NO. 13-1635

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

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

V.

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

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

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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ARGUMENT IN REPLY

Defendants begin their "supplemental brief" with the assertion that Plaintiffs' "claims stem from a clouded misunderstanding of freedom of speech jurisprudence and a gross misstatement of the facts." (Defs.' Supplemental Br. at 1). Defendants then promptly proceed to misapprehend the law and misstate the facts.

We will begin with the facts.

A. Reply to Defendants' Erroneous Factual Presentation.

Fortunately, there is a record before this court, and it is a record that includes video evidence. This record establishes, without any reasonable dispute, that Defendants did not arrest *any* of the bottle-throwing hecklers (let alone conduct a mass arrest to make the point that this conduct will not be tolerated by the County).[1] Defendants claim that "Festival attendees . . . were arrested, cited, charged, and prosecuted" for their criminal activity directed toward silencing Plaintiffs' speech (*see* Defs.' Supplemental Br. at 10), but that is simply not the case. The Post-Operation Report that Defendants cite is undisputed evidence (and an admission on the part of the County which is further corroborated by video), that Defendants did virtually *nothing* to stop the hecklers and protect Plaintiffs while they were engaging in their protected speech activity. According to this Post-Operation Report, Defendants issued

[1] We refer here to the traditional notion of arrest: placing a person in handcuffs and taking him into custody. This is the type of law enforcement action that has a true deterrent effect on a group of individuals who might need more than an occasional, toothless plea of "please stop what you are doing."

only *one* citation for disturbing the peace (while threatening to arrest all of the Christians for disorderly conduct), gave only three *verbal warnings*, and *briefly* detained *two* other individuals. (R-13-9: Defs.' Ex. I [Post-Operation Report], Pg ID 115-16). That was it. In fact, according to the report, only *two* of these individuals—the one who received the citation and one of the two *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 115-16).

Yet, Defendants had thirty-four (34) deputies and nineteen (19) reserve officers on the scene, and this force also included a mounted unit with six (6) horses—a force that, *according to Defendants*, was "larger than the Sheriff's Department contribution to the Word Series or the President of the United States when he visits Michigan."[2] Consequently, this was hardly "Defendants[']' best efforts . . . to contain the increasingly boisterous crowd" (Defs.' Supplemental Br. at 18), and it is simply false to claim that "the deputies [did] not have sufficient manpower to restrain the audience" (Defs.' Supplemental Br. at 22).

To further demonstrate the inaccuracy of Defendants' claim, Defendants were able to muster more than a dozen officers to escort Plaintiffs out of the festival area under threat of arrest and a dozen more officers to pull them over moments after they departed to conduct a traffic stop and then issue them a traffic citation for apparently

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

removing the license plate from their van for personal safety reasons. (R-28: Defs.' Ex. A [Video at 54:18-58; 56:13-57:50; 59:10-1:06:50], App.).

In short, it is incorrect to argue that this tepid (at best) response by Defendants to the actions of the hecklers was constitutionally sufficient to warrant not only the suppression of Plaintiffs' speech but the direct threat to criminalize this speech as disorderly conduct.

Indeed, an exchange captured on video between Plaintiff Israel and Defendant Richardson right before Richardson tells Plaintiffs that if they don't leave the festival area they will be cited for disorderly conduct, provides a telling admission on the part of Defendants. In this exchange, Plaintiff Israel states: "The problem is that when you're not around that's when they start throwing things and become a little bit more aggressive than what you see." Defendant Richardson responds: "Ok. I understand that *and I don't disagree with you*. But part of the reason that they throw things . . . is because you tell them stuff you know . . . *you tell them stuff that enrages them*. . . ." (R-28: Defs.' Ex. A [Video at 48:53 to 49:12], App.). Plaintiff Israel proceeds to point out the fact that they were not even preaching (they stopped that activity about 15 minutes after their arrival when they were directed by a sheriff to stop using a bullhorn, a directive to which Plaintiffs complied);[3] instead, the hecklers were reacting to the content of Plaintiffs' signs. (R-28: Defs.' Ex. A [Video at 49:12 to 49:20],

[3] (R-28: Defs.' Ex. A [Video at 14:37 to 15:19], App.).

App.). Nonetheless, regardless of the form of expression used by Plaintiffs, this is a classic example of the government enforcing a heckler's veto, which is impermissible under the First Amendment. We turn now to Defendants' faulty legal analysis.

B. Reply to Defendants' Erroneous Legal Analysis.

Defendants offer this court an erroneous "gloss" on the applicable case law—a "gloss" that invites this court to disregard bedrock principles of First Amendment jurisprudence—principles which, quite frankly, separate our free and civilized society from all others, specifically including those political cultures that use violence or the threat of violence to suppress free speech. Indeed, accepting Defendants' view of the law would create dangerous and perverse incentives by rewarding violence over free speech and providing the next police force that wants to silence a speaker with the blueprint for doing so. Defendants' arguments must be rejected.

We begin with Defendants' assertion that they "acted in a content-neutral manner." (Defs.' Supplemental Br. at 12). This is incorrect. It is a fundamental principle of First Amendment jurisprudence (*i.e.*, it is clearly established law that Defendants violated here) that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (emphasis added). "The 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, 789 (9th Cir. 2008) ("Whether prospectively, as in

Forsyth County, or retrospectively, as in the case before us, the government may not give weight to the audience's negative reaction."); *see also Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.") (citations and quotations omitted); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (same); *Street v. New York*, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

Thus, by ordering Plaintiffs to cease their free speech activity under threat of arrest for disorderly conduct based on the hostile crowd's reaction *is* a heckler's veto and thus a content-based restriction on speech *as a matter of law*. Defendants' claims to the contrary are wrong. (*See* Defs.' Supplemental Br. at 12-14 [attempting, but failing, to distinguish *Forsyth County* and *Center for Bio-Ethical Reform, Inc.*]).

Defendants assert that *Forsyth County* is distinguishable because "the Supreme Court held that the ordinance unconstitutionality (sic) burdened speech that may be seen as unpopular by burdening its speakers with paying higher fees and making such speech more difficult to disseminate." (Defs.' Supplemental Br. at 13). Yet, here Defendants are burdening "unpopular" speech by *criminalizing* it (not just making it

more costly) and *halting* its dissemination (not simply making it "more difficult to disseminate"). *Forsyth County* provides no shelter for Defendants.

Regarding *Center for Bio-Ethical Reform, Inc.*, Defendants correctly observe that the threatened enforcement of the ordinance at issue violated the First Amendment "because the ordinance was enforced against speech after individuals reacted to the speech at which point the speech was deemed disruptive." (Defs.' Supplemental Br. at 13). However, after articulating this basic principle known as the heckler's veto—*i.e.*, suppressing speech because of the reaction of others to that speech—Defendants contradict themselves by claiming that "unlike *Center for Bio-Ethical Reform*, where a specific category of speech was being targeted, Defendants in the present case *were reacting to the events at the festival* regardless of the content (sic) any speech." (Defs.' Supplemental Br. at 14) (emphasis added).

Thus, based on their misunderstanding of this bedrock First Amendment principle, Defendants proceed to argue that their conduct "did not amount to a heckler's veto." (Defs.' Supplemental Br. at 14-19). As the case law makes clear, Defendants are mistaken. Indeed, their conduct is a *classic* example of an impermissible heckler's veto.

Defendants next tactic is to essentially argue (without directly stating it) that Plaintiffs' speech is not worthy of First Amendment protection because it was "incitement" speech. For support, Defendants first cite to *Feiner v. New York*, 340

U.S. 315 (1951), which is a mistake (as we explained in detail in Plaintiffs' supplemental brief[4] and will briefly address below), but perhaps excusable in that *Feiner* can be misread. Defendants next cite to *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), which is also a mistake, but it is an inexcusable one. (*See* Defs.' Supplemental Br. at 15-19).

Specifically, *Terminiello* stands for the very proposition that Defendants seek to refute: "[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."[5] *Id*. at 4. Thus, per the Supreme Court, Defendants may <u>not</u> punish Plaintiffs' speech because it "induces a condition of unrest [or] stirs people to anger" (*i.e.*, it "enrages" them). That is, Defendants may not "react[] to the events at the festival" and use those events to justify punishing Plaintiffs' speech.[6] The First Amendment protects Plaintiffs' speech against such "censorship or punishment," and "[t]here is no room under our Constitution for [Defendants'] more restrictive view." *Id*.

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[4] (*See* Pls.' Supplemental Br. at 9-12).

[5] *See Terminiello*, 337 U.S. at 3 (describing the situation as follows: "Outside of the auditorium a crowd of about one thousand persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order; but they were not able to prevent several disturbances. The crowd outside was angry and turbulent.").

[6] As *Forsyth County* makes plain, bottle-throwing hecklers do not constitute a "clear and present danger" of a "substantive evil." *Forsyth Cnty.*, 505 U.S. at 134 (stating that the ordinance unlawfully burdened speech that was "unpopular with bottle throwers").

In *Feiner*, the speech restriction was upheld because the speech in question was considered "incitement" speech. *Feiner*, 340 U.S. at 305 (upholding the disorderly conduct conviction because the petitioner "was endeavoring to arouse the Negro people against the whites, *urging that they rise up in arms and fight* for equal rights") (emphasis added). A point recognized by this court. *See Glasson v. Louisville*, 518 F.2d 899, 905 n.3 (6th Cir. 1975) ("For over twenty years the Supreme Court has confined the rule in *Feiner* to a situation where the speaker, in urging his opinion upon an audience, *intends to incite it to take action that the state has a right to prevent*.") (emphasis added); *see also Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect."). In short, this case is not *Feiner*. Indeed, the only individuals at the Arab Festival in 2012 who were inciting the crowd "to take action that the state has a right to prevent" (*i.e.*, encouraging the physical assault of others) were the hecklers themselves.

In sum, the clearly established principle of law at issue here was previously described by this court as follows:

> 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.

Glasson, 518 F.2d at 905-06; *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973) ("[T]he Supreme Court has often emphasized [that] state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights."); *Dunlap v. City of Chicago*, 435 F. Supp. 1295, 1298 (N.D. Ill. 1977) ("Section 1983 imposes an affirmative duty upon police officers to protect speakers who are airing opinions which may be unpopular."); *Nesmith v. Alford*, 318 F.2d 110, 121 (5th Cir. 1963) (noting that "liberty is at an end" when police are permitted to enforce a heckler's veto). Here, Defendants did precisely what they are not permitted to do: "empower an audience to cut off expression of a speaker with whom it disagreed" by allowing it to "take violent action against the speaker." In short, "[a] police officer has the duty not to ratify and effectuate a heckler's veto," *Glasson*, 518 F.2d at 906—a duty Defendants failed to fulfill here.

At this point it should be evident that by ordering Plaintiffs to halt their speech activity and leave the festival area under threat of arrest for disorderly conduct based on the crowd's reaction to their speech, Defendants effectuated a heckler's veto and thereby violated clearly established law under the First Amendment. As a result, Defendants do not enjoy qualified immunity, which looks at the "*objective* legal reasonableness" of their actions. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (stating that the qualified immunity test "focuses on the objective legal reasonableness of an official's acts") (emphasis added). Restricting and threatening to criminalize

protected speech based on listeners' reaction is *not* legally reasonable. Period. *Forsyth Cnty.*, 505 U.S. at 134; *Glasson*, 518 F.2d at 905-06; *Smith*, 482 F.2d at 37; *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d at 790; *Nesmith*, 318 F.2d at 121.

In addition, the facts establish that Defendants Richardson and Jaafar acted with a retaliatory motive, believing that Plaintiffs were part of a "radical group" that expressed an "offensive" and "crazy" message.[7] These facts alone prove dispositive of the immunity inquiry. *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.").

[7] (R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival] [pejoratively referring to Plaintiff Bible Believers as "a radical group" that will "show up at the festival trying to provoke our staff in a negative manner and attempt to capture the negativity on video camera"] Pg ID 100; R-20-2: Israel Decl. at ¶ 27, Ex. B [Video at Chapter 4] [showing that 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*"] Pg ID 179, App.). Thus, this is not a situation like in *Potts v. City of Lafayette*, 121 F.3d 1106 (7th Cir. 1997), where the court upheld an operations order targeted at the "secondary effects" of bringing personal items into a KKK rally to prevent injury. There, unlike here, the court further noted that "[n]othing in the record suggests that the [police officials] disagreed with the content of the message of the KKK or other groups expected to attend the rally." *Id*. at 1111; *see also Feiner*, 340 U.S. at 319 (noting 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"); *cf. Boos v. Barry*, 485 U.S. 312, 321 (1988) (O'Connor, J.) (stating that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" that can serve as the basis for restricting speech under the First Amendment).

Finally, qualified immunity does not shield Defendants against Plaintiffs' claims for declaratory and injunctive relief. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989).

Regarding the County's liability, it is clearly established that municipalities are liable under § 1983 if municipal policy or custom was the "moving force" behind the alleged unconstitutional action.[8] *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978). Thus, "when *execution* of a government's policy or custom . . . inflicts the injury . . . the government as an entity is responsible under § 1983." *Id*. at 694. In short, municipal liability "is about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986) (holding the municipality liable for a decision made by the county prosecutor that resulted in the violation of the petitioner's Fourth Amendment rights). Here, the County is liable for the order to cite Plaintiffs for disorderly conduct if they did not halt their speech activity—an order that violated Plaintiffs' constitutional rights. This was not the single action of a rogue officer. It

[8] Curiously, Defendants quote this general principle as articulated by this court in *Ellis v. Cleveland Municipal School District*, 455 F.3d 690, 700 (6th Cir. 2006), but add the word "unconstitutional." (Defs.' Supplemental Br. at 19 [quoting *Ellis* as stating, "A plaintiff who sues a municipality for a constitutional violation under § 1983 must prove the municipality's [unconstitutional] policy or custom caused the alleged injury"]).

was the concerted action of two *senior* law enforcement officers of the "Executive Command Unit" (*i.e.*, the officers placed in charge at the festival by the County) in consultation with the County's legal advisor and in accord with the County's "Operations Plan," the executed Agreement between the County and the festival organizers, and the policy articulated in the Corporation Counsel's letter to Plaintiffs. (*See* Pls.' Supplemental Br. at 23-25 [citing evidence]). In sum, the County is "responsible."

In addition, the County and its Sheriff in his official capacity are proper parties for declaratory and injunctive relief in this case—relief which would declare unconstitutional and enjoin the future application of the disorderly conduct law to restrict Plaintiffs' speech. *See Steffel v. Thompson*, 415 U.S. 452 (1974) (permitting an as applied constitutional challenge to a criminal statute to proceed against county officials in a case in which the petitioner was threatened by the police with arrest under the statute if he did not stop distributing handbills on a shopping center sidewalk).

CONCLUSION

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

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

/s/ *David Yerushalmi*
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CERTIFICATE OF COMPLIANCE

I certify that the attached supplemental brief is proportionally spaced, has a typeface of 14 points Times New Roman, and is 12 pages in length.

AMERICAN FREEDOM LAW CENTER

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

Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2015, 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

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