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

BRIEF OF PLAINTIFF KIMBERLEY THAMES (SECOND BRIEF)

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiff states the following:

Plaintiff Kimberley Thames is an individual, private party.

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

AMERICAN FREEDOM LAW CENTER

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

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiff respectfully requests that this Court hear oral argument. This case presents for review important constitutional questions arising out of Defendants' unlawful seizure and a 49-hour detention of Plaintiff Kimberley Thames based *entirely* on statements she allegedly made that cannot be punished as matter of law. In short, this case involves constitutional rights of the highest order.

Additionally, this case involves important questions regarding responsibility for the deprivation of a private citizen's fundamental rights. More specifically, should the City and its Chief of Police be liable for actions that the City's Rule 30(b)(6) witness admits were taken pursuant to City Police Department policies and practices and that were ratified by the Chief of Police? Plaintiff believes they should be held responsible and thus liable for the deprivation of her rights—the blame should not be shouldered by just the individual police officers.

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

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PRELIMINARY STATEMENT

In the City of Westland ("City"), as a matter of policy, practice, and training, a pro-life demonstrator can be arrested, searched, and jailed *for over 49 hours* for allegedly uttering the word "bomb" while engaging in free speech activity on a public sidewalk outside of an abortion center. Per the sworn testimony of Defendant Brooks, the *shift supervisor* who directed the arrest of Plaintiff Kimberley Thames ("Plaintiff"):

> 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). Defendants are mistaken. The fundamental and fatal flaw of Defendants' entire argument is their disregard of *the* material fact that the *only* basis for the arrest was *speech* attributed to Plaintiff. Consequently, the *precise words* that they claim she uttered are crucial. As demonstrated below, the statements Plaintiff was alleged to have made cannot be punished under the First Amendment as a matter of law.[1] *See infra*. As a result, there is *no* crime and thus *no* probable cause to arrest, search, and detain Plaintiff.

[1] The Officer Defendants' argument is based upon a straw man. Plaintiff is not (and has never) argued that true threats are protected speech. (*See* Officer Defs.' Br. at 23). What she has consistently argued, and continues to argue here, is that *the speech for which she was arrested* was not a true threat but political hyperbole at best and thus cannot be the basis for punishment under the First Amendment *as a matter of law*. *See infra*. She has never "backtracked" from that position. To suggest otherwise, as

Defendants' *reckless* disregard for Plaintiff's clearly established, fundamental rights was on full display through the recorded conversation with Officer Halaas:

> Plaintiff: "You got the wrong person."
> Officer Halaas: "Ma'am, I don't give a shit! I got to go!"
> Plaintiff: "Well you should."

(R-36-3: Ex. O, Miller Dep. at 46:18-25 to 47:1-10, Pg. ID 694; R-36-3: Ex. C [Internal Investigation] at 12, Pg. ID 599; *see also* R-49: Op. & Order at 7, Pg. ID 863).

In sum, the Court should reject Defendants' efforts to escape liability in this case, grant judgment in Plaintiff's favor on the issue of liability as to all Defendants, and remand for further proceedings to resolve the issue of damages.

STATEMENT OF JURISDICTION

On November 22, 2016, Plaintiff filed this action, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1: Compl, Pg. ID 1-38). Plaintiff also alleged various state law claims against certain defendants not before this Court.[2] The district court exercised its jurisdiction as against the City Defendants pursuant to 28 U.S.C. §§ 1331 and 1343.

On December 20, 2017, Defendants City of Westland, Jeff Jedrusik, Jason

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the Officer Defendants do here (Officer Defs.' Br. at 23), is to suggest a falsehood.

[2] Previously, Plaintiff accepted an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure from Defendants Northland Family Planning Clinic, Renee Chelian, and Mary E. Guilbernat, thereby dismissing these defendants. (*See* R-25: J., Pg. ID 342-44). Plaintiff did not pursue any claims against the John Doe Defendant. (*See* R-49: Op. & Order at 38-39, Pg. ID 894-95).

Soulliere, John Gatti, Adam Tardiff, and Norman Brooks (collectively referred to as "Defendants") filed a motion for summary judgment. (R-35: Defs.' Mot. for Summ. J., Pg. ID 386-422). That same day, Plaintiff filed a motion for partial summary judgment as to liability. (R-36: Pl.'s. Mot. for Partial Summ. J., Pg. ID 530-561). The parties filed their respective responses and replies.

On April 20, 2018, the district court entered an opinion and order granting in part and denying in part Defendants' motion for summary judgment and denying Plaintiff's motion for partial summary judgment. (R-49: Op. & Order, Pg. ID 857-97).

On May 18, 2018, Defendants Brooks, Gatti, Soulliere, and Tardif, the individual police officers (hereinafter collectively referred to as "Officer Defendants"), timely filed a notice of appeal, appealing that portion of the district court's order denying their request for qualified immunity. (R-51: Officer Defs.' Notice of Appeal, Pg. ID 899-900). Because there is no material fact dispute and the Officer Defendants' appeal only raises issues of law, the denial of their request for qualified immunity is immediately appealable as a collateral order. *See Johnson v. Jones*, 515 U.S. 304, 313-14 (1995).

On May 25, 2018, Plaintiff timely filed a notice of cross appeal (R-53: Notice of Cross Appeal, Pg. ID 902-04), appealing the liability issues as to the Officer Defendants.

On June 11, 2018, this Court issued an order requiring Plaintiff to show cause in writing why her cross appeal should not be dismissed for lack of jurisdiction. (Doc. No. 8-2, Order to Show Cause, Case No. 18-1608). Plaintiff made that showing in her response filed with this Court on June 29, 2018. (Doc. No. 17, Pl.'s Resp. to Show Cause Order, Case No. 18-1608). In her response, Plaintiff demonstrated that the issues considered by the district court, raised in the Officer Defendants' appeal, and presented by the cross appeal are inextricably intertwined.[3] Plaintiff further argued that her cross appeal does no more than invoke this Court's unquestioned power to direct entry of judgment for her on remand under 28 U.S.C. § 2106 in light of the nature of the Officer Defendants' appeal from the decision below. (*See id*.).

On June 18, 2018, the district court granted Plaintiff's motion for entry of judgment (R-58: Order Granting Pl.'s Mot., Pg. ID 936-44) and entered final judgment in favor of the City of Westland and Defendant Jedrusik pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (R-59: J., Pg. ID 945). That same day, Plaintiff timely filed a notice of appeal as to this final judgment. (R-60, Notice of Appeal, Pg. ID 946-48). This Court has jurisdiction to hear appeals of final judgments pursuant to 28 U.S.C. § 1291.

Subsequently, Plaintiff filed a motion with this Court, requesting that the Court

[3] In their opening brief, the Officer Defendants agree that there is no genuine dispute of material fact (Officer Defs.' Br. at 1-2), and that the central issue as to the officers' liability (*i.e.*, whether they had probable cause to arrest Plaintiff) presents "a question of law to be decided by the court, not a jury." (Officer Defs.' Br. at 27-28).

consolidate this appeal with the Officer Defendants' appeal and Plaintiff's cross appeal. That motion was granted. (Doc. No. 23-2, Order Granting Consolidation, Case Nos. 18-1576/18-1608/18-1695).

Accordingly, this Court has jurisdiction to hear the Officer Defendants' appeal, Plaintiff's cross appeal, and Plaintiff's appeal of the final judgment entered pursuant to Rule 54(b).

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether the Officer Defendants violated Plaintiff's clearly established constitutional right to be free from unreasonable searches and seizures when they arrested and detained her for more than 49 hours based on an alleged statement that does not qualify as a true threat as a matter of law in direct violation of the Fourth Amendment and 42 U.S.C. § 1983.

II. Whether the Officer Defendants violated Plaintiff's clearly established constitutional right to freedom of speech when they arrested and detained her for more than 49 hours based on an alleged statement that does not qualify as a true threat as a matter of law but is protected political speech and thereby further prevented Plaintiff from engaging in her pro-life speech activity on the public sidewalk outside of an abortion center in direct violation of the First Amendment and 42 U.S.C. § 1983.

III. Whether the Officer Defendants violated Plaintiff's clearly established constitutional right to the free exercise of religion when they arrested and detained her

for more than 49 hours based on an alleged statement that does not qualify as a true threat as a matter of law but is protected political speech and thereby prevented Plaintiff from engaging in expressive religious activity and from attending Mass and receiving the Sacraments while in police custody in direct violation of the First Amendment and 42 U.S.C. § 1983.

IV. Whether the Officer Defendants violated Plaintiff's clearly established constitutional right to the equal protection of the law when they arrested Plaintiff and detained her for more than 49 hours based on an alleged statement that does not qualify as a true threat as a matter of law because Plaintiff was engaging in pro-life speech activity in direct violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

V. Whether Defendant Jedrusik, the Chief of Police, who is responsible for supervising and training the Officer Defendants and who ratified the actions of the Officer Defendants, is liable for violating Plaintiff's clearly established constitutional rights.

VI. Whether the municipality is liable for the violation of Plaintiff's clearly established constitutional rights when (1) the violations occurred as a result of the actions of nearly the entire day shift and their supervisor and not simply one or a few rogue police officers; (2) the City, through its designated Rule 30(b)(6) witness, admitted during its deposition that the Officer Defendants were acting pursuant to City

policy and practice and that the City took full responsibility for the officer's actions; (3) the City, through its Chief of Police, ratified the actions of the Officer Defendants, concluding that the arrest was justified; (4) Plaintiff was deprived of her right to religious exercise while in police custody based on the City's policy of prohibiting members of the clergy from visiting detainees for religious reasons; and (5) Plaintiff's lengthy detention (over 49 hours) was due to a lack of manpower caused by City "budget constraints."

STATEMENT OF THE CASE

A. Undisputed Facts.[4]

On the morning of August 27, 2016, Plaintiff was on the public sidewalk outside of the Northland Family Planning Center ("Northland"), an abortion center located in the City, protesting abortion.[5] 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. (R-36-2: Ex. 1 Thames Decl. ¶¶ 2-4, Pg. ID 564-65; *see also* R-36-3: Ex. I Thames Dep. at 14:18-21; 15:12-19; 17:8-20; 53:5-8, Pg. ID 637-38, 643).

[4] Plaintiff agrees with the Officer Defendants that there is no genuine dispute of material fact in this case. (*See* Officer Defs.' Br. at 1-2).

[5] (*See* R-36-3: 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], Pg. ID 648; R-36-3: Ex. L Brooks Dep. at 35:17-20 [acknowledging that Plaintiff was on the public sidewalk at Northland protesting abortion on the day of her arrest], Pg. ID 678).

While *on the public sidewalk demonstrating against abortion*, Plaintiff had a brief conversation with a Northland security guard, Robert Parsley. (R-36-3: Ex. I Thames Dep. 33:2-5, 24-25, Pg. ID 639; R-36-3: Ex. E [Parsley Statement], Pg. ID 614). During this conversation, and *as Plaintiff told the officers at the scene and prior to her arrest*, 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 bombings and that she is not the type of person who would do such a thing. (R-36-3: Ex. J Soulliere Dep. at 57:24-25 to 58:1-17, Pg. ID 655; R-36-3: Ex. C [Internal Investigation] at 6, Pg. ID 593; R-36-2: Ex. 1 Thames Decl. ¶¶ 9-12, Pg. ID 565-66; *see also* R-36-3: Ex. N Farrar Dep. at 35:5-25 to 36:1-7, Pg. ID 687).

Shortly after this conversation with Parsley, Plaintiff departed to use a restroom. (R-36-3: Ex. I Thames Dep. at 45:17-25 to 46:1-10, Pg. ID 641). Upon returning to Northland to continue her pro-life activity, Plaintiff saw several police vehicles and Parsley speaking with City police officers. (R-36-3: Ex. I Thames Dep. at 48:21-25 to 49:1-13, Pg. ID 641-42). Defendants Gatti, Soulliere, Tardiff, Brooks, and Officer Halaas arrived at the scene. (R-35: Defs.' Mot. for Summ. J. at 3, Pg. ID 400; R-36-3: Ex. J Soulliere Dep. at 17:12-25 to 19:1-12, Pg. ID 647). Plaintiff was unaware that a Northland employee (Mary) had called 9-1-1.[6] (*See* R-36-2: Ex. 1 Thames Decl. ¶¶ 14-16, Pg. ID 566-67). Mary, who was calmly speaking with the 9-1-1 dispatcher,

[6] While the officers were dispatched as a result of the 9-1-1 call, they did not know the specific details of the call. (*See* R-36-3: Ex. J Soulliere Dep. at 45:11-13, Pg. ID 652).

told the dispatcher, *inter alia*, that Plaintiff was simply holding a sign and that she (Mary) saw nothing to indicate that Plaintiff had anything like a bomb. (R-36-3: Ex. J Soulliere Dep. at 46:5-25 to 48:1, Pg. ID 652; R-36-3: Ex. A [9-1-1 Recording], Pg. ID 584).[7]

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 and emphatically responded, "No." (R-36-3: Ex. J Soulliere Dep. at 49:23-25 to 51:1-20, Pg. ID 653; R-36-3: Ex. B [Police Video: JSoulliere at 8:51:21 to 8:51:36], Pg. ID 586).[8] *Plaintiff repeatedly and vehemently denied making any bomb threat whatsoever, telling the officer that the accusation was false*. (R-36-3: Ex. J Soulliere Dep. at 49:23-25 to 77:1-24, Pg. ID 653-60; R-36-3: Ex. B [Police Video: JSoulliere at 8:51:16 to 9:05:20], Pg. ID 586; R-36-3: Ex. I Thames Dep. at 43:4-12; 50:15-25, Pg. ID 640-42). *And contrary to Defendants' incorrect assertions*,[9] Plaintiff explained to Defendant Soulliere that Parsley brought

[7] The 9-1-1 recording was submitted to this Court by the Officer Defendants. (*See* Defs.' Counsel Ltr. to Clerk dtd Aug. 29, 2018).

[8] The Police Video was submitted to this Court by the Officer Defendants. (*See* Defs.' Counsel Ltr. to Clerk dtd Aug. 29, 2018).

[9] Defendants have made (R-35: Defs.' Mot. for Summ. J. at 4, 6, 7, 15, 16, Pg. ID 401, 403-04, 412-13) and continue to make (Officer Defs.' Br. at 19) the demonstrably false claim that Plaintiff was *evasive* in her responses to their *accusatory* questions. Plaintiff repeatedly and vehemently denied making a bomb threat, as the undisputed evidence shows without contradiction. She had no idea how or why Parsley would be making such an absurd accusation. *As she explained to the officers*, the only one who raised the issue of clinic bombings was Parsley. (Per Defendant Brooks, the Officer

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 this. (R-36-3: Ex. J Soulliere Dep. at 57:24-25 to 58:1-17, Pg. ID 655; R-36-3: Ex. B [Police Video: JSoulliere at 8:53:47 to 8:55:07], Pg. ID 586; R-36-3: Ex. I Thames Dep. at 42:18-25, 51:1-4, Pg. ID 640, 642; R-36-2: Ex. 1 Thames Decl. ¶ 18, Pg. ID 567-77).

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**."[10] (R-36-3: Ex. K Gatti Dep. at 53:5-23, Pg. ID 667; R-36-3: Ex. B [Police Video: JGatti at 8:51:31 to 8:52:53], Pg. ID 586). *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. (R-36-3: Ex. L Brooks Dep. at 32:3-25 to 33:1-10, Pg. ID 677-78; R-36-3: Ex. J Soulliere Dep. at 40:23-25 to 41:1-5, 67:2-25 to 68:1-11, Pg. ID 650-51, 657). Plaintiff continued to plead her innocence. (R-36-3: Ex. J Soulliere Dep. at 67:18-24, Pg. ID 657).

Defendants should have then arrested Parsley for using the "bomb" word outside of an abortion clinic.) As the Officer Defendants acknowledge, Plaintiff told them, *inter alia*, "*There is nothing I said that would, should be even misconstrued as such* [*i.e.*, a bomb threat]." (Officer Defs.' Br. at 10). Indeed, Plaintiff has no obligation to respond to the Officer Defendants' accusatory questions in the first instance. *See United States v. Butler*, 223 F.3d 368, 374 (6th Cir. 2000).

[10] As noted, these are the precise words that were the basis for the arrest, as Defendant Gatti testified in his deposition.

Upon being arrested, Plaintiff pleaded with the religious sister who was present to come to her assistance. (R-36-3: Ex. J Soulliere Dep. at 68:14-15, Pg. ID 657). The religious sister also told the officers that the accusation was false.[11] (R-36-3: Ex. J Soulliere Dep. at 68:12-25 to 71:1-22, Pg. ID 657-58; R-36-3: Ex. B [Police Video: JSoulliere at 8:56:32 to 8:58:20], Pg. ID 586; R-36-2: Ex. 1 Thames Decl. ¶¶ 19-21, Pg. ID 568). At one point, Defendant Gatti told the religious sister, "***You should not be in the position you are in, you're a disgrace***."[12] (R-36-3: Ex. K Gatti Dep. at 19:23-25 to 20:1-5. Pg. ID 665) (emphasis added).

At the scene, Defendant Soulliere and Halaas searched Plaintiff's vehicle without her consent. (R-36-2: Ex. 1 Thames Decl. ¶ 22, Pg. ID 568; R-36-3: Ex. L Brooks Dep. at 27:1-8, Pg. ID 676; R-36-3: Ex. J Soulliere Dep. at 72:3-25 to 73:1-13, Pg. ID 658-59; R-36-3: Ex. B [Police Video: JSoulliere at 9:00:48 to 9:01:10], Pg. ID 586; R-35: Defs.' Br. in Supp. of Mot. for Summ. J. at 7 [admitting that Defendant Soulliere and Halaas conducted the search], Pg. ID 404). They found no criminal contraband. (R-36-3: Ex. L Brooks Dep. at 27:14-18, Pg. ID 676). The Officer

[11] The Officer Defendants apparently find it beneficial to attack the character of the religious sister. (*See* Officer Defs.' Br. at 19 [assailing the nun's credibility]). However, as the video evidence shows, the Officer Defendants were more concerned with arguing with the sister and offending her with impertinent comments than with treating her as a percipient witness and having her make an official statement. The officers' bias was palpable.

[12] Defendant Brooks defended Defendant Gatti's insult of the religious sister, claiming that Gatti "simply stated a fact." (R-36-3: Ex. L Brooks Dep. at 42:14-19, Pg. ID 679).

Defendants 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.[13] (R-36-3: Ex. J Soulliere Dep. at 34:14-25 to 35:1-12, Pg. ID 649; R-36-3: Ex. L Brooks Dep. at 26:15-25, 27:18-19, 28:1-17, Pg. ID 676). The Officer Defendants did not take a statement from the religious sister nor did they take statements from the two other persons present outside of the clinic when the alleged threat was made. (R-36-3: Ex. J Soulliere Dep. at 59:13-25 to 60:1-13, Pg. ID 655; R-36-3: Ex. L Brooks Dep. at 23:24-25 to 24:1-5, Pg. ID 675). Indeed, Defendants couldn't even identify on a map where anyone was located during the alleged threat. (R-36-3: Ex. J Soulliere Dep. at 86:22-25 to 88:1-12, Pg. ID 661; R-36-3: Ex. L Brooks Dep. at 33:25 to 35:1-3, Pg. ID 678; Ex. F [Map], Pg. ID 616). While at the scene, Defendant Tardiff took a

[13] The Officer Defendants claim that they are "damned if they search *and* damned if they don't." (Officer Defs.' Br. at 12). They miss the point. Before an officer can search a person incident to an arrest, the officer must have probable cause. The Officer Defendants never did have probable cause, and their actions demonstrate it because they never believed the alleged "threat" was a "true threat." Indeed, 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 hardly 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.

written statement from Parsley, in which Parsley contradicted himself by claiming that the threat uttered by Plaintiff was "***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 Parsley at 0910 on August 27, 2016. (R-36-3: Ex. M Tardiff Dep. at 18:21-25 to 20:1, Pg. ID 682). Consequently, the alleged "threat" Parsley 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 materially and substantively different[14] from the alleged "threat" he put in his written statement moments after the arrest ("*bombs, bombs, on America, and bombs will blow up this building*").

As the evidence demonstrates, prior to arresting Plaintiff, the Officer Defendants had not received training on distinguishing between a "true threat" and speech that is protected by the First Amendment (R-36-3: Ex. J Soulliere Dep. at 36:16-19, Pg. ID 649; R-36-3: Ex. K Gatti Dep. at 117:4-7, Pg. ID 670; *see also* R-36-3: Ex. O Miller Dep. at 68:18-25 to 69:1-6, Pg. ID 697-98), despite claiming that bomb threats at abortion centers are common (R-36-3: Ex. C [Internal Investigation] at 15, Pg. ID 602).[15] Defendant Brooks, the *shift supervisor* who directed the arrest,

[14] Defendants attempted to minimize this glaring contradiction from their *only* witness by claiming that the statements were "somewhat different." (Officer Defs.' Br. at 14; *see also* R-35: Defs.' Br. in Supp. of Mot. for Summ. J. at 8, Pg. ID 405 [making similar claim]).

[15] Despite this false accusation directed at pro-lifers, in his 20 plus years as an officer,

testified that it is unlawful to "*say anything about bombs near a facility that performs abortions*" and that it is permissible to arrest someone for making an alleged threat that lacks any credibility. (R-36-3: Ex. L Brooks Dep. at 29:20-25 [emphasis added], Pg. ID 677; *id*. at 28:16-17 ["Threat doesn't have to be credible according to the law."], Pg. ID 676). None of the Officer Defendants protested or did *anything* to prevent Plaintiff's arrest. (R-36-3: Ex. L Brooks Dep. at 33:22-24, Pg. ID 678; R-36-3: Ex. K Gatti Dep. at 100:19-25 to 101:1-8, Pg. ID 668-69).

Plaintiff was taken to the City police station, booked, and placed in a holding cell. She remained in the City's custody *for over 49 hours*. (R-36-3: Ex. O Miller Dep. at 63:1-10, Pg. ID 696). The conditions in the holding cell were so bad that Plaintiff did not eat or sleep for the entire time she was incarcerated. (R-36-3: Ex. I Thames Dep. at 62:21-25 to 63:1-11, Pg. ID 644; R-36-2: Ex. 1 Thames Decl. ¶¶ 25-40, Pg. ID 569-71; R-36-3: Ex. G [Holding Cell Photos], Pg. ID 618-31).

Despite being told repeatedly that a detective would be in at any time to review her case (R-36-2: Ex. 1 Thames Decl. ¶¶ 25, 28, 34-37, Pg. ID 569-71), Detective Farrar did not do so until Monday, August 29, 2016.[16] (R-36-2: Ex. 1 Thames Decl. ¶ 37, Pg. ID 571; R-36-3: Ex. D [Incident Report] at 4-5, Pg. ID 610-11). The City

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Defendant Brooks is unaware of *any* bomb threat directed at Northland. (R-36-3: Ex. L Brooks Dep. at 20:14-23, Pg. ID 674; *see also* R-36-3: Ex. K Gatti Dep. at 117:12-21, Pg. ID 670).

[16] However, Detective Farrar reviewed the Incident Report at 1:25:34 pm on August 28, 2016. (R-36-3: Ex. H [Report Chronology], Pg. ID 633-34).

attributes this delay to budget constraints, which apparently only allow it to have one detective on weekend duty to handle in-custody prisoner cases. (R-36-3: Ex. O Miller Dep. at 20:5-25 to 21:1-3, Pg. ID 691-92).

Upon reviewing the file, Detective Farrar properly concluded that there was no criminal threat and directed Plaintiff's release. In the police report, Detective Farrar concluded as follows: "I do not see a direct threat where Kimberley threatened to bomb the clinic." (R-36-3: Ex. N Farrar Dep. at 24:19-24, Pg. ID 686; R-36-3: Ex. D [Incident Report] at 5, Pg. ID 611).

The City police department conducted an internal investigation, concluding that Plaintiff's arrest and subsequent detention were consistent with its policies, practices, and procedures. (R-36-3: Ex. O Miller Dep. at 91:5-22, Pg. ID 701; R-36-3: Ex. C [Internal Investigation] at 16, Pg. ID 603; R-36-3: 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], Pg. ID 695). Consequently, the City, through its Chief of Police, Defendant Jedrusik (R-36-3: Ex. O Miller Dep. at 81:16-19, Pg. ID 699), the official responsible to the City for the policies, practices and procedures of the department (R-36-3: Ex. O Miller Dep. at 91:5-11, Pg. ID 701), *ratified and sanctioned the officers' conduct* (R-36-3: Ex. O Miller Dep. at 44:6-25 to 45:1-3 [affirming no changes to policies, practices, or procedures], Pg. ID 693-94; R-36-3: Ex. C [Internal Investigation] at 16 [concluding that the arrest was "reasonable and

justified"], Pg. ID 603). 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***.

(R-36-3: Ex. O Miller Dep. at 86:1-10 [emphasis added], Pg. ID 700; *see also id*. at 9:4-25 to 10:1-4, Pg. ID 690). Also, while *in the City's custody* and pursuant to City policy (R-36-3: Ex. O Miller Dep. at 86:11-25 to 88:1, Pg. ID 700), Plaintiff was not permitted to attend Mass or receive the Eucharist, as required by her Catholic faith. (R-36-2: Ex. 1 Thames Decl. ¶ 34, Pg. ID 570).

B. Procedural History.

Following the close of discovery, the parties filed cross-motions for summary judgment. The Officer Defendants argued that there were no constitutional violations. Alternatively, they argued that they were entitled to qualified immunity. The City argued that it was not liable under *Monell*, and Defendant Jedrusik argued that there was no supervisory liability. (R-35).

Plaintiff moved for partial summary judgment as to liability since the question of damages would remain for the jury should she prevail as a matter of law. Plaintiff

argued that based upon the undisputed material facts, she was entitled to judgment as to liability on all of her constitutional claims as a matter of law. (R-36).

The district court denied the Officer Defendants' motion in part, granted the City's and Defendant Jedrusik's motions, and denied Plaintiff's motion. (R-49).

The Officer Defendants filed a timely notice of appeal as to the qualified immunity issues. (R-51). Plaintiff filed a timely notice of cross appeal, appealing the liability issues as to the Officer Defendants. (R-53).

This Court issued a show cause order, requiring Plaintiff to demonstrate that this Court has jurisdiction to hear her cross appeal. (Doc. No. 8-2, Case No. 18-1608). Plaintiff timely filed her response to this order. (Doc. No. 17, Case No. 18-1608).

In the meantime, the district court granted Plaintiff's motion for entry of judgment under Rule 54(b) of the Federal Rules of Civil Procedure as to the City and Defendant Jedrusik (R-58), thereby entering final judgment in their favor (R-59). Plaintiff filed a timely notice of appeal (R-60), and she filed a motion requesting that this Court consolidate that appeal (18-1695) with the Officer Defendants' appeal (18-1576) and Plaintiff's cross appeal (18-1608). That motion was granted. (Doc. No. 23-2, Case Nos. 18-1576/18-1608/18-1695). This appeal follows.

SUMMARY OF THE ARGUMENT

The Officer Defendants violated Plaintiff's clearly established constitutional right to be free from unreasonable searches and seizures when they arrested, searched,

and detained her for more than 49 hours based on an alleged statement that does not qualify as a true threat as a matter of law but is protected political speech. By unlawfully arresting and detaining Plaintiff, Defendants prevented Plaintiff from engaging in her expressive religious activity on the public sidewalk outside of the Northland abortion center. These actions deprived Plaintiff of her clearly established rights under the First (freedom of speech and free exercise of religion) and Fourth (unlawful search and seizure) Amendments and 42 U.S.C. § 1983. Moreover, because Plaintiff was targeted for adverse treatment based on the fact that she was engaging in pro-life expressive activity on a public sidewalk outside of an abortion center, the Officer Defendants deprived Plaintiff of the equal protection of the law in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. As a result, the Officer Defendants do not enjoy qualified immunity and are liable as a matter of law for violating Plaintiff's clearly established constitutional rights

The City and Defendant Jedrusik, the Chief of Police and the person responsible for supervising and training the Officer Defendants and for the policies and practices of the City Police Department, are also liable for violating Plaintiff's clearly established rights because (1) the violations occurred as a result of the actions of nearly the entire day shift and not simply one or a few rogue police officers, and they were done pursuant to the policies, practices, and training of the police department; (2) the City, through its designated Rule 30(b)(6) witness, admitted during its

deposition that the Officer Defendants were acting pursuant to City policy and practice and that the City takes full responsibility for the officer's actions; (3) the City, through its Chief of Police, ratified the actions of the Officer Defendants, concluding that the arrest was justified; (4) Plaintiff was deprived of her right to religious exercise while in custody based on the City's policy of prohibiting members of the clergy from visiting detainees for religious reasons; and (5) Plaintiff's lengthy detention (over 49 hours) was due to a lack of manpower caused by City "budget constraints."

This Court should 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.

STANDARD OF REVIEW.

Summary judgment is appropriate when there exists no genuine dispute with respect to the material facts and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

This Court "review[s] the denial of summary judgment on grounds of qualified immunity *de novo* because application of this doctrine is a question of law." *McCloud v. Testa*, 97 F.3d 1536, 1541 (6th Cir. 1996). However, as stated by this Court:

> A defendant who is denied qualified immunity may file an interlocutory appeal with this Court only if that appeal involves the abstract or pure legal issue of whether the facts alleged by the plaintiff constitute a violation of clearly established law. . . . If the defendant does not

> dispute the facts alleged by the plaintiff for purposes of the appeal, "our jurisdiction is clear." If, instead, the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal. . . . Only if the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a *prima facie* violation of clear constitutional law may we decide that the defendant is entitled to qualified immunity on an interlocutory appeal.

Berryman v. Rieger, 150 F.3d 561, 563 (6th Cir. 1998) (internal citations omitted).

While a denial of a motion for summary judgment based on the finding of a genuine issue of material fact is reviewed for an abuse of discretion, a denial based on purely legal grounds, as in this case, is reviewed *de novo*. *Wireless Income Props. v. McDonald*, 403 F.3d 392, 395-96 (6th Cir. 2005).

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

ARGUMENT

I. THE OFFICER DEFENDANTS DO NOT ENJOY QUALIFIED IMMUNITY.

To begin, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief,[17] it does not apply to claims against a municipality, nor does it apply to claims against a defendant in his official capacity. *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) ("[T]here is no qualified immunity to shield the defendants from claims [for declaratory and injunctive relief]"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) (same); *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997) ("Qualified immunity . . . does not shield [the defendant] from the claims brought against him in his official capacity."). Consequently, the Officer Defendants cannot use qualified immunity to thwart Plaintiff's request for relief that will allow her to exercise her First Amendment rights in the future.

[17] The Officer Defendants' actions have chilled Plaintiff's free speech rights such that she will not return to the public sidewalk outside of Northland to engage in her protected speech activity, (R-1: Compl. ¶ 4, Prayer for Relief, Pg. ID 3, 36; R-36-2: Ex. 1 Thames Decl. ¶ 45 [testifying as to the chilling effect of Defendants' actions on her free speech activity], Pg. ID 572), thus entitling her to declaratory and injunctive relief, *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)).

Further, the defense of qualified immunity does not shield the Officer Defendants' egregious violation of Plaintiff's clearly established rights.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated the applicable standard as follows: government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818; *see also Saucier v. Katz*, 533 U.S. 194 (2001) (mandating a two-step sequence for resolving qualified immunity claims); *Pearson v. Callahan*, 555 U.S. 223, 227, 236 (2009) (stating that "the *Saucier* procedure should not be regarded as an inflexible requirement" and that the court may decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances" of the particular case). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."). Moreover, when advancing their qualified immunity argument, the Officer Defendants "must be prepared to overlook any factual dispute and to concede

an interpretation of the facts in the light most favorable to the plaintiff's case." *Berryman*, 150 F.3d at 562. We turn now to apply these principles.

As argued in further detail below, arresting, searching, and detaining Plaintiff for over 49 hours for *allegedly* stating, "**I prophesy bombs are going to fall and they're going to fall in the near future**" violated her clearly established rights protected by the First, Fourth, and Fourteenth Amendments.[18] As an initial matter, this alleged statement is political hyperbole, particularly in the context of an abortion protest on a public sidewalk, and therefore protected by the First Amendment. At a minimum, it is not a "true threat," as noted by the court below. (*See* R-49: Op. & Order at 19 ["In essence, to 'prophesy' means to prognosticate, but it does not suggest willful conduct or that the speaker will be responsible for carrying out the prediction."], Pg. ID 875). Thus, uttering this statement under the circumstances would <u>not</u> warrant a *prudent* person, or one of *reasonable* caution, to believe, in the circumstances shown, that Plaintiff committed the criminal offense of making a terrorist threat. (*See* R-49: Op. & Order at 17-18 [correctly stating that "only a

[18] This case isn't close to the case relied upon by the Officer Defendants, *Hunter v. Bryant*, 502 U.S. 224 (1991). (Officer Defs.' Br. at 28, 29). As the Court noted in *Hunter*, a case involving threats against the President, "When Agents Hunter and Jordan arrested Bryant, they possessed trustworthy information that Bryant had written a letter containing references to an assassination scheme directed against the President, that Bryant was cognizant of the President's whereabouts, that Bryant had made an oral statement that 'he should have been assassinated in Bonn,' . . . and that Bryant refused to answer questions about whether he intended to harm the President. On the basis of this information, a Magistrate ordered Bryant to be held without bond." *Id*. at 228.

contextually credible threat . . . constitutes a 'true threat' punishable under the law" and citing *Watts v. United States*, 394 U. S. 705, 708 (1969) for this clearly established principle], Pg. ID 873-74).[19] The alleged "threat" set forth in Parsley's contradictory written statement ("**bombs, bombs, on America, and bombs will blow up this building**"), which was made immediately f*ollowing* Plaintiff's arrest, fares no better, as the court below concluded. (*See* R-49: Op. & Order at 20 [stating that this 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). And it matters not that Parsley identified Plaintiff as the person who allegedly made the statement because *making the statement is not a crime*. *See infra*. Consequently, the Officer Defendants' reliance on the presence of a "witness" is misplaced. (*See* Officer Defs.' Br. at 30). Parsley could "witness" Plaintiff holding a pro-life sign on the public sidewalk, but this does not license the Officer Defendants to arrest her. It's wrong to suggest otherwise.

[19] The Officer Defendants double down on their incorrect understanding of the law by stating that "Sgt. Brooks was absolutely correct that a threat 'doesn't have to be credible according to the law.'" (Officer Defs.' Br. at 32). Credibility and capability are two distinct concepts. While the person making the threat need not have the *capability* to carry it out, the threat itself must still be *credible*—even more, it must be a "*serious* expression of an intent to commit an act of unlawful violence," *Va. v. Black*, 538 U.S. 343, 359 (2003) (emphasis added). The Officer Defendants' actions at the time of the arrest, as noted above, demonstrate without contradiction that they did not consider this a "true threat," regardless of what they are claiming now in an effort to avoid liability.

Additionally, the Officer Defendants claim that none of the officers were "personally" *responsible* for the unlawful arrest; therefore, none of them are liable. (Officer Defs.' Br. at 26). They are wrong as a matter of fact and law. (*See* 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. *See Smoak v. Hall*, 460 F.3d 768, 784 (6th Cir. 2006); *Jacobs v. Vill. of Ottawa Hills*, 5 F. App'x 390, 395 (6th Cir. 2001)."], Pg. ID 877).[20]

In *Smith v. Ross*, 482 F.2d 33 (6th Cir. 1973), this Court held that a law enforcement officer can be liable under § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly, and thereby denies equal protection to persons legitimately exercising rights guaranteed them under state or federal law. Acts of omission are actionable in this context to the same extent as are acts of commission. *Id.* at 36-37. And it does not matter whether the individual violating the constitutional rights of a citizen is a fellow officer or a superior. *See Smith v. Heath*, 691 F.2d 220, 224-25 (6th Cir. 1982). In *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), this Court relied on *Ross* in holding that an

[20] This is why all of the officers at the scene of the unlawful arrest are liable for all of the claims advanced arising out of that arrest. Thus, in addition to the claims arising under the Fourth Amendment, all of the officers are liable for Plaintiff's claims arising under the First (free speech and free exercise) and Fourteenth (equal protection) Amendments.

officer could be liable for failing to intervene in an excessive force case. *Bruner*, 684 F.2d at 426. That same year, the Court concluded in a case alleging illegal search and seizure and unlawful arrest and detention in violation of the Fourth Amendment that "officers *who are present at the scene* of a violation of another's civil rights and who fail to stop the violation can be liable under [§] 1983[,]" citing *Bruner* and *Ross. Heath*, 691 F.2d at 225 (emphasis added); *see also Robertson v. Lucas*, 753 F.3d 606, 618 (6th Cir. 2014) ("The proper defendants in an action under § 1983 or *Bivens* are the law enforcement officers *who were personally involved in the incident* alleged to have resulted in a violation of the plaintiff's civil rights.") (emphasis added). Nearly twenty years later, this Court applied *Bruner* to another action involving an unlawful seizure. *See Jacobs v. Vill. of Ottawa Hills*, 5 F. App'x 390, 395 (6th Cir. 2001). In *Jacobs*, the Court observed, referencing *Bruner*, that "officers must affirmatively intervene to prevent other officers from violating an individual's constitutional rights." *Id*. The Court cited the Second Circuit's holding in *Anderson v. Branen*, 17 F.3d 552 (2d Cir. 1994), and found that an officer who fails to intercede is liable for the acts of other officers where he observes or has reason to know "(2) *that a citizen has been unjustifiably arrested*; or (3) that any constitutional violation has been committed by a law enforcement official." *Jacobs*, 5 F. App'x at 395 (citing *Anderson*, 17 F.3d at 557) (citations omitted) (emphasis added); *see also Carter v. Colerain Twp*., No. 105-CV-163, 2007 U.S. Dist. LEXIS 19561, at *14 (S.D. Ohio

Mar. 20, 2007); *Kaylor v. Rankin*, 356 F. Supp. 2d 839, 850-51 (N.D. Ohio 2005) (involving a failure to intervene in an unlawful arrest).

Here, there is no dispute that Defendants Gatti, Soulliere, Brooks, and Tardiff were *all present at the scene during the unlawful arrest* and each of them participated in it (*e.g.*, Defendant Gatti investigated the alleged complaint at the scene, hearing first hand from the security guard the alleged "threat" which precipitated the arrest; Defendant Soulliere questioned Plaintiff, placed her in handcuffs, searched her vehicle, transported her to the police station, and initiated her "booking"; Defendant Brooks was the shift supervisor, and he ordered his officers to arrest Plaintiff; Defendant Tardiff participated in the investigation by taking the written—and contradictory—statement of the security guard). (*See* R-49: Op. & Order at 21, Pg. ID 877). None of the officers protested or did anything to prevent Plaintiff's unlawful arrest. (R-36-3: Ex. L Brooks Dep. at 33:22-24, Pg. ID 678; R-36-3: Ex. K Gatti Dep. at 100:19-25 to 101:1-8, Pg. ID 668-69). Under the undisputed facts of this case, "[a] jury could reasonably find that [each officer] had sufficient time to intervene and was able to avoid the unlawful arrest of [Plaintiff] . . . . No one was being threatened, or appeared to be in any danger. No exigency kept [any officer] from inquiring further about the circumstances, or suggesting that some other course be followed." *Kaylor*, 356 F. Supp. 2d at 850. In short, *all* of the officers are liable.

Additionally, case law clearly established prior to August 27, 2016, the right to be free from retaliation for protected speech, thereby negating any claim of qualified immunity. *See Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821-25 (6th Cir. 2007) ("Because retaliatory intent proves dispositive of Defendants' claim to qualified immunity, summary judgment was inappropriate"); *see also Leonard v. Robinson*, 477 F.3d 347, 361 (6th Cir. 2007); *Kennedy v. City of Villa Hills, Ky.*, 635 F.3d 210 (6th Cir. 2011); *Greene v. Barber*, 310 F.3d 889, 893 (6th Cir. 2002). The law is well established that "'an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.'" *Greene*, 310 F.3d at 894 (quoting *Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998)). Thus, "the existence of probable cause [which did *not* exist here] is not determinative of the constitutional question" and thus the qualified immunity inquiry if, as the evidence shows, Plaintiff "was arrested in retaliation for [her] having engaged in constitutionally protected speech."[21] *Greene*, 310 F.3d at 894.

[21] This Court's precedent controls unless the U.S. Supreme Court decides otherwise, which makes the Officer Defendants' reliance on *Lozman v. City of Riveria Beach*, 138 S. Ct. 1945, 1954 (2018), mistaken. Further, Plaintiff has demonstrated that there was no probable cause to arrest her, and as a result, she would be entitled to recover even if the Supreme Court held that a plaintiff must establish the absence of probable cause in order to recover on a retaliatory arrest claim. Plaintiff was not only arrested for *pure speech* (in violation of the First Amendment), the arrest and 49-hour detention halted her expressive activity that day (in violation of the First Amendment) and has chilled her from exercising it in the future (in violation of the First

Here, as a matter of law, the alleged statement for which Plaintiff was arrested is not punishable as a "true threat" under the First Amendment. It is protected speech. *See infra*. Additionally, it was the fact that Plaintiff was protesting abortion outside of an abortion center that motivated the arrest, as Defendant Brooks, the supervising officer who ordered the arrest, admitted in his testimony. (R-36-3: Ex. L Brooks Dep. at 29:20-25 [testifying that "you can't say anything about bombs near a facility that performs abortions"], Pg. ID 677). At the scene of the arrest, this same officer referred to people who protest abortion as "fanatics." (R-36-3: Ex. C [Internal Investigation] at 10 ["Anybody who has anything to do with this whole thing, their fanatics."], Pg. ID 597; R-36-3: Ex. J Soulliere Dep. at 38:19-25 to 39:1, 22-25, Pg. ID 650). Also at the scene of the arrest, Defendant Gatti told the religious sister who was protesting alongside Plaintiff that "You should not be in the position you are in, you're a disgrace." (R-36-3: Ex. K Gatti Dep. at 19:23-25 to 20:1-5, Pg. ID 665). Defendant Gatti (and the City) justified the arrest based on the "very politically, religiously charged" issue of abortion. (R-36-3: Ex. K Gatti Dep. at 34:11-12, 35:18-22, Pg. ID 666; R-36-3: Ex. C [Internal Investigation] at 15 [same], Pg. ID 602). Thus, as the district court properly concluded, evidence of "animus" exists. (R-49: Op. & Order at 26 [citing "evidence of animus against pro-lifers"], Pg. ID 882). And because retaliatory intent proves dispositive of the Officer Defendants' claim to

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Amendment). (R-36-2: Ex. 1 Thames Decl. ¶ 45 [testifying as to the chilling effect of Defendants' actions on her free speech activity], Pg. ID 572).

qualified immunity, summary judgment is inappropriate. *Ctr. for Bio-Ethical Reform, Inc.*, 477 F.3d at 821-25.

Having shown that the Officer Defendants are not entitled to qualified immunity, we turn now to further demonstrate this point and to show that these officers are liable for violating Plaintiff's rights as a matter of law such that summary judgment should be granted in Plaintiff's favor.

II. THE OFFICER DEFENDANTS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED 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 and quotations 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 the Officer 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 <u>*for pure speech*</u>. 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* R-36-3: Ex. J Soulliere

Dep. at 37:2-8; 44:15-17, Pg. ID 650, 651; R-36-3: Ex. L Brooks Dep. at 27:14-1850:2-7, Pg ID 676).

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 engaging 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).[22]

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

[22] The Officer Defendants' attempt to undermine First Amendment protection by incorrectly arguing that the test for a "true threat" is whether the listener had a *subjective* fear (*see* Officer Defs.' Br. at 24) must be rejected. This case demonstrates the danger of such an approach—it would allow a listener to criminalize pure political hyperbole and thus effectuate a heckler's veto by claiming a subjective fear of the speaker's message. "The First Amendment knows no heckler's veto," *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001), and for good reason, *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) ("The heckler's veto is precisely that type of odious viewpoint discrimination.").

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).[23]

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). 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).

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

[23] 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. Plaintiff has not challenged the constitutionality of this criminal statute because well prior to Plaintiff's arrest, the Michigan Court of Appeals limited its application so that it would not run afoul of the First Amendment and be enforced the way the Officer Defendants seek to enforce it here. *See Osantowski*, 274 Mich. App. at 601, 736 N.W.2d at 297.

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 the Officer 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 the Officer 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 the Officer Defendants demonstrate that they perceived no imminent fear or apprehension nor did they perceive the alleged "threat" to be credible in any way. Indeed, the Officer 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 the Officer 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 and the district court properly found (R-49: Op. & Order at 19, Pg. ID 875), the Officer Defendants 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 the Officer 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 undisputed evidence: there was no legal justification, probable cause or otherwise, to arrest Plaintiff as a matter of law.[24] The Officer Defendants are liable for violating Plaintiff's clearly established rights under the Fourth Amendment.

[24] Indeed, the evidence shows that this was a politically-motivated arrest. (*See* R-36-3: 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"], Pg. ID 666; R-36-3: Ex. L Brooks Dep. at 29:20-25 [claiming you can't use the word "bomb" outside of an abortion clinic]), Pg. ID 677). During his deposition, Defendant Gatti testified that because the abortion issue is politically charged and Plaintiff indicated that she knew the complaint came from the security guard that those facts were "it" and were good

III. DEFENDANTS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED RIGHTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

A. The Officer 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

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enough to place Plaintiff under arrest. (R-36-3: Ex. K Gatti Dep. at 35:18-24 ["Q. Those are good enough facts to place her under arrest? A. I believe so."], Pg. ID 666).

citation omitted). There is no exception for public sidewalks adjacent to abortion centers. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (striking down on First Amendment grounds buffer zone restrictions around abortion centers).

In *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015), this Court, sitting *en banc*, 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 engages in expressive activity, such as praying and witnessing for life outside of the Northland abortion center, as part of her religious exercise. By arresting and detaining Plaintiff *and thereby preventing her from engaging in her expressive religious activity and chilling the future exercise of her activity* (R-36-2: Ex. 1 Thames Decl. ¶ 45, Pg. ID 572), the Officer Defendants violated Plaintiff's rights to freedom of speech and the free exercise of religion. The Officer Defendants misapprehend this aspect of Plaintiff's First Amendment claim. (*See* Officer Defs.' Br. at 41). 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: the Officer Defendants arrested and Defendants (the City and Defendant Jedrusik) 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. (R-36-2: Ex. 1 Thames Decl. ¶ 34, Pg. ID 570). By preventing Plaintiff from doing so—*an act which was done*

pursuant to Defendants' policy of denying clergy access to detainees[25]—Defendants deprived her of the right to the free exercise of religion.

C. The Officer Defendants Deprived Plaintiff of the Equal Protection of the Law.

The Officer Defendants misapprehend Plaintiff's claim. Plaintiff was arrested because she was pro-life. The very basis for the arrest is Defendant Brooks' assertion that a pro-lifer cannot utter the word "bomb" outside of an abortion center. The fact that this incident arose in the abortion context was *the* motivating factor for the arrest of Plaintiff, who was engaging in pro-life speech activity on the public sidewalk outside of the Northland abortion center at the time of the arrest. As stated by the district court, "the law was clearly established that the police could not arrest a peaceful speaker engaged in public speech on a public sidewalk." (R-49: Op. & Order at 31, Pg. ID 887). Not only is this a First Amendment violation (free speech *and* free exercise of religion, as discussed above), it is a violation of equal protection. In *Bible Believers v. Wayne County*, this 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

[25] (R-36-3: Ex. O Miller Dep. at 86:11-25 to 88:1 [affirming that as a matter of policy, Plaintiff was not permitted to have a priest come into the detention center to provide her with Holy Communion on Sunday, as her faith requires], Pg. ID 700).

> 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, the Officer 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* R-36-3: Ex. K Gatti Dep. at 34:11-12, Pg. ID 666; Ex. C [Internal Investigation] at 15, Pg. ID 602), and the legally false assertion that Plaintiff could be arrested for simply saying the word "bomb" outside of an abortion center, (R-36-3: Ex. L Brooks Dep. at 29:20-25, Pg. ID 675). There is nothing sacrosanct about this public sidewalk outside of the Northland abortion center that justifies this disparate treatment against pro-life demonstrators exercising their

fundamental right to free speech. The Officer Defendants deprived Plaintiff of the equal protection of the law based on her exercise of a fundamental right. That is a quintessential equal protection violation. *Bible Believers*, 805 F.3d at 256.

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

The district court concluded that the City and its Chief of Police should be free from *all* responsibility and thus have *no* liability for the actions of nearly the entire day shift of City police officers and the on scene supervising officer, Defendant Brooks. The court below is mistaken. As the undisputed evidence shows, the very actions that violated Plaintiff's clearly established rights were pursuant to the police department's policies, practices, and training, and for this reason, ratified by its Chief of Police. If municipal and supervisory liability are truly about "responsibility," then the City and Defendant Jedrusik are liable for the harm caused to Plaintiff.

The City is plainly liable for the policies of its police department. 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). And the municipality is liable when the conduct at issue has been *ratified* by a policy maker, as in this case—it's Chief of Police. As stated by the Court in *St. Louis v. Praprotnik*, 485 U.S. 112 (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.

Id. at 127 (emphasis added); *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1118 (6th Cir. 1994) (same).

The district court rejected Plaintiff's *Monell* liability claim and quoted *Burgess v. Fischer*, 735 F.3d 462, 479 (6th Cir. 2013), for the proposition that the Chief of Police's "after-the-fact approval of the investigation, which did not itself [cause] or continue a harm against [plaintiff], was insufficient to establish the *Monell* claim." (R-49: Op. & Order at 35-36, Pg. ID 891-92). Accordingly, the district court concluded that "even if the arresting officers lacked probable cause to arrest Thames, Thames has not introduced any evidence to suggest that the Police Chief's alleged

approval of the investigation of the officers was the moving force behind her alleged constitutional violations." (R-49: Op. & Order at 36, Pg. ID 892).

The district court is mistaken. Plaintiff is not arguing that the ratification of the conduct via the approval of the investigation was the moving force for the violation or that this *post hoc* investigation could somehow be construed as the Chief of Police ordering the unlawful actions. Rather, Defendant Jedrusik's *ratification* (*i.e.*, approval) of the unlawful acts as authorized by the policy and practice of the City's police department provides the basis for municipal and supervisory liability. These are the critical facts that takes this case out of *Burgess* and into *Monell*. As this Court explained in *Meyers*:

> 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. *Monell* is a case about responsibility. The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.

Meyers, 14 F.3d at 1117 (internal citations and quotations omitted).

Here, the Officer Defendants' actions were subject to review by the City's authorized policymaker—its Chief of Police. And the Chief of Police approved the Officer Defendants' actions as consistent with department policy and practice, thereby ratifying their actions. So too, the internal investigation conducted on behalf of and

for the Chief of Police makes plain that the Officer Defendants were operating pursuant to police department policies and practices. The City's designated Rule 30(b)(6) witness says all that is necessary to establish liability here:

> 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 [emphasis added], Pg. ID 700).

This testimony establishes that the Officer Defendants' actions were consistent with the policies and practices of the City's police department, and for this reason, the actions were ratified by the Chief of Police. That is all that is required to establish municipal and supervisory liability.

But there is more. 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, who is responsible to the City for the policies, practices, and procedures of the police department, failed to adequately train and supervise the Officer Defendants with regard to distinguishing between a "true threat" and protected speech. The undisputed facts demonstrate that the City's policy regarding speech outside of abortion centers includes the notion that any statement that includes the word "bomb" uttered on a public sidewalk outside one of these centers constitutes a threat that justifies arrest and detention of the speaker. Thus, 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.

Indeed, Defendants claim that there is a "violent history" that causes abortion centers to "operate on a consistent heightened state of security," and that this history "has lent itself to be a contributing factor *when establishing enforcement actions in and around*" these centers, one of which is within the City. (R-36-3: Ex. C [Internal Investigation] at 15 (emphasis added), Pg. ID 602). And the senior officer on the scene testified that he can arrest any pro-lifer for uttering the word "bomb" outside of an abortion center. Couple these two undisputed facts with the animus against pro-lifers exhibited by the Officer Defendants, and it is evident that the City has failed to

properly train and supervise its officers, and this deliberate indifference has led to the injuries that Plaintiff suffered at their hands.

To summarize, there are at least five reasons, particularly when taken together, for holding the City and Defendant Jedrusik liable in this case. First, the violations occurred as a result of the actions of nearly the entire day shift and the shift supervisor and not simply one or a few rogue police officers. 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 defendant police officers 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 *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). 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.

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, which granted Plaintiff **15,300** words for this Brief, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 13,749 words, excluding those sections identified in Fed. R. App. P. 32(f).

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 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.

AMERICAN FREEDOM LAW CENTER

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

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	Page ID	Description
R-1	1-38	Complaint
R-8	36-50	Answer
R-35	386-422	Defendants' Motion for Summary Judgment
R-36	530-61	Plaintiff's Motion for Partial Summary Judgment
R-36-2	563-73	Declaration of Kimberley Thames
R-36-2	574-75	Exhibit A to Thames Declaration: Photograph of Plaintiff and Religious Sister (Dep. Ex. 12)
R-36-2	576-77	Exhibit B to Thames Declaration: Photograph of Plaintiff in Booking Room (Dep. Ex. 15)
R-36-3	578-82	Declaration of Attorney Robert J. Muise
R-36-3	583-84	Exhibit A to Muise Declaration: Audio Recording of Thames 9-1-1 Call (Dep. Ex. 17)*
R-36-3	585-86	Exhibit B to Muise Declaration: Police Video (Dep. Ex. 4)*
R-36-3	587-605	Exhibit C: to Muise Declaration: Internal Investigation (Dep. Ex. 2)
R-36-3	606-12	Exhibit D to Muise Declaration: Incident Report (Dep. Ex. 6)
R-36-3	613-14	Exhibit E to Muise Declaration: Parsley Statement (Dep. Ex. 7)
R-36-3	615-16	Exhibit F to Muise Declaration: Map (Dep. Ex. 18)

R-36-3	617-31	Exhibit G to Muise Declaration: Holding Cell Photos (Dep. Ex. 20)
R-36-3	632-34	Exhibit H to Muise Declaration: Report Chronology (Dep. Ex. 34)
R-36-3	635-44	Exhibit I to Muise Declaration: Thames Deposition Excerpts
R-36-3	645-62	Exhibit J to Muise Declaration: Soulliere Deposition Excerpts
R-36-3	663-70	Exhibit K to Muise Declaration: Gatti Deposition Excerpts
R-36-3	671-79	Exhibit L to Muise Declaration: Brooks Deposition Excerpts
R-36-3	680-82	Exhibit M to Muise Declaration: Tardiff Deposition Excerpts
R-36-3	683-87	Exhibit N to Muise Declaration: Farrar Deposition Excerpts
R-36-3	688-701	Exhibit O to Muise Declaration: Miller (Rule 30(b)(6) Witness) Deposition Excerpts
R-49	857-97	Opinion and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment
R-51	899-900	Defendants' Notice of Appeal
R-53	902-04	Plaintiff's Notice of Cross Appeal
R-58	936-44	Order Granting Plaintiff's Motion for Entry of Judgment and Request for Expedited Review
R-59	945	Judgment (entered in favor of the City and Defendant Jedrusik)
R-60	946-48	Plaintiff's Notice of Appeal (as to the Judgment entered in favor of the City and Defendant Jedrusik)

*The audio (9-1-1 call) and video (Police Video) exhibits referenced here have been submitted to the Clerk of Court by the Officer Defendants per Defendants' counsel letter of August 29, 2018, and they are relied upon here by Plaintiff.