NO. 13-1635

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

BIBLE BELIEVERS; **RUBEN CHAVEZ**, aka RUBEN ISRAEL; **ARTHUR FISHER**; **JOSHUA DELOSSANTOS**,
Plaintiffs-Appellants,

V.

WAYNE, COUNTY OF; **BENNY N. NAPOLEON**, in his official capacity as Sheriff, Wayne County Sheriff's Office; **DENNIS RICHARDSON**, individually and in his official capacity as Deputy Chief, Wayne County Sheriff's Office; **MIKE JAAFAR**, individually and in his official capacity as Deputy Chief, Wayne County Sheriff's Office,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE PATRICK J. DUGGAN
CASE NO. 2:12-cv-14236-PJD-DRG

APPELLANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Permitting Defendants to escape liability in this case poses a serious threat to liberty. As the Fifth Circuit recognized decades ago:

> [L]iberty is at an end if a police officer may without warrant arrest, not the person threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and legally and constitutionally protected, is deemed offensive and provocative to settled social customs and practices. When that day comes, freedom of the press, freedom of assembly, freedom of speech, freedom of religion will all be imperiled.

Nesmith v. Alford, 318 F.2d 110, 121 (5th Cir. 1963). The decision below imperils our First Amendment freedoms by denying Plaintiffs' speech the protection it deserves and effectively incorporating into the First Amendment a "heckler's veto." The decision thus incentivizes "hecklers" who oppose an unpopular message to engage in disruptive, indeed criminal, behavior to silence the messenger, and it licenses government officials who may similarly oppose the message to effectively join the mob intent on suppressing speech by not only failing to address the crowd reaction but also by threatening to arrest the speaker *because of this reaction*. Simply put, this decision turns the First Amendment on its head by rewarding violence over free speech. It must be reversed.

STANDARD OF REVIEW

Because this case is before the court on the district court's grant of summary judgment, its review is *de novo*. *Watkins v. City of Battle Creek*, 273 F.3d 682, 685

(6th Cir. 2001). Accordingly, it can only affirm if the record reveals no genuine issues of material fact and shows that Defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). On summary judgment, the court views facts in the record and reasonable inferences that can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Additionally, because this case implicates First Amendment rights, this court must closely scrutinize the record without *any* deference to the district court. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995) (requiring courts to "conduct an independent examination of the record as a whole, without deference to the trial court" in cases involving the First Amendment); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

Upon this court's independent examination of the record in light of controlling law, the court should reverse the district court's grant of summary judgment in Defendants' favor, reverse the district court's denial of Plaintiffs' cross-motion for summary judgment, and enter judgment in Plaintiffs' favor.

SUMMARY OF RELEVANT FACTS

Plaintiffs are members of Bible Believers, which is an unincorporated association of individuals who share and express their Christian faith with others, including Muslims, through religious speech activities, including street preaching,

displaying signs and banners, and wearing t-shirts with various messages. Bible Believers has over 60 chapters nationwide.[1] Plaintiff Israel is the leader and spokesperson for this group of Christian evangelists, who attended the Arab Festival held in the City of Dearborn, Michigan in June 2011 and again in June 2012.[2]

On or about June 15, 2012, Plaintiffs went to the Warren Avenue area where the festival was taking place and wore t-shirts and carried signs and banners expressing their Christian message. Plaintiffs engaged in their expressive activity along the public sidewalks and other public areas where pedestrian traffic was permitted.[3]

Plaintiff Israel wore a t-shirt with the message "Fear God" on the front and "Trust Jesus, Repent and Believe in Jesus" on the back. Plaintiff Fisher wore a t-shirt with the message "Trust Jesus" on the front and "Fear God and Give Him Glory" on the back, and he carried a banner that said on one side, "Only Jesus Christ Can Save You From Sin and Hell," and on the other side it said, "Jesus Is the Judge, Therefore, Repent, Be Converted That Your Sins May Be Blotted Out." Plaintiff Fisher also carried a small, hand-held camera to record the event. Plaintiff DeLosSantos accompanied Plaintiffs and joined in their free speech activity.[4]

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[1] (R: 20-2: Israel Decl. at ¶ 3, Pg ID 174).
[2] (R: 20-2: Israel Decl. at ¶¶ 1-4, Pg ID 173-74).
[3] (R-20-2: Israel Decl. at ¶¶ 14-17, Pg ID 176-77).
[4] (R-20-2: Israel Decl. at ¶ 16, Pg ID 176-77). Other messages conveyed on t-shirts, signs, or banners that accompanied Plaintiffs included, among others, "Prepare to Meet Thy God – Amos 4:12," "Obey God, Repent," "Turn or Burn," "Jesus Is the Way, the Truth and the Life. All Others Are Thieves and Robbers," and "Islam Is A

While Plaintiffs were expressing their message, they were confronted by a group of "hecklers," consisting mostly of teenagers, who began throwing water bottles, rocks, and other debris at the Christians. The hecklers were also shouting and blowing horns. Some of them spat at the Christians, shouted profanities, and mocked the Christians' faith. Plaintiffs responded by holding up their hands to avoid being accused of acting aggressively toward the hecklers.[5]

When Wayne County deputies appeared at the scene, the hecklers would halt their aggression, only to resume it once the deputies departed.[6] The hecklers did not attack the Wayne County deputies; they only attacked the Christians.[7]

Shortly upon Plaintiffs' arrival at the Arab Festival, Defendant Jaafar was observed telling Defendant Richardson that Plaintiffs had to be removed and that he (Defendant Richardson) needed to do something about it.[8]

Approximately 30 minutes later, Defendant Jaafar confronted Plaintiff Israel and told him that the deputies were not going to provide protection for the Christians and that they had "the option to leave." Plaintiff Israel responded to Defendant Jaafar,

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Religion of Blood and Murder." (R-20-2: Israel Decl. at ¶ 17, Pg ID 177).
[5] (R-20-2: Israel Decl. at ¶¶ 18-20, Ex. B [Video at Chapter 1], Pg ID 177, App.).
[6] (R-20-2: Israel Decl. at ¶ 21, Ex. B [Video at Chapter 2], Pg ID 177-78, App.).
[7] (R-20-2: Israel Decl., Ex. B [Video at Chapters 1 & 2], App.; R-28: Defs.' Ex. B [Video], App.).
[8] (R-20-2: Israel Decl. at ¶ 22, Pg ID 178). Defendants Jaafar and Richardson are Deputy Chiefs with the Wayne County Sheriff's Office.

telling him that Defendants had the option "to stand with us." Defendant Jaafar did not respond. Instead, he abruptly departed.[9]

Moments after Defendant Jaafar departed, Defendant Richardson took over and escorted Plaintiff Israel to the side to discuss the matter. During this discussion, Plaintiff Israel pleaded with Defendant Richardson to assign just two Wayne County deputies to stand with the Christians during their speech activity, noting that when uniform officers are present, the hecklers stop their criminal assault. Defendant Richardson refused.[10]

While speaking with Plaintiff Israel, Defendant Richardson criticized Plaintiffs, motioning toward the Christians and stating, "*Look at your people here. Look it, look it. This is crazy*."[11] At one point, Defendant Richardson stepped away from the conversation and was seen consulting with Ursula Henry, Director of Legal Affairs for the Wayne County Sheriff's Office.[12]

After consulting with Ms. Henry, Defendant Richardson returned and gave Plaintiffs an ultimatum: Plaintiffs could either leave the festival area or they would be criminally cited and arrested for disorderly conduct. Defendant Richardson stated, "*If*

[9] (R-20-2: Israel Decl. at ¶¶ 23-24, Ex. B [Video at Chapter 3], Pg ID 178, App.).
[10] (R-20-2: Israel Decl. at ¶¶ 25-26, Ex. B [Video at Chapter 4], Pg ID 178, App.).
[11] (R-20-2: Israel Decl. at ¶ 27, Ex. B [Video at Chapter 4], Pg ID 179, App.).
[12] (R-20-2: Israel Decl. at ¶ 28, Ex. B [Video at Chapter 4], Pg ID 179, App.).

you don't leave we are going to cite you for disorderly." This conversation was captured on video.[13]

To avoid being cited and arrested by Defendants, Plaintiffs ceased their free speech activity and departed the area. This drew cheers from the hecklers.[14]

While Defendants claim that they could not spare just two deputies to protect Plaintiffs, more than a dozen deputies arrived at the scene to ensure Plaintiffs' departure.[15] Moreover, at no time did Wayne County deputies arrest the violent hecklers and take them away in handcuffs—an action that would have quieted the crowd and permitted Plaintiffs to continue their free speech activity without interference.[16]

According to Defendants' "Post-Operation Report," they issued only one citation for disturbing the peace, gave only three verbal warnings, and briefly detained two other individuals.[17] Yet, Defendants had thirty-four (34) deputies and nineteen

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[13] (R-20-2: Israel Decl. at ¶¶ 27-29, Ex. B [Video at Chapter 4], Pg ID 179, App.).
[14] (R-20-2: Israel Decl. at ¶ 30, Ex. B [Video at Chapter 4], Pg ID 179, 185).
[15] (R-20-2: Israel Decl. at ¶ 31, Ex. B [Video at Chapter 5], Pg ID 179, App.). Moreover, shortly after Plaintiffs departed the festival in their van, more than a dozen law enforcement officers were available to pull them over, conduct a traffic stop, and issue the driver a traffic citation. (R-20-2: Israel Decl. at ¶ 34, Ex. B [Video at Chapter 6], Pg ID 180, App.).
[16] (R-20-2: Israel Decl. at ¶ 32, Pg ID 179-80; R-28: Defs.' Ex. A [Video], App.).
[17] (R-13-9: Defs.' Ex. I [Post-Operation Report], Pg ID 115-16). According to Defendants' report, only two of these individuals—the one who received the citation and one who was temporarily detained—were associated with Plaintiffs (*i.e.*, the report identifies them as related to "(Bible Believers)"). This is further corroborated by the video evidence in that none of the hecklers were arrested and taken away in

(19) reserve officers on the scene, and this force also included a mounted unit with six (6) horses. According to Defendants, this force was "larger than the Sheriff's Department contribution to the Word Series or the President of the United States when he visits Michigan."[18]

Plaintiffs want to return to the City of Dearborn to engage in their free speech activity. However, they fear that if they do, they will again be confronted by hecklers and forced to halt their speech activity under the threat of arrest.[19]

ARGUMENT

I. Plaintiffs' Speech Is Protected by the First Amendment.

Plaintiffs' speech is fully protected by the First Amendment and cannot be punished as "incitement" or "fighting words"[20] as a matter of law. Moreover, as the undisputed facts demonstrate, Defendants threatened to *cite* and *arrest* Plaintiffs for disorderly conduct if they did not halt their speech activity and leave the festival area. Thus, Defendants' position is that Plaintiffs' speech can be *criminalized* by the

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handcuffs for engaging in their criminal activity. (*See also* R-28: Defs.' Ex. A [Video], App.).

[18] (R-13: Defs.' Mot. at 3, Pg ID 68).

[19] (R-20-2: Israel Decl. at ¶ 36, Pg ID 180).

[20] As *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942), makes clear, "fighting words" is a very narrow and limited category of speech, and it only encompasses "*face-to-face* words plainly likely to cause a breach of the peace by the addressee." (emphasis added); *Cohen v. California*, 403 U.S. 15, 20 (1971) (describing "fighting words" as "*personally abusive epithets* which, when *addressed to the ordinary citizen*, are, as a matter of common knowledge, inherently likely to provoke violent reaction") (emphasis added). Thus, this doctrine is inapplicable to the situation presented here: displaying signs and messages to a crowd on a public street.

government based on the crowd's reaction to its content. That is an exceedingly dangerous proposition that is contrary to well-established law.

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), the Supreme Court did not allow breach of the peace convictions to stand because the trial judge charged that the defendants' speech could be punished as a breach of the peace "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." *Id.* at 3. In finding such a position unconstitutional, the Supreme Court famously stated,

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view.

Id. at 4; *see also NAACP v. Claiborne Hardware, Co*., 458 U.S. 886, 928 (1982) ("The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech. . . ."); *Sandul v. Larion*, 119 F.3d 1250 (6th Cir. 1997) (shouting "f--k you" and extending middle finger to abortion protestors was protected speech and could not serve as a basis for disorderly conduct); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views.").

In *Glasson v. Louisville*, 518 F.2d 899 (6th Cir. 1975), this court stated:

> The purpose of the First Amendment is to encourage discussion, and it is intended to protect the expression of unpopular as well as popular ideas. Accordingly, *hostile public reaction does not cause the forfeiture of the constitutional protection afforded a speaker's message* so long as the speaker does not go *beyond mere persuasion and advocacy of ideas and attempts to incite to riot*.

Id. at 905 (emphasis added).

In short, speech cannot constitute incitement *if the speech itself does not advocate for violence*. To conclude otherwise is to waive *Brandenburg v. Ohio*, 395 U.S. 444 (1969), out of existence. And *Feiner v. New York*, 340 U.S. 315 (1951), which relied upon *Cantwell v. Connecticut*, 310 U.S. 296 (1940), is not to the contrary. *See Glasson*, 518 F.2d at 905 n.3 ("For over twenty years the Supreme Court has confined the rule in *Feiner* to a situation where the speaker in urging his opinion upon an audience *intends to incite it to take action that the state has a right to prevent*.") (emphasis added).

In *Feiner*, the Court upheld the disorderly conduct conviction because the petitioner "was endeavoring to arouse the Negro people against the whites, *urging that they rise up in arms and fight* for equal rights." *Id*. at 305 (emphasis added). Indeed, the petitioner's *purpose, as demonstrated by his advocacy for violence*, was to incite a riot. That is, *the petitioner's speech was calling for imminent lawless action*. As the Court observed, "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes *incitement to*

riot, they are powerless to prevent a breach of the peace."[21] *Id*. at 321 (emphasis added).

Moreover, and more recently, in *Claiborne Hardware*, the Court went further, finding that Charles Evers, a leader of a racially-motivated boycott that was the *cause of violence*, could not be held civilly liable for his provocative speech—speech which certainly suggested a call to violence—stating:

> Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of *his authorization* of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence—*apart from the speeches themselves*—that *Evers authorized, ratified, or directly threatened acts of violence*. . . . The findings are constitutionally inadequate to support the damages judgment against him.

Claiborne Hardware, Co., 458 U.S. at 929 (emphasis added).

Here is the critical point that the lower court (and the now-vacated panel opinion) failed to apprehend: in order for violence to be a basis for punishing or

[21] Additionally, in *Feiner*, the Court noted with importance that "there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions." *Feiner*, 340 U.S. at 319. Here, there is ample evidence of Defendants' hostility toward Plaintiffs' message. (R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival] [pejoratively referring to Plaintiff Bible Believers as "a radical group" that will "show up at the festival trying to provoke our staff in a negative manner and attempt to capture the negativity on video camera"] Pg ID 100; R-20-2: Israel Decl. at ¶ 27, Ex. B [Video at Chapter 4] [while speaking with Plaintiff Israel at the 2012 Arab Festival, Defendant Richardson criticized Plaintiffs for their speech, motioning toward the Christians and stating, "*Look at your people here. Look it, look it. This is crazy*"] Pg ID 179, App.).

proscribing speech, the *lawless action* must, in the first instance, *be directed by the speaker*. "Incitement" speech is a very limited category of speech that is proscribable consistent with the First Amendment under very narrow circumstances. As the Supreme Court clearly stated in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), which is the seminal case on "incitement" speech: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or 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*." *Id*. at 447 (emphasis added). In other words, the *speaker* must, in the first instance, be *advocating* for the "imminent" "use of force or of law violation" (*e.g.,* shouting "let's kill the President now") in order for the government to justify suppressing speech based on a theory of incitement. Speech which itself does not *call for violence* but is merely offensive to the listener (such as Plaintiffs' speech), does not lose its First Amendment protection based on the fact that the listener reacts to the speech with violence. This is known as a "heckler's veto," which is impermissible. *See infra* sec. II. To rule otherwise, as the lower court did, is to erase decades of cases and thus exclude from the First Amendment opinions that others might find objectionable. In other words, it is to write the First Amendment out of existence. In sum, Plaintiffs' unpopular speech is *fully* protected by the First Amendment, and Defendants were

acting "as an instrument for the suppression of unpopular views" in violation of clearly established law. *See infra* sec. III.

II. The First Amendment Knows No "Heckler's Veto."

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). And the Supreme Court has held time and again that the mere fact that someone might take offense to a speaker's message does not provide a basis for prohibiting it. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.") (citations and quotations omitted); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (same); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

Consequently, it is a clearly established principle of law that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "The First Amendment knows no heckler's veto." *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001).

In *Forsyth County*, the Court struck down an ordinance as content-based because the statute based parade fees on the estimated cost of maintaining public order during the event. Because the size of the fee "depend[ed] on the administrator's measure of the amount of hostility likely to be created by the speech based on its content," the ordinance unconstitutionally burdened speech that was "*unpopular with bottle throwers*." *Forsyth Cnty.*, 505 U.S. at 134 (emphasis added).

In *Center for Bio-Ethical Reform, Inc. v. L.A. County Sheriff Department*, 533 F.3d 780, 790 (9th Cir. 2008), the Ninth Circuit held that the application of a state ordinance to ban the display of abortion images near a public school based on the viewers' (which included minors attending the school) reaction to the images violated the First Amendment. In addition to noting that there is no "minors" exception to the heckler's veto, the Ninth Circuit made the following relevant observations:

> Here, the government did not prospectively gauge the effect of the message (and ban it accordingly), but instead waited for, and then responded to, listeners' reactions. Whether prospectively, as in *Forsyth County*, or retrospectively, as in the case before us, the government may not give weight to the audience's negative reaction.
>
> * * * *

> Section 626.8, if it applied to Plaintiffs' conduct in this case, would appear to be just the kind of accession to the heckler's veto outlawed by the case law. Plaintiffs' speech was permitted until the students and drivers around the school reacted to it, at which point the speech was deemed disruptive and ordered stopped under § 626.8. This application of the statute raises serious First Amendment concerns.

Id. at 789-90.

And while restrictions on speech because of the "secondary effects" that the speech creates are sometimes permissible, an effect from speech is not secondary if it arises from its content. Consequently, "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988) (O'Connor, J.).

Thus, in *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975), this court described the proper police response when faced with a situation in which an angry mob of hecklers opposes a speaker's message: "A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect . . . persons exercising their constitutional rights."[22]

Glasson thus reinforces the clearly established principle that "[t]he state may not rely on community hostility and threats of violence to justify censorship" of constitutionally protected speech. *Id*. at 906. As this court stated further,

> To permit police officers . . . to punish for incitement or breach of the peace the peaceful communication of . . . messages because other

[22] "Reasonable action" would certainly include, at a minimum, arresting those "hecklers" who are engaging in criminal conduct designed to silence the speaker.

> persons are provoked and seek to take violent action against the speaker would subvert the First Amendment, and would incorporate into that constitutional guarantee a "heckler's veto" which would empower an audience to cut off expression of a speaker with whom it disagreed.

Id. at 905-06; *see also Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973) ("[T]he Supreme Court has often emphasized in related contexts [that] state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights."); *Dunlap v. City of Chicago*, 435 F. Supp. 1295, 1298 (N.D. Ill. 1977) ("Section 1983 imposes an affirmative duty upon police officers to protect speakers who are airing opinions which may be unpopular.").

Because a restriction on speech based on a listener's reaction to the speech is content based, to justify the restriction, the government must satisfy strict scrutiny. That is, Defendants bear the burden of "prov[ing] that the proposed alternatives will not be as effective as the challenged [restriction]." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). "[T]o ensure that speech is restricted no further than necessary . . . the court should ask whether the challenged [restriction] is the *least restrictive means* among available, effective alternatives." *Id*. (emphasis added). Here, Defendants could have provided—*but refused to*—an adequate law enforcement presence to deter the hecklers, and Defendants could have actually arrested (*i.e*., placed in handcuffs and physically removed from the festival)—*but refused to*—the most disruptive hecklers. Instead, Defendants threatened to arrest Plaintiffs if *they* didn't leave the area. Thus, Defendants refused to perform their duty as law enforcement officers and

instead effectively joined a hostile mob that was intent on suppressing Plaintiffs' speech. In short, Defendants' actions do not survive strict scrutiny.

Thus, by justifying Defendants' actions, the lower court effectively incorporated into the First Amendment a "heckler's veto" which empowered an audience to cut off expression of a speaker with whom it disagreed, thereby subverting the First Amendment. This "dangerous" precedent must be reversed.

In the final analysis, as UCLA Law Professor Eugene Volokh observed in his commentary on the panel's now-vacated decision:

> Behavior that gets rewarded gets repeated. People who are willing to use violence to suppress speech will learn that such behavior is effective, at least when the police don't come down particularly hard on the thuggery. Indeed, they may find at times that even merely threatening violence might suffice to suppress speech they dislike. . . .
>
> But the "heckler's veto" gives the violent hecklers extra bonuses. They get to see the speakers suppressed by the government itself. They get to feel the extra pleasure and validation of feeling that the government has stepped in on [their] side. And they get to block speech even by those who don't fear physical attack, but who understandably don't want to be arrested and prosecuted.
>
> The society we live in stems from the incentives we create. Incentives for violent speech suppression mean more violent speech suppression. That, I think, will be the consequence of the Sixth Circuit panel decision, if it is not reversed by the en banc Sixth Circuit or by the Supreme Court.[23]

[23] Eugene Volokh, *Thuggery wins, free speech rights lose*, The Volokh Conspiracy (Aug. 27, 2014, 2:14 PM), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/27/thuggery-wins-free-speech-rights-lose/.

III. Summary Judgment Should Be Granted in Plaintiffs' Favor.

There is no material fact dispute, and Defendants' actions violated clearly established law. Therefore, this court should enter judgment in Plaintiffs' favor.

A. The Individual Defendants Do Not Enjoy Qualified Immunity.

As an initial matter, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, nor does it apply to claims against a municipality, such as the claims advanced against the County. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) (stating that "there is no qualified immunity to shield the defendants from claims" for "declaratory and injunctive relief"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity . . . does not bar actions for declaratory or injunctive relief."); *see also Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997) ("Qualified immunity shields defendant from personal liability, but it does not shield him from the claims brought against him in his official capacity.").

To determine whether Defendants Richardson and Jaafar are entitled to qualified immunity from damages in this action,[24] the test is "(1) whether, considering

[24] Upon finding a constitutional violation, Plaintiffs are entitled to nominal damages for the past loss of their constitutional rights as a matter of law. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991).

the allegations in a light most favorable to [Plaintiffs], a constitutional right has been violated, and (2) whether that right was clearly established." *Smoak v. Hall*, 460 F.3d 768, 777 (6th Cir. 2006) (emphasis added). The court may decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances" of the particular case. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Pursuant to controlling law, government officials are protected from personal liability and thus enjoy qualified immunity *only* "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted).

Glasson's "reasonable and good faith belief" statement is not a proper articulation of the qualified immunity standard (*i.e.*, the standard for when an officer must "respond in damages").[25] *Compare Glasson*, 518 F.2d at 910 (stating that an officer "will not be civilly liable if his conduct is based on a reasonable and good faith

[25] Moreover, *Glasson* states that an officer need not "respond in damages" for intercepting a speaker's message or removing the speaker when failing to do so *would subject the officers* "to violent retaliation or physical injury," *Glasson*, 518 F.2d at 909—a fact that is non-existent here. In short, *Glasson* does not countenance an officer to arrest (or threaten to arrest) a speaker for disorderly conduct because a crowd is reacting negatively toward his speech.

belief that it was necessary under the circumstances"), *with Harlow*, 457 U.S. at 819 (stating that the qualified immunity test "focuses on the ***objective legal*** reasonableness of an official's acts") (emphasis added).[26] Moreover, neither *Glasson*'s reasoning nor, as noted, qualified immunity in general applies to Plaintiffs' claims for declaratory and injunctive relief regarding Defendants' threat to arrest and cite Plaintiffs for disorderly conduct based on the hostile crowd's reaction to their speech. *See Glasson*, 518 F.2d at 907 (stating that its analysis did not apply to injunctive relief, only civil damages).

Glasson is relevant, however, in this respect: it reinforces the clearly established principle of constitutional law that "[t]he state may not rely on community hostility and threats of violence to justify censorship." *Id*. at 906. As noted previously, *Glasson* is clear: "To permit police officers . . . *to punish for incitement or breach of the peace* the peaceful communication of . . . messages because other persons are provoked and seek to take violent action against the speaker *would subvert the First Amendment*, and would incorporate into that constitutional guarantee a 'heckler's veto' which would empower an audience to cut off expression of a speaker with whom it disagreed." *Id*. at 905-06 (emphasis added). Defendants Richardson and Jaafar violated this clearly established principle of law.

[26] Even under the "good faith" articulation of *Glasson*, the video in this case shows that Defendants did just about nothing to control the crowd. This is not "good faith"—it is manufacturing a crisis as an excuse to silence those exercising their First Amendment rights.

Additionally, even under *Glasson*'s reasoning, Defendants' actions were entirely unreasonable. *See, e.g.*, *Glasson*, 518 F.2d at 910-11 (holding that the police officers were required to respond in damages under § 1983 for failing to protect the speaker under the circumstances). As the evidence shows, Defendants did virtually nothing to protect Plaintiffs' right to freedom of speech. Had Defendants demonstrated to the "hecklers" even a modicum of willingness to halt or arrest them for interfering with Plaintiffs' speech activity, Plaintiffs would have been able to continue their activity free from interference. Indeed, Defendants had a *significant* law enforcement presence at the festival—"larger than the Sheriff's Department contribution to the Word Series or the President of the United States when he visits Michigan." This force consisted of thirty-four (34) deputy sheriffs and nineteen (19) reserve officers, and it included a mounted unit with six (6) horses. Yet, Defendants want this court to believe that this robust security force could do nothing to quiet a small crowd consisting mainly of miscreant teenagers intent on throwing bottles and other debris at Plaintiffs. And worse yet, Defendants ask this court to ratify their patently unlawful order to Plaintiffs that if *they* didn't halt their speech activity, then Defendants would arrest them. *Defendants' position is objectively unreasonable as a matter of law*. Indeed, Defendants' actions (or, more accurately, inaction) rewarded and, in effect, condoned the criminal behavior of the "hecklers" in violation of Plaintiffs' clearly established constitutional rights.

In sum, it was clearly established on June 15, 2012, that Plaintiffs had a constitutional right to carry signs and wear t-shirts that expressed a Christian (or even anti-Islam) message on the public streets of Dearborn, and that their speech activity could *not* be punished by government officials based on "community hostility and threats of violence." It was, and it remains today, clearly established that the First Amendment knows no heckler's veto. *Forsyth Cnty.*, 505 U.S. at 134; *see also Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d at 790; *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973) (observing that "the Supreme Court has often emphasized" that "state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights") (citing cases); *see also Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 824 (6th Cir. 2007) (denying qualified immunity because "Supreme Court decisions . . . recognize that government actions may not retaliate against an individual for the exercise of protected First Amendment freedoms" and thus concluding that "the 'contours of the right' to be free from retaliation were thus abundantly clear") (internal quotations and citation omitted).

Moreover, the facts *also* establish that Defendants Richardson and Jaafar acted with a retaliatory motive, believing that Plaintiffs were part of a "radical group" that expressed an "offensive" and "crazy" message. *See, e.g., Smith*, 482 F.2d at 37 ("We do not condone the actions of the deputy, who would have served his office more

honorably by unequivocally protecting appellant regardless of the local unpopularity his actions might have evoked."). These facts alone prove dispositive of the qualified immunity inquiry. *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d at 825 ("Because retaliatory intent proves dispositive of Defendants' claim to qualified immunity, summary judgment was inappropriate.").

B. The County Is Liable for the Constitutional Violations.

In *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978), the Court affirmed that municipalities are liable under § 1983 if municipal policy or custom was the "moving force" behind the alleged unconstitutional action. And "when *execution* of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." *Id.* at 694.

"*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). "The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 479. Thus, acts "of the municipality" are "*acts which the municipality has officially sanctioned or ordered*." *Id.* at 480 (emphasis added). Consequently, "it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Id.* "If [a] decision to

adopt [a] particular course of action is properly made *by the government's authorized decisionmakers*, it surely represents an act of official government 'policy' as that term is commonly understood." *Id*. at 481 (emphasis added).

Thus, for example, in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the municipality was held liable for a decision made by the county prosecutor that resulted in the violation of the petitioner's Fourth Amendment rights. Based on his understanding of the law, the prosecutor authorized deputy sheriffs to forcibly enter the petitioner's medical clinic to serve capiases on two of his employees who were subpoenaed as witnesses but had failed to appear before a grand jury. *Id*. at 484.

Here, the County is ultimately responsible for the order to cite Plaintiffs for disorderly conduct if they did not halt their speech activity—an order that violated Plaintiffs' constitutional rights. This order was issued pursuant to County "policy" as evidenced by the County's agreement to provide law enforcement for the festival; its stated mission to "keep the peace" at the festival "in the event there is a disturbance," *see Saieg v. City of Dearborn*, 641 F.3d 727, 742 (6th Cir. 2011) (holding the city liable for enforcing the Arab Festival rule prohibiting literature distribution); its assertion in its festival "Operations Plan" that Plaintiff Bible Believers is a "radical group" that intends to engage in provocative conduct at the festival; and its Corporation Counsel's warning to Plaintiffs that if their speech has "the tendency to . . . disturb the peace" then Plaintiffs will be held "criminally accountable," and further

warning Plaintiffs that the County "cannot protect everyone from the foreseeable consequences that come from speech that is *designed and perhaps intended to elicit a potentially negative reaction*." (R-13-8: Defs.' Ex. H [County's Response] [emphasis added], Pg ID 113).

Indeed, the Corporation Counsel also set forth the "policy" of the County with regard to its response to a situation in which a crowd reacts negatively toward a speaker, and this "policy" was plainly the moving force behind the order from Defendant Richardson—who, along with Defendant Jaafar, was a member of the "Executive Command Unit" and thus in charge of the law enforcement actions at the festival on behalf of the County and pursuant to the Agreement entered into by the County. (*See* R-20-3: Muise Decl. at ¶ 3, Ex. A [Agreement], Pg ID 191-94).

In short, it is the County and its policies that were the moving force behind Defendant Richardson's order to cite and arrest Plaintiffs if they did not leave the festival area. And this conclusion is further reinforced by the fact that Defendant Richardson was seen on video consulting with the Director of Legal Affairs for the Wayne County Sheriff's Office prior to issuing his unlawful order. (*See* R-20-2: Israel Decl. at ¶ 28, Ex. B [Video at Chapter 4], Pg ID 179, App.)

Additionally, the County, through its officials, specifically including its Sheriff, Defendant Napoleon, is responsible for enforcing the criminal law within its jurisdiction, *see* Mich. Comp. Laws § 51.76(2)(b), including within the festival area,

as evidenced by the Agreement, (R-20-3: Muise Decl. at ¶ 3, Ex. A [Agreement], Pg ID 191-94). This includes enforcing laws that prohibit disorderly conduct. (*See, e.g.*, R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival] [describing the mission of the County Sheriff's Office to include, *inter alia*, "keep[ing] the peace in the event there is a disturbance"], Pg ID 100). Consequently, the County and Defendants in their official capacities are liable for the enforcement of the disorderly conduct law to halt Plaintiffs' speech.

In *Steffel v. Thompson*, 415 U.S. 452 (1974), for example, the Court permitted an as applied constitutional challenge to a criminal trespass statute to proceed against "the Solicitor of the Civil and Criminal Court of DeKalb County [and] the chief of the DeKalb County Police," among others, in a case in which the petitioner was *threatened* by the police with arrest for violating the law if he did not stop distributing handbills on the exterior sidewalk of a shopping center. Here, declaratory and injunctive relief, at a minimum, are available against the County and its officials for the unlawful application of the disorderly conduct law to restrict Plaintiffs' speech.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the court reverse the grant of summary judgment in Defendants' favor, reverse the denial of Plaintiffs' cross-motion for summary judgment, and enter judgment in Plaintiffs' favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached supplemental brief is proportionally spaced, has a typeface of 14 points Times New Roman, and is 25 pages in length.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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