 Supreme Court precedent for hundreds of years has said that
15 political speech is the core First Amendment value that we're
16 trying to protect. It's not the only speech we protect, but
17 it is the most important speech that we protect. And if *Reed*
18 says in a sign ordinance case we're gonna apply strict
19 scrutiny to content-based sign ordinance restrictions, you're
20 certainly gonna do that in politically speech restrictions.
21 And clearly, this statute, 168.944, seeks to regulate
22 political speech.

23 Um, the, the, the -- I don't wanna -- again, I'll
24 just try to highlight what we think is most important. People
25 can argue about whether or not an anti-incumbency

1 representation, or misrepresentation statute serves a
2 compelling state interest. But more importantly, even if it
3 did, it, it doesn't -- it's certainly not narrowly tailored to
4 protection of election integrity, which I think would be the,
5 um, reason most commonly given for -- in support of a statute
6 like this.

7 Um, there are, and we've given, you know, various
8 examples why, um, it is not narrowly tailored. Probably the,
9 the most obvious one is that it only targets that kind of
10 allegedly false speech. It doesn't -- I mean, you, you can't
11 pick up the newspaper on any day of the week and not find an
12 example of some person misrepresenting, or, or half-truths, or
13 twisting the truth, or in some fashion making a serious
14 misrepresentation, um, including very public figures who spoke
15 on TV recently. And um, and we don't proscribe that.

16 We also don't proscribe it if, if someone who is the
17 incumbent, in an anti-incumbency atmosphere, misrepresents
18 whether or not he or she in fact holds the office. We don't
19 say a misrepresentation there is, uh, uh, is a violation of
20 statute.

21 We have this very blatantly incumbent-oriented
22 statute enacted, by definition, incumbents to help protect
23 their own elected office. And that can't be a narrowly
24 tailored restriction serving any kind of legitimate, let alone
25 compelling, state interest.

1 Um, I think it's instructive that we have two cases,
2 um, that are quite recent. Um, one outta the Sixth Circuit,
3 *SBA List*, which, which struck down *Ohio* statute proscribing
4 any false statement during a campaign, um, on the ground,
5 primarily, that it was not narrowly tailored to serve a
6 compelling -- they, they accepted the compelling state
7 interest, Ohio's interest in election integrity, and, and, you
8 know, voters not being misled and all that. But it was both
9 over-inclusive and under-inclusive, and there was no mechanism
10 for weeding out frivolous complaints, there was no materiality
11 component, all the things, that, that they discuss, and which
12 I think are equally applicable to this statute.

13 Um, we also have the *Magda* case, which is a state
14 court case out of Ohio, the Ohio Court of Appeals, which
15 struck down a statute that is very similar to this one. It
16 was an anti-incumbency, anti-incumbency misrepresentation
17 statute. Again, relying on *SBA List* and on *Alvarez*, and
18 distinguishing earlier Supreme Court precedent, as I think
19 this Court must do, notwithstanding the People's response
20 that, that you should rely on that earlier Supreme Court
21 precedent. I think it's irrelevant; I think it's effectively
22 overruled. The *Lostracco* case, the only reported case in
23 Michigan, has effectively been overruled by subsequent, um, U.
24 S. Supreme Court, um, precedent.

25 Uh, the People cite -- cited yesterday to the *Winter*

1 decision. Um, the *Winter* decision is, I think, more helpful
2 for us than it is for the People. Um, this is what I call a
3 judges-are-different case. Um, uh, the, the, um, uh, if I
4 could just pull out my copy of it, um --

5 THE COURT: Is that the compelling state interest is
6 different in a judicial election versus running for --

7 MR. SHEA: That's correct.

8 THE COURT: -- non-judicial office?

9 MR. SHEA: That's right. That, that, that, that
10 there was a compelling state interest in the public's
11 confidence, in the impartiality of and integrity of the
12 judiciary. And they make a very clear distinction when they
13 say:

14 "However much or however little truth-bending the
15 public has come to expect from candidates for political
16 jobs, judges are not politicians, and the state's
17 decision to elect its judiciary does not compel it to
18 treat judicial candidates like campaigners for political
19 office."

20 This is a judges-are-different case. By its
21 language, it's distinguished from the case of persons seeking
22 elected political office in any other branch of government.
23 And it doesn't control here at all. As a matter fact, as I
24 said, I think it really, um, more -- it really bolsters, I
25 believe, our, our argument. Um, so, I'm not gonna go further

1 on the First Amendment facial invalidity argument. I think
2 the Court understands where we're coming from on that.

3 On the Fourteenth Amendment void for vagueness, um,
4 you know, that, that -- we have to remember that the statute
5 doesn't just proscribe the use of certain particular words,
6 like incumbent or re-elect. It goes on to say, "or otherwise
7 indicates, represents or gives the impression that a candidate
8 for public office is the incumbent." And the People's
9 response, it forthrightly acknowledges that Ms. Rajendra is
10 being charged under the "gives the impression" section of
11 Michigan's statute.

12 Well, um, as we argue in our brief, and I believe as
13 the Court of Appeals in Michigan explained in *Boomer* and the
14 other cases that we've, you know, that we've cited, words like
15 that don't fairly put a person on notice as to what is
16 prohibited. And where a person is not fairly placed on
17 noticed as to what is prohibited, um, not only does that
18 person -- is that -- and especially when it implicates speech,
19 it chills speech, and that alone makes it unconstitutional.
20 But moreover, it encourages arbitrary and, um, standardless
21 enforcement, and that also is a due process violation under
22 the Fourteenth Amendment.

23 Um, the -- there's an interesting passage, which Mr.
24 Blanchard brought to my attention this morning, out of the
25 *Winter* case that the People gave us last night, or late

1 yesterday afternoon, that addresses this. Now, remember in
2 *Winter*, there, there were -- they were evaluating the
3 constitutionality of seven or eight different provisions --

4 THE COURT: Correct.

5 MR. SHEA: -- in the judicial canons. And some it
6 found unconstitutional, and some it found constitutional. One
7 of the ones that struck -- um, one of the ones it struck down
8 as unconstitutional was on, was on vagueness grounds. And I'm
9 looking at, um, the page 9 of the Westlaw copy that we got
10 yesterday, in the end of the paragraph above headnote 11.

11 THE COURT: Mm-hmm, I've got it right in front of
12 me.

13 MR. SHEA: Where it says:

14 "Because the canon", this is the judicial canon
15 being evaluated at that time, "gives judicial candidates
16 little confidence about when they exercise their right to
17 affiliate with a party or when they violate the law, the
18 campaigning clause is vague and unconstitutionally
19 overbroad. The district rightly struck it in its
20 entirety."

21 And it's quite analogous, I think, here. Um, where
22 the statute gives legislative candidates little confidence
23 about when they exercise, you know, their right to speak about
24 the office that they seek to hold, um, then the, the, the, the
25 statute is unconstitutionally vague.

1 Um, and finally, Your Honor, um, the as-applied
2 challenge, I don't think the Court needs to go there, but even
3 if it were to uphold the Constitution, the facial validity of
4 the statute, um, for similar reasons as the void for vagueness
5 argument, um, it is unconstitutional as applied to Ms.
6 Rajendra, because proscribing speech based on implication, um,
7 necessarily is to proscribe speech that is not clearly false.
8 It allows for ambiguity and doesn't provide fair warning as to
9 the unlawfulness of the speech that is at issue.

10 So, for that additional reason, um, we believe the
11 statute is unconstitutional, at least as applied in this case.
12 We, we believe it should be struck entirely, but certainly as
13 applied here. And I'm happy to answer any questions.

14 THE COURT: I do have one question. In the wording
15 of the statute under which she's charged, do you see any, um,
16 built into the statute, any mens rea requirement?

17 MR. SHEA: I don't. And I'm assuming that, um, if
18 the Court were to -- well, I think that's an, that's an
19 additional problem. Um, it doesn't even -- at least in the
20 *Ohio* statutes, it said --

21 THE COURT: "Knowingly".

22 MR. SHEA: -- "knowingly". Right. And there's, and
23 there's nothing here. I suppose that, if we actually had to
24 try this case, there would be additional litigation on whether
25 there should be a mens rea requirement read in, but there

1 certainly is not one here. And um, given the, um, habits of
2 incumbents to protect their positions, that may not have been
3 by accident.

4 THE COURT: All right, thank you. All right. And
5 Mr. Miller.

6 MR. MILLER: Thank you, Your Honor. First, I'd like
7 to reiterate the People's position in their, um, response
8 brief that we are of the position that *Lostracco* is still good
9 law in Michigan, and has not been overruled. As you know,
10 *Lostracco* held that candidates' knowing misrepresentations
11 were not constitutionally protected free speech.

12 Um, the fact that they -- the court in *Lostracco* did
13 impose a knowing requirement does, I think, get back to your
14 question of mens rea. I believe there is a mens rea required
15 in this statute, even if it's not explicit in here, and that
16 would be with either knowing or with reckless disregard for
17 the falsity of the statement of incumbency made. Um, I'll
18 talk about that a little bit later, but I think that is clear
19 from Supreme Court precedent.

20 To the ex -- to the extent that this Court doesn't
21 believe that *Lostracco* is controlling or good law anymore, the
22 People believe that this statute would survive even a strict
23 scrutiny analysis. This is one of the rare cases that tends
24 to, to thread the needle. Looking at the --

25 THE COURT: If I may interrupt you just one minute.

1 MR. MILLER: Yes.

2 THE COURT: You -- I'm assuming you don't contest or
3 disagree in any way that this is a content-based restriction
4 on speech, for the statute, is that correct?

5 MR. MILLER: Well, Your Honor, Your Honor, I don't
6 think it's that simple. It's not a black and white question.
7 There are, if you look at the statute, there are some
8 limitations as to where these statements, um, can be made,
9 such as in advertising or using any campaign material. So, I,
10 I don't think it's restricting. There is some non-content-
11 based, um, restrictions. The --

12 THE COURT: Isn't it all about whether someone's
13 referring to himself or herself as the incumbent, when they're
14 not the incumbent?

15 MR. MILLER: That part of the statute, I would
16 agree, is a content-based restriction. However --

17 THE COURT: Isn't that what you're charging Ms.
18 Rajendra with?

19 MR. MILLER: Yes, Your Honor, but under -- the
20 defense points to the *U. S. v Alvarez* case as saying that
21 there's no, um, category of, of -- just because speech is
22 false, doesn't mean it's categorically excluded from First
23 Amendment protections. What *Alvarez* holds is that, um, false
24 statements, yes, as a category, aren't exempt from First
25 Amendment protections, but it does make an exception that

1 says:

2 "When false claims are made to effect fraud or
3 secure other valuable considerations, such as employment,
4 the government may restrict speech without affronting the
5 First Amendment."

6 I think the key here is that the state, with the
7 statute 168.944, is not trying to impose any restriction on
8 the free exchange of ideas, or even to penalize what may be a
9 negligent false representation in, in campaigning. Instead,
10 it's a much more narrow statute that is only geared towards
11 the statement of, of false incumbency. And I think it's
12 common knowledge that being the incumbent in, in an election
13 is, is helpful for, for that candidate, whether or not it's
14 true. And that would satisfy Alvarez, um, the valuable
15 consideration portion of Alvarez.

16 Um, and I think when they are saying "false claims
17 are made to effect fraud", fraud requires that knowing or, um,
18 or, or reckless mens rea built into it. So, I don't think
19 that this statute could be used against someone who made an
20 honest mistake. I think at trial it will need to be proved a
21 mens rea of knowing or, or of reckless on behalf the defendant
22 with regard to the statements made. So, I don't think that we
23 run into First Amendment issues, nor any of the issues in, in
24 Alvarez.

25 *U. S. v Garrison* was not completely abrogated by, by

1 Alvarez, and I still think, um, in *Garrison*, they also stated
2 that the knowingly false statement and false statement made in
3 reckless disregard for the truth do not enjoy constitutional
4 protection.

5 The cases, numerous Sixth Circuit cases that we've
6 been discussing, um, both in the written briefs and here in
7 court today, um, in many of these cases, the courts were
8 striking down laws that they felt were swept much more broadly
9 than the statute in question.

10 Looking at the *SBA List* case, that Ohio law swept
11 more broadly and it applied to all false statements. There
12 was no, um -- it didn't just apply to material statements.

13 In the statute 168.944, the only type of conduct
14 being proscribed is a false implication of incumbency. And I
15 think, by definition in this statute, the only types of
16 statements sought to be prohibited are ones that would secure
17 a material gain for the candidate.

18 Looking to the *Winter v Wolnitzek* case, I do, um,
19 acknowledge the defense counsel's arguments that the Sixth
20 Circuit tried to distinguish between judicial candidates for
21 office and other political candidates. I find it hard to
22 accept their reasoning that judicial candidates for office are
23 completely exempt from the political sphere. I think anyone
24 whose watched the last two Supreme Court nomination hearings
25 might also agree with me that there are inherently politics,

1 even in judicial elections.

2 And so, I believe that their holding, where they
3 upheld a canon that was much broader than the statute that
4 we're talking here. In *SBA List*, that canon prohibited judges
5 from recklessly making any false statement that is material to
6 a campaign. That was found to be facially constitutional by
7 the Sixth Circuit panel. However, they did in that case find
8 it unconstitutional as applied, but that's regarding an issue
9 that I don't believe is applicable here.

10 If strict scrutiny does apply to the statute, the
11 statute encompasses only the least restrictive means on
12 speech. It seeks to do one thing and one thing only, and that
13 is prevent those who are not incumbents from claiming they are
14 in campaign materials. It achieves this with the restriction
15 that is perfectly aligned with the types of statement sought
16 to be restricted. The only way to prevent voters from being
17 misled by candidates seeking an advantage in an election with
18 regard to a statement of false incumbency is to prohibit those
19 statements from being made.

20 I understand that counsel takes issue, um, thinking
21 that the, the statute is too vague and therefore must be void.
22 However, I believe that the wording of the statute reflects a,
23 a necessary, um, intent on the legislature to proscribe all
24 forms of conduct that could imply false incumbency. There's
25 simply too many ways in which a candidate, um, could try to

1 technically avoid a violation, while very clearly making a
2 statement of false incumbency. And so, I believe that the law
3 as written is the least restrictive means of, of protecting
4 this compelling interest of ensuring that elections are, um,
5 conducted fairly, and that the electorate, um, is well
6 informed.

7 THE COURT: Can I ask you about that?

8 MR. MILLER: Yes.

9 THE COURT: How does it address that compelling
10 state interest -- assuming there's a compelling state interest
11 in making sure the election's fair, and keeping voters from
12 being misled, how is that met, if a person is charged with
13 this crime after the election?

14 MR. MILLER: Well, Your Honor, I think it's
15 unreasonable to expect law enforcement and the prosecutor's
16 office to be able to respond with immediacy to every single
17 type of, um, violation of the laws that occur. Certainly, I
18 think there would be a, um, a message sent to future
19 candidates to avoid this type of speech in the future.

20 And to the extent that, um, there might be a
21 chilling effect on free speech, of course there's a chilling
22 effect with the type of statute prescribing some type of
23 conduct, but we don't seek to chill free speech for the
24 exchange of politically meaningful ideas. What we seek to
25 chill is any fraudulent expressions of, of incumbency. We are

1 trying to protect -- it's not just the incumbent; it's also
2 the voters, and the, the election process in general and other
3 candidates who may be, um, swayed or misled by a statement of
4 false incumbency.

5 So, I think it's unreasonable to expect that a, um,
6 um, investigation, prosecution and conviction will all happen
7 prior to the conclusion of the election. However, that
8 doesn't mean it doesn't have an effect towards, um, potential
9 future candidates for office.

10 THE COURT: But isn't that one of the timing issues
11 that are discussed in some of the cases that are cited by both
12 of you --

13 MR. MILLER: It was --

14 THE COURT: -- including --

15 MR. MILLER: It was one of, I believe, three issues
16 that were, were, were brought up in one of the cases. Um, I
17 believe that was the *List* case, but I may be mistaken.
18 However, the *List* case does hold that the, um, state's
19 interest in preserving the integrity of elections and
20 protecting others from confusion and undue influence, and
21 ensuring an individual's right to vote not be undermined by
22 fraud in the election process are compelling interest. So,
23 the, the court acknowledged that, um, protecting the
24 electorate, protecting the integrity of elections is a
25 compelling government interest. Um, however, I don't think

1 the timing aspect is what the entire, um, holding hinged on.
2 And I believe it to be unreasonable to impose that type of
3 restriction on the government.

4 Just going back to the Alvarez case, Your Honor, um,
5 the Alvarez case didn't address fraud in the criminal sense.
6 It addressed, um, um, a much broader set of circumstances of
7 people falsely claiming to have earned military decorations
8 that they were not entitled to. Alvarez does have dicta that
9 states:

10 "Where false claims are made to effect a fraud,
11 secure monies, or other valuable considerations, the
12 government may restrict speech without affronting the
13 First Amendment."

14 I think that pulls us out of the Alvarez sphere of
15 analysis, because we are dealing with a situation in which the
16 state is alleging fraud, a fraudulent statement on the part of
17 the defendant, not simply a false -- a negligently false
18 statement. Um --

19 THE COURT: May I ask you a question?

20 MR. MILLER: Yes, Your Honor.

21 THE COURT: There is reference in the defense brief
22 and their attachments, and they've had no motion to strike, in
23 terms of similar statements made by the other candidates in
24 the same race. Is that being contested? And two, um, there
25 is reference to, in the context of Ms. Rajendra's race, that

1 she was, in fact, running as a, for lack of a better
2 description, fresh face, new, um, person, not an experienced
3 politician going to Lansing. Is that contested in any way?

4 MR. MILLER: Your Honor, I'm hesitant to comment on
5 the merits of the second point that you addressed about, um, a
6 candidate's being new. I think that's an issue for the fact
7 finder to be decided at trial, after there's been development
8 of testimony and presentation of the, of the evidence. We
9 simply, at this point, um, don't have on the record a
10 development of the proofs with regard to -- and I think this
11 would go back to the defendant's intent, and what they meant
12 -- what they were trying to do when they, um, included this
13 language in their fliers.

14 THE COURT: So, couldn't, in fact, if today they saw
15 fit to present testimony in that nature, that would be
16 something that I could hear today, is that what you're saying,
17 as opposed to just at trial?

18 MR. MILLER: Um, I, I don't believe that this Court
19 is in a position to make an ultimate determination on the
20 issues at a motion hearing today. I think it would have to be
21 put forth at trial.

22 And Your Honor, with regards to the other statements
23 that were listed in the defendant's brief, um, as you know,
24 it's not -- with other types of crimes, you know, someone
25 who's charged with a crime can't come in here and point to a

1 list of all other uncharged crimes as being evidence that this
2 is, um, you know, an unconstitutional application of the law.

3 What our office does is respond to complaints from
4 the general public which, and in this case, I believe there
5 were two members of the public who had submitted complaints to
6 our office and to the Ann Arbor Police Department, um, who
7 conducted an investigation. Following that, you know, the
8 case was reviewed, um, and authorized by a prosecuting
9 attorney -- an assistant prosecutor in our office. That's
10 just simply how the process is. I can't speak to whether or
11 not we received complaints regarding other statements made
12 during this election, um, but all I can confirm is that, in
13 this case, yes, there were complaints from the public.

14 THE COURT: Okay. And I hope you're not thinking
15 that I'm trying to be critical of your office in any way.

16 MR. MILLER: Oh, no, Your Honor, not at all.

17 THE COURT: I'm certainly not. Um, but I have a
18 question, doesn't that go to, however, the issue of whether
19 it, um, encourages, and I'm not saying your office in
20 particular, but doesn't that go to the argument in the case
21 law that it, um, leads to selective enforcement, or could lead
22 to selective enforcement; say you had an unscrupulous
23 prosecutor that chose to prosecute someone espousing a certain
24 view that he or she didn't agree with?

25 MR. MILLER: Well, Your Honor, I think that's why we

1 have a mens rea requirement that needs to be --

2 THE COURT: But is there a mens rea requirement in
3 the statute?

4 MR. MILLER: I, I don't -- I think there is, because
5 of the idea that this is regarding, um, false -- the false
6 incumbency designation provides with it a material gain. And
7 I think that, having looked at the Supreme Court precedent,
8 um, if, if we apply this without a mens rea, um, I don't think
9 that would be appropriate, because if it was a mistake of
10 speech, a genuine mistake, which is an issue that should be
11 decided by the fact finder, um, it would not be appropriate
12 to, um, enforce a criminal statute in that, in that instance.

13 THE COURT: But --

14 MR. MILLER: So, I think there necessarily has to be
15 a mens rea read into, read into the statute, and that would be
16 knowingly or recklessly false.

17 THE COURT: Okay. And I totally agree with you, and
18 I assume the defense does, too. My question, though, is it's
19 not in the statute right now, is that correct?

20 MR. MILLER: That is correct; but I believe through,
21 um, case law and by looking at the statute in conjunction with
22 the *Lostracco* Court of Appeals case, which we believe is
23 controlling, there is a knowing element that must be read into
24 the statute.

25 THE COURT: Okay. And *Lostracco* is also a judicial

1 election issue, as opposed to non-judicial, is that correct?
2 And as was the case you cite, *Winters versus Wolnitzek*.

3 MR. MILLER: Yes, Your Honor; but *Lostracco* dealt
4 with the very same statute which we're discussing today.

5 THE COURT: Correct.

6 MR. MILLER: Mm-hmm. And the Michigan statute
7 doesn't, I think rightfully, does not distinguish between
8 candidates for a judicial election and candidates for any
9 other type of, of state office.

10 And Your Honor, regards to the defendant's argument
11 that, as applied, this is an unconstitutional statute, um,
12 again, I don't want to get into too much the substance of the
13 statements, because I believe that is an issue that needs to
14 be, um, developed at trial and submitted to, um, the fact
15 finder for a decision.

16 However, looking at the statements here, it's our
17 position that these are, um, you know, plainly fraudulent
18 statements that can't really be interpreted in any other way.
19 Even in the light most favorable to, to the defendant, Miss
20 Rajendra, a jury could, um, find these statements to be false
21 statements of incumbency. And I think we at least need to,
22 um, allow the case to, to reach that point, before making any
23 decisions.

24 Um, you know, the statements are, "As a mom of four
25 and as your State Senator, I want my kids and all kids in

1 Michigan to have" access to an education, or something along
2 those lines. But we view it that there's no ambiguity over
3 this the statement. "As a mom of four and as your State
4 Senator, I want". It's not I will want. It's not as a future
5 mother of four. We are talking about the present tense here.

6 To the extent that, um, you know, there is a mens
7 rea requirement, that's how we are protected from, um, the
8 arbitrary enforcement of, of, of a law like this. The
9 defendant has the right to a jury of her peers to decide what,
10 what she meant when she wrote this statement, and I believe
11 that is adequate protection under, under the law.

12 Your Honor, I'll just end, again, that I don't
13 think, um, this statute was meant to chill the exchange of
14 ideas that have, um, any political import. Whether we like
15 those ideas or not, the free exchange of ideas in the, in the
16 marketplace is a very important concept.

17 What we seek to protect with this statute is fraud.
18 And I know that there have been some suggestions about the,
19 the cure to false speech is more free speech. However, it's
20 in no other context of criminal fraud do we put the onus of
21 uncovering that fraud or correcting it on the victim or those
22 who are defrauded. And I think that this statute perfectly
23 comports with that sentiment. We are not trying to restrict
24 free speech here. We are trying to restrict fraud. Thank
25 you.

1 THE COURT: Okay, thank you.

2 MR. SHEA: Your Honor, may I briefly rebut?

3 THE COURT: All right.

4 MR. SHEA: I'll try to limit it to three broad
5 points. First, um, the People, um, have to argue, if they're
6 gonna, if they're gonna say that *Lostracco* is still good law,
7 they have to argue that *Alvarez* doesn't apply. Um, and they
8 claim it doesn't -- that *Alvarez* doesn't apply because *Alvarez*
9 recognizes that speech can be regulated in the manners that,
10 um, that *Alvarez* describes. And they talk about defamation,
11 fraud, and other things that create pecuniary harm.

12 We're talking about civil damages types of cases in,
13 in the defamation context and commercial speech context.
14 *Alvarez* did not cite those examples as a, a way of, um,
15 justifying the regulation of political speech. It, it, it
16 was, it was talking about how narrow it is, those things are,
17 and how inapplicable those concepts are to the case that was
18 before it, which was the person who was falsely claiming he
19 had been a Congressional Medal of Honor recipient.

20 Um, furthermore, if the Court were to accept the
21 People's argument as, as -- that *Alvarez* doesn't apply here,
22 it would have to disagree with *SBA List*, not to mention *Magda*,
23 but *SBA List* being a Sixth Circuit decision, I think, is, is,
24 is more important. And I think quite clearly, from the
25 rationale there, *Alvarez* does apply here, and *Lostracco*

1 necessarily must be disregarded.

2 Um, second, um, the People claim that this statute
3 is, in fact, narrowly tailored. They say it's the only way to
4 keep the electorate from being misled. The only way to keep
5 the electorate from being misled I believe I, I heard, I wrote
6 down, is to prohibit the misrepresentation. Well, that's just
7 not true. The best way to keep an electorate from being
8 misled is to have the candidates opposing the allegedly
9 misleading candidate to say, hey, he or she is misleading you.
10 I mean, it is, it is -- how difficult, if someone truly were
11 to say elect -- re-elect me, I'm the incumbent, would it be
12 for the opposition to say, why would you elect this person at
13 all when they're lying to you about the fact they're the
14 incumbent when they're not the incumbent?

15 Um, the, the cure to, and I think this is a theme that
16 is consistent throughout the cases that we've discussed, the
17 default is, when it comes to political speech, the cure for
18 misleading political speech is not to prohibit it, but to
19 encourage counter-speech, and to recognize that counter-speech
20 is the most effective deterrent to misleading speech. Truth
21 trumps falsity. I think another phrase I read again last
22 night, the rational corrects the irrational. And that is the
23 spirit underlying the First Amendment, as recognized by
24 binding precedent.

25 Um, as *Alvarez* said, the government has not shown

1 and cannot show why counter-speech would not suffice to
2 achieve its interest. The remedy for speech that is false is
3 speech that is true. This is the ordinary course in a free
4 society, and that is most applicable here.

5 Um, so, the reason the statute is not narrowly
6 tailored is because it is unnecessary. If someone were so
7 bold as to proclaim themselves the office holder when they're
8 not, do we really think that the person they're running
9 against isn't gonna call them out on it, and that's not gonna
10 get put out there in the campaign?

11 And is that not more effective than an after-the-
12 fact prosecution in a criminal fashion of, of, of speech that
13 the prosecutor claims is false by implication? That's not
14 effective. And nobody was misled in this, the complaints
15 notwithstanding. The complaints came from people affiliated
16 with someone opposed -- for the candidate opposed to Ms.
17 Rajendra. They clearly knew that she was not the incumbent.
18 They were not misled. So, these weren't complaints from
19 people who were misled. These were complaints from people who
20 were trouble makers. And nobody has ever come forth and said,
21 oh, we actually thought she was the incumbent. This was an
22 open seat.

23 To the extent there was anything misleading, and to
24 the extent there was, it was innocent, looking at Ms.
25 Rajendra's campaign at large, she herself cures it. She ran

1 as an outsider. She ran as fresh blood. She ran as somebody
2 who could shake things up, because she wasn't part of the
3 establishment. Anybody who thought that she was the incumbent
4 was living under a rock. And nobody has actually come forth
5 and said that. So, this is a --

6 THE COURT: But isn't that one of the issues the
7 prosecutor's -- I just asked if I could consider that, and
8 he's, in essence, saying there's nothing on the record to show
9 that, other than arguments of counsel in your brief. And that
10 was one of my questions, if there's any, um, thing being
11 provided that I can legitimately consider, in terms of that
12 point?

13 MR. SHEA: Well, I, I'm using it to illustrate the
14 larger point, the constitutional point. I'm not asking you to
15 make a, a finding of fact. The prosecutor may be right, that
16 you can't make a finding of fact on evidence that hasn't been
17 presented beyond my words, or beyond our brief. Um, but it
18 does illustrate the larger point, that, um, the, the cure to
19 misleading speech is more speech that counters the misleading
20 speech.

21 That is why this statute is not narrowly tailored.
22 Because it assumes that the only way -- the only effective way
23 of prohibiting political misrepresentations are by prohibiting
24 them. Well, that's not a -- the only to keep them out of the
25 marketplace of ideas is by prohibiting them. That's not the

1 way it works. That's not the way the First Amendment works;
2 that's not the way our society works. And it's clearly not
3 narrowly tailored when every other kind of misleading
4 political speech, which is harder to rebut -- I mean, how many
5 years did we have to contend with a sitting president was born
6 in Kenya? Much more difficult thing to rebut, as it turned
7 out, than I'm the office holder when I'm really not the office
8 holder. Counter-speech is the most effective way to rebut
9 misleading speech, particularly in as black and white a
10 situation as this statute tries to address. So, the statute's
11 unnecessary. And since it's unnecessary, by definition, it's
12 not narrowly tailored to effectuate a compelling state
13 interest.

14 My last point, the as-applied challenge, the
15 government can't be language police. Um, and they
16 particularly can't be the language police where they're trying
17 to enforce a principle who's, you know, at, at, at the root of
18 the enforcement is we don't like your language by implication.

19 Um, the fact that a jury could, if we didn't have
20 the First Amendment, sit in judgment of that doesn't mean a
21 jury should, or that any other arm of the government, whether
22 you're a prosecutor, or whether you're a campaign commission,
23 or whether, you know, you're any other body that, that, that
24 seeks to curtail political speech. Um, it's just not
25 consistent with our constitutional form of government, and

1 it's not consistent with the First Amendment. Um, and
2 regardless of whether -- even if a statute said, you know, you
3 can only use these specific words, didn't have the by-
4 implication language, that's not what we have here, and that's
5 not the prosecution we have here. So, it is unconstitutional
6 as applied.

7 THE COURT: Thank you. All right. And Mr. Miller,
8 you're standing up. Did you wish to add one final point,
9 or --

10 MR. MILLER: If I may just briefly address --

11 THE COURT: All right.

12 MR. MILLER: -- defense counsel's argument. Your
13 Honor, I note that defense counsel, um, offered some quotes to
14 this court. I have a quote that is often misattributed to
15 Mark Twain. It's unknown who said it, but that quote states:
16 "A lie can travel halfway around the world, while the truth is
17 putting its shoes on."

18 It's unreasonable to expect that, um, we can put
19 the, the burden of disproving fraudulent speech on other
20 members of the, of the community, especially in the context of
21 a political election. Um, there's nothing to -- if we don't
22 have, um, this statute on the books, there's nothing to stop a
23 candidate from making a false statement of incumbency just
24 days before the election, without any time for, um, the public
25 to cure it with more free speech. No, what we need to avoid

1 this type of harm to the integ -- integrity of elections is a,
2 a statute that will proscribe certain false statements of
3 incumbency, and that's exactly what the statute tries to do
4 here.

5 I don't think -- I, I think it's more of a burden to
6 expect others to respond to someone's fraudulent statements
7 with the truth, and somehow to convince people that what
8 they're saying carries more truth and weight than what a
9 candidate is saying. But I also don't think that this law
10 imposes a, a very big burden on candidates for political
11 office. It simply prohibits any implication of false
12 incumbency.

13 This case and these charges could have been avoided
14 by the simple substitution of the word "if" for "as". If
15 elected your State Senator, you know, or instead of "As your
16 state senator". I, I don't think that that is a burdensome
17 restriction on speech. We're certainly not restricting
18 conveying any type of ideas or political sentiment. Um, it's
19 just that statement of false incumbency, because the
20 legislature deemed, uh, deemed it a compelling enough interest
21 to, to protect, and I believe that it is permitted under the
22 case law we've discussed today. Thank you.

23 THE COURT: Thank you. And if I can see you, Mr.
24 Miller and Mr. Shea, at the bench for just a moment, please.

25 (At 9:58 a.m., bench conference off the record)

1 (At 10:00 a.m., bench conference concluded)

2 THE COURT: All right, thank you, counsel. Anything
3 additional for the record, um, Mr. Miller or Mr. Shea?

4 MR. MILLER: Nothing from the People, Your Honor.

5 MR. SHEA: Thank you, Judge, no.

6 THE COURT: All right. Um, and I deliberately
7 didn't write an opinion ahead of time, because today was an
8 opportunity for both of you to answer my questions and give
9 further information. And so, I really wanted to come in
10 honestly with an open mind, which I did, and um -- but I am
11 prepared to give a decision. Um, I just mentioned to counsel
12 that, rather than sort of rambling around on something so
13 important, I would rather have a few minutes to just
14 consolidate, in light of the additional information I received
15 today, how I'd express it.

16 So, what I'm going to -- I also understand there's
17 pressure on everyone that would like to have a result. So,
18 rather than just saying I'll issue a written opinion in 14
19 days, or something of that nature, I would be able to give an
20 oral opinion, assuming my voice holds out, too, this
21 afternoon. If I set it for -- I have a lot of trials and
22 other people waiting on other things. So, I really don't
23 wanna take ten minutes, um, to put my thoughts in a proper
24 order, um, to render my opinion. So, if I said 4:00 today,
25 could you both come back for that?

1 MR. SHEA: Yes.

2 MR. MILLER: Yes, Your Honor.

3 THE COURT: Okay. So, I'll have my opinion at 4:00
4 today. And I appreciate both of you, you know. It's been
5 interesting. I honestly believe I understand the respective
6 positions of each of you. And um, it's been helpful today to
7 me when you've answered my questions. And I will have my
8 opinion at 4:00.

9 MR. SHEA: Thank you, Judge.

10 THE COURT: Okay? Thank you.

11 MR. MILLER: Thank you, Your Honor.

12 (At 10:02 a.m., court recessed)

13 (At 4:05 p.m. court reconvened)

14 THE COURT: All right, we'll go on the record in the
15 case of People versus Anuja Rajendra, 18-0703. And good
16 afternoon, everyone.

17 MR. SHEA: Good afternoon, Judge.

18 MR. MILLER: Good afternoon, Your Honor.

19 THE COURT: If you could state your appearances
20 again for the record, please.

21 MR. MILLER: Darren Miller on behalf of the People.

22 THE COURT: Thank you.

23 MR. SHEA: John Shea, Your Honor, with and on behalf
24 of Anuja Rajendra, along with Michael Steinberg, David
25 Blanchard, Daniel Korobkin and Frances Hollander.

1 THE COURT: All right, thank you. All right. And I
2 do not have a written opinion. I have my notes to give an
3 opinion. Um, frankly, I would have probably preferred --
4 well, not probably, would have preferred to have more time to
5 write a more, um, well-written, scholarly opinion, with the
6 actual cites to cases, but I know that both sides would rather
7 have the case resolved today. And so, I'll try to be as clear
8 as possible, so either side may pursue any remedies you see
9 fit. And I won't give citations to the cases, but I'll refer
10 to them by the names that were used in your briefs, and so
11 you'll know which case I'm talking about.

12 In this case, the defendant Anuja Rajendra is
13 charged with violating the Michigan statute that makes it a
14 misdemeanor for a person running for political office to
15 advertise or use in any campaign material the words incumbent,
16 re-elect, re-election or, and I quote, "otherwise indicate,
17 represent, or give the impression that", unquote, the
18 candidate is the incumbent, when he or she is not. And the
19 statute is MCL 168.944.

20 Specifically, the prosecutor's office charges in the
21 complaint, um, and in their brief that Ms. Rajendra violated
22 that statute by giving the impression that she was an
23 incumbent senator. And they base that on the statements in
24 the Complaint that she allegedly made in a campaign mailer.
25 In the first charge, Count 1, quote, "As your State Senator, I

1 am steadfast in my commitment to", end quote. And the second
2 misdemeanor charge, Count 2, for the statement, quote, "As a
3 mom of four and as your State Senator, I want my kids and all
4 kids in Michigan to have the same opportunity for quality
5 education and success", end quotes.

6 Those statements are alleged to have misled the
7 voters by giving them the impression that Miss Rajendra was an
8 incumbent Senator when, in fact, she was not. And that is the
9 theory in the People's brief pages 1 and 3, and in the
10 Complaint.

11 There is no claim, and no one's arguing that at any
12 time Ms. Rajendra used the words that are proscribed in that
13 statute. She never referred to herself as an incumbent, or
14 used the words re-elect or re-election.

15 The defense argues that the statute is
16 unconstitutional on its face, pursuant to law from the U. S.
17 Supreme Court, specifically the *Alvarez* case, in which the U.
18 S. Supreme Court found that statements made by Mr. *Alvarez*,
19 who falsely claimed he had earned the Congressional Medal of
20 Honor when he did not, that it was deliberately, and knowingly
21 made and false, that nevertheless, his speech was protected by
22 the First Amendment.

23 The defense also cites other cases from the Sixth
24 Circuit Court of Appeals, and Ohio, to support the position
25 that, even false political speech is protected by the

1 Constitution.

2 The prosecution relies on the only Michigan
3 appellate case that appears to address the statute under which
4 Ms. Rajendra is charged, and that is the *Lostracco* case, 150
5 Mich App., a 1980 617 -- a 1986 case from the Michigan Court
6 of Appeals. However, in that case, it was a judicial campaign
7 in which a district judge running for circuit judge used
8 language that could be read to look as if he were the
9 incumbent circuit judge, the position for which he was
10 running. His opponent had gone to circuit court to get an
11 injunction to stop him from using that language in his signs,
12 circulars and advertisements, and wanted him to have language
13 that specifically informed the voters that he was a district
14 court judge.

15 But even in *Lostarco* -- *Lostracco*, the Court of
16 Appeals acknowledged that both state and federal law regarding
17 free speech in the political arena provide great protection
18 for speech concerning the public. However, the court there
19 concluded that, since the circuit court found that the judge's
20 materials and wording were, in fact, misleading, any further
21 publication of them would constitute a knowing
22 misrepresentation. And so, enjoining them would not therefore
23 infringe on the defendant's right of free speech.

24 The premise on which the *Lostracco* case is decided
25 lies on the point, as they state, quote, "Knowing

1 misrepresentations are not constitutionally protected free
2 speech". And in my opinion, that has been overruled, or at
3 least clarified, um, by the U. S. Supreme Court case in the
4 2012 *Alvarez* case.

5 Defense also referred all of us to a series of cases
6 from Ohio. The *Magda* decision from 2016, in particular, where
7 the Ohio courts faced a very similar situation as I see this
8 one, where a lower court decision had said that false, like
9 *Lostracco*, that false speech merits no constitutional
10 protection. Um, and when they ruled on it and looked at it,
11 based on *Alvarez* and other decisions, they found that the Ohio
12 statute was unconstitutional.

13 Even if the statements made in the campaign
14 literature of Ms. Rajendra are false - and of course the
15 defense claims some may read them as aspirational, especially
16 in their context - but even if they were false, the U. S.
17 Supreme Court has made clear that the highest protection is
18 given to political speech. And the appropriate remedy to
19 false political speech is more political speech, not
20 restricting such speech. And for that, I will cite the
21 *Alvarez* decision, 567 U. S. 727.

22 The statute under which Ms. Rajendra is being
23 prosecuted is a content-based restriction on the exercise of
24 pure political speech. It is presumptively invalid and
25 subject to strict scrutiny. Such statutes may only be

1 justified if the government proves that they are narrowly
2 tailored to serve a compelling state interest. And for that I
3 refer you to the *Reed* case.

4 In this case, Mr. Shea argued today that the, um --
5 there is no reason for this statute, that there was not a
6 compelling state interest addressed here. But even assuming
7 there is, and it could be preserving the integrity of
8 elections and protecting voters from confusion, the law under
9 which Ms. Rajendra is being prosecuted does not protect those
10 interests. It is not narrowly tailored. Far too much
11 legitimate clearly protected speech, speech we'd want to hear
12 during campaigns, is restricted or chilled.

13 As the Sixth Circuit Court of Appeals stated in the
14 2016 case that the prosecutor cited and filed last night,
15 *Winter v Woltznit* -- Wolnitzek, um, they cite a U. S. Supreme
16 Court case, *Brown* to say, and I quote:

17 "Erroneous statement is inevitable in free debate.
18 And the chilling effect of absolute accountability for
19 factual misstatements is the, um -- in the course of
20 political debate is incompatible with an atmosphere of
21 free discussion."

22 The statements for which Ms. Rajendra is criminally
23 charged could easily have been addressed and debunked by
24 counter-speech to correct any potential misunderstanding.
25 Prosecuting her after the election does nothing to correct any

1 misleading statement to voters, 'cause the election is over.
2 Post-election prosecution not only fails to address the
3 claimed compelling need and issue -- at issue, it can punish
4 citizens running for office and deter other well-qualified
5 people from running.

6 I find that the statute is both over-inclusive and
7 unconstitutionally vague. It fails to give fair notice of
8 what conduct is prohibited. The statute prohibits speech
9 that, quote, "gives the impression of incumbency". What does
10 that mean? The defense in their brief gives an example, or
11 asks a question, "What if there were a picture of the
12 candidate outside the State Capitol building in an ad for
13 literature, does that suggest she's the incumbent?"

14 Interpretations may vary. Courts warn that the
15 government should not be the one to decide without standards.
16 It could lead to arbitrary and discriminatory enforcement.
17 And let me make clear that I'm in no way suggesting that that
18 is the case here, but it is a concern expressed by appellate
19 courts ruling on First Amendment issues such as these.

20 So, in short, I find that the statute under which
21 Ms. Rajendra is charged is unconstitutional on its face, and
22 as applied; it is not narrowly tailored to further a
23 compelling government interest; it prohibits speech without
24 providing fair notice of what speech is actually prohibited.

25 And I am well aware, pardon me, that as a district

1 court judge, my ruling has zero precedential value beyond this
2 case. But I am granting the defense motion and dismissing the
3 charges against Ms. Rajendra with prejudice.

4 I don't believe there's any bond to refund or
5 anything.

6 MR. SHEA: No.

7 THE COURT: No.

8 MR. SHEA: Thank you, Judge.

9 THE COURT: All right, thank you.

10 MR. MILLER: Thank you, Your Honor.

11 THE COURT: Thank you.

12 (At 4:15 p.m., proceedings concluded)
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CERTIFICATION

STATE OF MICHIGAN)
)
COUNTY OF WASHTENAW)

I certify that this transcript, consisting of 45 pages, is
a complete, true and correct transcript to the best of my ability
of the digitally videotaped proceedings taken in this case on
January 10, 2019.

Date: March 1, 2019

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