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

BIBLE BELIEVERS; RUBEN CHAVEZ (a.k.a. RUBEN ISRAEL); ARTHUR FISHER; and JOSHUA DELOSSANTOS,

Plaintiffs,

v.

WAYNE COUNTY; 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; and MIKE JAAFAR, individually and in his official capacity as Deputy Chief, Wayne County Sheriff's Office,

Defendants.

No. 2:12-cv-14236-PJD-DRG

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Hon. Patrick J. Duggan

AMERICAN FREEDOM LAW CENTER
Robert J. Muise, Esq. (P62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
(734) 635-3756

David Yerushalmi, Esq. (Ariz. Bar No. 009616;
DC Bar No. 978179; Cal. Bar No. 132011;
NY Bar No. 4632568)
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
david.yerushalmi@verizon.net
(646) 262-0500
Counsel for Plaintiffs

ABIH H. AYAD & ASSOCIATES, P.C.
Abih H. Ayad (P59518)
2200 Canton Center Rd., Ste. 220
Canton, Michigan 48187
ayadlaw@hotmail.com
(734) 983-0500
Counsel for Defendants

ISSUE PRESENTED

Whether Defendants' restriction on Plaintiffs' private religious speech on the public sidewalks and other public areas during the Arab Festival held in Dearborn, Michigan based on the adverse reaction of listeners or viewers to the content of Plaintiffs' message causes irreparable harm to Plaintiffs sufficient to warrant preliminary injunctive relief.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966)

Elrod v. Burns, 427 U.S. 347 (1976)

Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992)

Glasson v. Louisville, 518 F.2d 899 (6th Cir. 1975)

Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011)

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

Defendants' opposition to Plaintiffs' motion for a preliminary injunction is a feckless attempt to avoid the inevitable conclusion compelled by the undisputed facts and controlling law. And that conclusion is this: Defendants' clear and unambiguous threat *to arrest Plaintiffs* for engaging in constitutionally protected speech activity *based on a hostile crowd's reaction* to Plaintiffs' message is a clear violation of the First Amendment. Plaintiffs' protected speech cannot be criminally punished or banned as a matter of law. And the momentary loss of First Amendment freedoms causes irreparable harm sufficient to warrant the requested injunction. *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod v. Burns*, 427 U.S. 347 (1976)).

In short, Defendants invite this court to join them in condoning—and, indeed, *rewarding*—criminal behavior designed to silence speech that the criminal hecklers find offensive. The court should decline this invitation for error, which subjects a private citizen's *fundamental* right to freedom of speech to mob rule and the personal predilections of government officials, who themselves have openly expressed opposition to the speaker's message.[1]

A summary of the undisputed facts follows:

[1] In addition to the fact that qualified immunity does not foreclose injunctive relief in this case, *see 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"); *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."), the retaliatory intent of Defendants Richardson and Jaafar defeat any claims of qualified immunity as a matter of law, *see Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 825 (6th Cir. 2007) ("Because retaliatory intent proves dispositive of Defendants' claim to qualified immunity, summary judgment was inappropriate.").

- In June 2012, Plaintiffs were walking along the public sidewalks adjacent to the Dearborn Arab Festival, carrying signs and banners expressing their Christian message.[2] (Israel Decl. at ¶¶ 14-17 at Ex. 1 [Doc. No. 20-2]).

- Expressing a message through the display of signs and banners is a form of speech that is protected by the First Amendment. *See Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment.").

- The Wayne County Sheriff's Office, on behalf of Defendant Wayne County, was the lead law enforcement agency at the Arab Festival and the sole entity responsible for enforcing the law at the festival.[3] (*See* Defs.' Opp'n at 3 ["The Wayne County Sheriff's Department is the exclusive law enforcement agency for the Festival."] [Doc. No. 29]).

- Defendants Richardson and Jaafar, who are Deputy Chiefs with the Wayne County Sheriff's Office and who "attended [the Arab Festival] as officers in the Executive

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[2] Defendants' claim that Plaintiffs were moving "further into the crowd" (Defs.' Opp'n at 11 [Doc. No. 29]) is disingenuous. The public sidewalks along Warren Avenue remained open at all times to the general public and for pedestrian traffic unrelated to the Arab Festival. Indeed, the businesses along Warren Avenue remained open during the festival. Consequently, these sidewalks retained their character as public sidewalks (*i.e.,* a public forum). *See Saieg v. City of Dearborn*, 641 F.3d 727, 737 (6th Cir. 2011) (striking down speech restriction on public sidewalks at Arab Festival on First Amendment grounds). Plaintiffs engaged in their expressive activity on these sidewalks and, quite appropriately, walked along them while expressing their message. Had Plaintiffs stopped and remained stationary, Defendants would have inevitably ordered them to move (or cited them for blocking pedestrian traffic).

[3] In fact, Defendants acknowledge in their opposition that they anticipated Plaintiffs' attendance at the Arab Festival, claiming that Plaintiffs "intended to attend the Festival in order *to provoke* patrons of the Festival and law enforcement officers in order to capture the alleged *negative reaction* of the crowd on video camera." (Defs.' Opp'n at 2 [Doc. No. 29]) (emphasis added). Defendants then proceed to admit that, as a result, "the Sheriff's Department adopted a mission statement to 'provide Wayne County citizens, festival patrons, organizers, [and] merchants with [a] law enforcement presence and to ensure the safety of the public, and keep the peace in the event that there is a disturbance.'" (Defs.' Opp'n at 2 [Doc. No. 29]). Consequently, there can be no dispute that Defendants Richardson and Jaafar were operating pursuant to official policy when they ordered Plaintiffs to depart under threat of arrest for disorderly conduct.

Command Unit" (Defs.' Opp'n at 2 [Doc. No. 29]), were in charge of law enforcement at the festival on behalf of Wayne County and its sheriff's office.

- While Plaintiffs were engaging in their speech activity, a hostile crowd opposed Plaintiffs' message and engaged in criminal behavior directed toward Plaintiffs as a result. (*See*, *e.g.,* Defs.' Opp'n at 5 ["[Plaintiffs] attracted large crowds of people who were in a disagreement with their intentions."] [Doc. No. 29]).

- When deputies from the sheriff's office were present, Plaintiffs were able to express their message without interference from the hostile crowd. (*See* Defs.' Opp'n at 10 [acknowledging that the presence of deputies discouraged the counter-protestors] [Doc. No. 29]).

- Approximately one hour after Plaintiffs commenced their speech activity, Defendants sided with the hostile crowd by ordering Plaintiffs to leave the area *under threat of arrest for disorderly conduct*.[4] (Israel Decl. at ¶¶ 27-29, Ex. B [Chapter 4], at Ex. 1 [videotape of Defendant Richardson telling Plaintiff Israel that "[i]f you don't leave we are going to cite you for disorderly" and confirming that Plaintiffs would be arrested if they did not comply with the order] [Doc. No. 20-2]).

- Upon ordering Plaintiffs to depart under threat of arrest, Defendant Richardson expressed his opposition to Plaintiffs' speech, stating, "Look at your people here. Look it, look it. This is crazy." (Israel Decl. at ¶ 27, Ex. B [Chapter 4], at Ex. 1 [Doc. No. 20-2]).

- Defendants had thirty-four (34) deputies and nineteen (19) reserve officers on the scene, and this force included a mounted unit with six (6) horses. (Defs.' Br. at 3 [Doc. No. 13]).

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[4] *Defendants continue to misstate a critical fact*: Defendants did *not* "simply ask[Plaintiffs] to disperse." (Defs.' Opp'n at 6 [Doc. No. 29]). Defendants ordered Plaintiffs to leave the area under threat of arrest for disorderly conduct. There is no dispute over this fact. The unlawful order was captured on video, and *it was because of this order that Plaintiffs departed the area and did not—indeed, will not—return*, thereby requiring the requested injunction.

- Despite the large law enforcement presence, when Plaintiff Israel, the spokesperson for the Christians, pleaded with Defendant Richardson to simply provide *two deputies* to keep the hostile crowd in check so as to allow Plaintiffs to continue their protected speech activity, *Defendant Richardson refused*. This, by any measure of "reasonableness," is a complete abdication of responsibility to safeguard the free speech rights of Plaintiffs. (*Compare* Defs.' Opp'n at 9 [incorrectly claiming that "Defendants did not abdicate their responsibilities, but instead acted reasonably to protect the public safety"] [Doc. No. 29]).

ARGUMENT

"[T]he threat of violence or public hostility to the views of those exercising First Amendment liberties does not of itself justify denial of the right, but rather *is grounds for injunctive relief*." *Cottonreader v. Johnson*, 252 F. Supp. 492, 497 (M.D. Ala. 1966) (emphasis added); *Glasson v. Louisville*, 518 F.2d 899, 905-07 (6th Cir. 1975) (citing *Cottonreader* with approval and affirming that "[t]o 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").

Here, there is no dispute that Defendants threatened "to punish for [disorderly conduct] the peaceful communication of [Plaintiffs'] messages because other persons [were] provoked and [sought] to take violent action against [Plaintiffs]." Allowing Defendants to do so "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." In sum, denying the requested injunction would subvert the First

Amendment and deprive Plaintiffs of their fundamental right to freedom of speech protected by this constitutional guarantee.

Indeed, Defendants cannot, as a matter of clearly established law, *criminalize* Plaintiffs' speech by threatening to arrest Plaintiffs for disorderly conduct if they did not halt their protected activity. *See Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (holding that speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" cannot be criminally punished); *Tx. v. Johnson*, 491 U.S. 397, 414 (1989) (same).

Moreover, restricting speech based on the adverse reaction of a listener or viewer to its message is a content-based restriction prohibited by the First Amendment. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135 (1992). And there is no "minors" exception to this rule. *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780 790 (9th Cir. 2008).

In the final analysis, an order *enjoining* Defendants from (1) criminally *punishing* Plaintiffs' constitutionally protected speech activity and (2) unlawfully *prohibiting* Plaintiffs' speech by siding with hecklers intent on suppressing Plaintiffs' message is plainly warranted and in the public interest. *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this court grant this motion and enter the requested injunction, which will protect Plaintiffs' First Amendment right to freedom of speech, prevent irreparable harm, and promote the public interest.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)

/s/ David Yerushalmi
David Yerushalmi, Esq.

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2013, 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.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)