NOS. 18-1576/18-1608/18-1695

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

KIMBERLEY THAMES
Plaintiff-Appellee/Cross-Appellant/Appellant

V.

NORMAN BROOKS; JOHN GATTI; JASON SOULLIERE; ADAM TARDIFF,
Defendants-Appellants/Cross-Appellees

AND

CITY OF WESTLAND; JEFF JEDRUSIK, individually and in his official capacity as Chief of Police, City of Westland Police Department
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE GEORGE CAREM STEEH
CASE NO. 2:16-cv-14130

REPLY BRIEF OF PLAINTIFF KIMBERLEY THAMES (FOURTH BRIEF)

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ARGUMENT IN REPLY

This Fourth Brief is filed in reply to Defendants' arguments and in support of Plaintiff's claims that the Officer Defendants are liable for violating Plaintiff's clearly established constitutional rights as a matter of law and that the City of Westland ("City") and its Chief of Police, Defendant Jedrusik, are similarly liable for the constitutional violations.

I. THE OFFICER DEFENDANTS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS AS A MATTER OF LAW.

A. Because There Is No Dispute as to Any Material Fact, This Appeal Raises Pure Questions of Law.

To begin, the Officer Defendants do not have to "concede" any facts in this appeal (*see* Defs.' Third Br. at 3-4) because there is no dispute of *any* material fact. Consequently, the qualified immunity issue is inextricably tied to the liability issue, and both issues can and should be decided by this Court. That is, this case only raises issues of law for the Court to decide. Therefore, this Court has jurisdiction over Plaintiff's cross-appeal. *See Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (1998) ("The doctrine of pendent appellate jurisdiction allows an appellate court, in its discretion, to exercise jurisdiction over issues that are not independently appealable when those issues are 'inextricably intertwined' with matters over which the appellate court properly and independently has jurisdiction."). As this Court acknowledged in its show cause order, if there was a material fact dispute, then the

Officer Defendants' appeal of the qualified immunity issue would be improper. (*See* Doc. No. 8-2, Order to Show Cause, Case No. 18-1608 [stating, "To the extent that the defendants' appeal in No. 18-1576 raises issues of law, the denial of qualified immunity is immediately appealable as a collateral order," and citing *Johnson v. Jones*, 515 U.S. 304, 313-14 (1995)]).

In this regard, the Officer Defendants' reference to how the facts are viewed for summary judgment or their speculation about how facts might be found if the case went to a jury is both disingenuous and pointless. (*See* Defs.' Third Brief at 1-4.). The root premise of the Officer Defendants' interlocutory appeal (No. 18-756) is the claim that there is no dispute of material fact and they are entitled to judgment as a matter of law. In her cross-appeal (No. 18-1608), Plaintiff maintains that the very facts the Officer Defendants rely upon show that she is entitled to judgment as a matter of law. Put another way, both agree that there are no factual inferences left for the fact-finder to draw that could affect the outcome; they differ only as to the legal consequences that follow from those undisputed facts. For the same reason, the Officer Defendants' focus on what facts might be found if this case went to trial is utterly beside the point of the present appeals. Again, both appeals rest upon the shared premise that there are no factual inferences left for the fact-finder to draw (from the undisputed facts) that should affect the outcome of the case. If this Court disagrees with this shared premise, then both appeals will fail.

Based on the undisputed material facts, there are no statements attributed to Plaintiff that qualify as a "*true threat*" as a matter of law. As a result, the Officer Defendants had no legal basis (probable cause or otherwise) for arresting, searching,[1] and detaining Plaintiff for *over 49 hours*[2] based on these alleged statements. The arrest was unlawful as a matter of law. *See, e.g.*, *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) ("When an officer makes an arrest, it is a 'seizure' under the Fourth Amendment, and the arrest is a violation of a right secured by the amendment if there is not probable cause.").

[1] In their appellee brief, Defendants assert that "the officers are both damned if they search *and* damned if they don't." (Defs.' Appellee Br. at 20). Their argument misses the point. Before an officer can search a person incident to an arrest, the officer must have probable cause. The Officer Defendants never had probable cause, and their actions (*i.e.*, their failure to take any reasonable actions that officers would otherwise have taken if they believed the statement was a "*serious expression of an intent to commit an act of unlawful violence*"—such as evacuating the building, searching the building and its perimeter, calling for a bomb-sniffing dog, etc. . .) demonstrate this fact because they never believed the alleged "threat" was a "true threat." Rummaging through some personal belongings in the passenger compartment of Plaintiff's vehicle and making comments about the titles of books that were found in it is not a serious search for a bomb. (*See* R-36-3: Ex. B [Police Video: JSoulliere at 9:00:48 to 9:01:10], Pg. ID 586). Moreover, even after searching Plaintiff's vehicle and finding nothing, they proceeded with the arrest, and they detained her for more than 49 hours.

[2] Defendants assert that Plaintiff was not detained for over 49 hours, but only for 48 1/2 hours. (Defs.' Appellee Br. at 24). While this is a petty assertion, it is nonetheless wrong. Per the testimony of the City's Rule 30(b)(6) witness, who was testifying as to the information found in the "official record" of Plaintiff's arrest, Plaintiff was arrested at "9:05 a.m." on August 27, 2016, and released at "10:14 a.m." on August 29, 2016. (R-36-3: Ex. O Miller Dep. at 63:1-10, Pg. ID 696). That is more than 49 hours.

Because there is no dispute of any *material* fact, and thus no requirement for a jury to make any findings of fact on the issues presented by these appeals, probable cause should be determined by the Court as a matter of law. *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005) (stating that "[w]hen no material dispute of fact exists, probable cause determinations are legal determinations that should be made" by the court). And because there was no probable cause, the Officer Defendants are liable for violating Plaintiff's clearly established rights protected by the First (free speech and free exercise), Fourth (unlawful search and seizure), and Fourteenth (equal protection) Amendments as set forth in Plaintiff's opening brief and argued further below. Indeed, *probable cause is the lynchpin to this case*, particularly with regard to the qualified immunity and liability issues involving the Officer Defendants. Because these two issues are inextricably linked, Plaintiff's cross-appeal is entirely proper.

B. The Alleged "Threat" Uttered by Plaintiff Is Not a "True Threat" as a Matter of Law.

By way of review, here is what the undisputed record reveals, first by way of the sworn testimony of Defendant Gatti <u>*and*</u> the *police video recording*:[3]

[3] Defendants' assertion that Plaintiff ignores the video evidence (Defs.' Third Br. at 10 ["Thames conspicuously avoids direct reference to the recordings themselves."]; *see also* Defs.' Appellee Br. at 11]) is demonstrably false. Indeed, Plaintiff cites to *specific* video recordings at least seven times in her opening brief. (Pl.'s Second Br. at 9-12). And as the record reveals, the testimony of the officers confirms what the video shows and vise versa.

(Video playing)
OFFICER GATTI: *What exactly did she say*?[4]
* * *
BY MR. MUISE:
Q. I stopped at 8:52:31. It appears that the lady that was there asked the security guard to come up because he was the one that actually heard what [Plaintiff] said to respond to your inquiry as to what exactly she said; correct?
A. Yes.
(Video playing at 11:24 a.m.)
MARY: What did she say exactly?
SECURITY GUARD: She said, "I prophesy bombings, I prophesy bombs, there is going to be a bombing in the near future."
OFFICER GATTI: "*I prophesy bombs*?"
SECURITY GUARD: Yeah. "I prophesy bombs are going to fall and they're going to fall in the near future."
[Video stopped]
BY MR. MUISE:
Q. We went over this in the internal investigation report and I stopped it at 8:52:53. He told you, "I prophesy bombs, I prophesy bombs are going to fall in the near future." Is that your recollection?
A. After seeing the video, yes.
Q. And those are the -- *you asked him specifically what exactly did she say, and that's what he told you, "I prophesy bombs, I prophesy bombs are going to fall in the near future", correct?*
A. Yes.

(R-35-7: Def. Ex. F Gatti Dep. at 52:12, 23-25 to 53:5-23 [emphasis added], Pg. ID 490-91; R-36-3: Ex. B [Police Video: JGatti at 8:51:31 to 8:52:53], Pg. ID 586)).[5]

[4] This was Defendant Gatti's *specific* question that was captured on the police video and that was directed to the witness. Thus, this is *the* crucial exchange between Defendants' *only* witness to the alleged crime and the officers who are required to have probable cause before arresting Plaintiff for this crime.

[5] Contrary to the Officer Defendants' incorrect assertion (Defs.' Third Br. at 10), Defendant Gatti's testimony was unequivocal, and it was not the product of leading questions—it was the result of viewing the police video and confirming the precise "threat" allegedly uttered by Plaintiff (*i.e.*, what "exactly" the security guard claims

Per the sworn written statement of Defendants' *only* witness to the alleged crime (a statement that was collected *at the scene of the arrest* by Defendant Tardiff *at the request* of Defendant Brooks, the senior officer at the scene who ultimately directed Plaintiff's arrest):

"***She said, bombs, bombs on America, and bombs will blow up this building***."

(R-36-3: Ex. E [Parsley Statement] [emphasis added], Pg. ID 614; R-36-3: Ex. M Tardiff Dep. at 18:22-25 to 19:1-3, Pg. ID 682). This statement was signed by the security guard at *0910* on August 27, 2016, at the scene of the arrest and just minutes after Plaintiff was taken into custody.[6] (R-36-3: Ex. M Tardiff Dep. at 18:21-25 to 20:1, Pg. ID 682).

These two very different statements were also the statements that the district court analyzed (appropriately so) in its ruling. (*See* R-49: Op. & Order at 19 ["In essence, to 'prophesy' means to prognosticate, but it does not suggest willful conduct

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she said). The fact that Defendant Gatti would ask for the "exact" words shows that he at least had a rudimentary understanding that when you are seeking to arrest someone for *pure speech*, the precise words matter.

[6] Defendants ask this Court to ignore this *contemporaneously* made written statement by their *only* witness because the officers are apparently so incompetent that no one cared to consider or even review it before arresting Plaintiff. (*See* Defs.' Third Br. at 12; *see also* Defs.' Appellee Br. at 16). But the fact remains that the information contained within this statement was in the possession and thus within the knowledge of the Officer Defendants prior to removing Plaintiff from the scene of the arrest in handcuffs, booking her, and incarcerating her in a detention cell for two days. Moreover, Defendant Brooks reviewed the *complete* Incident Report at 2:37:40 p.m. on the day of the arrest, approved it, and sent it to the Detective Bureau minutes later (2:40:17 p.m.). (R-36-3: Ex. L Brooks Dep. at 11:1-25 to 12:1-19, Pg. ID 673; R-36-3: Ex. H [Report Chronology], Pg. ID 634). Yet, Plaintiff remained in custody.

or that the speaker will be responsible for carrying out the prediction."], Pg. ID 875; *id*. at 20 [stating that the written statement "is a vague prediction about the future and does not suggest any present intention on the part of Thames to carry out a crime of violence against the clinic"], Pg. ID 876).

In their brief, Defendants cobble together various segments of the recordings in an effort to manufacture what they believe is a "true threat." (*See, e.g.*, Defs.' Third Br. at 8 [acknowledging that the "*precise words*" matter, but then stating, "The accuser, Robert Parsley, is recorded telling officers that Thames said '*[t]here is going to be a bombing in the near future . . . and they're going to fall on you people*.'"]; *see also id*. at 17 ["In this case, [the Officer Defendants] had eyewitness identification by Robert Parsley that Thames had said '*bombs*' would fall on the Northland Family Planning Clinic personnel '*in the near future*' . . . ."]). But this effort ultimately fails because they cannot change what was recorded. (*See, e.g.*, Defs.' Third Br. at 23, 24 [quoting the security guard stating, "I prophesy bombs" and "I prophesy bombs are going to fall . . .]). No matter how you try to spin it, as the district court properly concluded, "prophesying" "does not suggest willful conduct or that the speaker will be responsible for carrying out the prediction." (R-49: Op. & Order at 19, Pg. ID 875). In short, the alleged statement is not a "true threat" as a matter of clearly established law, *Va. v. Black*, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a *serious expression of an intent*

to commit an act of unlawful violence to a particular individual or group of individuals.") (emphasis added), and thus it cannot be proscribed by § 750.543m as a matter of clearly established law, *People v. Osantowski*, 274 Mich. App. 593, 601, 736 N.W.2d 289, 297 (2007) (analyzing the constitutionality of Mich. Comp. Laws § 750.543m, construing the statute as limited to "true threats" so as not to infringe on First Amendment protections, and confirming that "[s]tatutes that criminalize *pure speech* 'must be interpreted with the commands of the First Amendment clearly in mind'") (quoting *Watts v. United States*, 394 U. S. 705, 707 (1969) (emphasis added).[7]

And whether a statement constitutes a "true threat" is *not* based on the *subjective* evaluation of the recipient of the statement as the Officer Defendants argue (*see* Defs.' Third Br. at 27), and for good reason: this would permit a heckler to veto speech by empowering him to make a felony accusation against a speaker. Rather, whether an alleged "threat" is punishable consistent with the First Amendment as a

[7] The Officer Defendants assert that "[u]nless a statute is clearly unconstitutional (*which Thames never contends in this case*), officers have immunity for enforcing it, even if it is ultimately determined to be unconstitutional." (Defs.' Third Br. at 29). They are mistaken. Here, the Officer Defendants are using this statute *to punish speech*, which is impermissible as a matter of clearly established law. *See Osantowski*, 274 Mich. App. at 601, 736 N.W.2d at 297. In *Bible Believers*, for example, the Wayne County sheriffs were unlawfully enforcing a disturbing the peace law. It's not that the law was unlawful, but the way in which they were intending to enforce it was a violation of the plaintiffs' constitutional rights. *See Bible Believers v. Wayne Cnty.*, 805 F.3d 228 (6th Cir. 2015) (unlawfully threatening the plaintiffs with arrest for disturbing the peace); *see also Watts*, 394 U. S. at 705, 707 (finding the statute "certainly . . . constitutional on its face" but violating the First Amendment as applied to the petitioner's speech).

"true threat" is determined objectively. *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (upholding the dismissal of an indictment, concluding that to come within § 875(c), a threat must be communicated with intent (defined objectively) to intimidate, that is, "a reasonable person . . . would [have to] take the statement as a serious expression of an intention to inflict bodily harm"). And to ensure that First Amendment rights are fully protected, whether Plaintiff's statement is punishable as a "true threat" is a question of law for the Court. *See Watts*, 394 U. S. at 705 (reversing conviction on First Amendment grounds as a matter of law).

Moreover, per the sworn testimony of Defendant Brooks, the senior officer at the scene who ultimately directed Plaintiff's arrest:

> *I don't know the exact verbiage* that—that he said to Officer Gatti. My—there's only one word that concerns me in this whole thing and that's bombs. Just like you can't yell fire in a crowded theater, ***you can't say anything about bombs near a facility that performs abortions***.

(R-49: Op. & Order at 7 [emphasis added], Pg. ID 863). Thus, per Defendant Brooks, the "true threat" was simply uttering the word "bomb" "*near a facility that performs abortions.*" This qualifier is significant because it demonstrates why this arrest violates the equal protection guarantee of the Fourteenth Amendment. (*See also* R-36-3: Ex. C [Internal Investigation] at 10 [quoting Defendant Brooks as stating, "Anybody who has anything to do with this whole thing, their fanatics"], Pg. ID 597). That is, it demonstrates that Plaintiff was specifically targeted because she was engaging in pro-life speech activity "near a facility that performs abortion." As the

Officer Defendants concede, the security guard was the first to use the "bomb" word. (Defs.' Third Br. at 10-11 ["The officers never deny that Thames told Soulliere that it was *Parsley* who had interjected the idea of 'bombings' into their prior conversation."]; *see also* Defs.' Appellee Br. at 14 [same]). However, because the security guard was affiliated with the abortion center, his use of the "bomb" word did not prompt his arrest. But because Plaintiff was anti-abortion, it did for her. This disparate treatment, which targets a fundamental right, violates the Equal Protection Clause. *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[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.").

Thus, in light of what was allegedly stated and the circumstances under which it was allegedly stated (*i.e.*, during a pro-life demonstration on a public sidewalk outside of an abortion facility), the speech at issue is political hyperbole fully protected by the First Amendment. *Watts*, 394 U.S. at 707-08; *see id.* at 706 ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). The law was clearly established at the time of Plaintiff's arrest that her arrest was unlawful.

C. The Officer Defendants' Arrest of Plaintiff Halted Her Expressive Religious Activity and Chilled the Future Exercise of Her Rights.

It is further undisputed that at the time of her arrest, Plaintiff was praying and holding a pro-life sign on the public sidewalk outside of the Northland Family

Planning Center, an abortion center located within the City. Plaintiff was engaging in this expressive activity as part of her religious exercise. *And as a direct result of the arrest* (not just the prolonged detention), the Officer Defendants prevented her from engaging in this expressive religious activity, and their actions have chilled her from engaging in this activity in the future. Despite Defendants' arguments, *this* (and not retaliation) is the *heart* of Plaintiff's First Amendment (free speech and free exercise) claims. And because there was no probable cause,[8] as Plaintiff has argued throughout, the Officer Defendants not only violated the Fourth Amendment, they violated the Free Speech and Free Exercise Clauses of the First Amendment.

In *Bible Believers v. Wayne County*, 805 F.3d 228, 255-56 (6th Cir. 2015), for example, this Court noted the following: (1) "[t]he right to free exercise of religion

[8] The Officer Defendants argue that "Thames never addresses [their] argument - - based on the *post-**Greene*** decisions by the Supreme Court in ***Hartman v. Moore***, 547 U.S. 250 (2006) and by this Court in ***Barnes v. Wright***, 449 F.3d 709 (6th Cir. 2006) - - that a First Amendment 'retaliation' claim cannot be maintained, if probable cause for an officer's actions otherwise exists." (Officer Defs.' Third Br. at 33; *see also* Defs.' Appellee Br. at 42). They are mistaken. (*See* Pl.'s Second Br. at 28-29, n.21). But their mistake is beside the point. As Plaintiff has argued throughout, *there was no probable cause to arrest*. And, as noted above, retaliation is only one basis for the First Amendment violations. Whether it was in retaliation or not, the Officer Defendants unlawfully seized Plaintiff and prevented her from engaging in her expressive religious activity. And the Officer Defendants' actions have chilled Plaintiff from exercising these rights in the future, warranting declaratory and injunctive relief *regardless of retaliation*. *See Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim," (2) "[t]he government cannot prohibit an individual from engaging in religious conduct that is protected by the First Amendment," (3) "[f]ree exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts," and (4) because "Defendants prevented the Bible Believers from proselytizing based exclusively on the crowd's hostile reaction to the religious views that the Bible Believers were espousing . . ., the free exercise claim succeeds on the same basis as the free speech claim." (internal citations omitted). The same is true here. The Officer Defendants prevented Plaintiff from engaging in her expressive religious activity based exclusively on the security guard's reaction to Plaintiff's speech in violation of the First Amendment. And, as the district court properly found, each officer played a role in the unlawful arrest and not one officer intervened to stop it. Consequently, they are all liable. (R-49: Op. & Order at 21 ["Under Sixth Circuit precedent, those police officers present at the scene of a wrongful arrest who have the opportunity and means to prevent the harm from occurring, may be liable under § 1983 for failing to intervene to prevent the wrongful arrest."], Pg. ID 877). As the Officer Defendants acknowledge, "there is no dispute that an officer can be liable for failure to intervene against another officer's unconstitutional acts." (Defs.' Third Br. at 30).

Moreover, there is no dispute that Plaintiff was arrested, booked, and detained

in the City's detention center for *at least* 48 hours, and while she was detained, she was unable to attend Mass or receive the Eucharist as *required* by her religion. Defendants argue that there is no legal basis for Plaintiff's assertion that her right to free exercise of religion was infringed by the City's policy of prohibiting her from exercising a fundamental tenet (and, in fact, requirement) of her faith.[9] (Defs.' Appellee Br. at 43-44). They are mistaken. Even individuals imprisoned following a conviction have free exercise rights. *See, e.g.*, *Flagner v. Wilkinson*, 241 F.3d 475, 487 (6th Cir. 2001) (permitting an as-applied free exercise challenge to an Ohio prison grooming regulation to proceed); *see generally Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (recognizing that prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison). Because this violation occurred as a direct result of a municipal policy, the municipality is liable. That is, there is no qualified immunity analysis (*i.e.*, no requirement for "clearly established law") for liability to attach. *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"). This leads us now to our discussion of the liability of the City and its Chief of Police.

[9] The district court did not treat this as a separate claim but as an element of damages. (*See* R-49: Op. & Order at 28 ["This is not a separate constitutional tort, but relates to damages for her wrongful arrest and retaliatory arrest claims."], Pg. ID 884).

II. THE CITY AND DEFENDANT JEDRUSIK, ITS CHIEF OF POLICE, ARE LIABLE FOR THE CONSTITUTIONAL VIOLATIONS.

A. This Court Has Jurisdiction to Hear Plaintiff's Appeal of the Final Judgment Entered Pursuant to Rule 54(b).

Defendants' (City and Jedrusik) challenge to the district court's certification of the judgment in their favor under Rule 54(b) is mistaken. As the district court noted, Rule 54(b) specifically provides that "[w]hen an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more but fewer than all, claims or parties, only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). As this Court explained in *Gavitt v. Born*, 835 F.3d 623 (2016), Rule 54(b) certification is designed to "strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties." *Id*. at 638.

After the Officer Defendants filed their interlocutory appeal, the district court certified the judgment in favor of the City and Jedrusik for immediate appeal under Rule 54(b) in an order that carefully applied the governing law to the facts of this case. (R-58: Order Granting Entry of J. at 1-9, Pg. ID 936-44). On appeal, Defendants claim that the district court erred because the judgment in their favor was not final within the meaning of 54(b), and also, the district court abused its discretion when it found there was no just reason for delay. (Defs.' Appellee Br. at 1-5).

Defendants misapprehend and misapply the governing law.

The district court's judgment in favor of Defendants was unquestionably final and therefore properly certified for immediate appeal under Rule 54(b). First, the judgment involves different parties, the City and Jedrusik, and not the Officer Defendants who improperly arrested, searched, and detained Plaintiff. Second, Plaintiff's claims against the City and Jedrusik turn on different facts. Defendant Jedrusik's liability turns on facts that show his failure to properly train and supervise his officers regarding their responsibility to respect the constitutional rights of citizens and his ratification of the officers' unlawful acts. The City's liability turns on facts that show that its policies and practices and its failure to properly train its police officers were the moving force behind the violation of Plaintiff's rights. Defendant Jedrusik's ratification of the unlawful acts similarly holds the City responsible for the violations. In contrast, the liability of the Officer Defendants turns on facts showing that they unlawfully arrested, searched, and detained Plaintiff.

Defendants rely on *Gavitt*, but fail to see that in *Gavitt*, this Court held that certification was proper because it involved judgments relating to "separate actions taken by different actors with different roles . . . [i]n other words, they involve separate claims based on different 'operative facts.'" *Gavitt*, 835 F.3d at 638. Here, the operative facts needed to establish the liability of the City and its Chief of Police are not the same facts as those needed to establish the liability of the Officer

Defendants as the district court found in its order. (R-58: Order Granting Entry of J. at 5-7, Pg. ID 940-42). Thus, this case is wholly unlike *Lowery v. Federal Express Corporation*, 426 F.3d 817 (6th Cir. 2005), where the plaintiff's Title VII and breach of contract claims against a single defendant both turned on the same alleged retaliation for his filing of a workplace grievance. *See id*. at 821. In sum, the district court's entry of judgment in favor of the City and Jedrusik was legally correct.

Defendants' claim that the district court abused its discretion when it found there was no just reason for delay is similarly flawed. (Defs.' Appellee Br. at 4-5). Here they argue that their liability is derivative in the sense that they might get off the hook if this Court finds the officers are entitled to immunity. But again, the real question is whether the district court's certification "strike[s] a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties." *Gavitt*, 835 F.3d at 638. The district court's certification does so for reasons it stated in a detailed order that speaks for itself. (R-58: Order Granting Entry of J. at 4-9, Pg. ID 939-44). Significantly, the reasons supporting the district court's decision to certify its judgment in favor of the City and Jedrusik would still hold even if the Officer Defendants had not filed their interlocutory appeal because its certification would ensure that only one trial would be needed to resolve all of Plaintiff's claims against every defendant.

In sum, this Court has jurisdiction to hear and decide this appeal, and the

interests of justice and preserving judicial resources compel it to do so.

B. The City and Its Chief of Police Are "Responsible" for the Constitutional Violations.

"*Monell* is a case about responsibility"—it does not immunize a municipality so that individual officers who are acting consistent with how they were trained and how they are expected to operate are left holding the bag. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986) ("*Monell* is a case about responsibility."). The City had multiple opportunities to distance itself from the actions of the Officer Defendants, but each time it confirmed that the officers were operating pursuant to department policy and practice and how they were trained. Indeed, the witness *designated by the City to testify on its behalf* admitted this fact:

> Q. You testified aside from those three instances where officers were verbally counseled that everything that the city police officers did with regard to my client, including the arrest and subsequent detention, was consistent with the policies, practices of the police department; is that right?
> A. That's correct.
> Q. As you sit here today, would the City of Westland take responsibility for all those actions?
> A. Yes.

(R-36-3: Ex. O Miller Dep. at 86:1-10, Pg. ID 700). The City has no substantive response to this clear admission of liability.[10] As stated by the Court in *Meyers v. City*

[10] Defendants only response is that the City cannot be liable because there was no constitutional violation. (Defs.' Appellee Br. at 45-46). But that does not address the point. Rather, it avoids it in an attempt to circumvent the facts and testimony of the City's designated witness. Thus, per Defendants' argument, upon finding a

of Cincinnati, 14 F.3d 1115, 1117 (6th Cir. 1994), "The requirement that a municipality's wrongful actions be a 'policy' is not meant to distinguish isolated incidents from general rules of conduct promulgated by city officials. *It is meant to distinguish those injuries for which 'the government as an entity is responsible under § 1983,' from those injuries for which the government should not be held accountable*." (internal citation omitted) (emphasis added).

Additionally, the actions of the Officer Defendants were officially ratified by Defendant Jedrusik, the Chief of Police and person responsible for the policies, practices, and procedures of the City police department and for the training of its officers.[11] *See St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies."). In short, the City and its Chief of Police are "responsible" for the deprivation of Plaintiff's rights.

Furthermore, per Defendants' testimony and arguments presented in the district court *and in this Court*, a pro-life demonstrator can be arrested in the City as a matter of policy and practice for simply uttering the word "*bomb*" outside of an *abortion*

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constitutional violation, the City *is* "responsible," and thus liable for the violation.

[11] Defendants' argument that Plaintiff has made a "belated attempt to create a 'supervisory liability' claim against Chief Jedrusik" (an argument they made below) (Defs.' Appellee Br. at 46) is without merit. (*See, e.g.*, R-1: Compl. ¶¶ 19-22 [setting forth supervisory liability claim], Pg. ID 6).

facility. It does not matter how this word was uttered *by the pro-life demonstrator* (we know the security guard said the "bomb" word first, but it was apparently permissible for him to do so), this word is forbidden, and simply uttering it constitutes a crime. (Defs.' Appellee Br. at 8 ["[T]he supervisor making the arrest decision, Defendant Brooks, did so with specific reference to the mention of '*bombs*.' This is the '*precise word*' that *was* 'crucial' to Brooks' decision."]; *see also id*. at 15 ["Thames' alleged reference to 'bombs' was the critical element for her arrest."]).

To summarize, first, the violations occurred as a result of the actions of nearly the entire day shift and the shift supervisor (Defendant Brooks) and not simply the acts of one or a few rogue police officers. And the officers were operating pursuant to the policy and practice that a pro-life demonstrator can be arrested for simply uttering the word "bomb" outside of an abortion facility. Second, pursuant to the *sworn testimony* of the City's designated Rule 30(b)(6) witness, the City takes full "responsibility" for the actions of the Officer Defendants and admits that these actions were pursuant to the policies, practices, and procedures of its police department. (R-36-3: Ex. O Miller Dep. at 86:1-10, Pg. ID 700). Third, the City, through its Chief of Police, Defendant Jedrusik, officially sanctioned and ratified the unlawful conduct of the Officer Defendants. (R-36-3: Ex. O Miller Dep. at 44:6-25 to 45:1-3, 49:5-10 [affirming no changes to policies, practices, or procedures], Pg. ID 693-95; Ex. C [Internal Investigation] at 16 [concluding that the arrest was "reasonable and

justified"], Pg. ID 603). Fourth, the length of the unlawful detention was caused by the policies, practices, and procedures of the City, which cites "budget" reasons for why Plaintiff remained imprisoned for over *49 hours* (R-36-3:Ex. O Miller Dep. at 20:5-25 to 21:1-3 [citing budget reasons for why there is only one detective on weekend duty to handle in custody prisoner cases], Pg. ID 691-92), before being released because there was no evidence of a crime, (R-36-3: Ex. N Farrar Dep. at 24:19-24, Pg. ID 686; Ex. D [Incident Report] ["I do not see a direct threat where Kimberley threatened to bomb the clinic."] at 5, Pg. ID 611).[12] And finally, the City's policy of denying its prisoners the right to exercise their religion and fulfil their religious obligations while in police custody is a municipal policy that violates the First Amendment. (R-36-3: Ex. O Miller Dep. at 86:11-25 to 88:1 [prohibiting religious exercise as a matter of policy], Pg. ID 700).

In the final analysis, the City and Defendant Jedrusik are "responsible" and thus liable for the deprivation of Plaintiff's clearly established rights and the injuries she suffered as a result.

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[12] The record shows that Defendant Soulliere completed the Incident Report at 11:40:52 a.m. on August 27, 2016. The report was reviewed by Defendant Brooks at 2:37:40 p.m. that same day. Defendant Brooks approved the report and *sent it to the Detective Bureau minutes later* (2:40:17 p.m.). (R-36-3: Ex. L Brooks Dep. at 11:1-25 to 12:1-19, Pg. ID 673; R-36-3: Ex. H [Report Chronology], Pg. ID 634). In short, Defendants' "budget constraints" justification for its lack of manpower and thus attention to innocent persons sitting in its holding cells is not a "bona fide emergency" or an "extraordinary circumstance." (*See* Defs.' Appellee Br. at 41).

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court affirm the district court's denial of qualified immunity, reverse the district court's denial of Plaintiff's motion for summary judgment on the issue of liability as to all Defendants, and remand for further proceedings to resolve the issue of damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 and this Court's briefing schedule, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5,899 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, 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.

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SUPPLEMENTAL ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	Page ID	Description
R-35-7	476-510	Defendants' Exhibit F to Motion for Summary Judgment
R-58	936-44	Order Granting Plaintiff's Motion for Entry of Judgment and Request for Expedited Review