IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DANIEL A. HORWITZ,	)	
	)	
Plaintiff,	)	
	)	Case No. 3:24-cv-1180
v.	)	JUDGE GIBBONS
	)	
U.S. DISTRICT COURT FOR THE	)	
MIDDLE DISTRICT OF TENNESSEE, *et al.*	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR A TEMPORARY RESTRAINING ORDER (ECF 30) & RENEWED MOTION FOR PRELIMINARY INJUNCTION (ECF 21)

Mr. Horwitz filed this lawsuit after 27 months of trying in vain to get the Middle District to vindicate his First Amendment rights by ruling on the constitutionality of Local Rule 83.04. Shortly thereafter, on November 1, 2024, he sought a preliminary injunction to prevent the enforcement of the unconstitutional aspects of Rule 83.04(a)(2) while this case proceeds. ECF 21. In support of his motion, Mr. Horwitz detailed why he was likely to succeed on all three of his constitutional claims. ECF 21-1. The Judicial Defendants filed motions to extend their time to oppose the preliminary injunction on November 15, 19, and 26—eventually requesting until December 27 to file a response. ECF 25, 26, 27.

While Mr. Horwitz's motion for preliminary injunction was pending, on December 13, CBS News asked to interview Mr. Horwitz about some of his cases in the Middle District. *See* ECF 30-4. Mr. Horwitz tried to confer with the Judicial Defendants about how he could participate in that interview without violating Rule 83.04(a)(2)'s vague presumptions of prejudice, but the Judicial Defendants would not offer him any leeway. As a result, Mr. Horwitz filed a motion to renew and expedite his pending request for preliminary injunction (or, in the alternative, for a temporary restraining order) so that he could participate in the CBS News interview. ECF 30.

On December 27, when the Judicial Defendants' preliminary-injunction opposition was due, they filed a single brief opposing only the alternative relief of a TRO pending the Court's consideration of the preliminary injunction. They did not oppose the original motion for preliminary injunction. *See* ECF 33 ("Opp. Br."). Their failure to respond to the separate bases for relief that Mr. Horwitz raised in his November 1 motion is enough to justify an injunction. In a First Amendment case like this one, the government "bears the burden" of showing that the "proposed less restrictive alternatives are less effective than" Rule 83.04. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (cited at ECF 21-1, at 9). The Judicial Defendants have not done so. Nor could they, as Rule 83.04(a)(2)'s vague presumptions of prejudice and burden-shifting appear to be unique among federal courts. This Court should enjoin the enforcement of Rule 83.04(a)(2) as quickly as possible.

I. Mr. Horwitz is Likely to Succeed on All Three of His Claims

Mr. Horwitz's brief in support of a preliminary injunction set out why he is likely to succeed on all three of his constitutional claims: (1) Rule 83.04(a)(2) is facially unconstitutional because it violates the First Amendment's requirement that the burden of persuasion be placed on the party seeking to censor speech, ECF 21-1 at 14–16; (2) the Judicial Defendants' application of Rule 83.04 violates the First Amendment because they do not require a party seeking to censor speech to produce real evidence of a specific harm that the proposed speech restriction will alleviate to a material degree, *id.* at 16–21; and (3) Rule 83.04 is void for vagueness because an attorney of reasonable intelligence cannot guess which public comments will trigger Rule 83.04(a)(2)'s presumptions of prejudice, *id.* at 21–23. Then, in his renewed motion seeking expedited relief, Mr. Horwitz focused on the first of those claims and included a survey of "trial publicity" rules from other federal courts to show 83.04(a)(2) is not narrowly tailored. *See* ECF 30-1, 30-5.

The Judicial Defendants' opposition addresses only Mr. Horwitz's request for expedited relief based on his facial challenge.[1] They say that Mr. Horwitz did not establish a likelihood of success on the merits "in his terse one-page worth of briefing on the issue." Opp. Br. 8. This response overlooks the 14 pages of merits briefing that Mr. Horwitz submitted in support of a preliminary injunction. ECF 21-1, at 10–23. Moreover, it inverts the burden of persuasion for First Amendment cases. *See Ashcroft*, 542 U.S. at 666. Rather than explain how Rule 83.04 can satisfy strict scrutiny, the Judicial Defendants merely try to shift their burden to Mr. Horwitz. Opp. Br. 8–9 ("Plaintiff has failed to show that allocating to the speaker the burden … conflicts with the Supreme Court's perspective[.]").

[1] Their primary argument is their assertion of sovereign immunity. ECF 33, Opp. Br. 7–8. Mr. Horwitz explained in his motion-to-dismiss response why, under *Larson*'s well-established framework, his claims for declaratory and injunctive relief against the officials who enforce an unconstitutional rule do not trigger sovereign immunity. ECF 34, at 2–7.

The Judicial Defendants then claim that *Gentile* "did not take issue" with the Nevada State Bar's provision listing which speech topics are ordinarily prejudicial. Opp. Br. 8 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1061 (1991)). But to support their claim, they cite the text of the rule in an appendix to Justice Kennedy's opinion striking down the rule. The reason they can't cite the opinion is because the portion approving of the rule's list of "statements that are likely to cause material prejudice" was in the *dissent*. 501 U.S. at 1076 (Rehnquist, C.J., dissenting); *see also* ECF 21-1 at 13–14 (explaining this). The Judicial Defendants have not found a single First Amendment case that has ever approved of placing the burden of proof on a speaker, regardless of his occupation.

Instead, the Judicial Defendants' merits argument relies on the fact that *Gentile* allowed courts to apply the substantial-likelihood-of-material-prejudice standard to attorneys' speech (instead of clear-and-present-danger). But Mr. Horwitz does not challenge *Gentile*'s standard. As he has explained, *Gentile* still requires strict scrutiny. That means the proponent of a gag order must produce real evidence that a statement is substantially likely to materially prejudice a trial *and* show that a gag order is the least restrictive means of curing the prejudice. ECF 21-1 at 16–17. Rule 83.04 requires no such showing (and places the burden on the speaker), as evidenced by the lack of evidence in support of the *Newby* gag order. Yet, rather than disclaim Magistrate Frensley's application of the rule, the Judicial Defendants maintain that he applied the standard "the Supreme Court approved in *Gentile*." Opp. Br. 12. But the only reason the Middle District has been able to restrict Mr. Horwitz's speech is Rule 83.04(a)(2)'s unique burden-shifting and vague presumptions, which *Gentile* did not approve and which cannot satisfy strict scrutiny.

Nor do the Judicial Defendants offer any rebuttal to Mr. Horwitz's likely success on his as-applied and vagueness claims. On the contrary, they rhetorically question how the Court can be sure that Rule 83.04 functions the way Mr. Horwitz suggests. Opp. Br. 9. That the judges who enforce the rule are confused only helps prove Mr. Horwitz's vagueness claim that Rule 83.04 chills speech because intelligent lawyers can't be sure when or how it applies. *See*

Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1122 (11th Cir. 2022) ("If UCF's own attorney … can't tell whether a particular statement would violate the policy, it seems eminently fair to conclude that the school's students can't either.").

The Fifth Circuit's pronouncement that an evidentiary presumption "must not be confused with the burden of proof" does not help the Judicial Defendants. *See Franklin Life Ins. Co. v. Heitchew*, 146 F.2d 71, 74 (5th Cir. 1944) (cited at Opp. Br. 9). *Heitchew* merely explained that a contract may assign the burden of proof to either party, regardless of who benefits from a presumed fact, and held that an evidentiary presumption does not break the tie when the parties present conflicting evidence. *Id.* at 74–75. It in no way suggests that courts can presume that speech exceeds the First Amendment's protection. Moreover, unlike the contracts in *Heitchew*, Rule 83.04(a)(2) creates a presumption *and* shifts the burden of proof: The rule determines some speech is "more likely than not" to be materially prejudicial and then places "the burden [] upon the person commenting upon such matters to show that the comment did not pose such a threat." In other words, the rule forces the speaker to prove that his speech was *not* prejudicial or the Middle District will presume prejudice and can impose sanctions, as evidenced by Magistrate Frensley's application in *Newby*. The First Amendment prohibits placing that burden on a speaker. *See* ECF 21-1 at 14–16 (collecting cases); ECF 30-1 at 7–8 (same); *contra* Opp Br. 9–10 (claiming Mr. Horwitz did not "cite a single case" on placement of the burden).

II. Mr. Horwitz Continues to Suffer Irreparable Harm

The Judicial Defendants claim that Mr. Horwitz will not suffer irreparable harm because he can always choose to speak and then prove his speech was non-prejudicial in an enforcement proceeding if CoreCivic finds his statements "offensive." Opp. Br. 11.[2] This

[2] Just after saying that "CoreCivic has no authority to 'invoke' or enforce the Court's Local Rules," the Judicial Defendants admit CoreCivic could "file a motion for relief pursuant to LR 83.04[.]" Opp. Br. 11. CoreCivic's willingness to do so is, of course, what led to the *Newby* gag order. And CoreCivic has repeatedly shown its willingness to do so again. *See* ECF 21-1 at 7 & n.3; ECF 30-1 at 2, 5–6 & n.5.

argument runs counter to the black-letter First Amendment law Mr. Horwitz has cited. *See* ECF 21-1 at 14–16; ECF 30-1 at 7–8. There is no way to apply that rule consistently with the First Amendment, short of ignoring Subsection (a)(2)'s plain text. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (presuming irreparable injury). Moreover, Rule 83.04's unconstitutional features—its burden-shifting and vague categories of presumptively prejudicial speech—are *currently* chilling Mr. Horwitz's speech. The mere threat of enforcement is injury enough to justify injunctive relief. *See* ECF 30-1 at 6 (citing *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019)); *see also Christian Healthcare Ctrs., Inc. v. Nessel*, 117 F.4th 826, 850 (6th Cir. 2024) (refusal to disavow enforcement against specific plaintiff); *Babbitt v. United Farm Workers*, 442 U.S. 289, 302 (1979) ("Appellees are thus not without some reason in fearing prosecution[.]").

III. An Injunction Would Not Harm the Public or "Others"

Rather than identify any potential harm to themselves, the Judicial Defendants assert that "CoreCivic's interests may be impacted" by an injunction. Opp. Br. 13. This position misunderstands the requested relief. Mr. Horwitz has never suggested he can say things that are substantially likely to materially prejudice his party-opponents. His position has always been that his speech cannot be suppressed "unless a party-opponent produces real evidence that a specific thing Mr. Horwitz has said is substantially likely to materially prejudice proceedings *and* that no less-restrictive means would prevent that prejudice." ECF 21-1 at 24; *see also* ECF 30-1 at 8 (same). In other words, Mr. Horwitz is simply asking to restore the constitutional order. *See Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978) (if status quo is causing irreparable injury, "it is necessary to alter the situation").

The First Amendment, as articulated in *Gentile*, strikes the balance for what an attorney can say publicly. Any further restriction on Mr. Horwitz's speech is against the public interest, as the public has a right to hear what Mr. Horwitz has to say and "no substantial harm to others can be said to adhere to [an unconstitutional law's] enjoinment." *Deja Vu of Nashville v. Nashville*, 274 F.3d 377, 400 (6th Cir. 2001).

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Respectfully,

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CERTIFICATE OF SERVICE

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