NO. 13-1635

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

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

v.

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

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

APPELLANTS' BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiffs-Appellants state the following:

Plaintiff-Appellant Bible Believers is an unincorporated association. Plaintiffs-Appellants Ruben Chavez (aka Ruben Israel), Arthur Fisher, and Joshua DeLosSantos are individual, private parties.

Consequently, no party is a subsidiary or affiliate of a publicly owned corporation. Thus, there are no publicly owned corporations, not a party to the appeal, that have a financial interest in the outcome.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this court hear oral argument. This case presents for review important constitutional questions regarding the right to freedom of speech and the duty of law enforcement officials to protect that speech, rather than join a hostile mob intent on suppressing the speakers' message.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitution

Statutes

Rules

Other

STATEMENT OF JURISDICTION

On September 25, 2012, Plaintiffs filed this action, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1: Compl, Pg ID 1-21.). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On January 25, 2013, Defendants filed a motion for summary judgment, or in the alternative, motion to dismiss. (R-13: Defs.' Mot. for Summ. J. / Mot. to Dismiss [hereinafter "Defs.' Mot."], Pg ID 61-92). Plaintiffs responded on February 14, 2013, and further cross-moved for summary judgment. (R-20: Pls.' Resp. to Defs.' Mot. & Cross-Mot. for Summ. J., Pg ID 132-70).

On February 19, 2013, Plaintiffs filed a motion for preliminary injunction. (R-22: Pls.' Mot. for Prelim. Inj., Pg ID 208-31). Defendants responded on March 12, 2013. (R-29: Defs.' Resp. to Pls.' Mot. for Prelim. Inj., Pg ID 257-76).

The parties timely filed their respective replies in support of their motions. (R-25: Defs.' Reply in Supp. of Mot. for Summ. J. / Mot. to Dismiss, Pg ID 235-41; R-30: Pls.' Reply in Supp. of Mot. for Prelim. Inj., Pg ID 277-90).

On May 14, 2013, the court entered an opinion and order granting Defendants' motion for summary judgment, denying Plaintiffs' cross-motion for summary judgment, and further denying Plaintiffs' motion for preliminary injunction as moot. (R-34: Op. & Order, Pg ID 295-330). Judgment was entered in favor of Defendants,

resolving all parties' claims. (R-35: J., Pg ID 331-32).

That same day (May 14, 2013), Plaintiffs filed a timely notice of appeal, (R-36: Notice of Appeal, Pg ID 333-35), seeking review of the district court's opinion and order.

This court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

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

Nesmith v. Alford, 318 F.2d 110, 121 (5th Cir. 1963). Unfortunately, that day has come, unless this court reverses the patently erroneous decision below, which imperils our First Amendment freedoms.

Indeed, the district court's decision compels private citizens who engage in "peaceful and legally and constitutionally protected" conduct to surrender their fundamental right to freedom of speech to mob rule because *violence* now serves as a lawful *justification* for the government to suppress a speaker's unpopular message. (*See* R-34: Op. & Order at 21, Pg ID 315 ["The Court finds that the actual demonstration of violence here *provided the requisite justification* for Defendants' intervention, even if the officials acted as they did *because of the effect the speech had*

on the crowd." (emphasis added)]). As a result, the district court's decision rewards and thus encourages violence as a legitimate means of suppressing unpopular speech—an outcome squarely at odds with the First Amendment.

Here, Plaintiffs challenge Defendants' restriction on their right to peacefully engage in religious speech on the public sidewalks and other public areas during the Dearborn Arab International Festival (hereinafter "Arab Festival"), which has traditionally been held each June in the City of Dearborn, Michigan. In 2012, Defendants threatened to *arrest* Plaintiffs for disorderly conduct based on the adverse and *criminal* response of hecklers' who disagreed with the *content* of Plaintiffs' message. Based on Defendants' threat to *criminalize Plaintiffs' speech*, Plaintiffs ceased their constitutionally protected activity.

The constitutional violations at issue here are illustrated by the case of *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966), which was cited with approval by this court in *Glasson v. Louisville*, 518 F.2d 899, 907 (6th Cir. 1975). In *Cottonreader*, the federal court "issued an injunction that ordered police officers to protect [the demonstrators for racial equality] from violent actions threatened by persons opposed to their cause." *Glasson*, 518 F.2d at 907. In granting the requested injunctive relief, the Alabama federal court stated, "Thus, the 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, 252 F. Supp. at 497. As this court similarly observed in *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973), "[T]he Supreme Court has often emphasized in related contexts [that] state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights."

In the present case, Defendants not only used "community hostility as an excuse not to protect . . . the exercise of fundamental rights," but further used it as an excuse to *criminalize* Plaintiffs' speech by threatening to arrest them for disorderly conduct if they did not halt their constitutionally protected activity. This threat of arrest, which forced Plaintiffs to halt their free speech activity, clearly violated Plaintiffs' constitutional rights. *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).

In sum, the district court's decision establishes a dangerous precedent that is contrary to controlling law and, indeed, imperils our fundamental First Amendment freedoms.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether Defendants violated Plaintiffs' constitutional rights protected by the First and Fourteenth Amendments to the U.S. Constitution (rights to freedom of speech, free exercise of religion, and equal protection) when they relied upon

community hostility and threats of violence to justify censoring Plaintiffs' religious speech activity.

II. Whether Defendants further violated Plaintiffs' rights by threatening to arrest them for disorderly conduct and thereby criminalizing Plaintiffs' free speech activity because others were provoked and sought to take violent action against Plaintiffs on account of their message.

III. Whether the municipality is liable for the violation of Plaintiffs' constitutional rights, particularly when the violation involves the enforcement of a criminal law that deters the exercise of those rights.

STATEMENT OF THE CASE

On September 25, 2012, Plaintiffs filed this action, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1: Compl., Pg ID 1-21).

On January 25, 2013, Defendants filed a motion for summary judgment, or in the alternative, motion to dismiss. (R-13: Defs.' Mot., Pg ID 61-92). Defendants improperly moved to dismiss Plaintiffs' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.[1] (*See* R-13: Defs.' Mot. at 9-11, Pg ID 74-76 [claiming that the court should dismiss Plaintiffs' Complaint pursuant to

[1] As Plaintiffs noted in their opposition, "[A] Rule 12(b)(6) motion 'must be made before pleading if a responsive pleading is allowed.' Fed. R. Civ. P. 12(b). Here, Defendants filed an answer, thereby closing the pleadings. (Answer [Doc. No. 8])." (R-20: Pls.' Resp. to Defs.' Mot. & Cross-Mot. for Summ. J. at 1, Pg ID 143).

"Rule 12(b)(6)" for failing "to meet the minimum pleading requirements"]). Alternatively, Defendants moved for summary judgment, arguing that the individual defendants were entitled to qualified immunity; that the municipality is not liable for any of the claims under *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978); and that, nevertheless, Defendants' restriction on Plaintiffs' speech was content-neutral and thus permissible. (R-13: Defs.' Mot. at 11-25, Pg ID 76-90). In support of their motion, Defendants submitted numerous unauthenticated documents, to which Plaintiffs objected.[2]

Plaintiffs responded to Defendants' motion on February 14, 2013, and further cross-moved for summary judgment because there was no material dispute that Defendants threatened to *cite* and *arrest* Plaintiffs for *disorderly conduct* if they did not halt their free speech activity and leave the festival area because the predominantly Muslim crowd *was reacting negatively toward Plaintiffs' message*.

[2] Plaintiffs raised the following evidentiary objections in their opposition:

> Aside from Defendant Richardson's affidavit (Defs.' Br., Ex. F [Doc. No. 13-6]), Defendants failed to authenticate the documents submitted in their motion. *See Ragsdale v. Holder*, 668 F. Supp. 2d 7, 16 (D.D.C. 2009) ("[T]o be considered for or against summary judgment, a document must be authenticated, either by an affidavit that meets the requirements of Rule 56(e) [of the] Federal Rules of Civil Procedure, or in accord with the Federal Rules of Evidence. Indeed, for the Court to accept anything less would defeat the central purpose of the summary judgment device, which is to weed out those cases insufficiently meritorious to warrant the expense of a jury trial.") (internal punctuation and citations omitted). Consequently, Plaintiffs object to Defendants' Exhibits A, B, C, D, G, and J. However, Plaintiffs do not object to Defendants' Exhibits E, H, or I on these grounds.

(R-20: Pls.' Resp. to Defs.' Mot. & Cross-Mot. for Summ. J. at 4 n.3, Pg ID 146).

(R-20: Pls.' Resp. to Defs.' Mot. & Cross-Mot. for Summ. J. at 4, Pg ID 146). Plaintiffs submitted video evidence in support of their opposition and cross-motion.[3] (R-20-2: Israel Decl. at ¶¶ 18-34, Ex. B [Video, Chapters 1-6], Pg ID 177-80, App.). This indisputable video evidence confirms that the order to cite and arrest Plaintiffs for disorderly conduct "was issued based on the crowd's response to the content of Plaintiffs' speech." (*See* R-20: Pls.' Resp. to Defs.' Mot. & Cross-Mot. for Summ. J. at 4, Pg ID 146; R-20-2: Israel Decl. at ¶¶ 18-29, Ex. B [Video, Chapters 1-4], Pg ID 177-79, App.).

On February 19, 2013, Plaintiffs filed a motion for preliminary injunction, seeking to protect during the pendency of this litigation their right to engage in their free speech activity during the 2013 Arab Festival, which was scheduled for this past June.[4] (R-22: Pls.' Mot. for Prelim. Inj., Pg ID 208-31). Defendants responded on

[3] Pursuant to 6 Cir. I.O.P. 10, Plaintiffs provided copies of the relevant videos to the clerk of this court. (*See* Appellants' App.).

[4] The 2013 Arab Festival was eventually cancelled. And while this fact is not part of the record because the decision to cancel the festival was made after the parties submitted their evidence below, this court could take judicial notice of this fact. *See In re Matter of American Biomaterials Corp.*, 954 F.2d 919, 922 (3rd Cir. 1992) ("The normal rule that [an appellate court] considers only the factual record before the district court is subject to the right of an appellate court in a proper case to take judicial notice of new developments not considered by the lower court.") (internal quotations and citations omitted); *Gustafson v. Cornelius Co.*, 724 F.2d 75, 79 (8th Cir. 1983) ("An appellate court may take judicial notice of a fact for the first time on appeal."); *see also* 16A Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3956.4 (1999) (noting that a court of appeals may supplement the record to add material not presented to the district court by resort to judicial notice); Fed. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding.").

March 12, 2013. (R-29: Defs.' Resp. to Pls.' Mot. for Prelim. Inj., Pg ID 257-76).

The parties timely filed their respective replies in support of their motions. (R-25: Defs.' Reply in Supp. of Mot., Pg ID 235-41; R-30: Pls.' Reply in Supp. of Mot. for Prelim. Inj., Pg ID 277-90).

On May 14, 2013, the court entered an opinion and order granting Defendants' motion for summary judgment, denying Plaintiffs' cross-motion for summary judgment, and further denying Plaintiffs' motion for preliminary injunction as moot. (R-34: Op. & Order, Pg ID 295-330). The district court held that "the actual demonstration of violence" in response to Plaintiffs' message "provided the requisite justification" for Defendants to restrict Plaintiffs' speech activity by threatening to arrest and cite them for disorderly conduct. (R-34: Op. & Order at 21, Pg ID 315).

Judgment was entered in favor of Defendants, resolving all parties' claims. (R-35: J., Pg ID 331-32). This appeal follows. (R-36: Notice of Appeal, Pg ID 333-35).

STATEMENT OF FACTS

A. Plaintiffs' Religious Speech Activity.

Plaintiff Bible Believers is an unincorporated association of individuals who share and express their Christian faith with others, including Muslims, through religious speech activities, including street preaching and displaying signs, banners, and t-shirts with various messages. Bible Believers has over 60 chapters nationwide,

and Plaintiffs Israel,[5] Fisher, and DeLosSantos are members of the organization. (R: 20-2: Israel Decl. at ¶ 3, Pg ID 174).

Plaintiff Israel is a travelling Christian evangelist who, *based upon his sincerely held religious beliefs*, shares and expresses his Christian faith with others, including Muslims, through free speech activities, which include street preaching and displaying signs, banners, and t-shirts with Christian messages and Scripture quotes. Plaintiff Israel was the leader and spokesperson for a group of Christian evangelists that attended the Arab Festival held in the City of Dearborn, Michigan in June 2011 and again in June 2012. Plaintiff Israel engaged in his religious speech activity at each Arab Festival as a member of Bible Believers. (R: 20-2: Israel Decl. at ¶¶ 1-4, Pg ID 173-74).

B. Public Forum for Plaintiffs' Speech.

For the past seventeen years, the Arab Festival was held on the public streets in Dearborn. The 17th Annual Arab Festival was held from Friday, June 15, 2012, to Sunday, June 17, 2012. (R-8: Answer at ¶ 17 [admitting facts], Pg ID 39). At various points throughout the festival, barriers are erected to separate the public sidewalks from the activities of the event, which is a street festival held mostly on Warren Avenue. (R-20-2: Israel Decl. at ¶¶ 6-7, Pg ID 174-75).

[5] Plaintiff Israel's legal name is Ruben Chavez. However, he is known to the public as Ruben Israel and will be referred to in this brief as Plaintiff Israel.

The public sidewalks along Warren Avenue retain their character as a public forum during the Arab Festival. (R-34: Op. & Order at 13 [identifying "the forum in this case as a traditional public forum"], Pg ID 307).

C. Plaintiffs' Free Speech Activity at the 2011 Arab Festival.

On or about June 17, 2011, Plaintiff Israel and several other members of Bible Believers, including Plaintiffs Fisher and DeLosSantos, attended the Arab Festival. When they arrived with their Christian signs, banners, and t-shirts, Wayne County deputies directed them to a "free speech zone," which was a confined area surrounded by barricades. (R-20-2: Israel Decl. at ¶ 9, Pg ID 175).

Plaintiff Israel and his fellow Christians returned to the Arab Festival on Sunday, June 19, 2011, and Wayne County deputies told Plaintiff Israel that they were not going to provide the barricaded "free speech zone." As a result, the Christians walked along the public sidewalks, expressing their Christian message. (R-20-2: Israel Decl. at ¶ 10, Pg ID 175).

While Plaintiffs were expressing their message, a confrontation ensued with irate Muslims who objected to the message. Wayne County deputies moved in after the confrontation died down and seized one of the Christians. The deputies apprehended the Christian, and Defendant Jaafar paraded him past the angry Muslims while they cheered. (R-20-2: Israel Decl. at ¶ 11, Pg ID 175).

D. Defendant Wayne County Agrees to Be "Lead Law Enforcement Agency" at the Arab Festival.

Defendant Wayne County is a charter county existing under the laws of the State of Michigan, Defendant Benny N. Napoleon is the Wayne County Sheriff, and Defendants Dennis Richardson and Mike Jaafar are Deputy Chiefs with the Wayne County Sheriff's Office. (R-8: Answer at ¶¶ 10-13 [admitting facts], Pg ID 38). During the Arab Festival, Defendants Richardson and Jaafar were "serving in the Executive Command Unit." (R-34: Op. & Order at 4, Pg ID 298).

On or about June 2, 2011, the City of Dearborn entered into an agreement with the Wayne County Sheriff's Office, which was acting on behalf of Defendant Wayne County, in which "[t]he Wayne County Sheriff's Department [agreed to] be the lead law enforcement agency within the perimeter of the [Arab] Festival" (hereinafter "Agreement"). The Agreement was signed on behalf of Defendant Napoleon. (R-1: Compl. at ¶ 28, Pg ID 8; R-8: Answer at ¶ 28 [admitting facts], Pg ID 40). The American Arab Chamber of Commerce, which is responsible for organizing the Arab Festival, was also a party to the Agreement. (R-20-3: Muise Decl. at ¶ 3, Ex. A [Agreement], Pg ID 188-200). Per the Agreement, the Arab Festival was conducted pursuant to, *inter alia*, the "rules and regulations" of the [American Arab Chamber of Commerce] *and* the Wayne County Sheriff's Department." (R-20-3: Muise Decl. at ¶ 3, Ex. A [Agreement] [emphasis added], Pg ID 191). As the lead law enforcement agency for the Arab Festival, the stated mission of the Wayne County Sheriff's Office

was "to provide Wayne County citizens, festival patrons, organizers, [and] merchants with law enforcement presence and to ensure the safety of the public, and keep the peace in the event there is a disturbance." (R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival], Pg ID 100).

By virtue of this Agreement and its authority to enforce the criminal law through its sheriff's office, Defendant Wayne County was responsible for law enforcement at the Arab Festival. This authority included citing and arresting individuals for causing a "disturbance," (*see, e.g.*, R-13-9: Defs.' Ex. I [Post-Operation Report], Pg ID 114-16), including a "disturbance" caused by expressing an unpopular message, as demonstrated below.

E. Pre-Festival Notice of Plaintiffs' Speech Activity and the Foreseeable, Hostile Response to Plaintiffs' Message.

Plaintiffs planned on returning to the City of Dearborn in June 2012, for the purpose of engaging in their religious speech activity. Prior to doing so, however, Plaintiff Israel, through counsel, sent a letter on or about May 9, 2012 to Defendant Napoleon and Robert A. Ficano, the Wayne County Executive, informing them that he would be attending the Arab Festival once again "to peacefully share his Christian beliefs with others, including Muslims, who attend the festival." The letter further informed Defendants that "[i]n the past, Israel and a few friends have attempted to engage in peaceful expression at this festival. But upon sharing their Christian beliefs, certain Muslims began physically assaulting Israel and his friends. When Israel and

his friends asked for help from police officers with the Wayne County Sheriff's Department, the officers took the side of the violent Muslims and ordered Israel and his friends to stop their expression." (R-20-2: Israel Decl. at ¶¶ 12-13, Ex. A [Letter to Wayne County], Pg ID 175-76, 182-84).

The County acknowledged receipt of Plaintiffs' letter and, through its "Corporation Counsel," responded on or about June 14, 2012.[6] (R-13-8: Defs.' Ex. H [County's Response], Pg ID 112-13). In its official response, the County set forth its policy that applied to Plaintiffs' expressive conduct, stating, *inter alia*, that "individuals can be held criminally accountable for conduct which has the tendency to incite riotous behavior or otherwise disturb the peace" and that the County "cannot protect everyone from the *foreseeable consequences* that come from speech *that is designed and perhaps intended to elicit a potentially negative reaction*." (R-13-8: Defs.' Ex. H [County's Response] [emphasis added], Pg ID 113). The Corporation Counsel also stated the policy of the County with regard to how it would respond to a situation in which a crowd reacts negatively toward a speaker, claiming that law enforcement may "discharge their duty of preserving the peace by intercepting [the speaker's] message or by removing the speaker. . . ." (R-13-8: Defs.' Ex. H [County's Response], Pg ID 113).

[6] Ms. Darnella Williams, "Counsel to Sheriff Benny N. Napoleon," was copied on the letter. (R-13-8: Defs.' Ex. H [County's Response], Pg ID 113).

In addition to the Corporation Counsel's statements, in the "Operations Plan" for the 2012 Arab Festival, which was dated June 7, 2012 and sent from Defendant Jaafar to Defendant Napoleon "(through channels)," Defendants pejoratively referred to Plaintiff Bible Believers as "a radical group" that will "show up at the festival trying to provoke our staff in a negative manner and attempt to capture the negativity on video camera." (R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival], Pg ID 100).

In short, Defendants were on notice that Plaintiffs' speech activity would foreseeably cause the crowd at the Arab Festival to react negatively toward Plaintiffs' message *based on its content*—content that is fully protected under the First Amendment. Additionally, it is the "policy" of the County, which, as set forth above, agreed to be the lead law enforcement agency for the Arab Festival, that if a "radical group" of protestors is engaging in speech that is causing a crowd to react negatively, the peaceful protestors may be held criminally accountable for the "disturbance" even if the speech in question is fully protected by the First Amendment—which is precisely what happened in this case.

F. Plaintiffs' Free Speech Activity at the 2012 Arab Festival.

On or about June 15, 2012, Plaintiffs and their Christian companions went to the Warren Avenue area where the Arab Festival was taking place and wore t-shirts and carried signs and banners expressing their Christian message. Plaintiffs

peacefully engaged in their expressive activity along the public sidewalks and other public areas where pedestrian traffic was permitted. (R-20-2: Israel Decl. at ¶¶ 14-17, Pg ID 176-77).

During Plaintiffs' expressive activity, Plaintiff Israel wore a t-shirt with the message, "Fear God" on the front and "Trust Jesus, Repent and Believe in Jesus" on the back. Plaintiff Fisher wore a t-shirt with the message, "Trust Jesus" on the front and "Fear God and Give Him Glory" on the back, and he carried a banner that said on one side, "Only Jesus Christ Can Save You From Sin and Hell," and on the other side it said, "Jesus Is the Judge, Therefore, Repent, Be Converted That Your Sins May Be Blotted Out." Plaintiff Fisher also carried a small, hand-held camera to record the event. Plaintiff DeLosSantos accompanied Plaintiffs and joined in their free speech activity. (R-20-2: Israel Decl. at ¶ 16, Pg ID 176-77).

Other messages conveyed on t-shirts, signs, or banners that accompanied Plaintiffs included, among others, "Prepare to Meet Thy God – Amos 4:12," "Obey God, Repent," "Turn or Burn," "Jesus Is the Way, the Truth and the Life. All Others Are Thieves and Robbers," and "Islam Is A Religion of Blood and Murder." (R-20-2: Israel Decl. at ¶ 17, Pg ID 177).

While Plaintiffs and their companions were walking along the public sidewalks and expressing their message, they were assaulted by a group of Muslims, which

consisted mostly of teenagers.[7] Adult bystanders were encouraging the Muslim youths, who were throwing water bottles, rocks, and other debris at the Christians. The Muslims were also shouting and blowing horns to harass the Christians. Some of the Muslims spat at the Christians. The Muslims also shouted profanities at the Christians and mocked the Christians' faith. The Christians responded by simply holding up their hands to avoid being falsely accused of acting aggressively toward their Muslim attackers. (R-20-2: Israel Decl. at ¶¶ 18-20, Ex. B [Video at Chapter 1], Pg ID 177, App.).

When Wayne County deputies appeared at the scene of the Muslim counter-protest, the Muslims would halt their attack, only to resume it once the deputies departed. (R-20-2: Israel Decl. at ¶ 21, Ex. B [Video at Chapter 2], Pg ID 177-78, App.). The Muslims did not attack the Wayne County deputies; they only attacked the

[7] It was evident to Plaintiffs (and, indeed, to any reasonable observer) that the violent counter-protestors were Muslim by what they were saying and how they were reacting to Plaintiffs' messages. (*See* R-20-2: Israel Decl. at ¶ 19, Ex. B [Video at Chapter 1 & 3], Pg ID 177, App.; R-28: Defs.' Ex. B [Video], App.). Additionally, by way of a footnote, the district court stated that there is "no evidence to support Plaintiffs' assertion that Defendants were enforcing Sharia law." (R-34: Op. & Order at 26 n.12, Pg ID 320). However, under Sharia (*i.e.*, Islamic law), the penalty for blasphemy (*i.e.*, Plaintiffs' message) is death. Consequently, the violent response to Plaintiffs' message is consistent with Sharia, and Defendants' actions accomplished what the Muslim hecklers set out to do—punish and silence Plaintiffs' "blasphemy." *See also Saieg v. City of Dearborn*, 641 F.3d 727, 732 (6th Cir. 2011) (observing in a case involving the same Arab Festival that "Saieg also faces a more basic problem with booth-based evangelism: '[t]he penalty of leaving Islam according to Islamic books is death,' which makes Muslims reluctant to approach a booth that is publicly 'labeled as . . . Christian'").

Christians. (R-20-2: Israel Decl., Ex. B [Video at Chapters 1 & 2], App.; R-28: Defs.' Ex. B [Video], App.).

Indeed, when Defendants Jaafar and Richardson confronted Plaintiff Israel prior to ordering Plaintiffs to leave under penalty of arrest (see below), Defendants were able to keep the peace between Plaintiffs and the protestors. (*See* R-20-2: Pls.' Ex. B [Video at Chapters 3, 4, & 5], App.; *see also* R-28: Defs.' Ex. B [Video], App.).

G. Defendants' Unconstitutional Restriction on Plaintiffs' Speech.

Shortly upon Plaintiffs' arrival at the Arab Festival and continuing for approximately the first hour while they were expressing their message, Defendant Jaafar was repeatedly telling Defendant Richardson that Plaintiffs had to be removed and that he (Defendant Richardson) needed to do something about it. (R-20-2: Israel Decl. at ¶ 22, Pg ID 178).

Approximately 30 minutes later, Defendant Jaafar confronted Plaintiff Israel, and in an angry manner told him that the deputies were not going to protect him or his fellow Christians. Defendant Jaafar told Plaintiff Israel that he and his fellow Christians had "the option to leave." Plaintiff Israel responded to Defendant Jaafar, telling him that Defendants had the option "to stand with us." Defendant Jaafar did not respond. Instead, he abruptly departed.[8] (R-20-2: Israel Decl. at ¶¶ 23-24, Ex. B [Video at Chapter 3], Pg ID 178, App.).

[8] Defendant Jaafar, a Muslim, was featured in the now-cancelled show, "*All American*

Moments after Defendant Jaafar departed, Defendant Richardson took over and escorted Plaintiff Israel to the side to discuss the matter. With blood dripping from his forehead as a result of the Muslim attacks, Plaintiff Israel pleaded with Defendant Richardson to assign just two Wayne County deputies to stand with the Christians during their speech activity, noting that when uniform officers are present, the Muslims stop their criminal assault. Defendant Richardson refused. (R-20-2: Israel Decl. at ¶¶ 25-26, Ex. B [Video at Chapter 4], Pg ID 178, App.).

While speaking with Plaintiff Israel, Defendant Richardson criticized Plaintiffs for their speech, motioning toward the Christians and stating, "Look at your people here. Look it, look it. This is crazy." (R-20-2: Israel Decl. at ¶ 27, Ex. B [Video at Chapter 4], Pg ID 179, App.).

At one point, Deputy Chief Richardson stepped away from the conversation and was seen consulting with Ursula Henry, Director of Legal Affairs for the Wayne County Sheriff's Office. (R-20-2: Israel Decl. at ¶ 28, Ex. B [Video at Chapter 4], Pg ID 179, App.). After consulting with Ms. Henry, Defendant Richardson returned and gave Plaintiffs an ultimatum: *Plaintiffs could either leave the Arab Festival or they would be criminally cited and arrested for disorderly conduct*. Defendant Richardson

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Muslim," which appeared on The Learning Channel (TLC). (R-8: Answer at ¶ 53 [admitting facts], Pg ID 43). In a 2012 televised segment of "*All American Muslim*," Defendants Jaafar and Richardson were on camera discussing the 2011 Arab Festival. During this conversation, Defendants Jaafar and Richardson discussed Plaintiffs' signs and banners, describing Plaintiffs' message as "offensive." (R-20-2: Israel Decl. at ¶ 35, Pg ID 180).

stated, "If you don't leave we are going to cite you for disorderly." This conversation was captured on video. (R-20-2: Israel Decl. at ¶¶ 27-29, Ex. B [Video at Chapter 4], Pg ID 179, App.).

To avoid being cited and arrested by Defendants, Plaintiffs ceased their free speech activity and departed the area. (R-20-2: Israel Decl. at ¶ 30, Ex. B [Video at Chapter 4], Pg ID 179, 185).

While Defendants claim that they could not spare just two deputies to *protect* Plaintiffs' peaceful speech activity, more than a dozen deputies arrived at the scene to ensure that Plaintiffs *ceased* their activity and *departed* the area under threat of arrest. (R-20-2: Israel Decl. at ¶ 31, Ex. B [Video at Chapter 5], Pg ID 179, App.).

Defendants' actions drew cheers from Muslim onlookers who were involved in the attacks. However, at no time did Wayne County deputies publicly arrest the Muslim attackers and take them away in handcuffs—an action that would have quieted the crowd and permitted Plaintiffs to continue their free speech activity without interference. (R-20-2: Israel Decl. at ¶ 32, Pg ID 179-80; *see also* R-28: Defs.' Ex. A [Video], App.).

According to Defendants "Post-Operation Report," Defendants issued only one citation for disturbing the peace, gave only three verbal warnings, and briefly detained two other individuals. (R-13-9: Defs.' Ex. I [Post-Operation Report], Pg ID 115-16). Yet, 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. (R-13: Defs.' Mot. at 3 [noting that this force was "larger than the Sheriff's Department contribution to the Word Series or the President of the United States when he visits Michigan"], Pg ID 68).[9] Moreover, according to Defendants' report, only two of these individuals—the one who received the citation and one who was temporarily detained—were associated with Plaintiffs (*i.e.*, the report identifies them as related to "(Bible Believers)"). (R-13-9: Defs.' Ex. I [Post-Operation Report], Pg ID 116). This is further corroborated by the video evidence in that none of the counter-protestors were arrested and taken away in handcuffs for engaging in their criminal activity directed toward Plaintiffs. (R-28: Defs.' Ex. A [Video], App.). Indeed, it is evident (and certainly a reasonable inference to be drawn and construed in Plaintiffs' favor) that

[9] By way of a footnote, the district court dismisses by misconstruing counsel for Plaintiffs' argument at the May 7, 2013 motion hearing regarding the size of the force available to Defendants at the Arab Festival. (R-34: Op. & Order at 22 n. 11, Pg ID 316). The obvious point counsel was making was that there is little doubt that had this crowd of teenage miscreants been engaging in similar conduct directed toward President Obama, this sizeable force from the Wayne County Sheriff's Office—*without* the assistance of the Secret Service or anyone else—would have been more than sufficient to stop the disruptive conduct. Indeed, the irrefutable video evidence shows clearly that when the officers were present in force, and in particular when the mounted officers were present, there was no violence. (R-20-2: Pls.' Ex. B [Video at Chapter 2], App.; *see generally* R-28: Defs.' Ex. A [Video], App.). In short, Defendants had no interest in actually protecting Plaintiffs' speech activity, as is further evidenced by their numerous statements demonstrating their disdain for Plaintiffs and their message. (*See, e.g.*, R-20-2: Israel Decl. at ¶¶ 27, 35, Ex. B [Video at Chapter 4], Pg ID 179-80, App.; R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival], Pg ID 100).

Defendants, particularly Defendant Jafaar, did not want to upset the local Muslim community by arresting the lawless hecklers.

Shortly after departing the Arab Festival in their van, more than a dozen law enforcement officers were available to pull over Plaintiffs, conduct a traffic stop, and issue the driver a traffic citation—the citation was issued by a Wayne County deputy. The citation was issued because Plaintiffs had removed the license plate from their van for security reasons—they did not want their vehicle to be identified by any of the hostile counter-protestors as they were leaving the Arab Festival area. (R-20-2: Israel Decl. at ¶ 34, Ex. B [Video at Chapter 6], Pg ID 180, App.).

Plaintiffs want to return to the City of Dearborn during the annual Arab Festival to engage in their free speech activity. However, they fear that if they do, they will again be attacked by Muslim hecklers and forced to halt their speech activity under the threat of arrest for disorderly conduct. (R-20-2: Israel Decl. at ¶ 36, Pg ID 180).

SUMMARY OF THE ARGUMENT

Plaintiffs' peaceful, religious speech activity is fully protected by the Free Speech and Free Exercise Clauses of the First Amendment. While engaging in their constitutionally protected activity at the Dearborn Arab Festival in 2012, an angry mob of Muslim hecklers engaged in criminal conduct directed toward Plaintiffs in an effort to silence Plaintiffs' message because the hecklers objected to its content. However, rather than protecting Plaintiffs' constitutional rights, Defendants sided with

the Muslim hecklers and ordered Plaintiffs to cease their First Amendment activity under pain of arrest for disorderly conduct.

It was clearly established in June 2012 that a listeners' reaction to speech is not a content-neutral basis for regulation. The First Amendment knows no hecklers' veto. Moreover, the U.S. Supreme Court has clearly stated that speech best serves its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Therefore, such speech cannot be criminally punished, which Defendants threatened to do here in violation of the First Amendment. Additionally, government officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights. Rather, government officials have a duty to protect the speaker and punish those engaged in criminal conduct designed to silence the speaker's message. Thus, by ratifying and effectuating the hecklers' veto in this case, Defendants effectively joined a mob intent on suppressing ideas in violation of the First Amendment.

Furthermore, by denying Plaintiffs access to a public forum to engage in their religious speech activities, which Defendants disfavored by their words and actions, while permitting the Muslim hecklers to use this forum to engage in a counter-protest, which had the purpose and, as a result of Defendants' actions, effect of silencing

Plaintiffs' message, Defendants also violated the equal protection guarantee of the Fourteenth Amendment.

Finally, the evidence shows that the unconstitutional actions at issue in this case were not simply the discretionary acts of a couple of rogue law enforcement officers. Rather, this was a concerted action that was planned by and executed on behalf of Defendant Wayne County. In short, municipal "policy" was the "moving force" behind the unconstitutional acts at issue—acts which were officially sanctioned by Defendant Wayne County and its chief law enforcement officer, Defendant Napoleon, who, in his official capacity, is also the government official responsible for enforcing the criminal law within Wayne County, including the law prohibiting disorderly conduct that was used to suppress Plaintiffs' speech in this case.

ARGUMENT

I. STANDARD OF REVIEW.

This court reviews the district court's grant of summary judgment *de novo*. *Watkins v. City of Battle Creek*, 273 F.3d 682, 685 (6th Cir. 2001). It may affirm only if the record, *read in the light most favorable to Plaintiffs*, reveals no genuine issues of material fact and shows that Defendants were entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Upon its review of the record, this court must consider the evidence and draw all reasonable inferences in Plaintiffs' favor. *Siggers-El v. Barlow*, 412 F.3d 693, 699 (6th Cir. 2005).

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

II. Plaintiffs Were Engaging in Constitutionally Protected Activity at the Arab Festival when Defendants Threatened to Arrest Them for Disorderly Conduct Based upon the Crowd's Reaction to Their Speech in Violation of the First and Fourteenth Amendments.

A. Plaintiffs' Speech Activity Is Protected by the Free Speech and Free Exercise Clauses of the First Amendment.

It cannot be gainsaid that Plaintiffs were engaging in constitutionally protected speech activity at the Arab Festival when Defendants threatened to arrest them for disorderly conduct based upon the crowd's reaction to the content of Plaintiffs' message. (*See* R-34: Op. & Order at 12 [concluding that Plaintiffs' activities "are protected by the First Amendment"], Pg ID 306). And Plaintiffs' speech activity is protected by *both* the Free Speech Clause *and* the Free Exercise Clause of the First Amendment. Consequently, as demonstrated further below, Defendants' restriction on Plaintiffs' religious speech activity violated *both* guarantees of the First

Amendment, contrary to the district court's erroneous conclusion.

1. Free Speech Clause.

Conveying a religious message with signs, as Plaintiffs were doing here, is protected speech under the Free Speech Clause of the First Amendment.[10] *See Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."); *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (demonstrating with signs constitutes protected speech under the First Amendment); *see also Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[Religious expression] is as fully protected under the Free Speech Clause as secular private expression."). There is no dispute on this issue. (*See* R-34: Op. & Order at 12 n.7 [noting Defendants' agreement], Pg ID 306).

2. Free Exercise Clause.

Additionally, Plaintiffs' religious speech activity is further protected by the Free Exercise Clause of the First Amendment. *See, e.g.*, *Murdock v. Pa.*, 319 U.S. 105, 110 (1943) (holding that "spreading one's religious beliefs" and "preaching the Gospel" are constitutionally protected by the Free Exercise Clause); *Bd. of Educ. v.*

[10] Plaintiffs' right to videotape at the Arab Festival is also fully protected by the First Amendment. *See Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) ("[T]he videotaping of public officials is an exercise of First Amendment liberties."). (*See* R-13-5: Ex. E [Wayne County Sheriff's Office Operations Plan for the Arab Festival] [complaining that Plaintiff Bible Believers is one of the "groups" that will "show up at the festival trying to provoke (Wayne County Sheriff's Office) staff in a negative manner and attempt to capture the negativity on video camera"], Pg ID 100).

Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J.) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). The right to free exercise of religion embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). Under the First Amendment, the government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id*. at 626. Indeed, "[t]he principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993); *see also id*. at 534 (holding that the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs") (quotations and citations omitted). And "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id*.

Here, the district court erroneously asserted that "Plaintiffs have failed to provide any details regarding their free exercise claim." (R-34: Op. & Order at 27 [erroneously concluding that "[g]iven the absence of legal argument coupled with the dearth of factual support, Defendants are entitled to summary judgment on Plaintiffs'

free exercise claim as a matter of law"], Pg ID 321). As demonstrated in this brief (and as argued and demonstrated in the court below, *see* R-20: Pls.' Resp. to Defs.' Mot. & Cross-Mot. for Summ. J. at 13-15 [arguing that Plaintiffs' activity is protected by the Free Speech and Free Exercise Clauses of the First Amendment], Pg ID 155-57), there is no question that, as a matter of well-established law, the Free Exercise Clause protects Plaintiffs' religious proselytizing—activity for which there is abundant factual support in the record—from government interference. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 523 (stating that the "principle" that the government may not "suppress religious belief or practice is . . . well understood"). Indeed, in his sworn declaration, Plaintiff Israel testified as follows:

> I am a travelling Christian evangelist. Based upon my sincerely held religious beliefs, I am required to preach the Gospel of Jesus Christ, to try and convert non-believers, and to call sinners to repent. Pursuant to my beliefs, I share and express my Christian faith with others, including Muslims, through various activities, including street preaching and displaying signs, banners, and t-shirts with Christian messages and Scripture quotes.

(R-20-2: Israel Decl. at ¶ 2; *see also* Ex. B [Video of Plaintiffs' "street preaching"], Pg ID 174, App.; R-28: Defs.' Ex. A [Video of Plaintiffs "preaching"], App.). This activity—the very activity at issue here—is protected from government interference by the Free Speech *and* Free Exercise Clauses. Thus, by threatening to arrest Plaintiffs for engaging in their religious activity (and thus *criminalizing* this activity), Defendants violated Plaintiffs' right to the free exercise of religion, in addition to

violating Plaintiffs' right to freedom of speech. This principle is "well understood."

Indeed, in *Murdock v. Pa.*, 319 U.S. 105 (1943), the Court reversed the convictions of several Jehovah's witnesses who violated a city ordinance that required all solicitors to have a license. The Court framed the issue as whether the ordinance which required religious proselytizers (like every other solicitor) to pay a license tax to pursue their activities was constitutional. The fact that the ordinance was "nondiscriminatory" did not matter. *Id*. at 115. As the Court noted, "Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Id*. Consequently, by imposing a burden (*i.e.* a tax) upon the free exercise of religion, the government violated the First Amendment. Thus, the Court reversed the convictions and protected the petitioners' freedom of religion, noting that it was "restor[ing] to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith . . . ." *Id*. at 117.

Similarly here, by threatening to arrest Plaintiffs for disorderly conduct and thus suppressing Plaintiffs' religious practice of street evangelizing, Defendants violated Plaintiffs' right to religious exercise protected by the First Amendment.

3. Traditional Public Forum.

Plaintiffs' constitutional right to engage in religious expression free from government interference is at its zenith when Plaintiffs exercise that right in a

traditional public forum, as in this case. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). Indeed, Plaintiffs do not surrender their constitutional rights because an Arab festival is taking place on the public streets. *See Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011) (striking down on First Amendment grounds a literature distribution policy enforced by Dearborn police at the Arab Festival); *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005) (holding that the city's "streets remained a traditional public forum" in a case striking down a restriction on the plaintiff's right to distribute religious literature on the city's streets, "notwithstanding the special permit that was issued to the Arts Council" to use the streets for the Columbus Arts Festival, which was open to the public); *see also Frisby v. Schultz*, 487 U.S. 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 wherever 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 quotations and citation omitted); *Schneider v. N.J.*, 308 U.S. 147, 163 (1939) ("[T]the 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.").

Thus, in a public forum, such as a city street or sidewalk, the government's ability to restrict speech and religious practice is *sharply* limited. *See Cornelius*, 473 U.S. at 802 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (striking down the challenged city ordinance and stating, "Constitutional concerns are heightened further where, as here, the [ordinance] restricts the public's use of streets and sidewalks for political speech"); *see also Perry Educ. Ass'n v Perry Local Educators*, 460 U.S. 37, 55 (1983) ("[I]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. . . .").

Defendants' restriction on Plaintiffs' speech activity does not meet this exceedingly high threshold. Simply claiming that there is a public safety issue is not enough. Defendants were required to take affirmative steps to *protect* Plaintiffs' speech *commensurate* with the constitutional requirement that Plaintiffs' speech not be restricted but for *compelling* reasons and that any actions taken to restrict that speech be the *least restrictive means available*. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) ("When plaintiffs challenge a content-based speech restriction, *the burden is on the Government to prove that the proposed alternatives will not be as*

effective as the challenged [restriction].") (emphasis added); *see also id*. ("[T]o ensure that speech is restricted *no further than necessary* . . . the court should ask whether the challenged [restriction] is the *least restrictive means* among available, effective alternatives.") (emphasis added).

Additionally, leaving aside Defendants' constitutional duty to *protect* Plaintiffs' speech activity, Defendants had no justification for *criminalizing* Plaintiffs' peaceful speech activity by threatening to arrest them for disorderly conduct based on the crowd's response to Plaintiffs' message.

In short, the district court's decision below does violence to the First Amendment and must be reversed.

B. Defendants' Restriction on Plaintiffs' Speech Was Content Based in Violation of the First Amendment.

While the government may impose *content-neutral* time, place, and manner restrictions on speech in a public form, *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989); *see also Saieg*, 641 F.3d at 735, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). "The First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V. v .City of St. Paul*, 505 U.S. 377, 391 (1992). And the Supreme Court has held time and again that the mere fact that someone might take offense at the content of the speech or the

viewpoint of the speaker does not provide a basis for prohibiting the speech. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.") (citations and quotations omitted); *Tx. v. Johnson*, 491 U.S. 397, 414 (1989) (same); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); *Street v. N.Y.*, 394 U.S. 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 v. S.C.*, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.").

Furthermore, it is a clearly established principle of First Amendment jurisprudence that *a listener's reaction to speech is not a content-neutral basis for regulation*. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).[11] "The

[11] The district court dismisses Plaintiffs' reference to *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992), as "disingenuous." (R-34: Op. & Order at 17, Pg ID 311). However, *Forsyth* clearly stands for the principle—as the Court stated quite

First Amendment knows no heckler's veto." *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001); *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780 790 (9th Cir. 2008) (noting that there is no "minors" exception to the heckler's veto). And while restrictions on speech because of the "secondary effects" that the speech creates are sometimes permissible, an effect from speech is not secondary if it arises from the content of the speech. Consequently, "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.).

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

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clearly in its opinion—that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Id*. at 134. The Court further stated that "[s]peech cannot be financially burdened, *any more than it can be punished or banned*, simply *because it might offend a hostile mob*." *Id*. at 134-35 (emphasis added). And when restating this fundamental principle of First Amendment jurisprudence, the Court cited to, *inter alia*, *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), a case involving the unconstitutional application of a breach of the peace ordinance, as in this case. Indeed, the district court's dismissive treatment of these well-established principles of First Amendment jurisprudence is itself "disingenuous."

Here, ordering Plaintiffs to halt their constitutionally protected activity *under threat of arrest for disorderly conduct* rather than halting the actual criminal and disorderly conduct of the "moiling mob" is not a constitutionally permissible response by Defendants. Rather, the proper (and constitutional) response would have been to arrest the counter-protesters, *en masse* if necessary—particularly in light of the large number of officers (which included a mounted unit) that were available. In short, Defendants' actions empowered the hecklers and censored Plaintiffs' speech in direct violation of the First Amendment.[12]

Indeed, controlling precedent leaves no doubt that Plaintiffs' expressive activity cannot be punished as disorderly conduct as a matter of law. In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), for example, 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

[12] Issuing *one* citation, giving *three verbal warnings*, and temporarily detaining *two* individuals, as set forth in Defendants' "Post-Operation Report," hardly constitute a reasonable response in defense of the important First Amendment interests at stake. (R-13-9: Defs.' Ex. I [Post-Operation Report], Pg ID 115-16). Indeed, there is no justification for threatening to arrest Plaintiffs (and their entire group of Christian protestors) for disorderly conduct if *they* did not leave the Arab Festival. As the evidence shows, when Defendants did make their presence known to the crowd, the violence stopped and the speech continued. (R-20-2: Israel Decl. at ¶ 21, Ex. B [Video at Chapter 2], Pg ID 177-78, App.).

inhabitants in the enjoyment of peace and quiet by arousing alarm." *Id.* at 3. In finding such a position unconstitutional, the Supreme Court famously stated,

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

Id. at 4 (emphasis added); *see also NAACP v. Claiborne Hardware, Co*., 458 U.S. 886, 928 (1982) ("The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech. . . ."); *Sandul v. Larion*, 119 F.3d 1250 (6th Cir. 1997) (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); *Edwards*, 372 U.S. at 237 (reversing breach of the peace convictions and observing that the petitioners "were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection").

The district court relies heavily on the Supreme Court's 1951 decision in *Feiner v. N.Y.*, 340 U.S. 315 (1951), as the basis for upholding Defendants' restriction on Plaintiffs' speech based on the crowd's hostile reaction to Plaintiffs' message. (*See* R-

34: Op. & Order at 14-15, Pg ID 308-09). However, a close reading of *Feiner*, particularly in light of subsequent Supreme Court cases involving "incitement" speech, reveals that the district court's reliance was misplaced.

In *Feiner*, the Court upheld the disorderly conduct conviction because the petitioner attempted to arouse the blacks in the crowd against the whites, urging them to "rise up in arms and fight for equal rights." *See id*. at 305 ("[Feiner] was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights."). Indeed, the petitioner's *purpose*, according to the Court's finding, was to incite a riot. That is, the petitioner was calling for imminent lawless action. As the Court observed, "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker *passes the bounds of argument or persuasion* and *undertakes incitement to riot*, they are powerless to prevent a breach of the peace."[13] *Id*. at 321 (emphasis added).

Indeed, compare this 1951 Supreme Court decision to the Court's 1982 decision in *NAACP v. Claiborne Hardware, Co*., 458 U.S. 886 (1982), and the difference (which is undoubtedly a result of the times) is palpable. In *Clairborne Hardware*, the

[13] Moreover, unlike the present case where there is ample evidence of Defendants' hostility toward Plaintiffs' message (*see, e.g.*, nn.8-9, *supra*), in *Feiner*, the Court noted with importance that "there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions." *Feiner*, 340 U.S. at 319.

Court found that Charles Evers, a leader of a racially-motivated boycott that was the cause of violence, could not be held civilly liable for his speech under the First Amendment. The lower court (Mississippi), which held Evers liable, found, for example, as follows:

> "Evers told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him*. According to Sheriff Dan McKay, who was present during the speech, Evers told the assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people. Evers' remarks were directed to all 8,000-plus black residents of Claiborne County, and not merely the relatively few members of the Claiborne NAACP."

Id. at 900 n.28. In another speech, the Supreme Court observed, "Evers stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night." *Id*. at 901.

The Supreme Court reversed the judgment, finding that Evers' speech could not be a basis for civil liability under the First Amendment and concluding as follows:

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

Id. at 929 (emphasis added).

Here is the critical point that the district court failed to apprehend: In order for violence (or the threat of violence)[14] to be a basis for punishing speech, the lawless action must, in the first instance, be *directed by the speaker*. "Incitement" speech is a very limited category of speech that is proscribable consistent with the First Amendment under very narrow circumstances. As the Supreme Court clearly stated in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe *advocacy of the use of force or of law violation* except where such advocacy *is directed* to inciting or producing *imminent* lawless action *and is likely to incite or produce such action*." *Id*. at 447 (emphasis added). Thus, contrary to the district court's holding, the *speaker* must be advocating for "the use of force or of law violation" in order for the government to justify suppressing speech based on an "actual demonstration of violence." (*Contra* R-34: Op. & Order at 21, Pg ID 315).

Thus, contrary to the district court's ultimate conclusion, in this case Defendants were acting "as an instrument for the suppression of unpopular views," *see Feiner*, 340 U.S. at 321, in violation of the Constitution.

[14] In this case, the "violence" was from a group of delinquent "children" who were throwing "epithets," "water bottles and other debris" at Plaintiffs (while the adults mostly stood back and watched). (*See* R-34: Op. & Order at 19 ["The negative reactions are evidenced by the throngs of mostly children surrounding the Bible Believers who hurled epithets at the Bible Believers in addition to water bottles and other debris."], Pg ID 313). There was no fighting or fisticuffs of any sort.

Moreover, it is disingenuous for the district court to permit Defendants to punish Plaintiffs' speech because Defendants refused—*despite ample notice and warning*—to provide the necessary protection *in the first instance* to dissuade the "actual demonstration of violence" at issue here. The district court appears to conclude that government speech regulations "motivated by *anticipated* listener reaction to the content of the implicated communication" are content based, whereas the very same restrictions based on the *actual* reaction of the listener are not. (*See* R-34: Op. & Order at 18-21 [stating that "[w]here violence is merely anticipated in response to speech, government action interceding upon that speech is not justified," but concluding "that the actual demonstration of violence here provided the requisite justification" for the government to intercede and suppress Plaintiffs' speech], Pg ID 312-15). This conclusion is contrary to the law. *Forsyth Cnty.*, 505 U.S. at 134 (stating that a "[l]isteners' reaction [not *anticipated* reaction] to speech is not a content-neutral basis for regulation"). Indeed, such a rule of law would permit—and, indeed, condone—the very situation we have here: the government *anticipates* an adverse listener reaction and takes no legitimate action to protect the speaker, but instead waits for the *actual* adverse reaction to then justify the restriction. This turns the First Amendment on its head. And, quite appropriately, it is contrary to this circuit's precedent. In *Glasson v. Louisville*, 518 F.2d 899, 905 (6th Cir. 1975), this court stated, without equivocation:

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

Id. at 905 (emphasis added).

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

> To permit police officers . . . *to punish for incitement or breach of the peace* the peaceful communication of . . . messages because other persons *are* provoked and *seek to take violent action* against the speaker *would subvert the First Amendment*, and would incorporate into that constitutional guarantee a 'heckler's veto' which would empower an audience to cut off expression of a speaker with whom it disagreed.

Id. at 905-06 (emphasis added). Here, Defendants violated this clearly established principle of law. And by upholding and justifying Defendants' actions, the district court has effectively "incorporate[d] into [the First Amendment] a 'heckler's veto' which . . . empower[s] an audience to cut off expression of a speaker with whom it disagreed," contrary to well-established law.

Additionally, under *Glasson*'s reasoning, Defendants' actions were entirely unreasonable such that the individual Defendants are also liable for damages. *See, e.g.*, *Glasson*, 518 F.2d at 910-11 (holding that the police officers were required to

respond in damages under § 1983 for failing to protect the speaker under the circumstances). As the undisputed evidence shows, Defendants did virtually nothing to effectively protect Plaintiffs' right to freedom of speech at the Arab Festival. Had Defendants demonstrated to the public and the Muslim attackers even a modicum of willingness to truly halt or arrest members of the hostile crowd for interfering with Plaintiffs' speech activity, Plaintiffs would have been able to continue their constitutionally protected activity free from interference.

As Defendants admit, they had a significant law enforcement presence at the Arab Festival—"larger than the Sheriff's Department contribution to the Word Series or the President of the United States when he visits Michigan." (R-13: Defs.' Mot. at 3, Pg ID 68). As noted, this force consisted of thirty-four (34) deputy sheriffs and nineteen (19) reserve officers, and it included a mounted unit with six (6) horses. (R-13: Defs.' Mot. at 3, Pg ID 68). Yet, the district court accepted Defendants' claim that this robust security force could do nothing to quiet a small crowd of violent "children" intent on throwing water bottles and other debris at Plaintiffs. And worse yet, the district court ratified Defendants' patently unlawful order to Plaintiffs that if *they* didn't halt *their* peaceful, free speech activity, then Defendants would arrest *them*. Indeed, Defendants' actions (or, more accurately, inaction) and the district court's order ratifying these actions rewarded and, in effect, condoned the criminal behavior of the Muslim protestors, in violation of Plaintiffs' constitutional rights.

In short, at a minimum, the evidence plainly allows a reasonable trier-of-fact to reject Defendants' transparently self-serving rationalization of their unconstitutional conduct and to infer that Defendants sided with the Muslim hecklers intent on suppressing Plaintiffs' speech based on its content. Indeed, given the evidence, including the video record, the trier-of-fact could reasonable and easily conclude that Defendants chose to threaten Plaintiffs with an unconstitutional arrest because Defendants too found Plaintiffs to be a "radical group" with an "offensive" message.

Thus, contrary to the district court's applause for Defendants' alleged "restraint,"[15] it is quite reasonable to conclude that Defendants tepid response to the initial (and foreseeable) indications that the crowd strongly disagreed with the content of Plaintiffs' message was due to the fact that Defendants opposed Plaintiffs' message but did not yet have the pretext necessary for suppressing it.[16]

In the final analysis, there can be no reasonable dispute that by threatening to arrest Plaintiffs for disorderly conduct for engaging in constitutionally protected

[15] Remarkably, the district court found that Defendants' alleged "restraint in the face of finding the message 'offensive,' could be construed in their favor and as evidence that they waited until a tangible public safety threat emerged before intervening." (R-34: Op. & Order at 19, Pg ID 313).

[16] Contrary to the very case it relied upon to uphold Defendants' speech restriction (*i.e.*, *Feiner*), the district court incorrectly concluded "that the fact that Jaafar and Richardson found the speech 'offensive' is irrelevant to whether they unjustifiably interceded upon Plaintiffs' speech rights." (R-34: Op. & Order at 19, Pg ID 313); *compare Feiner*, 340 U.S. at 319 (noting, with importance, that "there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions").

speech based on the adverse and criminal response of counter-protestors who objected to Plaintiffs' message (and not as a result of any violence *directed by Plaintiffs*), Defendants violated Plaintiffs' clearly established constitutional rights.

C. Defendants' Speech Restriction Violated the Equal Protection Clause of the Fourteenth Amendment.

The district court also erred by failing to apply the relevant law and facts to Plaintiffs' equal protection claim. Indeed, nowhere does the district court cite to *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), which sets forth the controlling principle of law. 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. In doing so, the Court stated the following: "[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; *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities in a public forum violates the Equal Protection Clause).

As the facts demonstrate, Defendants' order to Plaintiffs that they cease their free speech activity under threat of arrest for disorderly conduct based on the adverse reaction of Muslim counter-protestors violated the Equal Protection Clause of the Fourteenth Amendment (as well as the First Amendment) by denying Plaintiffs access

to a public forum to engage in their religious speech activities, which Defendants disfavored by their words and actions, while permitting the Muslims to use this forum to engage in a counter-protest that included committing acts of violence, shouting profanities, and mocking the Christians—a counter-protest that had the purpose and, as a result of Defendants' actions, effect of silencing Plaintiffs' message.[17]

Moreover, in its free exercise analysis, the district court noted that "several other Christian groups proselytized at the Festival without incident." (R-34: Op. & Order at 26, Pg ID 320). Consequently, if a religious group wanted to proselytize at the Arab Festival and the content of the group's message did not offend the Muslim hecklers that were present, then the speech was permitted. Thus, far from justifying the district court's decision on Plaintiffs' free exercise claim, this point further demonstrates the error of the court's equal protection analysis.

[17] Despite the fact that Defendants themselves refer to the members of the crowd as "counter-protestors," the district court refused to do so. (R-34: Op. & Order at 28 n.13, Pg ID 322). This is a convenient, albeit factually incorrect, way of *attempting* to avoid the equal protection issue in this case. However, it is not possible to avoid the fact that the counter-protestors were engaging in expressive conduct. In fact, as seen on the video, the counter-protestors even made what appeared to be make-shift signs with messages in protest to what Plaintiffs were saying. (*See* R-20-2: Pls.' Ex. B [Video, Chapter 4 at 05:59 to 06:02], App.). Nonetheless, unlike the way in which Defendants treated Plaintiffs, Defendants did not direct the counter-protestors to immediately depart the festival area under threat of arrest for disorderly conduct, let alone arrest them for actually *engaging* in disorderly conduct.

III. The County Is Liable for Violating Plaintiffs' Constitutional Rights.

In *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978), the Supreme Court affirmed that municipalities are liable under 42 U.S.C. § 1983 if municipal policy or custom was the "moving force" behind the alleged unconstitutional action. And "when *execution* of a government's policy or custom, *whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy*, inflicts the injury . . . the government as an entity is responsible under § 1983." *Id*. at 694 (emphasis added).

"*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). "The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id*. at 479. Thus, acts "of the municipality" are "*acts which the municipality has officially sanctioned or ordered*." *Id*. at 480 (emphasis added). Consequently, "it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Id*. at 480. Indeed, "a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made *by the government's authorized*

decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood."[18] *Id*. at 481 (emphasis added).

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

Here, there is little doubt that the County is ultimately responsible for the order *to arrest Plaintiffs for disorderly conduct* if they did not halt their free speech activity based on the hostile crowd's reaction to their speech—an order that violated Plaintiffs' constitutional rights. This order was issued pursuant to County "policy" as evidenced by the County's agreement to provide law enforcement for the Arab Festival; its stated

[18] Municipal liability may also be based on injuries caused by a failure to adequately train or supervise employees, so long as that failure results from "deliberate indifference" to the injuries that may be caused. *City of Canton v. Harris*, 489 U.S. 378, 388-91(1989). "[W]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011). A "policy of inaction" *after having received notice* creates the constitutional violation. *Id*. As evidenced by the County's pattern of conduct in 2011 and again in 2012, the County has failed to adequately train or supervise its employees with regard to the First Amendment rights of speakers who express disfavored messages to a hostile crowd. (*See, e.g.*, "Statement of Facts" Secs. C-F, *supra*).

mission to "keep the peace" at the festival "in the event there is a disturbance," *see Saieg*, 641 F.3d at 742 (holding the city liable for enforcing the Arab Festival rule prohibiting literature distribution); its assertion in its Arab Festival "Operations Plan" that Plaintiff Bible Believers is a "radical group" that intends to engage in provocative conduct at the Arab Festival; and its Corporation Counsel's[19] warning to Plaintiffs that if their speech has "the tendency to . . . disturb the peace" then Plaintiffs will be held "criminally accountable," and further warning Plaintiffs that the County "cannot protect everyone from the foreseeable consequences that come from speech that is designed and perhaps intended to elicit a potentially negative reaction." (R-13-8: Defs.' Ex. H [County's Response], Pg ID 113).

Indeed, the County's Corporation Counsel also set forth the "policy" of the County with regard to its response to a situation in which a crowd reacts negatively toward a speaker, and this "policy" was plainly the moving force behind the arrest order from Defendant Richardson—who, along with Defendant Jaafar, was a member of the "Executive Command Unit" and thus plainly in charge of the law enforcement actions at the Arab Festival on behalf of the County and pursuant to the Agreement

[19] "The mission of the Department of Corporation Counsel is to provide legal representation, litigation, legal advice and counsel, and Human Relations business certification services to benefit Wayne County departments and elected officials, so they can legally fulfill their official duties." (available at http://www.co.wayne.mi.us/cc.htm [last visited on Feb. 6, 2013]).

entered into by Defendant Napoleon on behalf of the County. (*See* R-20-3: Muise Decl. at ¶ 3, Ex. A [Agreement], Pg ID 191-94).

In short, it is the County and its policies that were the moving force behind Defendant Richardson's order to Plaintiffs (*i.e.*, that Plaintiffs would be *arrested for disorderly conduct* if they did not halt their free speech activity and leave the Arab Festival). And this conclusion is further reinforced by the fact that Defendant Richardson was seen on video consulting with Ms. Ursula Henry, Director of Legal Affairs for the Wayne County Sheriff's Office, prior to issuing his unlawful order. (*See* R-20-2: Israel Decl. at ¶ 28, Ex. B [Video at Chapter 4], Pg ID 179, App.)

Additionally, the County, through its Sheriff, Defendant Napoleon, is responsible for enforcing the criminal law within its jurisdiction, *see, e.g.*, Mich. Comp. Laws § 51.76(2)(b) ("Enforcing the criminal laws of this state. . . .")—and certainly within the Arab Festival, as evidenced by the Agreement, (*see* R-20-3: Muise Decl. at ¶ 3, Ex. A [Agreement], Pg ID 191-94). This includes enforcing violations for disorderly conduct. (*See, e.g.*, R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival] [describing the mission of the County Sheriff's Office to include, *inter alia*, "keep[ing] the peace in the event there is a disturbance"], Pg ID 100). Consequently, the County, and, at a minimum, Defendant Napoleon in his official capacity, are proper defendants in this legal challenge to the application of the disorderly conduct law to Plaintiffs' speech. *See, e.g.*, *Steffel v.*

Thompson, 415 U.S. 452 (1974) (permitting an as applied constitutional challenge to a Georgia criminal statute to proceed against "the Solicitor of the Civil and Criminal Court of DeKalb County [and] the chief of the DeKalb County Police," among others, in a case in which the petitioner was *threatened* by the police with arrest for violating the criminal trespass law if he did not stop distributing anti-Vietnam War handbills on the exterior sidewalk of a Georgia shopping center).

In sum, as *Monell* makes clear, municipality liability is ultimately a question of "responsibility." In light of the facts and circumstances in this case, it is evident that the County is "responsible" for the constitutional violations at issue.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this court reverse the district court's grant of Defendants' motion for summary judgment, reverse the district court's denial of Plaintiffs' cross-motion for summary judgment, and enter judgment in Plaintiffs' favor.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 12,808 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

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

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	Page ID	Description
R-1	1-21	Complaint
R-8	36-50	Answer
R-13	61-92	Defendants' Motion for Summary Judgment, or in the Alternative, Defendants' Motion to Dismiss
R-13-5	100-06	Defendants' Exhibit E: Wayne County Sheriff's Office "Operations Plan — (Arab American International Festival)"
R-13-6	107-09	Defendants' Exhibit F: Affidavit of Dennis Richardson
R-13-7	110-11	Defendants' Exhibit G: Letter from Counsel for Ruben Israel to Wayne County Officials
R-13-8	112-13	Defendants' Exhibit H: Wayne County's Response to Letter
R-13-9	114-17	Defendants' Exhibit I: Wayne County Sheriff's Office Arab American Festival Post-Operation Report
R-20	132-70	Plaintiffs' Response to Defendants' Motion & Cross-Motion for Summary Judgment
R-20-2	172-85	Plaintiffs' Exhibit 1: Declaration of Plaintiff Israel
R-20-2	182-84	Plaintiffs' Exhibit A to Exhibit 1: Letter from Counsel for Ruben Israel to Wayne County Officials
R-20-2*	185	Plaintiffs' Exhibit B to Exhibit 1: DVD of Video Footage from 2012 Arab Festival [filed with district court in traditional manner]
R-20-3	186-204	Plaintiffs' Exhibit 2: Declaration of Robert J. Muise

R-20-3	189-200	Plaintiffs' Exhibit A to Exhibit 2: Agreement Regarding Dearborn Arab International Festival
R-28*	254	Defendants' Exhibit A: DVD of Raw Video Footage from 2012 Arab Festival [filed with district court in traditional manner]
R-34	295-330	Opinion & Order
R-35	331-32	Judgment
R-36	333-35	Notice of Appeal

*The video exhibits referenced here are identified in Appellants' Appendix and were previously provided to the clerk of this court pursuant to 6 Cir. I.O.P. 10.