IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

DAN McGHEE,

Plaintiff,

v.

CITY OF WESTLAND, *et al.*,

Defendants.

Case No. 2:17-cv-13191-AC-EAS

Hon. Avern Cohn

[Fed. R. Civ. P. 12(b)(1) & 12(b)(6)]

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PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

ISSUES PRESENTED

I. Whether Plaintiff has standing to advance this constitutional challenge to a City ordinance that chills the exercise of his rights protected by the First and Fourteenth Amendments.

II. Whether Plaintiff has stated a plausible claim that Defendants violated his constitutional rights.

III. Whether Defendant Gatti is entitled to qualified immunity and thus not liable for nominal damages when he violated the clearly established constitutional rights of Plaintiff.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)

Bible Believers v. Wayne Cnty., 805 F.3d 228 (6th Cir. 2015) (*en banc*)

Church of the Lukumi Babalu Aye, Inc v. City of Hialeah, 508 U.S. 520 (1993)

Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807 (6th Cir. 2007)

Grayned v. City of Rockford, 408 U.S. 104 (1972)

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

McCullen v. Coakley, 134 S. Ct. 2518 (2014)

Nichols v. Muskingum Coll., 318 F.3d 674 (6th Cir. 2003)

Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972)

Steffel v. Thompson, 415 U.S. 452 (1974)

Tanner v. City of Va. Beach, 277 Va. 432 (2009)

INTRODUCTION

Defendants ask this Court to dismiss Plaintiff's Complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. More specifically, Defendants argue: (1) that Plaintiff lacks standing to advance this challenge to a City ordinance that Defendants enforce to restrict the free speech rights of pro-life demonstrators, including Plaintiff and (2) that Plaintiff has failed to state a claim for relief that is plausible on its face. Defendants also ask this Court to dismiss the nominal damage claim against Defendant Gatti, arguing that he is entitled to qualified immunity. Defendants are mistaken.

STANDARD OF REVIEW

"In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction. . . ." *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003) (internal citations omitted). And "where a defendant argues that the plaintiff has not alleged sufficient facts in her compliant to create subject matter jurisdiction, the trial court takes the allegations in the complaint as true." *Id.*

When reviewing Defendants' motion to dismiss under Rule 12(b)(6), the Court must construe the Complaint in the light most favorable to Plaintiff and accept all allegations as true. *See Harbin-Bey v. Rutter*, 420 F.3d 571, 575 (6th Cir. 2005). Rule 8(a)(2) requires only "a short and plain statement of the claim

showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotation marks omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).[1] Factual allegation need only "be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. Consequently, Plaintiff need only "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012) ("If a reasonable court can draw the necessary inference from the factual material stated in the complaint, the plausibility standard has been satisfied."). Plaintiff's Complaint satisfies this standard. We turn now to standing.

I. Plaintiff Has Standing to Advance this Constitutional Challenge.

When addressing the jurisdictional issue of standing, it is error to "confuse[] standing with the merits." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006). The Court's "threshold inquiry into standing in no way depends on the merits of the [Plaintiff's] contention that particular conduct is

[1] In *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), a case decided shortly after *Twombly*, the Supreme Court reversed a dismissal granted under Rule 12(b)(6), holding that it was error for the appellate court to conclude that the allegations were "too conclusory" for pleading purposes.

illegal." *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990) (internal quotations and citation omitted). Consequently, "in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *Dorton v. KMart Corp.*, Case No. 16-cv-10202, 2017 U.S. Dist. LEXIS 10636, at *8 (E.D. Mich. Jan. 26, 2017) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal. . . . The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.") (internal citations and quotations omitted).

The doctrine of standing gives meaning to Article III's "case" or "controversy" requirements "by identifying those disputes which are appropriately resolved through the judicial process." *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotations and citation omitted). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Consequently, to invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468

U.S. 737, 751 (1984); *see also Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (stating that a plaintiff has standing to seek prospective relief if he can "show actual present harm or a significant possibility of future harm").

In the First Amendment context, the standing requirements are appropriately relaxed. *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (stating that standing is properly relaxed for First Amendment challenges "because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application'") (quotations in original, citations omitted); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) ("When the First Amendment is in play . . . the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections."). Accordingly, when a challenged restriction chills the exercise of free speech, as in this case, the affected party (and even a third party)[2] has standing to challenge that restriction. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("[T]he threat of sanctions may deter . . . almost as potently as the

[2] *See, e.g., King Enters. v. Thomas Twp.*, 215 F. Supp. 2d 891, 906 (E.D. Mich. 2002) ("It is important to observe that prudential standing rules are somewhat relaxed in the First Amendment context. . . . [T]he freedom of expression and the unfettered exchange of ideas is considered the lifeblood which sustains a democracy. Thus, where a law regulates speech based on content, contains a prior restraint of protected speech, chills the right of expression of third parties, or restricts the expression of others not before the court, third parties may wage a facial challenge to the offending law based on First Amendment rights.") (internal quotations and citations omitted).

actual application of sanctions.") (internal quotations and citation omitted); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact"). As stated by the Court in *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."

Here, we have a criminal law that impinges upon protected speech. And not only have Defendants already threatened to enforce this criminal law against Plaintiff, *they have in fact arrested and charged one of Plaintiff's pro-life companions, Cal Zastrow, in Plaintiff's presence, for violating* ***this very law*** *based on his* ***speech activity—the very same activity engaged in by Plaintiff***. (Compl. ¶¶ 24-28, 34-36). And immediately following this unlawful arrest, Defendant Gatti warned Plaintiff that he too would suffer the same consequences if he engaged in similar expressive conduct. (Compl. ¶¶ 29, 30). While the criminal case against Zastrow was eventually dismissed, it was done so pursuant to an agreement where the arrested party had to release the City of any civil liability and in which the City disavowed any wrongdoing. (Compl. ¶¶ 34-36). Thus, the challenged law and its chilling effect remain unchanged.[3] (Compl. ¶¶ 36, 41).

[3] Defendants have also demonstrated an animus toward the pro-lifers and a

Plaintiff has not only alleged that he will engage in a course of conduct that Defendants claim violates the challenged ordinance (Compl. ¶¶ 21, 32, 33, 41), he has submitted a declaration reinforcing that very point.[4] Defendants are wrong to suggest otherwise. (Defs.' Br. at 8). As stated by Plaintiff:

> Northland is located in a commercial district along Ford Road in Westland, Michigan. At this location, Ford Road is a very busy five lane road (two lanes east bound, two lanes west bound, and a center turn lane). The vehicle traffic on this road is very loud, and *it can be heard from more than 50 feet away*. Consequently, in order to effectively express our pro-life Gospel message, *the other pro-lifers and I must raise our voices to be heard over the traffic and other noise that is customary in a commercial area and that is particular to this area*. *Also, because we cannot trespass on Northland property, we must raise our voices so we can be heard by our intended audience, many of whom are 50 feet or more away from us*.

(McGhee Decl. ¶ 5 [emphasis added] [Doc. No. 11-2]; *see also* Compl. ¶ 21 ["The vehicle traffic on this road is very loud, and it can be heard *from more than 50 feet away*. Consequently, *in order to effectively preach their pro-life Gospel message, Plaintiff and the other pro-lifers must raise their voices to be heard over the traffic and other noise that is customary in a commercial area and that is particular to this area*."] [emphasis added]).[5]

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willingness to selectively enforce this law against them. (Compl. ¶¶ 38, 40).

[4] It is proper for the Court to consider this declaration when addressing the issue of standing. *Nichols*, 318 F.3d at 677 (6th Cir. 2003) ("In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings. . . .").

[5] Defendants' assertion that "[a]t no point in his Complaint does McGhee assert that he intends to express his views at a volume that could result in arrest under the ordinance at issue" (Defs.' Br. at 8) is false.

The very cases relied upon by Defendants, *Laird v. Tatum*, 408 U.S. 1 (1972), and *Morrison v. Board of Education of Boyd County*, 521 F.3d 602 (6th Cir. 2008) (Defs.' Br. at 6-7), establish Plaintiff's standing in this case. As stated by *Morrison* (and quoted by Defendants ([Defs.' Br. at 7]), "In order to have standing, . . . a litigant alleging chill must still establish that a concrete harm—*i.e.*, enforcement of a challenged statute—occurred or is imminent." *Morrison*, 521 F.3d at 610. That is precisely what has happened in <u>*this*</u> case. Defendants arrested one of Plaintiff's companions *in his presence* for allegedly violating the challenged ordinance as a result of his speech activity, and Plaintiff was then *directly* warned by Defendant Gatti that the same could happen to him. (Compl. ¶¶ 21-30). This is "specific present objective harm [and] threat of specific future harm." *See Laird*, 408 U.S. at 13-14.

Additionally, rather than disavowing this unlawful application of the ordinance, Defendants have doubled-down in their response to Plaintiff's motion for preliminary injunction, claiming that it is entirely proper. (*See* Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj. at 20 [Doc. No. 14] [asserting that Zastrow's arrest was proper because his preaching could be heard "***from more than 50 feet away, even next to a busy road***"]).[6] In sum, there is *nothing* speculative about this case. The

[6] This further shows the arbitrary way in which Defendants enforce the ordinance because the only "50-foot" restrictions in the ordinance refer to "[t]he sounding of any horn or signal device on any automobile, bus, truck, or other vehicle" and

"concrete" harm has already occurred and will continue to occur in the future absent relief from this Court. Plaintiff has standing to advance this challenge.

II. Plaintiff Has Stated Claims to Relief that Are Plausible on Their Face.

In what amounts to approximately two pages of argument that is devoid of any meaningful analysis *of the challenged ordinance at issue* and its unlawful *application* to Plaintiff's speech, Defendants assert, *ipse dixit*, that Plaintiff's claims fail because the challenged ordinance is a constitutionally permissible noise restriction. (Defs.' Br. at 9-11). Defendants are mistaken.

Before turning to Defendants' specific arguments, we pause here to discuss in further detail the First Amendment issues at stake. To begin, the First Amendment protects Plaintiff's right to have his voice heard. And, as demonstrated below, this right is at its zenith when it involves speech on a controversial public issue, such as abortion, on a public sidewalk. As stated by the 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 U.S. 138, 145 (1983) (citations omitted). Indeed, Plaintiff's speech is protected by the Free Speech *and* Free Exercise Clauses of the First Amendment. *Capitol Square Rev. & Adv. Bd. v Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully

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"[t]he playing or operation of any device designed for sound amplification." (Compl. ¶ 18 [ordinance]). Neither applies to the spoken word.

protected under the Free Speech Clause as secular private expression.") (citations omitted); *Bd. of Educ. v Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J.) (observing that "private speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses"). In *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015), the *en banc* court 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 their *expressive* activity. Per 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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> 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 (2014) ("[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable." (internal parentheses omitted)).
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> 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 F.3d at 255-56.

Accordingly, Plaintiff's speech "is entitled to special protection" under the First Amendment, not criminal prosecution under an unconstitutional City ordinance.

Moreover, the forum in question (a public sidewalk) is indisputably a traditional public forum. *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora.") (internal citation omitted). There is no exception for 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 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. N.J.*, 308 U.S. 147, 163 (1939); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (striking down a 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");

Perry Educ. Ass'n v. Perry Local Educators, 460 U.S. 37, 55 (1983) ("In a public forum . . . all parties have a constitutional right of access . . . .").[7]

In sum, speech "*about babies being murdered*" and "*quotes of scripture and accusations of murder*" on the public sidewalk outside of an abortion clinic is fully protected by the First Amendment (Free Speech and Free Exercise Clauses) and thus beyond criminal prosecution by the City.

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), the 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

[7] It is no defense to this constitutional challenge that Plaintiff might have alternative ways of communicating his message. *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) ("[L]aws regulating public fora cannot be held constitutional simply because they leave potential speakers alternative fora for communicating their views."); *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d 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. . . ."). Moreover, there are no adequate alternatives that would permit Plaintiff to reach his intended audience. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 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.'").

> 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 Tx. v. Johnson*, 491 U.S. 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. S.C.*, 372 U.S. 229 (1963) (reversing convictions for breach of the peace where 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 F.3d 1250 (6th Cir. 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 ordinance); *People v. Pouillon*, 254 Mich. App. 210 (2002) (reversing on free speech grounds 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); *People v. Boomer*, 250 Mich. App. 534 (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,[8] 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 U.S. 520, 534, 546 (1993) (striking down on Free Exercise Clause grounds an ordinance prohibiting the sacrifice of animals); *see also 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. In *City of Hialeah*, for example, the

[8] 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); (Compl. ¶ 18 [ordinance]).

Court struck down on free exercise grounds an ordinance prohibiting the sacrifice of animals that defined sacrifice as the "unnecessary" killing of an animal. *See id.* 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 reasons, the ordinance violated the challengers' right to the free exercise of religion. Similarly, the City's ordinance permits non-"disturbing" or "necessary" "noises," such as "a warning sound necessary for the protection of the public," but the City has deemed Plaintiff's pro-life religious speech, which is "necessary for the protection of the" unborn, "disturbing" and "unnecessary" and thus prohibited. The City's actions cannot withstand the "rigorous" scrutiny demanded by the Free Exercise Clause.

In sum, "[t]he ordinance before us makes a crime out of what under the Constitution cannot be a crime." *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971).

We turn now to address Defendants' specific arguments, which begin with the conclusory assertion noted at the start of this section and a citation to the well-known standard set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), in which the Court stated that in a public forum the government may impose "*reasonable* restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified *without reference to the content of the regulated speech*, that they are *narrowly tailored* to serve a significant

governmental interest, and that they *leave open ample alternative channels* for communication of the information.'" (citation omitted) (emphasis added).

Here, Defendants arrested a pro-lifer (Zastrow) under the challenged ordinance and made *specific reference* to the content of his speech as a basis for claiming that he violated the law. (*See* Compl. ¶ 27 ["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*. . . ."] [emphasis added]). The challenged ordinance criminalizes "unreasonably loud, disturbing, or unnecessary noise, *which disturbs the comfort, repose, health, peace or safety of others*." (Compl. ¶ 18 [emphasis added]). Defendant Gatti made *specific reference* to the *content* of Zastrow's speech because it was this content "which disturb[ed] . . . others," including Defendant Gatti, who was offended when Zastrow accused him of "assisting in the murdering of babies"—prompting the arrest.[9] (Compl. ¶ 27).

Moreover, in order to determine whether a "noise" (*i.e.*, speech, as in this case) is "necessary," the arresting officer would invariably have to make reference to its content. Plaintiff and the other pro-lifers certainly believe that it is

[9] This is certainly an allegation—and, at a minimum, a reasonable inference drawn from the allegations—that the Court must accept in Plaintiff's favor for purposes of this motion. *See Keys*, 684 F.3d at 610 ("If a reasonable court can draw the necessary inference from the factual material stated in the complaint, the plausibility standard has been satisfied.").

"necessary" for their speech to be heard by those who want to abort unborn children (*i.e.*, it must be audible beyond 50 feet). Indeed, they believe their speech is more "necessary" to the protection of human life than "vehicles emitting a warning sound necessary for the protection of public safety," which the challenged ordinance allows. (Compl. ¶ 18). A "warning sound" from a vehicle does not "warn" those who want to abort unborn children of the dangers of doing so.

Additionally, the City's ordinance is unconstitutionally vague and overbroad on its face and as applied to punish Plaintiff's speech. Defendants fail to address this crucial aspect of Plaintiff's challenge.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . ***The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments***." *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972) (citations omitted) (emphasis added); *Lewis v. New Orleans*, 415 U.S. 130, 134 (1974) (stating that because the challenged ordinance

"is susceptible of application to protected speech, the section is constitutionally overbroad and therefore is facially invalid").

As the Supreme Court stated in *Grayned*:

> 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); *see Cox v. La.*, 379 U.S. 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 U.S. at 4-5); *Coates*, 402 U.S. 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."); *Dombrowski*, 380 U.S. at 479 (striking down a provision of a state law defining subversive organizations because the language was unduly vague, uncertain, and broad and thereby inhibited protected expression).

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 U.S. at 112 (internal quotations and punctuation omitted) (emphasis added). For similar reasons, *Madsen v. Women's Health Center*, Inc., 512 U.S. 753 (1994) and *Hill v. Colorado*, 530 U.S. 703 (2000), are readily distinguishable. Defendants reliance on these cases is misplaced. (*See* Defs.' Br. at 10).

In *Madsen*, the Court upheld various provisions of an injunction (and struck down others) issued by a state court that addressed specific and localized harm related to the activity of certain demonstrators outside of various abortion clinics located in central Florida. As the Court noted,

> An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties. The parties seeking

> the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

Id. at 762. There is no narrowly tailored injunction at issue here. And in *Hill v. Colorado*, 530 U.S. 703 (2000), the Court rejected a facial challenge to an ordinance which made it unlawful within 100 feet of a health care facility's entrance for any person to knowingly approach *within eight feet of another person*, without that person's consent, to pass a leaflet or handbill, to display a sign, or to engage in oral protest, education, or counseling with such other person. The Court upheld the statute, concluding that it was narrowly tailored to address a specific harm. *See id*. There is nothing, however, "narrowly tailored" about criminalizing via a general "noise" ordinance pro-life speech that can be heard from more than 50 feet away on a noisy public sidewalk outside of an abortion clinic. Indeed, fourteen years after its decision in *Hill*, the Court in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), struck down on First Amendment grounds a content-neutral restriction (35-foot buffer zone) around abortion clinics because the statute was not narrowly tailored and the restriction compromised the pro-lifers' speech activity.

In the final analysis, 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 U.S. 415, 438 (1963). The City's ordinance fails to provide the necessary precision to withstand this constitutional challenge.

See also State v. Immelt, 173 Wash. 2d 1, 267 P.3d 305 (2011) (holding that a county noise ordinance prohibiting the honking of a vehicle horn except for a public safety purpose was impermissibly overbroad).

In *Tanner v. City of Virginia Beach*, 277 Va. 432 (2009), the Virginia Supreme Court struck down on federal constitutional grounds a city noise ordinance that is substantively similar to the ordinance at issue here. Per 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 U.S. at 108-09); *see also Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 489 (4th Cir. 1983) (finding phrase "unnecessary noise" unconstitutionally vague); *Dupres v. City of Newport, R.I.*, 978 F. Supp. 429, 433–34 (D.R.I. 1997) (stating that "noise which . . . annoys, disturbs, injures, or endangers the comfort, repose, peace, or safety of any individual" is vague); *Dae Woo Kim v. City of N.Y.*, 774 F. Supp. 164, 170 (S.D.N.Y. 1991) (same); *Norfolk 302, LLC v. Vassar*, 524 F. Supp. 2d 728, 740 (E.D. Va. 2007) (holding prohibition on "noisy conduct" impermissibly vague).

The same is true here. The City'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.[10]

Moreover, under the circumstances, the application of this ordinance to the free speech activity of pro-life demonstrators on the public sidewalk in this commercial district adjacent to the very busy and noisy Ford Road is *unreasonable* and thus impermissible. *See Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006) (holding that it is unreasonable to restrict speech that could be heard from 25

[10] It is impermissible as a matter of First Amendment jurisprudence to punish speech which "disturbs." *See, e.g., Terminiello*, 337 U.S. at 4-5; *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.").

feet away in a public square because it would prohibit "the sounds that typify the [area] and the activities it is meant to facilitate"); *United States v. Doe*, 968 F.2d 86, 91 (D.C. Cir. 1992) (holding that it is unreasonable to restrict noise exceeding 60 decibels at 50 feet in a park).

Finally, Defendants also fail to address Plaintiff's equal protection claim. The relevant principle of law was articulated by the Supreme Court in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, the Court stated, "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use 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. By denying Plaintiff and other pro-life demonstrators access to a public forum to engage in their speech activities, which Defendants disfavor, Defendants have deprived Plaintiff of the equal protection of the law. (Compl. ¶ 63; *see also* ¶¶ 38, 40).

III. Defendant Gatti Is Not Entitled to 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 City.[11] *Cnty. of Sacramento*

[11] Consequently, "immunity" is no basis for arguing that the Court should dismiss the claims against the City in this case, as Defendants' suggest. (*See* Defs.' Br. at 9) (arguing that "'[i]mmunity' is among these affirmative defenses" that justifies

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."). In this case, in addition to a claim for nominal damages, Plaintiff is seeking declaratory and injunctive relieve against Defendant Gatti.

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court mandated a two-step sequence for resolving government official's qualified immunity claims. First, a court must decide whether the facts alleged or shown by a plaintiff make out a violation of a constitutional right. And second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id*. 201. In *Pearson v. Callahan*, 555 U.S. 223, 227 (2009), the Court held that "the *Saucier* procedure should not be regarded as an inflexible requirement." Consequently, the court may

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dismissal under Rule 12(b)(6)).

decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances" of the particular case. *Id.* at 236.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated the applicable standard: 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." *Id.* at 818. 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). In light of pre-existing First Amendment law, the unlawfulness of Defendant Gatti's actions is unmistakably "apparent."

Indeed, Defendant Gatti cannot use the challenged ordinance as a blunt instrument to suppress speech he finds "disturbing" and then run and hide behind a claim that he is entitled to qualified immunity. As stated by the Ninth Circuit:

> Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. Similarly, an officer who unlawfully enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance, will not be entitled to immunity even if there is no clear case law declaring the ordinance or the officer's particular conduct unconstitutional.

Grossman v. City of Portland, 33 F.3d 1200, 1209-10 (9th Cir. 1994).

Additionally, Plaintiff has alleged facts demonstrating that Defendant Gatti retaliated against him due to an animus toward pro-lifers. (Compl. ¶¶ 38-41 [setting forth allegations of animus], *id*. at ¶ 44 ["Plaintiff's constitutionally protected activity motivated Defendants' adverse actions. Thus, Defendants acted with a retaliatory intent or motive."]). Defendant Gatti's police report demonstrates his retaliatory intent. Per Defendant Gatti, it was *after* Zastrow started accusing him of intimidation and "assisting in the murdering of babies" that he returned to arrest Zastrow. (Compl. ¶ 27 ["As [Gatti] *walked away* Zastrow *accused* [*him*] of trying to intimidate him and continued to yell and *stated that* [*Gatti*] *was assisting in the murdering of babies*. [Gatti] returned to the parking lot where Zastrow continued to *yell quotes of scripture and accusations of murder*. [Officers] Plear and [Gatti] then *arrested Zastrow for disturbing the peace*."] [emphasis added]). Thus, "[b]ecause retaliatory intent proves dispositive of [Defendant Gatti's] claim to qualified immunity," dismissal is "inappropriate." *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821-25 (6th Cir. 2007) (holding that the district court erred in granting qualified immunity).

CONCLUSION

Plaintiff respectfully requests that the Court deny Defendants' motion.

Respectfully submitted,

/s/ *Robert J. Muise*
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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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