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

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| KIMBERLEY THAMES,<br>Plaintiff,<br>v.<br>CITY OF WESTLAND, *et al.*,<br>Defendants. | No. 2:16-cv-14130-GCS-EAS<br>Hon. George Caram Steeh<br>Mag. Judge Elizabeth A. Stafford<br>[Fed. R. Civ. P. 56] |

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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

David Yerushalmi, Esq. (Ariz. Bar No. 009616;
DC Bar No. 978179; Cal. Bar No. 132011;
NY Bar No. 4632568)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
Tel: (646) 262-0500
dyerushalmi@americanfreedomlawcenter.org

THOMAS MORE SOCIETY
Patrick T. Gillen (P47456)
1025 Commons Circle
Naples, Florida 34119
Tel: (734) 355-4728
ptgillen@avemarialaw.edu

*Attorneys for Plaintiff*

CUMMINGS, McCLOREY,
DAVIS & ACHO, P.L.C.
Gregory A. Roberts (P33984)
17436 College Parkway
Livonia, Michigan 48152
(734) 261-2400
groberts@cmda-law.com

*Attorneys for City Defendants*

Plaintiff Kimberley Thames ("Plaintiff"), by and through undersigned counsel, hereby moves this Court for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. More specifically, Plaintiff seeks entry of judgment on the issue of liability on her claims against the City Defendants (Defendants City of Westland, Jeff Jedrusik, Jason Soulliere, John Gatti, Adam Tardiff, and Norman Brooks) arising under the First (Free Speech and Free Exercise), Fourth (Unlawful Search and Seizure), and Fourteenth (Equal Protection) Amendments.[1]

In support of this motion, Plaintiff relies upon the pleadings and papers of record, as well as her brief and exhibits filed with this motion.

For the reasons set forth more fully in her brief, there is no genuine dispute as to any material fact and Plaintiff is entitled to judgment on her claims as a matter of law. Fed. R. Civ. P. 56(a).

Pursuant to E.D. Mich. LR 7.1, on December 6, 2017, a meet-and-confer was held in which Plaintiff's counsel sought but did not receive concurrence from Defendants' counsel in the relief sought by this motion.

[1] Previously, Judgment was entered in Plaintiff's favor as against the Northland Defendants (Northland Family Planning Clinic, Renee Chelian, and Mary E. Guilbernat) pursuant to Rule 68 of the Federal Rules of Civil Procedure. (*See* J. [Doc. No. 25]).

WHEREFORE, Plaintiff hereby requests that this Court grant this motion and enter judgment in her favor as to the issue of liability on her constitutional claims.[2]

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (P62849)
David Yerushalmi, Esq.

THOMAS MORE SOCIETY

/s/ *Patrick Gillen*
Patrick Gillen, Esq. (P47456)

*Counsel for Plaintiff*

[2] The Court bifurcated discovery. Upon finding Defendants liable, the parties will then engage in discovery directed to damages. Nevertheless, upon finding a constitutional violation, Plaintiff is entitled to nominal damages as a matter of law. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991).

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**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

## ISSUES PRESENTED

I. Whether Plaintiff is entitled to judgment as a matter of law on the issue of liability as against Defendants for violating her rights protected by the Fourth Amendment.

II. Whether Plaintiff is entitled to judgment as a matter of law on the issue of liability as against Defendants for violating her rights protected by the Free Speech Clause of the First Amendment.

III. Whether Plaintiff is entitled to judgment as a matter of law on the issue of liability as against Defendants for violating her rights protected by the Free Exercise Clause of the First Amendment.

IV. Whether Plaintiff is entitled to judgment as a matter of law on the issue of liability as against Defendants for depriving her of the equal protection of the law guaranteed by the Equal Protection Clause of the Fourteenth Amendment.

## CONTROLLING AND MOST APPROPRIATE AUTHORITY

*Beck v. Ohio*, 379 U.S. 89 (1964)

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

*Brandenburg v. Ohio*, 395 U.S. 444 (1969)

*Meyers v. City of Cincinnati*, 14 F.3d 1115 (6th Cir. 1994)

*Monell v. N.Y. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)

*People v. Osantowski*, 274 Mich. App. 593, 736 N.W.2d 289 (2007)

*Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92 (1972)

*St. Louis v. Praprotnik*, 485 U.S. 112 (1988)

*United States v. Mendenhall*, 446 U.S. 544 (1980)

*Va. v. Black*, 538 U.S. 343 (2003)

*Watts v. United States*, 394 U. S. 705 (1969)

## INTRODUCTION

This case presents egregious violations of the constitutional rights of Plaintiff Kimberley Thames ("Plaintiff"), who was *unlawfully arrested* and *jailed for more than 49 hours* based on a facially bogus and fraudulent complaint that lacked any indicia of credibility, reliability, or trustworthiness. As a consequence of Defendants' unlawful actions, Plaintiff was prevented from engaging in protected religious speech activity, and she was denied religious services while she was incarcerated. Justice demands that this Court grant Plaintiff's motion.

## UNDISPUTED MATERIAL FACTS

On the morning of August 27, 2016, Plaintiff was on the public sidewalk outside of the Northland Family Planning Center ("Northland"), an abortion clinic located on Ford Road in the City of Westland, Michigan ("City"), protesting abortion.[3] Plaintiff was on the public sidewalk praying and holding a pro-life sign and a Rosary. Plaintiff, who is Catholic, engages in her pro-life speech activity at Northland as part of her religious exercise. Plaintiff is compelled by her sincerely held religious beliefs to do so. (Ex. 1 Thames Decl. ¶¶ 2-4; *see also* Ex. I Thames Dep. at 14:18-21; 15:12-19; 17:8-20; 53:5-8).

[3] (*See* Ex J. Soulliere Dep. at 23:24-25 to 24:1-4 [acknowledging that Plaintiff was out demonstrating against abortion on the day of her arrest]; Ex. L Brooks Dep. at 33:17-20 [acknowledging that Plaintiff was on the public sidewalk at Northland protesting abortion on the day of her arrest]).

While on the public sidewalk, Plaintiff had a brief conversation with a Northland security guard, Robert Parsley. During this conversation, Plaintiff told Parsley that she would pray that he would find another job. (Ex. I Thames Dep. 33:2-5, 24-25; Ex. E [Parsley Statement]). Parsley told her that he was there to protect everybody,[4] to which Plaintiff responded that she was happy to hear. According to Plaintiff, Parsley then brought up the issue of clinic bombings, claiming that abortion clinics in Michigan have been bombed, to which Plaintiff responded that she was not aware of any such bombings and that she is not the type of person who would do such a thing.[5] (*See* Ex. J Soulliere Dep. at 57:24-25 to 58:1-17; Ex. C [Internal Investigation] at 6; Ex. 1 Thames Decl. ¶¶ 9-12).

Shortly after this conversation, Plaintiff departed to use a restroom at a local store. (Ex. I Thames Dep. at 45:17-25 to 46:1-10). Upon returning to Northland to continue her pro-life activity, Plaintiff saw several police vehicles and Parsley speaking with City police officers. (Ex. I Thames Dep. at 48:21-25 to 49:1-13). The City officers who arrived at the scene included Defendants Gatti, Soulliere, Tardiff, Brooks, and Officer Halaas. (Ex. J Soulliere Dep. at 17:12-25 to 19:1-12).

[4] According to Parsley's written statement he provided to the police, "I told her my job is fine after she said to get another job. I also told her I am procting (sic) everyone that is to come near my building." (Ex. M Tardiff Dep. at 18:22-25 to 19:1-3; Ex. E [Parsley Statement]).

[5] Plaintiff explained this to the officers at the scene prior to her arrest. (Ex. J Soulliere Dep. at 57:24-25 to 58:1-17; *see also* Ex. N Farrar Dep. at 35:5-25 to 36:1-7 [reviewing transcript of police video provided in the Internal Investigation (Ex. C) and confirming that Plaintiff told him the same during her interrogation]).

Plaintiff was unaware that an employee from Northland (Mary) had called 9-1-1, complaining about an alleged bomb threat.[6] (*See* Ex. 1 Thames Decl. ¶¶ 14-16). Mary, who was calmly speaking with the 9-1-1 dispatcher, told the dispatcher, *inter alia*, that Plaintiff was holding a sign. The dispatcher responded:

> 911: She's holding a sign? Okay. Does she appear to have anything to indicate that she had a bomb in her car? Did she say anything further?
> MARY: I don't—I don't see that she has like anything on her other than the sign. (Inaudible) took a picture of her. The security guard just went back outside.

(*See* Ex. J Soulliere Dep. at 46:5-25 to 48:1; Ex. A [9-1-1 Recording]).

Upon returning to her free speech activity, Plaintiff was confronted by Defendant Soulliere, who asked, "Did you tell someone there was going to be a bombing?" Plaintiff promptly responded, "No." (Ex. J Soulliere Dep. at 49:23-25 to 51:1-20; Ex. B [Police Video-JSoulliere at 8:51:21 to 8:51:36]). Plaintiff repeatedly and vehemently denied making any bomb threat whatsoever, telling the officer that the accusation was false. (Ex. J Soulliere Dep. at 49:23-25 to 77:1-24; Ex. B [Police Video-JSoulliere at 8:51:16 to 9:05:20]; Ex. I Thames Dep. at 43:4-12; 50:15-25). Plaintiff explained to Defendant Soulliere that Parsley brought up the issue of clinic bombings, claiming that abortion clinics in Michigan have been bombed, to which Plaintiff responded that she was not aware of any such

[6] While the officers were dispatched to Northland as a result of the 9-1-1 call, the officers did not hear the call itself nor did they receive a verbatim transcript of the call. (*See* Ex. J Soulliere Dep. at 45:11-13).

bombings. (Ex. J Soulliere Dep. at 57:24-25 to 58:1-17; Ex. B [Police Video-JSoulliere at 8:53:47 to 8:55:07]; Ex. I Thames Dep. at 42:18-25; 51:1-4; Ex. 1 Thames Decl. ¶ 18).

While Plaintiff was pleading her innocence with Defendant Soulliere, Parsley, who was instructed by Defendant Gatti to tell him *exactly* what Plaintiff said, told the officer that Plaintiff stated: "**I prophesy bombs are going to fall and they're going to fall in the near future**." (Ex. K Gatti Dep. at 53:5-23; Ex. B [Police Video-JGatti at 8:51:31 to 8:52:53]). Based on this alleged statement, Defendant Brooks, the senior officer, directed Plaintiff's arrest for making terrorist threats, at which time she was placed in handcuffs. (Ex. L Brooks Dep. at 32:3-25 to 33:1-10; Ex. J Soulliere Dep. at 40:23-25 to 41:1-5; 67:2-25 to 68:1-11). Plaintiff continued to plead her innocence. (Ex. J Soulliere Dep. at 67:18-24).

Upon being arrested, Plaintiff pleaded with the religious sister who was present to come to her assistance. (Ex. J Soulliere Dep. at 68:14-15). The religious sister also told the officers that the accusation was false. (Ex. J Soulliere Dep. at 68:12-25 to 71:1-22; Ex. B [Police Video-JSoulliere at 8:56:32 to 8:58:20]; Ex. 1 Thames Decl. ¶¶ 19-21). At one point, Defendant Gatti told the religious sister, "You should not be in the position you are in, you're a disgrace."[7] (Ex. K Gatti Dep. at 19:23-25 to 20:1-5).

[7] Defendant Brooks, the shift supervisor, defended Defendant Gatti's insult: "Q.

At one point, Officer Halaas ordered Plaintiff to "Get in" the police vehicle, to which Plaintiff responded, "You got the wrong person." Officer Halaas replied, "Ma'am, I don't give a shit! I got to go!" Plaintiff then replied, "Well you should." (Ex. O Miller Dep. at 46:18-25 to 47:1-10; Ex. C [Internal Investigation] at 12; *see also* Ex. J Soulliere Dep. at 39:7-11).

At the scene, officers searched Plaintiff's vehicle without her consent.[8] (Ex. 1 Thames Decl. ¶ 22; Ex. L Brooks Dep. at 27:1-8; Ex. J Soulliere Dep. at 72:22-24). Defendants found no criminal contraband. (Ex. L Brooks Dep. at 50:2-7). Defendant officers did not request the assistance of a bomb squad, they did not request the assistance of a bomb sniffing dog, they did not direct the evacuation of the clinic, they did not search the clinic for a bomb, they did not search the surrounding area for a bomb, they did not search the adjacent parking lot for a bomb, they did not search the dumpster for a bomb, and they did not impound Plaintiff's vehicle. (Ex. J Soulliere Dep. at 34:14-25 to 35:1-12; Ex. L Brooks Dep. at 26:15-25, 27:18-19, 28:1-17). Defendant officers did not take a statement from the religious sister nor did they take statements from the two other persons

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Would you consider that to be an improper comment to a private citizen by a police officer under your charge? A. It's called the First Amendment. I wouldn't. It's not disrespectful. It doesn't violate the policy and procedure. He didn't use vulgarity towards her. He simply stated a fact." (Ex. L Brooks Dep. at 42:14-19).

[8] The police video shows that Defendant Soulliere searched the vehicle. (Ex. J Soulliere Dep. at 72:3-25 to 73:1-13; Ex. B [Police Video-JSoulliere at 9:00:48 to 9:01:10] [describing items he is finding in the vehicle while searching]).

present outside of the clinic when the alleged threat was made. (Ex. J Soulliere Dep. at 59:13-25 to 60:1-13; Ex. L Brooks Dep. at 23:24-25 to 24:1-5). Indeed, they couldn't even identify on a map where anyone was located during the alleged threat. (Ex. J Soulliere Dep. at 86:22-25 to 88:1-12; Ex. L Brooks Dep. at 33:25 to 35:1-3; Ex. F [Map]). While at the scene, Defendant Tardiff took a written statement from Parsley, in which Parsley stated,

> I told her my job is fine, after she said to get another job. I also told her I am procting (sic) everyone that is to come near my building. I told her we are to protect the laws of the land. She said, ***bombs, bombs, on America, and bombs will blow up this building***.

(Ex. E [Parsley Statement] [emphasis added]; Ex. M Tardiff Dep. at 18:22-25 to 19:1-3). This statement was signed by Parsley at 0910 on August 27, 2016.[9] (Ex. M Tardiff Dep. at 18:21-25 to 20:1). Consequently, the alleged "threat" he told the officers that prompted Plaintiff's immediate arrest ("*I prophesy bombs are going to fall and they're going to fall in the near future*") was not the same as the alleged "threat" he put in his written statement moments after the arrest ("*bombs, bombs, on America, and bombs will blow up this building*").

Prior to arresting Plaintiff, Defendant officers had not received training on distinguishing between a "true threat" and speech that is protected by the First Amendment (Ex. J Soulliere Dep. at 36:16-19; Ex. K Gatti Dep. at 117:4-7; *see*

[9] The statement form states, "By signing I swear or affirm that the above report statement(s) to the Westland Police Department is/are true and correct." (Ex. E [Parsley Statement]).

*also* Ex. O Miller Dep. at 68:18-25 to 69:1-6), despite claiming that bomb threats at abortion clinics are common (Ex. C [Internal Investigation] at 15).[10] Defendant Brooks, the *shift supervisor* who directed the arrest, testified as follows:

> 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***.

(Ex. L Brooks Dep. at 29:20-25 [emphasis added]; *see also id*. at 28:16-17 ["Threat doesn't have to be credible according to the law."]). None of the defendant officers protested or did anything to prevent Plaintiff's arrest. (Ex. L Brooks Dep. at 33:22-24; Ex. K Gatti Dep. at 100:19-25 to 101:1-8).

Plaintiff was taken to the City police station, booked, and placed in a holding cell. She remained in Defendants' custody *for over 49 hours*. (Ex. O Miller Dep. at 63:1-10 [confirming that Plaintiff was arrested at 9:05 am on August 27 and not released until 10:14 am on August 29]). The food she was given was barely edible, and her holding cell had a single toilet that was open for all to see and a cement slab for sleeping—Plaintiff did not eat or sleep for the entire time she was in the City's custody. (Ex. I Thames Dep. at 62:21-25 to 63:1-11; Ex. 1 Thames Decl. ¶¶ 25-40; *see also* Ex. G [Holding Cell Photos]).

[10] Despite this politically-biased and false accusation directed at pro-lifers, in his 20 plus years as an officer, Defendant Brooks is unaware of *any* bomb threat directed at Northland. (Ex. L Brooks Dep. at 20:14-23; *see also* Ex. K Gatti Dep. at 117:12-21).

Defendant Soulliere completed the Incident Report at 11:40:52 am on August 27, 2016. The report was reviewed by Defendant Brooks at 2:37:40 pm that same day. Defendant Brooks approved the report and sent it to the Detective Bureau minutes later (2:40:17 pm). (Ex. L Brooks Dep. at 11:1-25 to 12:1-19; Ex. H [Report Chronology]). Despite being told repeatedly that a detective would be in at any time to review her case (Ex. 1 Thames Decl. ¶¶ 25, 28, 34-37), Detective Farrar did not do so until Monday, August 29, 2016.[11] (Ex. 1 Thames Decl. ¶ 37; Ex. D [Incident Report]). The City attributes this delay to budget constraints, which apparently only allow it to have one detective on weekend duty to handle in custody prisoner cases.[12] (Ex. O Miller Dep. at 20:5-25 to 21:1-3). Upon reviewing the file, Detective Farrar properly concluded that there was no criminal threat, and directed Plaintiff's release from custody.[13] (Ex. N Farrar Dep. at 24:19-24; Ex. D [Incident Report] ["I do not see a direct threat where Kimberley threatened to bomb the clinic."]).

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[11] However, the record indicates that Detective Farrar reviewed the Incident Report at 1:25:34 pm on August 28, 2016. (Ex. H [Report Chronology]).

[12] Defendants claim that Detective Farrar also had to handle a homicide investigation over the weekend (Ex. O Miller Dep. at 65:22-25 to 66:1-13), but that investigation didn't start until Sunday (Ex. N Farrar Dep. at 20:16-21; Ex. O Miller Dep. at 66:12-13). Plaintiff had been in custody since early Saturday morning. (Ex. O Miller Dep. at 63:1-10).

[13] When she was finally released, Plaintiff requested a ride to her vehicle. Her request was denied, so she had to walk a mile from the police station to the parking lot where her car was parked at the time of her arrest. (Ex. 1 Thames Decl. ¶ 44).

The City police department conducted an internal investigation, concluding that Plaintiff's arrest and subsequent detention were consistent with its policies, practices, and procedures. (Ex. O Miller Dep. at 91:5-22; Ex. C [Internal Investigation]; *see also* Ex. O Miller Dep. at 49:5-10 [confirming no changes to any policy, practice, or procedure as a result of Plaintiff's arrest and subsequent detention]). Consequently, the City, through its Chief of Police, Defendant Jedrusik (Ex. O Miller Dep. at 81:16-19), the official responsible to the City for the policies, practices and procedures of the department (Ex. O Miller Dep. at 91:5-11), ratified and sanctioned the officers' conduct (Ex. O Miller Dep. at 44:6-25 to 45:1-3 [affirming no changes to policies, practices, or procedures]; Dep. Ex. 2 [Internal Investigation] at 16 [concluding that the arrest was "reasonable and justified."]). Indeed, Deputy Chief Brian Miller, the witness designated by the City pursuant to Rule 30(b)(6) to testify on its behalf, testified as follows:

> 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***.

(Ex. O Miller Dep. at 86:1-10 [emphasis added]; *see also id*. at 9:4-25 to 10:1-4).

Also, while in the City's custody and pursuant to City policy (Ex. O Miller Dep. at 86:11-25 to 88:1), Plaintiff was not permitted to attend Mass or receive the eucharist, as required by her Catholic faith. (Ex. 1 Thames Decl. ¶ 34).

## STANDARD OF REVIEW

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotations and citation omitted). Accordingly, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See generally Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-81 (6th Cir. 1989) (discussing standard).

## ARGUMENT

### I. DEFENDANTS VIOLATED PLAINTIFF'S RIGHTS PROTECTED BY THE FOURTH AMENDMENT BY UNLAWFULLY SEIZING, SEARCHING, AND DETAINING HER FOR OVER 49 HOURS.

The Fourth Amendment protects private citizens against unreasonable police searches and seizures. U.S. Const. amend. IV. This protection is made applicable to the States by operation of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643 (1961). Accordingly, the Supreme Court has long recognized that,

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

*Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation omitted); *see also Coolidge v. N.H.*, 403 U.S. 443, 455 (1971) ("In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts."); *Fla. v. Royer*, 460 U.S. 491, 513 (1983) ("We must not allow our zeal for effective law enforcement to blind us to the peril to our free society that lies in this Court's disregard of the protections afforded by the Fourth Amendment.").

While "not all personal intercourse between policemen and citizens involves 'seizures' of persons, . . . when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [we may] conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19, n.16. A "seizure" occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

Here, there is no dispute that Plaintiff was seized by Defendants within the meaning of the Fourth Amendment. Plaintiff was handcuffed, transported to the City police station in a police vehicle, booked, and held in a detention cell for more

than 49 hours. At no time was Plaintiff free to leave. *Mendenhall*, 446 U.S. at 554. Consequently, "[w]hen 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." *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987).

The Supreme Court has explained that "'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Mich. v. DeFillippo*, 443 U.S. 31, 37 (1979). Per the Court:

> Whether that arrest was constitutionally valid depends in turn upon whether, *at the moment the arrest was made*, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

*Beck v. Ohio*, 379 U.S. 89, 91 (1964) (citation omitted) (emphasis added).

Thus, whether Plaintiff's constitutional rights were violated hinges on whether there was probable cause to arrest her in the first instance. *See Alman v. Reed*, 703 F.3d 887, 896 (6th Cir. 2013) (concluding that City of Westland police officers lacked probable cause for the arrest of the plaintiff, who sued them for violating his rights under 42 U.S.C. § 1983). And "[w]hen no material dispute of

fact exists, probable cause determinations are legal determinations that should be made" by the court. *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005).

To determine whether probable cause existed for arresting and detaining Plaintiff for over 49 hours for allegedly making a terrorist threat, we must first analyze the alleged crime. To begin, there is no dispute that Plaintiff was arrested *for pure speech*. That is, there is no evidence of her making any threatening gestures, brandishing any weapons, or possessing or displaying anything that could remotely be considered criminal contraband (*e.g.*, a hoax bomb). (*See* Ex. J Soulliere Dep. at 37:2-8; 44:15-17; Ex. L Brooks Dep. at 50:2-7).

Accordingly, statutes criminalizing speech "must be interpreted with the commands of the First Amendment clearly in mind" in order to distinguish true threats from constitutionally protected speech. *Watts v. United States*, 394 U. S. 705, 707 (1969). Consequently, the *precise* words allegedly uttered by Plaintiff are crucial and thus serve as the threshold for our inquiry. For if the words themselves cannot be criminalized within the commands of the First Amendment, there is no basis (probable cause or otherwise) for arresting Plaintiff for uttering them.

In *Watts*, the Court instructed that only a contextually *credible* threat to kill, injure, or kidnap the President constitutes a "true threat" that is punishable under the law. By contrast, communications which convey political hyperbole (even if they mention weapons, such as guns or bombs) are protected by the First

Amendment and do not constitute a "true threat." *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."). Thus, the Court instructed that Watt's alleged "threat," in its factual context (*i.e.*, Watts was engaging in a political protest, not unlike the fact that Plaintiff was also engaged in a protest against abortion on the public sidewalk outside of Northland) was not a "true threat" which could be constitutionally prosecuted, but instead was mere "political hyperbole" immunized by the First Amendment. *Id*. at 706-08; *see 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); *see also United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (upholding a dismissal of the 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*") (emphasis added).

These limitations on prosecuting speech deemed to be a "true threat" are not confined to prosecutions under federal law. They are limitations mandated by the First Amendment and are thus applicable to *all* crimes involving "threat" speech, including the alleged crime at issue here (Mich. Comp. Laws § 750.543m). *See*

*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*, 394 U.S. at 707).[14]

Additionally, in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), the Court stated that "the 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). And as Justice Brandeis stated in *Whitney v. California*, 274 U.S. 357 (1927):

> Fear of serious injury cannot alone justify suppression of free speech. . . . To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. *There must be reasonable ground to believe that the danger apprehended is imminent*.

*Id*. at 376 (Brandeis, J., concurring) (emphasis added).

[14] Section 750.543z further provides as follows: "Notwithstanding any provision in this chapter, a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision."). Mich. Comp. Laws § 750.543z.

The alleged "threat" uttered by Plaintiff that served as the basis for her arrest was "**I prophesy bombs are going to fall and they're going to fall in the near future**." Not only is this political hyperbole, particularly in context, it utterly fails to meet the constitutionally mandated standard to constitute a "true threat." The same is true of the other alleged statement, "**bombs, bombs, on America, and bombs will blow up this building**," even though this statement was not conveyed to Defendants until *after* they had arrested Plaintiff.

This inability, *as a matter of law*, to make a threshold showing of an actionable "threat" is fatal to Defendants' claim that they had probable cause to arrest Plaintiff based on her alleged statement(s). But there are additional reasons for finding Plaintiff's arrest unlawful under the circumstances. First, the officer (Defendant Brooks) who directed Plaintiff's arrest testified that she could be arrested for merely uttering the word "bomb" outside of an abortion clinic and that the alleged threat need not be "credible" at all. Second, not only was there no imminence in the actual *words* of the alleged threat for which Plaintiff was arrested, the actions of Defendants demonstrate that they perceived no imminent fear or apprehension nor did they perceive the alleged "threat" to be credible in any way. Indeed, Defendants' actions demonstrate that they did not believe that this was a "*serious expression of an intent to commit an act of unlawful violence*" or that there was *any* "*reasonable ground to believe that the danger apprehended*

[*was*] *imminent*." *See Black*, 538 U.S. at 359; *Brandenburg*, 395 U.S. at 447; *Whitney*, 274 U.S. at 376. Indeed, no "reasonable person," as Defendants' actions demonstrate, "would take the statement as a *serious expression of an intention to inflict bodily harm*." *See Alkhabaz*, 104 F.3d at 1495. As the undisputed evidence shows, Defendant officers did not direct the evacuation of the clinic, they did not request the assistance of a bomb squad, they did not request the assistance of a bomb sniffing dog, they did not search the clinic for a bomb, they did not search the surrounding area for a bomb, they did not search the adjacent parking lot for a bomb, they did not search the dumpster for a bomb, and they did not impound Plaintiff's vehicle for fear that a bomb may be planted within it. They did *nothing* that a reasonably prudent person who actually believed the alleged threat was serious, real, or imminent would do. *Nothing*. Indeed, the only "witness" that Defendants relied upon—the security guard—was not credible at all. He made *materially conflicting* statements at the scene of the arrest. In the final analysis, there is only one reasonable conclusion that can be drawn from the evidence: Defendants violated the Fourth Amendment because there was no legal justification, probable cause or otherwise, to arrest Plaintiff.[15]

[15] Indeed, the evidence shows that this was a politically-motivated arrest. (*See* Ex. K Gatti Dep. at 34:5-18; 35:18-24 [citing political reasons for the arrest—claiming "it's a very politically, religiously charged issue"]; Ex. L Brooks Dep. at 29:20-25 [claiming you can't use the word "bomb" outside of an abortion clinic]).

## II. DEFENDANTS VIOLATED PLAINTIFF'S RIGHTS TO FREEDOM OF SPEECH AND THE FREE EXERCISE OF RELIGION.

### A. Defendants Prevented Plaintiff from Engaging in Her Religious Expressive Activity in Violation of the First Amendment.

Plaintiff's religious expression (praying and holding a pro-life sign on the public sidewalk outside of Northland) is fully protected by the First Amendment. As stated by the Supreme Court, "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted). Indeed, Plaintiff's speech is protected by the Free Speech *and* Free Exercise Clauses of the First Amendment. *Capitol Square Rev. & Adv. Bd. v Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.") (citations omitted); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J.) (observing that "private speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses").

Moreover, the forum in question (a public sidewalk) is indisputably a traditional public forum. *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora.") (internal citation omitted). There is no exception for public sidewalks adjacent to abortion clinics. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529

(2014) (striking down on First Amendment grounds buffer zone restrictions around abortion clinics).

In *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) (*en banc*), the Sixth Circuit held that government officials violated the plaintiffs' rights to freedom of speech and the free exercise of religion by threating to arrest them and thereby preventing them from engaging in their *expressive* activity. Per the court:

> The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim. *Prater v. City of Burnside*, 289 F.3d 417, 427 (6th Cir. 2002). The government cannot prohibit an individual from engaging in religious conduct that is protected by the First Amendment. *Id.*
>
> The Bible Believers' proselytizing at the 2012 Arab International Festival constituted religious conduct, as well as expressive speech-related activity, that was likewise protected by the Free Exercise Clause of the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943). Plaintiff Israel testified that he was required "to try and convert non-believers, and call sinners to repent" due to his sincerely held religious beliefs. We do not question the sincerity of that claim. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) ("[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable." (internal parentheses omitted)).
>
> Free exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Rosenberger*, 515 U.S. at 841. 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. Therefore, the free exercise claim succeeds on the same basis as the free speech claim. *See Watchtower Bible*, 536 U.S. at 150, 159 n.8.

*Bible Believers*, 805 F.3d at 255-56.

Here, the undisputed evidence shows that Plaintiff is compelled by her sincerely held religious beliefs to engages in her expressive activity in opposition to abortion. Consequently, Plaintiff prays and stands as a witness for life on the public sidewalk outside of Northland as part of her religious exercise. By arresting and detaining Plaintiff and thereby preventing her from engaging in her speech activity and chilling her future exercise of this activity (Ex. 1 Thames Decl. ¶ 45), Defendants violated Plaintiff's rights to freedom of speech and the free exercise of religion. Indeed, if *threatening* to arrest someone engaged in expressive religious activity constitutes a violation of the Free Speech and Free Exercise Clauses of the First Amendment, *see Bible Believers*, 805 F.3d at 255-56, the *actual arrest* (and subsequent *49-hour confinement*) of a person engaging in such activity is without doubt a violation of these rights.

### B. Defendants Prevented Plaintiff from Attending Mass and Receiving the Eucharist in violation of the First Amendment.

Fundamentally, the "exercise of religion" embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding

religious beliefs as such."). "The 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).

In *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court held that the State's denial of unemployment compensation benefits because the employee *voluntarily* terminated his employment with a factory that produced armaments, claiming that the production of such items was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion in violation of the First Amendment. The Court stated that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id*. at 717-18. Here, the compulsion was direct: Defendants arrested and detained Plaintiff, thereby preventing her, pursuant to policy, from fulfilling her religious obligation. There is no dispute that Plaintiff, a practicing Catholic, is compelled by her sincerely held religious beliefs to attend Mass and receive the Eucharist on Sundays. (Ex. 1 Thames Decl. ¶ 34). By preventing Plaintiff from doing so, Defendants deprived her of the right to the free exercise of religion.

**III. Defendants Deprived Plaintiff of the Equal Protection of the Law.**

In *Bible Believers v. Wayne County*, the court stated:

We have held that:

> The Equal Protection Clause of the Fourteenth Amendment commands that no state shall . . . deny to any person within its

> jurisdiction the equal protection of the laws. To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment . . . burdens a fundamental right, targets a suspect class, or has no rational basis.
>
> *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (citations and internal quotation marks omitted). Freedom of speech is a fundamental right. *Lac Vieux Desert Band of Lake Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 410 (6th Cir. 1999). Therefore, Wayne County's actions are subject to strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). "In determining whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek relevant similarity." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (internal quotation marks omitted).

*Bible Believers*, 805 F.3d at 256 (emphasis added). In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), the Court stated, "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

Here, Defendants arrested Plaintiff because of her political viewpoint (*i.e.*, she was pro-life), justifying the arrest based on the "very politically, religiously charged" issue of abortion (*see* Ex. K Gatti Dep. at 34:11-12, 35:18-22; Ex. C [Internal Investigation] at 15; Ex. L Brooks Dep. at 29:20-25 [claiming he could arrest Plaintiff for simply saying the word "bomb" outside of an abortion clinic]), in violation of the equal protection guarantee of the Fourteenth Amendment.

## IV. Defendant City and Chief of Police Are Liable for the Violations.

In *Monell v. New York City Department of Social Services*, 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. At the end of the day, "*Monell* is a case about *responsibility*." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986) (emphasis added). Thus, acts "of the municipality" are "*acts which the municipality has officially sanctioned or ordered*." *Id*. at 480 (emphasis added). Indeed, the municipality is liable when the conduct at issue has been *ratified* by a policy maker, as in this case. As stated by the Court in *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. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

*Meyers v. City of Cincinnati*, 14 F.3d 1115, 1118 (6th Cir. 1994) (same). Additionally, 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). And supervisorial liability may be imposed under § 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury. *See Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992) (noting that "the police chief and city might be held liable for improper training or improper procedure even if [defendant police officer] is exonerated").

Here, Defendant Jedrusik, the Chief of Police and the person responsible to the City for the policies, practices, and procedures of the City police department, ratified and sanctioned the unlawful acts of the officers, and he and his supervisors failed to adequately train and supervise these officers with regard to distinguishing between a "true threat" and protected speech. And as the evidence amply demonstrates, Plaintiff's injuries were caused by this failure to train and supervise, and this failure resulted from the City's deliberate indifference to the injuries that it may cause. In sum, the City is "responsible." Indeed, per the testimony of the City's designated witness pursuant to Rule 30(b)(6), *the City takes full responsibility for Defendants' actions*. (Ex. O Miller Dep. at 86:1-10).

## CONCLUSION

As stated by Plaintiff, a Navy veteran, "No American citizen should be treated the way I was treated by the City and its police officers." (Ex. 1 Thames Decl. ¶ 46). Plaintiff respectfully requests that the Court grant her motion.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (P62849)
David Yerushalmi, Esq.

THOMAS MORE SOCIETY

/s/ *Patrick Gillen*
Patrick Gillen, Esq. (P47456)

*Counsel for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 20, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

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