STATE OF MICHIGAN
IN THE 18TH JUDICIAL DISTRICT COURT

PEOPLE OF THE CITY OF WESTLAND,

Plaintiff,

Case No. 17-WE-14316

Hon. Sandra Ference Cicirelli

CALVIN JOHN ZASTROW,

Defendant.
_____/

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DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT

MOTION TO DISMISS

NOW COMES Defendant CALVIN JOHN ZASTROW, by and through his attorneys, and hereby moves the Court to dismiss this case on constitutional grounds. *See* MCL 764.9d ("If the complaint is not sufficient on its face, and if the court is satisfied that a complaint sufficient on its face *cannot be drawn and filed on the basis of the available facts or evidence*, it shall dismiss the complaint.") (emphasis added).

As set forth further in the accompanying brief, the prosecution in this case violates Defendant Zastrow's fundamental rights protected by the First and Fourteenth Amendments. Consequently, the case must be dismissed.

Dated: August 3, 2017

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

The right to freedom of speech is not simply a right to catharsis. It is the right to have your voice heard so as to change opinions in order to shape public policy. Moreover, as stated by the U.S. Supreme Court, "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to *special protection*." *Connick v Myers*, 461 US 138, 145 (1983) (quoting *NAACP v Claiborne Hardware Co*, 458 US 886, 913 (1982) & *Carey v Brown*, 447 US 455, 467 (1980)) (emphasis added). Clearly, in this case, the pro-life, religious speech of Defendant Zastrow "is entitled to special protection" under the First Amendment, not criminal prosecution under an unconstitutionally vague and overbroad City of Westland Ordinance. This case must be dismissed.

FACTUAL BACKGROUND[1]

On June 24, 2017, Defendant Zastrow, a zealous pro-life advocate, was arrested for engaging in pro-life, religious speech activity on the public sidewalk outside of the Northland Family Planning Center ("Northland"), a facility where abortions are performed. (*See* http://northlandfamilyplanning.com/westland). Per the "Case Report" of the Westland Police Department, Officers Plear, Johns, and Gatti were dispatched to Northland for a larceny complaint regarding a "protest sign." One of the pro-life demonstrators had called the police alleging that someone from Northland had stolen one of their signs. (Case Report, Ex. A).

Per the Case Report, which was drafted by Officer Gatti, "Upon arrival [officers] parked their patrol vehicles in the center of the [Northland] facility's parking lot and could immediately

[1] The facts for purposes of this motion only are taken largely from the Case Report prepared by the Westland Police Department. This report is attached as Exhibit A.

could (*sic*) hear a protestor, Calvin Zastrow, yelling from the easement on Ford [Road].[2] Zastrow could be heard from over 50 [feet] away *yelling about babies being murdered.* Zastrow's actions were gaining the attention of people passing by and drawing the attention of employees at the location attempting to conduct business. . . . [Officer Gatti] advised Zastrow that he was being too loud and the yelling had to stop or he could be arrested for disturbing the peace. As [Officer Gatti] walked away Zastrow accused [him] of trying to intimidate him and continued to yell and stated that [Officer Gatti] was assisting in the murdering of babies. [Officer Gatti] returned to the parking lot where Zastrow continued to *yell quotes of scripture and accusations of murder*. [Officer] Plear and [Officer Gatti] then arrested Zastrow for disturbing the peace." (Case Report, Ex. A) (emphasis added).

Defendant Zastrow was arrested for allegedly violating the following City of Westland ordinance:

> **Sec. 62-99. Unreasonably loud, disturbing or unnecessary noise or disturbances.**
>
> (a) It shall be a misdemeanor for any person to create, assist in creating, permit, continue, or permit the continuance of any *unreasonably* loud, *disturbing*, or *unnecessary* noise, *which disturbs the comfort, repose, health, peace or safety of others* within the limits of the city.
>
> (1) The following acts, among others, are declared to be *unreasonably* loud, *disturbing* or *unnecessary* noises in violation of this section, but said enumeration shall not be deemed to be exclusive:

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[2] The "easement" referred to here is the public, grassy section that is adjacent to the public sidewalk. (*See* Map, Ex. B). This "easement" is a traditional public forum for First Amendment purposes. *See Frisby v Schultz*, 487 US 474, 480-81 (1988) ("[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.' No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.") (internal citation omitted). Moreover, at this location, Ford Road is a very busy (and loud), five lane road (two lanes east bound, two lanes west bound, and a center turn lane). The vehicles on this road can be heard from more than 50 feet away. (*See* Map, Ex. B).

a. The *sounding of any horn or signal device* on any automobile, bus, truck, or other vehicle, *except as a danger signal*, so as to create any loud or harsh sound plainly audible within any dwelling unit or residences, or, so as to be plainly audible *within 50 feet or more from such device*. *This section shall not apply to emergency vehicles or those vehicles emitting a warning sound necessary for the protection of public safety*.

b. The *playing or operation of any device designed for sound amplification* including but not limited to, any radio, television sets, musical instruments, phonograph, or loud speaker, in such a manner or with such volume to be *plainly audible*, either:

1. in any dwelling unit or resident which is not the source of the sound, or

2. so as to be plainly audible *50 feet or more from such device*.

(2) For the purpose of this section, a plainly audible sound is any sound of which the information content is unambiguously communicated to the listener such as, but not limited to, understandable spoken speech, or comprehensible musical rhythms.

(b) It shall be a misdemeanor for any person to make or excite any disturbance or contention in any tavern, store, grocery, manufacturing establishment, office or any other business place, or in any street, lane, alley, highway, public building, grounds or park, or at any election or other public meeting where citizens are peaceably and lawfully assembled.

(emphasis added).

Here, Defendant Zastrow did not employ a horn or any type of sound amplification device; he was simply using his voice to express his pro-life, religious message on the public sidewalk outside of Northland and adjacent to Ford Road, a very loud and busy street. Indeed, Defendant Zastrow was expressing his pro-life, religious message because it was "necessary for the protection of public safety": he wants to protect the innocent human lives that Northland intentionally kills by abortion. Defendant Zastrow's speech was sending a "danger signal" to help stop the killing of innocent human life by abortion.

Additionally, as the Case Report makes evident by the explicit reference to Defendant Zastrow's statements (*i.e.*, "*babies being murdered*" and "*quotes of scripture and*

accusations of murder"), it was the content of Defendant Zastrow's speech that the arresting officer deemed "*disturb[ing to] the comfort, repose, health, peace or safety of others*."

ARGUMENT

I. THIS PROSECUTION VIOLATES DEFENDANT'S RIGHTS PROTECTED BY THE FIRST AMENDMENT.

Expressing a pro-life, religious message in a traditional public forum is expressive conducted protected by the Free Speech *and* Free Exercise Clauses of the First Amendment. *See, e.g., Capitol Square Rev & Adv Bd v Pinette*, 515 US 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *Bd of Educ v Mergens*, 496 US 226, 250 (1990) (O'Connor, J.) (observing that "*private* speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses").

Indeed, the forum in question (a public sidewalk, *see supra* n.2) is a traditional public forum, and traditional public forums "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v CIO*, 307 US 496, 515 (1939). This includes public sidewalks adjacent to abortion clinics. *McCullen v. Coakley*, 134 S Ct 2518, 2529 (2014) (striking down on First Amendment grounds buffer zone restrictions around abortion clinics).

As stated by the U.S. Supreme Court, "[T]he streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v New Jersey*, 308 US 147, 163 (1939); *see also Am.-Arab Anti-Discrimination Comm v City of Dearborn*, 418 F3d 600, 605 (CA6 2005) (striking down the city

ordinance and stating, "Constitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public's use of streets and sidewalks for political speech"); *United States v Grace*, 461 US 171, 177 (1983) (stating that speech restrictions that impose "an absolute prohibition on a particular type of expression" in a public forum "will be upheld only if narrowly drawn to accomplish a compelling governmental interest") (citing cases); *Perry Educ Ass'n v Perry Local Educators*, 460 US 37, 55 (1983) ("In a public forum . . . all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers. . . .").[3]

In *Bible Believers v Wayne County*, 805 F.3d 228 (CA6 2015), the Sixth Circuit, sitting *en banc*, held that government officials violated the plaintiffs' rights to freedom of speech and the free exercise of religion by *threatening* to arrest them and thereby preventing them from engaging in religious *expressive* activity. As stated by the court:

> The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim. *Prater v. City of Burnside*, 289 F.3d 417, 427 (6th Cir. 2002). The government cannot prohibit an individual from engaging in religious conduct that is protected by the First Amendment. *Id.*

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[3] It is no defense to this constitutional challenge to the prosecution of Defendant Zastrow that he might have alternative ways of communicating his message. There are no adequate alternatives that would permit Defendant Zastrow to reach his intended audience. *See, e.g., Bay Area Peace Navy v United States*, 914 F2d 1224, 1229 (CA9 1990) ("[A]lternative mode[s] of communication may be constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened' [and a]n alternative is not ample if the speaker is not permitted to reach the 'intended audience.'"); *Members of the City Council v Taxpayers for Vincent*, 466 US 789, 812 (1984) ("[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.") (citations omitted); *see also Am.-Arab Anti-Discrimination Comm.*, 418 F3d at 607 ("[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . ."); *NAACP, Western Region v City of Richmond*, 743 F2d 1346 (CA9 1984) ("[L]aws regulating public fora cannot be held constitutional simply because they leave potential speakers alternative fora for communicating their views.").

> The Bible Believers' proselytizing at the 2012 Arab International Festival constituted religious conduct, as well as expressive speech-related activity, that was likewise protected by the Free Exercise Clause of the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943). Plaintiff Israel testified that he was required "to try and convert non-believers, and call sinners to repent" due to his sincerely held religious beliefs. We do not question the sincerity of that claim. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778, 189 L. Ed. 2d 675 (2014) ("[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable." (internal parentheses omitted)).
>
> Free exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Rosenberger*, 515 U.S. at 841.

Bible Believers, 805 F3d at 255-56.

Consequently, there can be no doubt that Defendant Zastrow's speech "*about babies being murdered*" and "*quotes of scripture and accusations of murder*" on the public sidewalk outside of Northland and adjacent to Ford Road is fully protected by the First Amendment (Free Speech and Free Exercise Clauses) and thus beyond criminal prosecution.

Controlling precedent leaves no doubt that Defendant Zastrow's expressive activity cannot be criminally punished as a matter of law. In *Terminiello v City of Chicago*, 337 US 1 (1949), for example, the U.S. Supreme Court did not allow 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 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 (emphasis added).

Indeed, in *People v Pouillon*, 254 Mich App 210; 657 NW2d 538 (2002), the court reversed a conviction for causing public disorder in a case involving a defendant who was yelling "They kill babies in that Church! Why are you going there?" to mothers who were dropping off their children at a day care operated by the church, and thus causing the children to become frightened and visibly upset. The conviction was reversed on free speech grounds.[4] *See id.*; *see also Claiborne Hardware, Co*, 458 US at 928 ("The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech. . . ."); *Texas v Johnson*, 491 US 397 (1989) (reversing conviction of protestor who burned an American flag while fellow protestors shouted, "America, the red, white, and blue, we spit on you"); *Edwards v South Carolina*, 372 US 229 (1963) (reversing conviction for breach of the peace in a case in which the police advised the petitioners that they would be arrested if they did not disperse within 15 minutes, and instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands); *Sandul v Larion*, 119 F3d 1250 (CA6 1997) (holding that the plaintiff's conduct, which included shouting "f--k you" and extending his middle finger to a group of abortion protestors, was constitutionally protected speech and could not serve as a basis for a violation of the city's disorderly conduct

[4] As noted by the court, "The rights to free speech under the Michigan and federal constitutions are coterminous." *Pouillon*, 254 Mich App at 213-14.

ordinance); *People v Boomer*, 250 Mich App 534; 655 NW2d 255 (2002) (reversing conviction on constitutional grounds in a case involving a defendant who was making a "loud commotion" and using "vulgar language" while canoeing on a river that was crowded with families and children).

Additionally, with regard to the Free Exercise challenge, when a law burdens religious exercise, as in this case, and it provides an exemption for non-religious conduct, as in this case,[5] the government must satisfy strict scrutiny—the "most rigorous scrutiny" under the law. *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 534, 546 (1993) (striking down on Free Exercise Clause grounds an ordinance prohibiting the sacrifice of animals). That is, the City must have a compelling interest to punish Defendant Zastrow for his speech and the reason for punishing him must be narrowly tailored to support that interest. *See id.* at 546 ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.") (internal quotations and citations omitted). And when a law restricts conduct protected by the First Amendment and yet permits other conduct that produces substantial or similar harm, the government's interest is not compelling. *See id.* at 546-47. *Church of the Lukumi Babalu Aye, Inc v City of Hialeah* illustrates this axiom of constitutional law. There, the U.S. Supreme Court struck down on free exercise grounds an ordinance prohibiting the sacrifice of animals that defined sacrifice as the "unnecessary" killing of an animal. The law permitted some animal killings as "necessary," but deemed the ritual, religious killing of an animal as unnecessary and thus criminal. By exempting some animal killings but prohibiting animal killings for religious

[5] The City's ordinance expressly exempts "emergency vehicles or those vehicles emitting a warning sound necessary for the protection of public safety," City Ordinance § 62-99(a)(1)a, as well as any "noise" that is deemed reasonable, necessary, or not disturbing, *see id.* at § 62-99(a).

reasons, the ordinance violated the challengers' right to free exercise of religion under the First Amendment. Similarly, the City's ordinance permits "necessary" "noises," but the City has deemed Defendant Zastrow's religious speech "unnecessary" and thus prohibited. The City's actions cannot withstand the "rigorous" scrutiny demanded by the Free Exercise Clause.

In the final analysis, even accepting the City's allegations as true, these allegations fail to state a criminal offense as a matter of law. *See* MCL 764.9d. Defendant Zastrow's expressive conduct is fully protected by the First Amendment (Free Speech and Free Exercise Clauses) and cannot be prohibited by this City ordinance. *See, e.g., Coates v Cincinnati*, 402 US 611, 616 (1971) ("The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution.").

II. THE CITY'S ORDINANCE IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED.

The City's ordinance is unconstitutionally vague and overbroad, particularly as applied to punish Defendant Zastrow's speech. As the U.S. Supreme Court stated in *Grayned v City of Rockford*, 408 US 104 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide *explicit standards* for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (internal punctuation and quotations omitted) (emphasis added);[6] *see Cox v Louisiana*, 379 US 536, 551-52 (1965) (holding that the breach of the peace statute was unconstitutionally vague in its overly broad scope, for Louisiana defined "breach of the peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet"; yet one of the very functions of free speech "is to invite dispute") (quoting *Terminiello*, 337 US at 4-5); *Coates*, 402 US at 614 ("In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct. . . . It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. . . . It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed."); *Dombrowski v Pfister*, 380 US 479 (1965) (striking down under the "vagueness doctrine" the provision of a State law defining subversive organizations because the language was unduly vague, uncertain, and broad and thereby inhibited protected expression); *Reno v ACLU*, 521 US

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[6] The Court in *Grayned* ultimately upheld the anti-noise ordinance against a facial challenge. However, its reasons for doing so readily distinguish that ordinance from the vague City ordinance at issue here. Per the Court:

> We do not have here a vague, general "breach of the peace" ordinance, but a statute written *specifically for the school context*, where the prohibited disturbances are *easily measured by their impact on the normal activities of the school*. Given this particular context, the ordinance gives fair notice to those to whom it is directed.

Grayned, 408 US at 112 (internal quotations and punctuation omitted) (emphasis added).

844, 870-72 (1997) (noting that the "vagueness" of the regulation raised "special First Amendment concerns").

Consequently, in the First Amendment context, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v Button*, 371 US 415, 438 (1963). The City's ordinance fails to provide the necessary precision to withstand this constitutional challenge, particularly as applied to punish Defendant Zastrow's First Amendment speech activity.

In *Tanner v City of Virginia Beach*, 277 Va 432; 647 SE2d 848 (2009), *cert den*, 130 S Ct 1137 (2010), for example, the Virginia Supreme Court struck down a city noise ordinance based on federal constitutional grounds. The ordinance at issue in *Tanner* is substantively similar to the City of Westland's ordinance at issue here. As stated by the court:

> The ordinance before us prohibits any "unreasonably loud, disturbing and unnecessary noise," noise of "such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity," or noise that "disturb[s] or annoy[s] the quiet, comfort or repose of reasonable persons." The ordinance also describes various acts that constitute per se violations.
>
> We conclude that these provisions fail to give "fair notice" to citizens as required by the Due Process Clause, because the provisions do not contain ascertainable standards. . . . Instead, the reach of these general descriptive terms depends in each case on the subjective tolerances, perceptions, and sensibilities of the listener.
>
> Noise that one person may consider "loud, disturbing and unnecessary" may not disturb the sensibilities of another listener. As employed in this context, such adjectives are inherently vague because they require persons of average intelligence to guess at the meaning of those words.

Id. at 440. Relying principally on U.S. Supreme Court precedent, the court observed that the determinations set forth in the challenged ordinance "invite[] arbitrary enforcement." *Id.* at 441. Thus, the court concluded, "Because these determinations required by the ordinance can only be

made by police officers on a subjective basis, we hold that the language of the ordinance is impermissibly vague." *Id.* (citing *Grayned*, 408 US at 108-09).

The same is true here. The City of Westland's ordinance is hopelessly vague and overbroad, and as this case demonstrates, it invites arbitrary enforcement and allows a police officer to make a subjective determination as to what is or is not "*unreasonably* loud, *disturbing*, or *unnecessary* noise" that "disturbs" others.[7] As the case law makes plain, Defendant Zastrow cannot be held criminally liable under this statute for engaging in his expressive activity on the public sidewalk outside of Northland.

III. THIS PROSECUTION DEPRIVES DEFENDANT OF THE EQUAL PROTECTION OF THE LAW.

The relevant principle of law was articulated by the U.S. Supreme Court in *Police Department of the City of Chicago v Mosley*, 408 US 92 (1972). In *Mosley*, the Court struck down a city ordinance that prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. The Court stated, "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use

[7] It is impermissible as a matter of First Amendment jurisprudence to punish speech which "disturbs." *See, e.g., Terminiello*, 337 US at 4-5; *Forsyth Cnty v Nationalist Movement*, 505 US 123, 134 (1992) (noting that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Texas v Johnson*, 491 US at 414 ("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."); *Erznoznik v City of Jacksonville*, 422 US 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 US 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Edwards*, 372 US at 237 ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."); *Boos v Barry*, 485 US 312, 321 (1988) (stating that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" that would permit regulation) (opinion of O'Connor, J.).

of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 96.

Here, by its own terms, the ordinance exempts *reasonably* loud or *necessary* noise or even unreasonably loud or unnecessary noise that does *not* disturb others. (*See supra* n.7). Moreover, the ordinance makes an express exemption for "*emergency vehicles or those vehicles emitting a warning sound necessary for the protection of public safety*." Consequently, the City does not punish those who "disturb" the people at Northland by loud sirens or other "warning sound[s]"—presumably the honking of a horn to gain someone's attention—but they seek to punish Defendant Zastrow because his "warning sound [*i.e.*, protected speech activity] necessary for the protection" of the unborn is apparently disturbing to those who support abortion at Northland. Indeed, virtually every vehicle driving along this busy section of Ford Road can be heard from more than 50 feet away (an absurd distance for applying a noise ordinance on a busy road in a commercial district). And virtually every motorcycle, particularly a Harley Davidson with its recognizable and famous engine sound, would drown out Defendant Zastrow. Yet, the City does not punish these loud noises. *See Church of the Lukumi Babalu Aye, Inc*, 508 US 520 at 546-47 ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."); *Congregation Lubavitch v. City of Cincinnati*, 997 F2d 1160, 1166 (CA6 1993) ("Because the City is so willing to disregard the traffic problems [by making

exceptions], we cannot accept the contention that traffic control is a substantial interest.") (internal quotations and citation omitted).[8]

Moreover, as the police videos/audio produced by the City pursuant to Defendant Zastrow's discovery request reveal, among other evidence of bias against the pro-life demonstrators that Defendant Zastrow is prepared to present at an evidentiary hearing on this motion, City police officers turn a blind eye when Northland employees seek to silence the speech of pro-life demonstrators by blasting their vehicle radios in the parking lot. *McCullen*, 134 S Ct at 2533 ("It is of course true that an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people.") (internal quotations and citation omitted). Indeed, an officer is captured on the audio portion laughing at the suggestion that blasting the radios to drown out the pro-life demonstrator's speech violates the City's ordinance.

In the final analysis, by seeking to prosecute Defendant Zastrow for his constitutionally protected, pro-life speech while exempting from the ordinance "noise" that is not constitutionally protected, this prosecution violates the equal protection guarantee of the Fourteenth Amendment (and the Free Speech and Free Exercise Clauses of the First Amendment).

CONCLUSION

The City cannot prosecute Defendant Zastrow for engaging in his religious, pro-life speech. The U.S. Constitution forbids it. This case must be dismissed.

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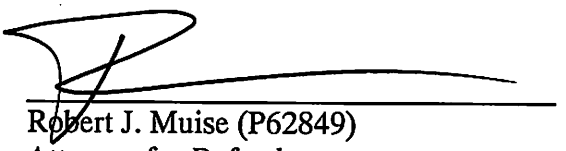
[8] For similar reasons (*i.e.*, the fact that the City makes exemptions for non-religious conduct but punishes Defendant Zastrow's religiously-motivated conduct) and as argued in Section I above, the prosecution of Defendant Zastrow violates his rights protected by the Free Exercise Clause of the First Amendment.

Dated: August 3, 2017

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER



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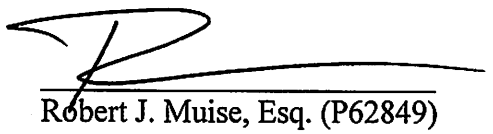
CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2017, I caused to be served via hand delivery a copy of the foregoing on the prosecuting attorney for the City of Westland.



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