No. _____

In the Supreme Court of the United States

KIMBERLEY THAMES,
Petitioner,

v.

CITY OF WESTLAND, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Kimberly Thames was praying on the public sidewalk outside of an abortion clinic when a clinic guard accused her of saying: "*I prophesy bombs are going to fall and they're going to fall in the near future*" and later claimed she said, "*bombs, bombs on America, and bombs will blow up this building.*" Thames was arrested and jailed for over 49 hours because, according to the senior officer at the scene, "*you can't say anything about bombs near a facility that performs abortions*." Thames was arrested and jailed for pure speech.

The Sixth Circuit held that Respondent police officers were entitled to qualified immunity because they reasonably believed that Thames's speech was a criminal threat. It also held that Respondent City of Westland was not liable for Thames's arrest, even though the arrest was authorized by City policy according to its Rule 30(b)(6) witness and ratified by its Chief of Police.

1. Did Petitioner's arrest and subsequent detention based on her speech violate her clearly established rights as set forth in *Watts v. United States*, 394 U.S. 705 (1969), *Virginia v. Black*, 538 U.S. 343 (2003), *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and *Brandenburg v. Ohio,* 395 U.S. 444 (1969), such that the arresting officers do not enjoy qualified immunity?

2. Is the City liable under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), for Thames's arrest and subsequent detention for allegedly

mentioning bombs outside a facility that performs abortions—a decision which was authorized by City policy and ratified by its Chief of Police and the City's designated Rule 30(b)(6) witness?

PARTIES TO THE PROCEEDING

Petitioner is Kimberley Thames ("Petitioner" or "Thames").

Respondents are the City of Westland, Michigan ("City"); Jeff Jedrusik, individually and in his official capacity as Chief of Police, City of Westland Police Department; Norman Brooks; John Gatti; Jason Soulliere; and Adam Tardiff (collectively referred to as "Respondents").

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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The opinion of the court of appeals appears at App. 1 and is unpublished but reported at Nos. 18-1576, 18-1608, 18-1695, 2019 U.S. App. LEXIS 36225. The opinion of the district court appears at App. 36 and is reported at 310 F. Supp. 3d 783.

JURISDICTION

The opinion of the court of appeals was entered on December 6, 2019. App. 1. A petition for rehearing en banc was denied on January 10, 2020. App. 73. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

Per the panel's opinion (verbatim): "On Saturday morning, August 27, 2016, Kimberley Thames, a 57-year old, Roman Catholic, pro-life activist, stood with three other people—an elderly woman who appeared to be a Catholic nun, and a wheelchair-bound man with his wife—on the public sidewalk outside Northland Family Planning, an abortion clinic. Thames was holding a two-foot-by-two-foot sign with a photo and handwritten words, advocating pro-life beliefs and protesting abortion."

Photo of Thames (left) taken from police dash camera upon arrival at the scene.

The panel opinion continues: "[w]hile many Northland Clinic employees knew Thames as an occasional protestor, the Clinic's security guard, Robert Parsley, apparently did not. He was standing somewhere near her when she engaged him in conversation, beginning with her offer that she was praying for him and praying that he would find a different job. But, at some point, there was discussion of bombs. Thames said that Parsley raised the topic of bombs, telling her that there had been bombings and threats at abortion clinics, but Parsley says that Thames initiated it and said something like: 'I prophesy bombs are going to fall and they're going to fall in the near future'; 'I prophesy bombs are going to fall and they're going to fall on you people'; and 'bombs,

bombs on America, and bombs will blow up this building.'" App. 2-3.

As the record demonstrates, Parsley, the clinic security guard, accused Thames of making a bomb threat, telling the officers prior to Thames's arrest that she stated the following: "I prophesy bombs are going to fall and they're going to fall in the near future."[1]

Prior to the police leaving the scene of the arrest, Parsley was instructed to make a written statement, in which he contradicted his prior statement and told the officers that the alleged "threat" was as follows: "She said, bombs, bombs on America, and bombs will blow up this building."[2]

Thames vehemently denied making any bomb threat, telling the police at the scene and prior to her arrest that Parsley brought up the issue of clinic bombings, claiming that abortion clinics in Michigan have been bombed, to which Thames 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.[3] *See* App. 4-6.

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

[2] (R-36-3:Ex. E [Parsley Statement], Pg.ID 614).

[3] (R-36-3:Ex. J Soulliere Dep. at 57:24-25 to 58:1-17, Pg.ID 655; R-36-3:Ex. C [Investigation] at 6, Pg.ID 593; R-36-2:Ex. 1 Thames Decl. ¶¶ 9-12, Pg.ID 565-66).

At the scene of the arrest, two officers searched Thames's vehicle. They did not find any explosives or any other contraband. App. 11.

Despite the alleged concern about a bomb, the officers did not request the assistance of a bomb squad or 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 Thames's vehicle.[4] *See* App. 11-12, 41.

The evidence also shows that there was no "alarm" on the part of the security guard or the clinic staff. As the recording of the 9-1-1 call demonstrates, Mary Guilbernat, the abortion clinic employee who made the call, was calmly speaking with the 9-1-1 dispatcher, and she told the dispatcher, *inter alia*, that Thames was simply holding a sign and that she (Mary) saw nothing to indicate that Thames had anything like a bomb.[5]

Based on the security guard's false accusation, Thames was handcuffed, brought to the police station, and jailed for over 49 hours under exceedingly difficult conditions. *See* App. 12-13.

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[4] (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).

[5] (R-36-3:Ex. J Soulliere Dep. at 46:5-25 to 48:1; R:36-3:Ex. A [9-1-1 Recording]).

Thames was finally released from jail when a detective reviewed the police report and properly concluded: "I do not see a direct threat where Kimberley threatened to bomb the clinic."[6]

Respondent Brooks, the senior officer directing Thames's arrest, explained his rationale for doing so as follows:

> I don't know the exact verbiage that—that he [Parsley] 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.

App. 8. Brooks also testified that the "[t]hreat doesn't have to be credible according to the law."[7] App. 12.

The district court properly held that the officers did not enjoy qualified immunity. App. 58, 60, 63. However, the court erred by failing to find that the alleged "threats" do not constitute "true threats" as a matter of clearly established law under the First

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[6] (R-36-3:Ex. N Farrar Dep. at 24:19-24, Pg.ID 686; R-36-3:Ex. D [Report] at 5, Pg.ID 611).

[7] Contrary to the Sixth Circuit's claim, *see* App. 21, 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). The officers' actions at the time of the arrest, as noted above, demonstrate without contradiction that they did not consider this a "true threat."

Amendment and thus erred by failing to enter judgment in Thames's favor. *See* App. 48-53. The district court also erred by finding no municipal or supervisory liability. *See* App. 63-69. The Sixth Circuit compounded the district court's errors by reversing the court's decision on the qualified immunity issue. App. 19-25. The court also affirmed the district court's municipal liability ruling. Accordingly, the panel dismissed the case.

REASONS FOR GRANTING THE PETITION

This case arises from an allegation that Petitioner Kimberly Thames said "something like 'I prophesy that bombs are going to fall, they're going to fall in the near future, and they're going to fall on you people, and on America, and bombs will blow up this building,'" while protesting outside of an abortion clinic. App. 21.

In defiance of this Court's controlling precedent, the Sixth Circuit erroneously concluded that Thames's alleged statement(s) provided sufficient justification for the officers to arrest and detain her for over 49 hours for making a "threat." Consequently, the Sixth Circuit erroneously concluded that the officers who arrested Thames based on the alleged statement(s) were entitled to qualified immunity because they could reasonably believe that the statement(s) constituted a "true threat" under clearly established law. Finally, the Sixth Circuit erroneously concluded that the City is not liable for Thames's unlawful arrest, which was executed by nearly the entire day shift and its supervisor, or her unlawful 49-hour detention—both of which were authorized by City policy per the City's

Rule 30(b)(6) witness and ratified through the City's Chief of Police.

Review by this Court is necessary because the Sixth Circuit committed precedent-setting errors of exceptional public importance and issued an opinion that directly conflicts with this Court's precedent. Sup. Ct. R. 10(c). Moreover, the problem is not limited to the Sixth Circuit. Lower courts, both state and federal, are unable to draw the line between words that, considered in context, are "true threats" and words that are protected speech.

The important First Amendment issues at stake in this case warrant this Court's attention and review, and this case provides a proper vehicle for resolving these issues because there is no dispute of any material fact.

I. Lower Courts Are Uncertain about the Standards Governing the *Mens Rea* and *Actus Reus* of True Threats.

Petitioner contends that the Second Circuit's decision in *New York v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001), is illustrative of the confusion in lower courts on how to distinguish true threats from protected speech. In *Operation Rescue National*, the court stated, in relevant part, as follows:

> When determining whether a statement qualifies as a threat for First Amendment purposes, a district court must ask whether "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the

> person threatened, as to convey a gravity of purpose and imminent prospect of execution . . . ." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir.), *cert. denied*, 429 U.S. 1022.

Operation Rescue Nat'l, 273 F.3d at 196-97. Significantly, this legal standard has been criticized by other circuits and dismissed as dicta by other Second Circuit panels. *See, e.g., United States v. Dillard*, 795 F.3d 1191, 1200 (10th Cir. 2015) (rejecting the district court's conclusion that the defendant's letter did not contain a true threat and criticizing the district court's reliance on *Operation Rescue National*, stating, "In recent cases, however, the Second Circuit has described this language as 'dicta' and has rejected the argument that all threats must satisfy all of these conditions in order to fall outside of the First Amendment protections.") (citing *United States v. Turner*, 720 F.3d 411, 424 (2d Cir. 2013)).

As the Second Circuit stated further in *Operation Rescue National*:

> Thus, generally, a person who informs someone that he or she is in danger from a third party has not made a threat, even if the statement produces fear. This may be true even where a protestor tells the objects of protest that they are in danger and further indicates recent political support for the violent third parties.

Operation Rescue Nat'l, 273 F.3d at 196-97. Applying the law to the facts, the Second Circuit concluded as follows:

> Although we are skeptical as to whether any of [the defendant's] statements constitute true threats, there is one in particular that illustrates our concern. The District Court found that [the defendant] threatened a clinic doctor when, soon after the murder of Dr. Bernard Slepian, she told the doctor that killing babies is no different than killing doctors. Given the context, it is understandable that the clinic doctor feared for her safety, and that [the defendant's] protest and strong rhetoric reinforced that fear. *But excessive reliance on the reaction of recipients would endanger First Amendment values, in large part by potentially misconstruing the ultimate source of the fear*. [The defendant's] expression went to the core of her protest message, and the statement (even in context) did not suggest that [the defendant] was engaged in a plan to harm the clinic doctor. This statement did not indicate the "unequivocal immediacy and express intention," *Kelner*, 534 F.2d at 1027, of a true threat. It was not a direct or even veiled threat, but expression of a political opinion. As such, it is entitled to First Amendment protection.

Id. (emphasis added).

The dissent in *United States v. Dillard*, 795 F.3d 1191 (10th Cir. 2015) (Baldock, J., dissenting), further illustrates the problem the lower courts have with analyzing threats in the context of the First Amendment:

This is the third "true threat" case I have sat on during the past year. *See also United States v. Wheeler*, 776 F.3d 736 (10th Cir. 2015); *United States v. Heineman*, 767 F.3d 970, 982-87 (10th Cir. 2014) (Baldock, J., concurring in the judgment). And the decisions are not getting any easier—this thorny case being a perfect example. Here, in contrast to my colleagues, I would affirm the district court because: (1) our case law, to my knowledge, has never been extended this far; and (2) the facts of this case do not merit such an extension.

The primary issue here is simple: Could a reasonable jury find that, objectively speaking, Angel Dillard threatened Dr. Mila Means? The Court says yes. The district court saw it differently, and so do I. The key "threat" in Dillard's letter is her statement that, should Dr. Means ever follow through on her plan to provide abortions, Dr. Means "will be checking under your car everyday-because maybe today is the day someone places an explosive under it." This statement was undeniably ill-advised. But was it a true threat, rather than just an ugly prediction Dillard foolishly chose to voice? *See United States v. Cassel*, 408 F.3d 622, 636-37 (9th Cir. 2005) ("Whether the threat is of injury to person or property, there is no doubt that it must be a threat of injury brought about—rather than merely predicted—by the defendant."). The district court classified it as a prediction, in part because the statement was: (1) *conditional*, hinging on actions Dr. Means may or may not

> take in the future; (2) *not imminent*, as Dr. Means was years away from acting; and (3) *impersonal*, as Dillard never took ownership of the actions in this sentence (nor indeed, of the entire surrounding paragraph). In response, the Court devotes a good portion of its analysis to showing that a true threat can indeed be conditional, non-imminent, or impersonal. And I would agree. But here we are dealing with a letter that is *all of the above*: conditional, non-imminent, *and* impersonal. The Court does not acknowledge this complication, much less wrestle with it. Any such wrestling should lead to this realization: Case law does not strongly support true threat exposure in a situation this attenuated.

Dillard, 795 F.3d at 1207 (Baldock, J., dissenting).

In short, there is disparity and conflict among the circuits as to how a "threat" should be analyzed under the First Amendment, including whether the courts should employ an objective or a subjective test in the first instance. *See, e.g., United States v. Ackell*, 907 F.3d 67, 77 n.4 (1st Cir. 2018) ("[T]he necessary subjective intent one needs to make a true threat is rather hazy."); *United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012) ("In determining whether a statement is a 'true threat,' we have employed an objective test so that we will find a statement to constitute a 'true threat' if an ordinary reasonable recipient who is familiar with the context would interpret the statement as a threat of injury") (internal quotation marks and alterations omitted); *United*

States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012) (finding a true threat if "a reasonable person would perceive the threat as real"); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) ("It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality's discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable."); *United States v. Mabie*, 663 F.3d 322, 333 (8th Cir. 2011) ("The government need not prove that [the defendant] had a subjective intent to intimidate or threaten in order to establish that his communications constituted true threats. Rather, the government need only prove that a reasonable person would have found that [the defendant's] communications conveyed an intent to cause harm or injury."); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 n.14 (9th Cir. 2011) ("*Black* requires that the subjective test must be met under the First Amendment whether or not the statute requires it, an objective test is not an alternative but an additional requirement over-and-above the subjective standard."); *United States v. Heineman*, 767 F.3d 970, 979 (10th Cir. 2014) ("[A] natural reading of *Black*'s definition of true threats embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim . . . . Other circuits have declined to read *Black* as imposing a subjective-intent requirement. . . . . But the reasons for their conclusions do not persuade us."); *see also Perez v. Fla.*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in denial of certiorari) ("Together, *Watts* and *Black* make clear that to sustain a threat conviction without

encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.").

Part of the confusion relates to the *mens rea* required under this Court's decision in *Black*. The petition now pending in *Kansas v. Boettger*, 450 P.3d 805 (2019), *petition for cert. filed* (U.S. Feb. 20, 2020) (No. 19-1051), illustrates that lower courts, both federal and state, also remain uncertain as to the *mens rea* required for a statement to constitute a "true threat." Members of this Court have expressed persistent concern that uncertainty on this issue is producing injustice, while differing over the *mens rea* requirement that is consistent with the First Amendment. *See, e.g., Elonis v. United States,* 135 S. Ct. 2001 (2015) (holding that negligence was insufficient to support a conviction but leaving open the ultimate question of the appropriate mental state for threat prosecutions); *id*. at 2013-18 (Alito, J., dissenting) (arguing that recklessness is consistent with the First Amendment); *id*. at 2018-24 (Thomas, J., dissenting) ("This failure to decide [the appropriate mental state for threat prosecutions] throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.").

This case implicates the confusion over *mens rea* because here Thames was arrested under Mich. Comp. Laws § 750.543m, which has been interpreted to

require only general intent. *See People v. Osantowski*, 736 N.W.2d 289, 297 (Mich. App. 2007) (construing the statute as limited to "true threats" so as not to infringe on First Amendment protections and confirming that "[s]tatutes that criminalize pure speech 'must be interpreted with the commands of the First Amendment clearly in mind'") (quoting *Watts*, 394 U.S. at 707); Mich. Comp. Laws § 750.543z ("[A] prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment . . . ."); *Osantowski*, 736 N.W.2d at 299 (relying on *Black* to hold that the only intent that the prosecution had the burden to prove was defendant's general intent to communicate a "true threat").

This case presents two additional and critical issues arising under this Court's "true threats" jurisprudence that are related to, but distinct from, the questions presented in *Kansas v. Boettger*. The first issue turns on the words that constitute the *actus reus* of a "true threat" under this Court's First Amendment jurisprudence. If States can impose *criminal* sanctions for speech based on mere recklessness or a general intent, as some justices have suggested and as many courts have held, then preserving the distinction between statements that count as "true threats" under *Black*, and those *statements* which are protected speech under this Court's decisions in *Watts*, *Brandenburg*, and *Claiborne Hardwar*e, becomes vitally important.

The reason is simple. If the *mens rea* requirement can be easily proven based on uttering the words that are the *actus reus* of a true threat, then First Amendment protection effectively turns on whether

those words, considered in context, fall under *Black* (and can be punished), or under *Watts*, *Brandenburg*, and *Claiborne Hardware* (and must be protected). As demonstrated herein, lower courts have proven unable to preserve that distinction on a principled basis. Sadly, in the current climate, speakers like Thames who seek to voice a pro-life message are often the victims of this vagary in the decisional process.

The second and related issue arising under the "true threats" doctrine turns on the proper application of this Court's decision in *Black*, which emphasizes the need for a careful and contextualized analysis of speech. Here, Thames was arrested and detained for over 49 hours because "you can't say anything about bombs near a facility that performs abortions," a decision which reflects a municipal policy that authorizes an arrest of an individual for using certain words. Such a policy flies in the face of this Court's decision in *Black*, which rejected the notion that the use of certain symbols, and by necessary implication the use of certain words, can be a surrogate for a case-specific inquiry about whether a given statement constitutes a "true threat." "The First Amendment does not permit such a shortcut." *Black*, 538 U.S. at 367.

Finally, there is confusion regarding the interplay between "true threats" under *Watts* and *Black* and "incitement" under *Brandenburg*. *See, e.g., United States v. Turner*, 720 F.3d 411, 429-36 (2d Cir. 2013) (Pooler, J., dissenting). The case at bar illustrates the confusion as the Sixth Circuit never addressed nor even considered the impact of *Brandenburg* in its decision.

Consider, for example, *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982). In *Claiborne Hardware*, the Court held that the "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Id*. at 927. In this case, Charles Evers, a civil-rights boycott organizer, spoke out against boycott breakers during several public rallies. *Id*. at 902. At one rally, he stated that boycott breakers would be "disciplined." At another rally he stated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id*. The Court acknowledged that Evers's speech "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence." *Id*. at 927. Nonetheless, the Court analyzed the threatening speech under *Brandenburg* and held that it was protected by the First Amendment. *Id*. at 927-29.

In the final analysis, this disparity and concomitant uncertainty as to how the lower courts should evaluate "threats" in the context of the First Amendment have a chilling effect on the freedom of speech as it forces those who seek to adhere to the law to steer far and wide of the perceived unlawful zone. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.") (internal quotations omitted). The First Amendment needs breathing space. *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide

adequate breathing space to the freedoms protected by the First Amendment.") (internal quotation marks omitted). The Court should provide this breathing space by granting review, reversing the Sixth Circuit, and providing guidance on how the lower courts should analyze "threats" to ensure the protections of the First Amendment.

II. This Case Shows that Lower Courts Remain Uncertain about When Inflammatory Speech Is Protected *as a Matter of Law* under *Watts*, *Claiborne Hardware*, or *Brandenburg*.

To determine whether Respondents were legally justified for arresting and detaining Thames for over 49 hours for allegedly making a terrorist threat, we must analyze the alleged crime. There is no dispute that Thames was arrested *for pure speech*. That is, there is no evidence of her making any threatening gestures, brandishing any weapons, or possessing or displaying anything that could remotely be considered criminal contraband (*e.g.*, a hoax bomb).[8]

Further, as this Court stated, 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*, 394 U.S. at 707. This principle applies to the alleged crime at issue here (Mich. Comp. Laws § 750.543m). *See Osantowski*, 736 N.W.2d at 297 (construing the statute as limited to "true threats" so

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[8] (*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).

as not to infringe on First Amendment protections) (citing *Watts*, 394 U.S. at 707); Mich. Comp. Laws § 750.543z ("[A] prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment . . . .").

And in cases involving the First Amendment, the Court demands *de novo* review "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); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

Thus, when there is no dispute of material fact, as in this case, the First Amendment question is a *question of law*. For example, in *Watts*, this 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. *Watts*, 394 U.S. at 707-08; *see id.* at 706 ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). The 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 Thames was also engaging in a protest against abortion on the public sidewalk outside of an abortion clinic) 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.

Accordingly, the Court held that the speech could not be punished as a matter of law, thereby *reversing the jury conviction* and ordering the "entry of a judgment of acquittal." *Id*. at 708. The Court did not defer to the jury, as the Sixth Circuit asserts is required here, App. 23—this Court *reversed* the jury.

The Sixth Circuit's opposite conclusion in this case, *see* App. 23 (quoting *United States v. Hankins*, 195 F. App'x 295, 301 (6th Cir. 2006) and concluding that "[t]he jury determines whether a statement is a true threat"), where there is no material fact dispute, runs afoul of the First Amendment and threatens core First Amendment protections, requiring the Court to correct this error.

Likewise, in *Virginia v. Black*, 538 U.S. 343, 359 (2003), the Court stated that "'[t]rue 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). Accordingly, the Court held *as a matter of First Amendment law* that the burning of a cross itself cannot serve as the basis for prosecution since it is an expressive act. *See id*. at 360-68. In this way, *Black* confirms the concerns expressed in *Watts* about punishing pure speech and makes clear that whether the speech is protected is a legal determination for the court, particularly when there is no dispute as to the actual alleged "threat." *See also United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (upholding the dismissal of an indictment for making a threat).

Significantly, the Court's decision in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), has this same thrust, emphasizing as it does 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).

This controlling precedent establishes that the *precise* words allegedly uttered by Thames 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 Thames for uttering them.

The undisputed record reveals (by way of the sworn testimony of Respondent Gatti *and* the police video recording) the following with regard to the critically important question of fact: "*What exactly did she say*?":

* * *

> BY MR. MUISE:
> Q. We went over this in the internal investigation report and I stopped [the police video] at 8:52:53. [Parsley] told you, "I prophesy bombs, I prophesy bombs are going to fall in the near future." Is that your recollection?
> A. After seeing the video, yes.
> Q. And those are the -- you asked him specifically *what exactly did she say*, and that's what he told you, "*I prophesy bombs, I prophesy*

> *bombs are going to fall in the near future*", correct?
> A. Yes.[9]

This is *the* crucial exchange between Respondents' *only* witness to the alleged crime and the officers who are required to have probable cause before arresting Thames for this crime.

Additionally, per the sworn *written* statement of Respondents' *only* witness to the alleged crime: "*She said, bombs, bombs on America, and bombs will blow up this building*."[10] This statement was signed by Parsley at the scene of the arrest, just minutes after Thames was taken into custody.[11]

The controlling—and well established—precedent cited above establishes that the statement(s) allegedly made by Thames are protected speech *as a matter of law*. The district court's findings support this conclusion. With regard to the alleged "prophesy threat," the district court properly observed the following: "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." App. 52. The district court further noted that the "threat" described in the written statement,

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

[10] (R-36-3:Ex. E [Parsley Statement], Pg.ID 614).

[11] (R-36-3:Ex. M Tardiff Dep. at 18:21-25 to 20:1, Pg.ID 682).

which wasn't conveyed to the officers until *after* they had arrested Thames, "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." App. 53.

On these points, the district court was correct. The alleged statements utterly fail to meet the constitutionally mandated standard to constitute a "true threat" as a matter of law under *Watts* or *Black*, or incitement under *Brandenburg*. And changing the word "bomb" to "brimstone, or God's fiery wrath, or something that might be considered overzealous proselytizing" doesn't change the legal conclusion, as the Sixth Circuit seems to suggest. App. 21-22. Indeed, the Sixth Circuit's suggestion underscores the fact that neither statement is a true threat—each is political hyperbole at best. And neither statement projects the imminence required by *Brandenburg*. Remarkably, the Sixth Circuit does not deal with *Watts* or *Brandenburg*, and makes only passing mention of *Black* through a borrowed cite to a state court appellate decision. *See* App. 21.

Because there is no dispute of any *material* fact about what Thames is *alleged* to have said, probable cause should have been determined by the court as a matter of law. *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005) (stating that "[w]hen no material dispute of fact exists, probable cause determinations are legal determinations that should be made" by the court); *but see* App. 22 (stating that "[b]oth sides . . . are wrong" to "insist this is not a question of fact for a jury but a strictly legal decision for the court"). And this is

particularly important in a case such as this, which involves an arrest and detention for *pure speech*.

In sum, Respondents' inability, *as a matter of law*, to make a threshold showing of an actionable "threat" is fatal to the officers' claim that they had probable cause to arrest Thames based on her alleged statement(s), and it is fatal to the Sixth Circuit's conclusion that the officers nonetheless enjoyed qualified immunity. It is also fatal to the Sixth Circuit's dismissal of Thames's claims based on a conclusion that no constitutional violation occurred.

In the final analysis, this petition presents important questions for this Court to resolve with regard to the interplay between *Watts*, *Black*, and *Brandenburg* in the context of a statute criminalizing pure speech and *who* (judge or jury) decides whether the speech is protected and thus beyond the reach of a criminal statute in the first instance.

III. This Case Shows that Courts Are Confused Over What Speech Is Protected under the Clearly Established Law Laid Down in *Watts*, *Brandenburg*, and *Claiborne Hardware*.

Officers 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Saucier v. Katz*, 533 U.S. 194 (2001); *Pearson v. Callahan*, 555 U.S. 223 (2009). "This 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.").

The qualified immunity analysis is ultimately an objective, legal analysis. As stated by the Court, "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct." *Harlow*, 457 U.S. at 819.

As demonstrated above, the question of whether a statement qualifies as a "true threat" under clearly established law is a question of law when there is no dispute of fact about the alleged statement. *See Watts*, 394 U.S. at 708. And if the alleged speech is not a "true threat" under clearly established First Amendment jurisprudence, then the arrest was unlawful and the officers do not enjoy qualified immunity.

The undisputed material facts establish that no statement attributed to Thames qualifies as a "true threat" *as a matter of clearly established law*. *See supra*. As a result, the officers had *no legal basis* (probable cause or otherwise) for arresting, searching, and detaining Thames for *over 49 hours* based on these alleged statements. The officers do not enjoy qualified immunity. *See Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) ("When an officer makes an arrest, it is a 'seizure' under the Fourth Amendment, and the arrest

is a violation of a right secured by the amendment if here is not probable cause.").

Indeed, there are multiple reasons for finding Thames's arrest unlawful as a matter of clearly established law in addition to the central point that the alleged speech is not proscribable under the First Amendment. First, the officer (Respondent Brooks) who directed Thames'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 Thames was arrested, the actions of the officers demonstrate that they perceived no imminent fear or apprehension nor did they perceive the alleged "threat" to be credible in any way. In fact, the officers' 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. As the undisputed evidence shows and as the district court properly found, App. 52, the officers did not evacuate the clinic nor did they search it or the surrounding area for a bomb, among other failings. In short, the officers did *nothing* that a reasonably prudent person who actually believed the alleged threat was serious, real, or imminent would do. And the only "witness" that the officers 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—and legal—conclusion that can be drawn from the undisputed evidence: there was no justification, probable cause or otherwise, to arrest Thames as a matter of law. Respondents are liable for violating Thames's clearly established rights under the First and Fourth Amendments. Review by this Court is warranted.

IV. This Case Shows that Courts Are Confused about the Application of *Black* to Municipal Policies that Authorize Arrests Based on Pure Speech.

"*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). It does not immunize a municipality so that individual officers who are acting consistent with how they were trained and how they are expected to operate are left holding the bag.[12] The City had multiple opportunities to distance itself from the actions of the officers, but each time it confirmed that the officers were operating pursuant to department policy and practice and how they were trained. Indeed, the witness *designated by the City to testify on its behalf* admitted this fact:

> Q. You testified aside from those three instances where officers were verbally counseled that everything that the city police officers did with regard to my client, including the arrest and subsequent detention, was consistent with the

[12] Moreover, because the officers (erroneously) enjoy qualified immunity, Thames is left with no recourse for the unjustified harm she suffered by the City and its law enforcement officials.

> 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.[13]

The City had no substantive response to this clear admission of liability.[14] Relying on this Court's precedent, the Sixth Circuit in *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1117 (6th Cir. 1994), stated, "The requirement that a municipality's wrongful actions be a 'policy' is not meant to distinguish isolated incidents from general rules of conduct promulgated by city officials. *It is meant to distinguish those injuries for which 'the government as an entity is responsible under § 1983,' from those injuries for which the government should not be held accountable*." (internal citation omitted) (emphasis added). Here, the City, as an entity, is responsible under § 1983 for the violation of Thames's rights.

Additionally, the actions of the officers were officially ratified by Respondent Jedrusik, the Chief of Police and the person responsible for the policies, practices, and procedures of the City police department and for training its officers. *See St. Louis v.*

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[13] (R-36-3:Ex. O Miller Dep. at 86:1-10, Pg.ID 700).

[14] The City's argument that it cannot be liable because there was no constitutional violation circumvents the issue by failing to respond directly to the question of who is "responsible" for the actions at issue. (*See* Appellee Br. at 45-46).

Praprotnik, 485 U.S. 112, 127 (1988) ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies."). Respondent Jedrusik did so through an official investigation, in which it was concluded that Thames's arrest was "reasonable and justified." [15] In short, the City and its Chief of Police are "responsible" for the deprivation of Thames's rights.

Finally, per Respondents' testimony and arguments, a pro-life demonstrator can be arrested in the City as a matter of policy and practice for simply uttering the word "*bomb*" outside of an *abortion facility*. It does not matter how this word was uttered *by the pro-life demonstrator* (we know the security guard said the "bomb" word first, but it was apparently permissible for him to do so), it is forbidden, and simply uttering it constitutes a crime. (*See* Appellees Br. at 8 ["[T]he supervisor making the arrest decision, Defendant Brooks, did so with specific reference to the mention of '*bombs*.' This is the '*precise word*' that *was* 'crucial' to Brooks' decision."]; *see also id*. at 15 ["Thames's alleged reference to 'bombs' was the critical element for her arrest."]).

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[15] (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).

This policy, which was the moving force behind the violation of Thames's rights, violates the rationale of *Virginia v. Black*. In that case, the jury was allowed to find intent to intimidate based solely on the burning of a cross. Per the opinion of Justice O'Connor, "The *prima facie* evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut." *Black*, 538 U.S. at 367. Here, the City's policy that "you can't say anything about bombs near a facility that performs abortions," functions just like the *prima facie* showing in *Black*, and ignores all of the contextual factors that must be considered in order to determine whether a specific statement is a true threat under *Black* or protected speech under *Watts*, *Brandenburg,* or *Claiborne Hardware*.

To summarize, first, the violations occurred as a result of the actions of nearly the entire day shift and the shift supervisor (Respondent Brooks) and not simply the acts of one or a few rogue police officers. And the officers were operating pursuant to the policy and practice that a pro-life demonstrator can be arrested for simply uttering the word "bomb" outside of an abortion facility. Second, pursuant to the *sworn testimony* of the City's designated Rule 30(b)(6) witness, the City takes full "responsibility" for the actions of the officers and admits that these actions were pursuant to the policies, practices, and procedures of its police department.[16] Third, the City, through its Chief of Police, Respondent Jedrusik, officially

[16] (R-36-3:Ex. O Miller Dep. at 86:1-10, Pg.ID 700).

sanctioned and ratified the unlawful conduct of the officers.[17] And finally, the length of the unlawful detention was caused by the policies, practices, and procedures of the City, which cites "budget" reasons for why Thames remained imprisoned for over *49 hours* before being released because there was no evidence of a crime.[18]

The City and Respondent Jedrusik are "responsible" and thus liable for the deprivation of Thames's clearly established rights and the injuries she suffered as a result.

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[17] (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).

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19a0594n.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case Nos. 18-1576/1608/1695

[Filed December 6, 2019]

KIMBERLEY THAMES,	)
	)
Plaintiff-Appellee/ Cross-Appellant,	)
	)
v.	)
	)
CITY OF WESTLAND, *et al.*,	)
	)
Defendants-Appellants/ Cross-Appellees.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: BOGGS, BATCHELDER, and BUSH, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. In this interlocutory appeal, four police officers, in their individual capacities, appeal the district court's denial of qualified immunity from claims of false arrest, retaliatory arrest in violation of freedom of speech and religion, and denial of equal protection. The plaintiff cross-appeals the denial of her motion for summary judgment on those claims and separately appeals the grant of summary judgment to the City and its Police Chief, certified for appeal under Federal Rule of Civil Procedure 54(b). We AFFIRM in part, REVERSE in part, and REMAND for entry of judgment consistent with this opinion.

I.

On Saturday morning, August 27, 2016, Kimberley Thames, a 57-year old, Roman Catholic, pro-life activist, stood with three other people—an elderly woman who appeared to be a Catholic nun, and a wheelchair-bound man with his wife—on the public sidewalk outside Northland Family Planning, an abortion clinic. Thames was holding a two-foot-by-two-foot sign with a photo and handwritten words, advocating pro-life beliefs and protesting abortion. While many Northland Clinic employees knew Thames as an occasional protestor, the Clinic's security guard, Robert Parsley, apparently did not. He was standing somewhere near her when she engaged him in conversation, beginning with her offer that she was praying for him and praying that he would find a different job. But, at some point, there was discussion of bombs. Thames said that Parsley raised the topic of bombs, telling her that there had been bombings and

threats at abortion clinics, but Parsley says that Thames initiated it and said something like: "I prophesy bombs are going to fall and they're going to fall in the near future"; "I prophesy bombs are going to fall and they're going to fall on you people"; and "bombs, bombs on America, and bombs will blow up this building."

At the end of this conversation, Thames left in her car (she says to use a restroom) but Parsley reported Thames's statements to a clinic employee, Mary Guilbernat, who immediately called 911. The dispatcher sent four City of Westland police officers to the Clinic: John Gatti, Jason Soulliere, Adam Tardif, and Sergeant Norman Brooks.[1] These are the defendants here.

When Thames returned to resume her protesting, the police were there. Officer Gatti had arrived first and interviewed Parsley and Guilbernat. Both identified Thames as the person who made the statements. Parsley also told Officer Gatti that Thames fled when he tried to take her photo, saying: "I tried to make contact [with Thames] via photo. . . . [M]ost of them they don't mind getting photoed, but she has a problem with giving me a photo."[2] When Officer

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[1] Another officer, John Halaas, arrived on-scene at some point and participated in Thames's arrest and the search of her car. Thames cites a rude comment that Officer Halaas made, but she did not name him in the lawsuit.

[2] In the police cruiser after her arrest, Thames was recorded on the dashcam video saying, unprompted: "He [Parsley] was trying to take a picture of me and I didn't want him to do that."

Soulliere approached Thames and asked if she had made a bomb threat, Thames denied it but would not tell Officer Soulliere what she *had* said to Parsley; instead, she talked around Officer Soulliere's questions, repeating that she had not made any threat, objecting that she did not know what she could have said that Parsley had misconstrued, and blaming Parsley, saying that he had first mentioned bombings at abortion clinics.

Souilliere: Did you tell someone there was going to be a bombing?

Thames: Noo-oh. . . . I didn't say anything like that.

Soulliere: Well there's several cops coming this way so I need to know why you said what you said - - and what you said.

Thames: Uh, I think you should ask him [Parsley] because I think he's misrepresenting something that I must have said. I certainly - -

Soulliere: Well what did you say?

Thames: I didn't say that.

Soulliere: Well, what *did* you say?

Thames: I didn't say *that*.

Soulliere: Well, I understand that.

Thames: I didn't say that. I don't really know.

Soulliere: But what did you say?

Thames: What would I have said that would have made him [Parsley] say such a thing?

Soulliere: Well, I don't know. That's why we're here to investigate because he said that you said there is going to be a bombing.

Thames: I *did not* say that.

Soulliere: This is a pretty serious threat.

Thames: Right, and I think, I think he [Parsley] has an issue.

Soulliere: So, what did you say to him?

Thames: I didn't say that. I wasn't - -

Soulliere: Ma'am, I understand that you didn't say that to him. But what did you say? Can we get to the bottom of this?

Thames: I do not know. I do not know.

Soulliere: Ok, you don't know what you said to him?

Thames: I do not know what he's referring to. Period. I do not know.

Soulliere: Well what did you *say* to him?

Thames: I didn't really say anything.

[The nun walked over to intervene in this conversation.]

Nun: Why don't you have them both come together? Why don't you call them both here?

Thames: Do I need an attorney? Because - -

Soulliere: Or you can just talk to me about what happened.

. . . [some repeated denials, rebuttals, and talking over each other]

Soulliere: Alright, well you won't even tell me what you said to him, so - -

Thames: It wasn't something for me to say that could be misconstrued.

Soulliere: Well, I've already explained to you what we've been called here for - -

Thames: I understand and it's a false call, sir.

Soulliere: Well, you won't even tell me what you said to him.

Thames: There is nothing I said that should be even misconstrued as such.

During this continued exchange, Thames explained to the officers that no one else had heard her conversation with Parsley. That is, clinic employee Mary Guilbernat did not hear the conversation with Parsley, but more

importantly, Thames said that the nun did not actually hear it either.

Based on Parsley's accusation, including his written statement, and Thames's evasiveness with Officer Soulliere, Sergeant Brooks, the senior officer at the scene, ordered Thames arrested for making a terrorist threat in violation of M.C.L. § 750.543m, the section of the "Michigan Anti-Terrorism Act" titled "Making Terrorist Threat or False Report of Terrorism." Sergeant Brooks testified at his deposition in this case about his reasoning for the arrest:

> Question: Are you aware that . . . at the scene, according to the video and Officer Gatti's testimony, the complaining witness [Parsley] says [that Thames said], 'I prophesy bombs, I prophesy bombs are going to fall and they're going to fall in the near future'?
>
> . . .
>
> And what does the complaining witness [Parsley] say in that written statement that my client [Thames] allegedly said?
>
> . . .
>
> Brooks: [Reading the written statement:] She said, 'Bombs, bombs on America and bombs will blow up this building.'
>
> Question: Those aren't the same words he [Parsley] told to Officer Gatti [at

the scene] as far as you understand; is that right?

Brooks: I don't know the exact verbiage that - - that he [Parsley] 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.

When this questioning continued:

Question: So what was the information - - back up - - was the information that Officer Gatti relayed to you [regarding Parsley's accusations that Thames had threatened a bombing] - - was that your basis for ordering the - - directing the arrest of my client [Thames]?

Brooks: The information that I was provided by Officer Gatti [i.e., Parsley's report of Thames's statements], and then Officer Soulliere also - - I talked to him briefly, and he was advising me that your client [Thames] was being very evasive and not answering any questions concerning her conversation with the security guard [Parsley].

> Question: What specifically was the information that you relied on to direct the arrest of my client?
>
> Brooks: Well, as I just stated, the information from Officer Gatti that the security guard had been told by her [Thames] that there was going to be bombs dropped or placed or somehow bombs were going to affect that facility and the fact that Officer Soulliere said that she [Thames] basically refused to say anything to him in regards to the conversation she and the security guard had. She was being very evasive.

Later in this deposition, Thames's attorney asked Sgt. Brooks about the fact that, while recording the events at the scene, one of the officers' field microphones recorded Brooks saying: "Anybody who has anything to do with this whole thing, they're fanatics." Sgt. Brooks answered that he was not referring to any one side of the abortion debate and that he meant a "fanatic" as just being someone who is extremely zealous on a certain topic—that is, he claimed that he was not favoring either position but meant both sides of the abortion issue were "fanatics." Thames has argued that this comment is proof of Brooks's animus against her beliefs and the motive for her arrest.

Back at the scene: when Officer Soulliere arrested and handcuffed Thames, she sought assistance from the nun, who intervened, claiming she had not heard

Thames make any bomb threat, implied that Parsley was lying, and then harangued Soulliere, Gatti, and Brooks because they were not arresting the clinic's owner and employees for "killing God's children," were instead protecting "a Nazi concentration camp," and were "wrong" and "evil" for "abid[ing] by the Supreme Court's law" rather than "God's law." Eventually, Officer Gatti, clearly frustrated, retorted to the nun: "You shouldn't be in the position you are. You're a disgrace."

Meanwhile, Officer Halaas was called away to another location and had to remove Thames from his cruiser to Soulliere's cruiser. The video revealed his aggravation:

Halaas:	[To Thames:] Alright, come on out [of Officer Halaas's cruiser]. I've got to put you in a different car.
Thames:	(inaudible)
Halaas:	Ma'am, we've already told you twice, for terroristic threats. . . . Hey, who's in [car number] 16, she's going in 16.
Thames:	May I ask what's going to happen to me?
Halaas:	Yeah, you're gonna go to jail.
Thames:	Do I get an attorney? Do I get to call anyone?
Halaas:	You'll get one free phone call. You'll get an attorney after you've

> been arraigned (inaudible) boy or a girl, however it works out. Have a seat. You'll get a - -
>
> Thames: What about my, will I (inaudible)
>
> Halaas: [Shouting] Have a seat! I've gotta go!
>
> Nun: [Yelling from distance] You've got the wrong person.
>
> Halaas: [Shouting at Thames] Get in!
>
> Nun: You have the wrong person.
>
> Halaas: [Shouting] Ma'am, I don't give a shit! I've gotta go!

Concurrently, Officers Soulliere and Halaas searched Thames and her car, incident to her arrest, but did not find any explosives or other contraband. The officers did not evacuate the Clinic or the surrounding area, nor did they conduct a search of the Clinic, the adjacent parking lot, or a nearby dumpster. They did not contact the Michigan State Police to request bomb sniffing dogs. They did not impound Thames's car. At his deposition, Sergeant Brooks explained:

> Question: There were no like bomb dogs, sniffing dogs that came to sniff to see if there was anything in the panels or interior of [Thames's] vehicle; is that right?

Brooks: We would have been searching for evidence, not necessarily a bomb.

Question: Did anybody search the surrounding vicinity of the Northland Family Planning Clinic for any contraband or a bomb?

Brooks: At that - - at that point we were not concerned about a bomb being physically there at that particular time because of the amount of protesters and employees and patients of the clinic. The reason we were sent there was because of the [verbal] threat [by Thames].

Question: If you thought the threat was credible, would you not want to evacuate the building?

Brooks: Threat doesn't have to be credible according to the law.

After arresting Thames, Officer Soulliere drove her to the Westland police station, booked her, and placed her in a holding cell where she remained over the weekend. None of the on-scene officers had any further contact with her or involvement in her arrest or detention. When she was released on Monday morning at 10:14 a.m., she had been in police custody for about 49 hours. The holding cell had a bunk for sleeping and a toilet, but Thames did not sleep or use the toilet. The jail's custody officers brought her food, but she did not eat. The custody officers did not offer Thames an

opportunity to attend mass or receive the Eucharist on Sunday.

A sergeant at the police station had approved Officer Soulliere's arrest report that Saturday but not until after Detective Jerry Farrar, the on-call detective that weekend, had ended his shift. On Sunday morning, Det. Farrar was directed immediately to a homicide investigation and, therefore, did not address Thames's case until Monday morning. At that point, Det. Farrar interviewed Thames, who waived her right to an attorney and insisted that she had not made a bomb threat. Det. Farrar determined that Parsley's written statement did not amount to "a direct threat where [Thames] threatened to bomb the clinic," and concluded that, "[e]ven though there was probable cause to arrest [Thames,] I find at this time there is insufficient evidence to charge her with a crime," so he decided to release her.

The Police Department conducted an internal investigation. It concluded that the arrest was "reasonable and justified," and was consistent with its policies, practices, and procedures. The report criticized Officer Halaas for saying "I don't give a shit," Sgt. Brooks for engaging in the political and religious argument at the scene, and Officer Gatti for saying "you're a disgrace" to the nun. The Police Chief, Jeff Jedrusik, accepted the report's findings. He reprimanded Officer Gatti, and cautioned Officer Halaas and Sgt. Brooks. Deputy Chief Brian Miller, the representative for this lawsuit, testified during his deposition that the arrest and detention of Thames in

this instance were consistent with the Department's policies and practices.

Thames brought a § 1983 suit against the four on-scene officers, the Police Chief, and the City of Westland, claiming false arrest, violation of her rights to free speech and free exercise of religion (including a claim of retaliatory arrest), violation of her right to equal protection, and *Monell*-based supervisory and municipal liability.[3] The officers sought qualified immunity on the individual-capacity claims and the Chief and the City moved for summary judgment on the official-capacity claims. Thames moved for a summary-judgment ruling that all defendants were liable on all claims. Although Thames denied making any threat or initiating the discussion of bombs, she agreed that she conversed with Parsley, that Parsley reported his version of that conversation to the police, and that the subsequent on-scene interactions with the responding officers were recorded and are admitted in this litigation. Moreover, and essential here, Thames has deliberately pressed her claims, and her arguments in this appeal, *as if she made the statements* as Parsley represented, effectively admitting Parsley's accusation of what she said—or conceding any dispute about it—and arguing only that those statements, considered in context, would not be sufficiently threatening to

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[3] Thames had also named the Clinic, its CEO, and the employee who called 911, but the district court dismissed those defendants and Thames has not appealed that judgment. Thames had named the security guard as a "John Doe" defendant but, after learning his name, never amended her complaint or served him with process. The district court dismissed the John Doe defendant (i.e., Parsley) and Thames has not appealed that judgment.

establish probable cause for her arrest. She has therefore insisted that there are no material facts in dispute and the only question here is whether, as a matter of law, her statements as reported by Parsley and the events in the recordings establish probable cause.[4]

The district court reviewed the audio and video recordings, heard argument from counsel, and denied both sides' motions for summary judgment on the false-arrest claim by holding that the controlling question—whether the officers had probable cause to arrest Thames—was a disputed question of material fact for a jury. The court also denied both sides' motions for summary judgment on the free-speech,

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[4] Thames asserts this most clearly and emphatically in her final brief, in which she says: "Based on the undisputed material facts, there are no statements attributed to [Thames] that qualify as a '*true threat*' as a matter of law." Thames's Reply Br. at 3. "Because there is no dispute as to any material fact, this appeal raises pure questions of law. . . . [T]he Officer Defendants do not have to 'concede' any facts in this appeal because there is no dispute of *any* material fact. . . . [T]his case only raises issues of law for the [c]ourt to decide." Reply Br. at 1. "Put another way, both [sides] agree that there are no factual inferences left for the fact-finder to draw that could affect the outcome; [the two sides] differ only as to the legal consequences that follow from those undisputed facts." Reply Br. at 2.

Moreover, in her Response to this court's show-cause order, Thames said: "The critically important point is that the factual dispute concerning *whether Thames actually made the statements is not material*. What *is* material to the resolution of this case is that no statement attributed to Thames qualifies as a true threat as a matter of law. Accordingly, those statements cannot provide probable cause for her arrest."

free-exercise, and equal-protection claims for two of the officers, reserving those claims for a jury, but granted qualified immunity to the other two officers, finding that Thames had no evidence to support the claims against those officers. Finally, the court granted summary judgment to the Chief and the City, finding that Thames had not asserted, nor could she prove, a pattern, policy, or specific action necessary for *Monell*-based liability claims. *See Thames v. City of Westland*, 310 F. Supp. 3d 783 (E.D. Mich. 2018).

The officers filed an interlocutory appeal, challenging the denial of qualified immunity (No. 18-1576). Thames cross-appealed (No. 18-1608), challenging the denial of her motion for summary judgment on liability. Finally, Thames sought and received from the district court a Rule 54(b) certification allowing her to appeal immediately the summary judgment for the Chief and the City (No. 18-1695). We consolidated the three appeals into this one.

II.

This is an interlocutory appeal in which the defendant officers and the plaintiff, Thames, challenge the district court's denial of their competing motions for summary judgment, based on qualified immunity and liability, respectively. Thames also challenges the grant of summary judgment to the Police Chief and the City. We must establish our jurisdiction for all three.

A.

The denial of summary judgment is ordinarily not a final decision within the meaning of 28 U.S.C. § 1291, and, accordingly, it is generally not immediately

appealable. But the "denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of [] § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Our jurisdiction is, however, limited: "we may not decide a challenge aimed solely at the district court's determination of the record-supported evidence, but we may decide a challenge with any legal aspect to it, no matter that it might encroach on the district court's fact-based determinations." *Bunkley v. City of Detroit*, 902 F.3d 552, 560 (6th Cir. 2018). Under our pragmatic approach, we "excise the prohibited fact-based challenge so as to establish jurisdiction." *Id*. In so doing, "we follow the same path as did the district court—considering the sufficiency of the plaintiff's proffered evidence, drawing all reasonable inferences in the plaintiff's favor—and, ideally, we would need look no further than the district court's opinion for the pertinent facts and inferences." *Id*. (citation omitted). But we are not limited to only those facts and inferences; rather, we must make our legal determination "based on th[e] now (for this purpose) undisputed record facts." *Id*. (citations omitted).

Proceeding in this manner, we have jurisdiction over this interlocutory appeal from the denial of qualified immunity. Moreover, in deciding this "purely legal" question, we can rely on Thames's stipulation that Parsley's recitation of her statements was true, and our own plenary review of the videotape recordings. *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007) ("The Court of Appeals . . . should have viewed the facts in the light depicted by the videotape.").

B.

Thames has correspondingly appealed the denial of her motion for summary judgment, in which she sought a determination of liability on the same claims (and facts) on which the officers sought qualified immunity. "[U]pon establishing interlocutory jurisdiction over the qualified-immunity aspect of the appeal, we are frequently presented with questions of our pendent appellate jurisdiction." *Bunkley*, 902 F.3d at 561 (citations omitted). In such cases, "[p]endent appellate jurisdiction may be exercised only when the immunity issues absolutely cannot be resolved without addressing the nonappealable [pendent] issues." *Id.* (alterations in original, citation omitted). Here, the question of the officers' liability is so completely intertwined with the claims of qualified immunity that we find that one necessarily resolves the other and establishes pendent appellate jurisdiction.

C.

Thames also appeals the grant of summary judgment to the Police Chief and the City on her *Monell* claims. Ordinarily, rulings that do not dispose of all parties and all claims do not end the action and are, therefore, not immediately appealable. But if the district court "expressly determines that there is no just reason for delay," it may "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." Fed. R. Civ. P. 54(b); *Libertarian Party of Ohio v. Husted*, 808 F.3d 279, 280 (6th Cir. 2015) (a Rule 54(b) order "make[s] a non-appealable order an appealable judgment"). We therefore have jurisdiction over this appeal.

III.

Qualified immunity shields government officials in the performance of discretionary functions from standing trial for civil liability unless their actions violate clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The plaintiff in a § 1983 action against such an official bears the burden of overcoming the qualified-immunity defense. *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 681 (6th Cir. 2013). At the summary-judgment stage, the plaintiff must show that (1) the defendant violated a constitutional right and (2) that right was clearly established. *Id.* at 680. At a minimum, this requires evidence of a "genuine issue of fact"; that is, "evidence on which [a] jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

A.

The district court denied the summary-judgment motions by both the defendant officers and Thames based on its belief that the determination of whether Thames's statements were "true threats" was a question for the jury. All parties contend that this belief was wrong.

The police arrested Thames on a violation of a Michigan statute titled "making a terrorist threat," which is codified as a specific provision of Michigan's Anti-Terrorism Act and says:

> (1) A person is guilty of making a terrorist threat or of making a false report of

> terrorism if the person does either of the following:
>
> (a) Threatens to commit an act of terrorism and communicates the threat to any other person[, or]
>
> (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.
>
> (2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.
>
> (3) [This] is . . . a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000, or both.

M.C.L. § 750.543m. In 2007, in a case challenging the constitutionality of this statute—on a claim that it was vague or overbroad—the Michigan Court of Appeals held it constitutional:

> [This statute] prohibit[s] only 'true threats' as they encompass the communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. Further, because the statutes require the existence of an intent to 'intimidate or coerce,' they extend beyond the type of speech or expressive conduct that is

> afforded protection by the First Amendment. As such, the statutes are neither unconstitutionally vague nor overbroad.

Michigan v. Osantowski, 736 N.W.2d 289, 298 (Mich. Ct. App. 2007) (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003), for the meaning of "true threat"), *rev'd for resentencing*, 748 N.W.2d 799 (Mich. 2008). As defined here, "true threats" are "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." *Id.* at 297 (quoting *Black*, 538 U.S. at 359). Two caveats. First, although this holding limits the statute to only true threats, the statute also includes "false reports" of true threats, M.C.L. § 750.543m(1)(b). And, "the defendant [need] not have the intent or capability of committing the" true threat, *id.* at § (2). This latter provision is why Sgt. Brooks and the other officers asserted at their depositions that, as they understand the law, the "[t]hreat doesn't have to be credible."

In this case and this appeal, we proceed on the understanding that Thames made certain statements to Parsley, something like: "I prophesy bombs are going to fall, they're going to fall in the near future, they're going to fall on you people, and on America, and bombs will blow up this building." Thames does not dispute the content of these statements but contends that, even if she said that, it does not rise to the level of a "true threat." Nor does Thames dispute that Parsley was both *alarmed enough* that he reported this immediately to Guilbernat, who immediately called 911, and *sincere enough* that he repeated his accusations to the

responding officers, identified Thames at the scene (and directed the officers to her), and swore out a written statement. While Thames is correct that a listener's subjective fear alone is not enough to turn an innocuous statement into a true threat (via a "heckler's veto"), Parsley's response is still meaningful. Four other facts bear mention. One, Thames said "bombs." She did not threaten brimstone, or God's fiery wrath, or something that might be considered overzealous proselytizing—she said "bomb." Two, she approached and said it, discreetly, *to the security guard*—she did not say it to staff passing by, or patients, or bystanders—and she did not say it where anyone else could hear her. Three, following this conversation, Thames refused to let Parsley photograph her and, without explanation to Parsley, immediately got into her car and drove off. She did return, but not until after the police had arrived. And, finally, when questioned, Thames emphatically denied making any bomb threat, but she was actively evasive and unwilling to tell Officer Soulliere what she *had* said to Parsley, even though Soulliere asked multiple times and stressed to her the importance of her answer.

The fundamental dispute here is whether the officers had probable cause to arrest Thames for her statements, but more specifically whether Thames's statements were "true threats." In a simplified sense, if they were "true threats," the officers had probable cause to arrest Thames and they win; if not, they arrested Thames without probable cause and she wins. Both sides insist this is not a question of fact for a jury but a strictly legal decision for the court. They are wrong.

"The jury determines whether a statement is a true threat." *United States v. Hankins*, 195 F. App'x 295, 301 (6th Cir. 2006); *Osantowski*, 736 N.W.2d at 302 ("As an issue of fact, the determination whether a statement was a true threat is generally a question for the jury."); *accord Michigan v. Pilette*, No. 266395, 2006 WL 3375200, at *7 (Mich. Ct. App. Nov. 21, 2006); *cf United States v. Houston*, 683 F. App'x 434, 438 (6th Cir. 2017). Because Thames's false-arrest claim turns on this disputed question of fact for the jury to decide, the district court properly denied her motion for summary judgment on that claim. But whether that claim survives for trial is dependent on whether the officers are entitled to qualified immunity. And qualified immunity is different.

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments . . . ." *Stanton v. Sims*, 571 U.S. 3, 6 (2013) (citations omitted). "This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quotation marks and citations omitted). Therefore, the qualified-immunity question does not require a decision that the statements were or were not true threats, but only a determination of whether the officers' (even mistaken) belief that the statements were true threats was unreasonable. Moreover, because the dashcam videos provide the relevant facts, the panel does not need to defer to the district court's fact finding or construe inferences in favor of the non-moving party (Thames); the panel can decide for itself whether "the events

recorded on the tape justified the officers' conduct." *See Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014).

Because Thames does not raise as a genuine issue of material fact whether she made the statements as Parsley represented, but only contends that those statements could not be true threats, we accept here that she forewarned of a bombing of the Clinic building in the near future. She initiated the conversation with Parsley, the security guard, and, though perhaps coincidentally, made the statements to him when and where no one else could hear them. Afterwards, she refused Parsley's attempts to photograph her and immediately drove off, which was reported to the police even though she did return, explaining that she had gone to use the restroom. Parsley reacted as if he believed her, prompting the call to 911, identifying and accusing her for officers at the scene, and completing a written statement. *See France v. Lucas*, 836 F.3d 612, 626 (6th Cir. 2016) ("An eyewitness identification will constitute sufficient probable cause unless there is an apparent reason for the officer to believe that the eyewitness was lying, did not accurately describe what he had seen, or was in some fashion mistaken regarding his recollection of the confrontation." (editorial marks and citation omitted)). And we see for ourselves in the video Thames's evasiveness and refusal to answer the direct and repeated question of what she had alternatively said to Parsley. *See District of Columbia v. Wesby*, 583 U.S. --, 138 S. Ct. 577, 587 (2018) (a "suspect's untruthful and evasive answers to police questioning could support probable cause" (quotation marks and citation omitted)). Based on this,

Sgt. Brooks's decision to arrest Thames for making a true threat was not unreasonable.

The officers were entitled to qualified immunity on Thames's false-arrest claim.

B.

The district court granted qualified immunity to Officers Soulliere and Tardif on Thames's free-speech (retaliatory arrest), freedom-of-religion, and equal-protection claims, but denied qualified immunity to Sgt. Brooks and Officer Gatti on these claims. The district court also denied Thames's motion for summary judgment on these claims. Both sides appeal.

In *Lozman v. City of Riviera Beach*, 585 U.S. --, 138 S. Ct. 1945, 1951 (2018), the Supreme Court granted certiorari to consider whether the existence of probable cause necessarily bars a First-Amendment-based retaliatory-arrest claim, but ultimately determined that it need not—and therefore would not—answer that question, and declined to set the test for proving a retaliatory-arrest claim in the ordinary course, *id.* at 1955. Despite its sidestepping the issue, the Court made a significant ruling and the *Lozman* opinion controls the analysis here.

The Court identified two potentially applicable tests: the *Hartman* test, which requires that "a plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge . . . [or else] the case ends," *id.* at 1952 (discussing *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006)); and the *Mt. Healthy* test, which allows a plaintiff to prevail by showing that the retaliation was the "but-for cause" of the governmental action (i.e., the arrest), regardless of the existence of probable cause, *see id.* at 1952 (discussing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977)). The

Court opined on the relative pros and cons of the two tests before changing the question.

> The City's argument here is that, just as probable cause is a bar in retaliatory prosecution cases [under *Hartman*], so too should it be a bar in this case, involving a retaliatory arrest. There is undoubted force in the City's position. There are on average about 29,000 arrests per day in this country. In deciding whether to arrest [a suspect], police officers often make split-second judgments. The content of the suspect's speech might be a consideration in circumstances where the officer must decide whether the suspect is ready to cooperate, or, on the other hand, whether he may present a continuing threat to interests that the law must protect.
>
> For these reasons retaliatory arrest claims, much like retaliatory prosecution claims, can present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury. That means it can be difficult to discern whether an arrest was caused by the officer's legitimate or illegitimate consideration of speech. And the complexity of proving (or disproving) causation in these cases creates a risk that the courts will be flooded with dubious retaliatory arrest suits.
>
> [T]here are [also] substantial arguments that *Hartman*'s framework is inapt in retaliatory arrest cases, and that *Mt. Healthy* should apply without a threshold inquiry into probable cause. For one thing, the causation problem in

> retaliatory arrest cases is not the same as the [prosecution] problem identified in *Hartman* . . . . [I]n retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision to prosecute is weakened by the presumption of regularity accorded to prosecutorial decision-making. That presumption does not apply in [the arrest] context. In addition, there is a risk that some police officers may exploit the arrest power as a means of suppressing speech.

Id. at 1953 (quotation marks and citations omitted). The *Lozman* Court held that, on the unique facts of that case, "*Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim," *id.* at 1955, but it refused to displace *Hartman* or to establish *Mt. Healthy* as the only test for assessing a retaliatory arrest claim, due to the foreseeable "difficulties that might arise if *Mt. Healthy* [were] applied to the mine run of arrests made by police officers," *id*. at 1954. The Court considered only these two tests and did not suggest the possibility of any other test.

Applying *Hartman* to the present facts, beginning with the officers' reasonable belief that they had probable cause (as established above) for this run-of-the-mine arrest, Thames's failure to disprove probable cause necessarily defeats her claims that the officers are liable for wrongfully arresting her as retaliation for exercising her First Amendment rights to free speech and religion by protesting at the Clinic. Even using the *Mt. Healthy* test, Thames's claim fails because she has no evidence to show that the alleged retaliation was the

"but-for cause" of her arrest. Given that none of the other protesters were arrested, particularly the far more effectively antagonistic nun, the officers' comments at the scene (i.e., Officer Halaas's hostile shout of "I don't give a shit," Sgt. Brooks's expression of his opinion that "anybody who has anything to do with this thing is a fanatic," and Officer Gatti's insult to the nun, calling her a "disgrace") do not demonstrate that they would not have arrested Thames "but for" her anti-abortion protesting. Rather, they arrested her for making what they reasonably accepted as being a bomb threat and for behaving in an evasive manner during the investigation of it.

Thames next claims that, aside from the alleged retaliation, the officers—by arresting her—also violated her First Amendment rights to free speech and free exercise of religion by removing her from the public sidewalk in front of the Clinic. This claim presupposes the accuracy of Thames's contention that they arrested her because she was engaging in protected First Amendment activity. That is incorrect. The officers arrested her because they reasonably believed that she made an illegal bomb threat. That is speech that is not protected by the First Amendment. The possibility or likelihood that Thames would have been engaged in protected First Amendment activities had she not been arrested is irrelevant. Had the police arrested her for anything from jaywalking to murder, they would also have removed her—as they would remove any similarly arrested person—from the public sidewalk, without regard to her intent or desire to exercise her otherwise constitutionally protected right to speak, pray, or proselytize on that sidewalk at that

time. This claim does not allege a constitutional violation.

Thames next claims that the officers and the City violated her right to the free exercise of religion because, while detaining her, they prevented her from attending mass and receiving the Eucharist on Sunday. Thames has no evidence that the arresting officers had any involvement in the duration or conditions of her detention *after* her arrest, and the record shows that they did not. Moreover, Thames has provided no pertinent legal authority to support her claim that she has a First Amendment free-exercise right to religious visits or receiving of the Eucharist during short-term (weekend) detention following arrest and pending arraignment.

Thames also raised an equal-protection claim on the basis that the officers did not arrest Parsley for saying "bomb" but arrested her for saying "bomb," contending that this was solely because she was exercising her fundamental First Amendment right to protest abortion. "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis," with "the threshold element" being "disparate treatment." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quotation marks and citations omitted). But Parsley was neither protesting nor making threats; he was on the job as a security guard. Thames was not similarly situated to Parsley. Moreover, Thames was

not similarly situated to the other protesters, such as the nun (who argued with and harangued the officers), because those other protesters did not vocalize any bomb threat. There is no "fundamental right" to make a bomb threat. It was because of the bomb threat that the police arrested Thames but not the other protesters. There is a rational basis for differentiating between people who voice bomb threats and everyone else.

Thames alternatively argues that she "was arrested because she was pro-life" and "[t]he very basis for the arrest [was] Defendant Brooks'[s] assertion that a pro-lifer cannot utter the word 'bomb' outside of an abortion center." But Sgt. Brooks did not say that a "*pro-lifer*" cannot use the word "bomb" outside an abortion clinic, he said "you" cannot, without any specification as to whether "you" would be pro-life, pro-choice, pro- or con-anything. More importantly, abortion protesters are not a protected class. *Norton v. Ashcroft*, 298 F.3d 547, 559 (6th Cir. 2002). And, as just established, Thames was not similarly situated to anyone who was treated differently.

The on-scene officers are entitled to qualified immunity on these claims. The district court was correct in denying summary judgment to Thames and it was correct in granting summary judgment and/or qualified immunity to Officers Soulliere and Tardif. But the district court erred in denying qualified immunity to Sgt. Brooks and Officer Gatti on these claims.

C.

Thames argues that the district court erred by granting summary judgment to the Police Chief and the City, in their official capacities, on her claims of supervisory and *Monell* liability. Thames contends that the City and the Police Chief are liable because the officers acted pursuant to City policy and the Chief ratified their actions, thus effectuating the policy. But because the officers did not violate any of Thames's constitutional rights, the policies or ratification are irrelevant, and Thames cannot hold the City or the Chief liable. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the [policy, practice, or custom] might have authorized the [action] is quite beside the point."); *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 404 (6th Cir. 2010) ("Because the individual defendants did not violate his constitutional rights under the First Amendment, Vereecke cannot rely on their conduct to establish . . . municipal liability.").

The district court's grant of summary judgment to the City and the Chief was proper.

IV.

For the foregoing reasons, we REVERSE the judgment of the district court denying qualified immunity, AFFIRM the judgment of the district court denying summary judgment to Thames and granting summary judgment to the City and Chief, and

REMAND for entry of an order consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 16-CV-14130

HON. GEORGE CARAM STEEH

[Filed June 18, 2018]

KIMBERLY THAMES,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF WESTLAND, et al.,	)
	)
Defendants.	)
	)

JUDGMENT

The above entitled matter has come before the court on the parties' cross-motions for summary judgment, and in accordance with the court's order (Doc. 49), granting Defendants City of Westland and Jeff Jedrusik's motion for summary judgment,

IT IS ORDERED AND ADJUDGED that judgment hereby is GRANTED in favor of Defendants City of Westland and Jeff Jedrusik.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Marcia Beauchemin
DEPUTY COURT CLERK

Dated: June 18, 2018

* * *

[Certificate of Service Omitted in the
Printing of this Appendix]

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 16-CV-14130

HON. GEORGE CARAM STEEH

[Filed April 20, 2018]

KIMBERLY THAMES,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF WESTLAND, et al.,	)
	)
Defendants.	)
	)

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Doc. 35) AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. 36)

I. Overview

Plaintiff Kimberly Thames, a 57-year old pro-life advocate, brought this 42 U.S.C. § 1983 suit arising out of her arrest and weekend detention at a Westland

police station holding cell, after an abortion clinic's security guard accused her of stating, "I prophesy bombs, I prophesy bombs. There is going to be a bombing in the near future." Thames denies making any statement involving the word, "bombs." Thames brought suit against Defendants the City of Westland, the Westland Chief of Police, four Westland police officers involved in her arrest, the Northland Family Planning Clinic, Inc. ("Northland") and its Chief Executive Officer, Renee Chelian, its employee Mary Guilbernat, and John Doe, the clinic's security guard. By prior order of the court, Northland, Chelian, and Guilbernat have been dismissed. Now before the court is a motion for summary judgment brought by the remaining Defendants as to the federal claims, and a cross-motion for partial summary judgment as to liability brought by Thames for most of the same claims. Oral argument was heard on March 15, 2018 and informs this court's decision. Also, in rendering its decision here, the court has reviewed the audiotape of the 9-1-1 call and various video recordings of Thames' arrest.

For the reasons set forth below, summary judgment shall enter for the City of Westland and Police Chief Jedrusik because there is no basis for *Monell* or supervisory liability. However, Defendants' motion for summary judgment for the arresting Defendants on Plaintiff's Fourth Amendment wrongful arrest claim shall be denied. Also, Defendants' motion for summary judgment shall be denied as to Plaintiff's First Amendment retaliatory arrest claim and Fourteenth Amendment equal protection claim as to Defendants Officer Gatti and Sergeant Brooks, but shall be granted

as to Officers Soulliere and Tardif. Plaintiff's motion for partial summary judgment as to liability shall be denied.

II. Factual Background

On Saturday, August 27, 2016, Thames, a Roman Catholic and pro-life supporter, stood on a public sidewalk outside the Northland abortion clinic holding a rosary and a sign in defense of the unborn. Thames was known to the Northland clinic as a frequent protestor. At the same time, a religious sister was also peacefully protesting near Thames. Thames engaged the security guard, Robert Parsley, standing outside the clinic in conversation and informed him that she was praying for him and hoped he could find a new position. She alleges that he then informed her that there have been bomb threats against abortion clinics, to which she claims she responded that she was not aware of any bombings in Michigan. After their conversation, Thames left in her car to use a nearby restroom.

Parsley's version of their conversation is quite different. In two different accounts, he claims that Thames threatened that bombs would fall. He reported these allegations to employees of the clinic. One of the clinic's employees, defendant Guilbernat, placed a 9-1-1 call to the police. In that call, Guilbernat stated, "We have protestors outside and one of them just made a statement that there's going to be a bombing." (Doc. 35, Ex. B at 00:04:09). The 9-1-1 operator asks her, "What exactly did they say?" *Id.* at 00:09:12, and Guilbernat repeats, "There's going to be a bombing." *Id.* at 00:12-14. The operator sought a second time to clarify the

threat, asking, "That's all they said is there's going to be a bombing? That's what they said, word for word?" *Id.* at 00:14-18. To which Guilbernat, replied, "Yes." *Id.* at 00:18-19. The operator then sought a third time to clarify the threat, to which Guilbernat accused Thames of stating "there's going to be a bombing." *Id.* at 01:57-58.

Guilbernat then gave the operator a description of the woman in question, describing her as dark complexioned, with dark hair in a bun, wearing a light blue short-sleeved top, a long blue skirt and flip-flops. *Id.* at 00:30-33, 1:01-11. In response to the 9-1-1 call, four Westland police officers responded to the clinic: Officers Jason Soulliere, John Gatti, Adam Tardif, and Sergeant Norman Brooks. These officers are named Defendants. Officer Halaas appeared later on the scene, and he has not been named in the lawsuit.

Thames returned to the location to continue protesting and saw several police vehicles and officers speaking to Parsley. Officer Gatti arrived on the scene first and interviewed Parsley and Guilbernat. Both identified Thames to him as the person who had made the statement. (Doc. 36, Ex. B at 8:50:19-25, 08:51:41-2, 08:52:01-03). Parsley told Officer Gatti that Thames stated, "I prophesy bombs are going to fall and they're going to fall in the near future." (Doc. 36, Ex. B at 8:51:31-8:52:53, Ex. K at 53:5-23). Parsley also accused Thames of stating, "I prophesy bombs are going to fall and they're going to fall on you people." (Doc. 40, Ex. E at 08:52:46-52). But when Parsley gave his written statement to Defendant Tardif a few minutes later, his story changed and he accused Thames of stating,

"bombs, bombs, on America, and bombs will blow up this building." (Doc. 36, Ex. E, Ex. M at 18:22-25 and 19:1-3).

Officer Soulliere asked Thames if she had made a bomb threat, and she denied it. (Doc. 36, Ex. J at 40:23-25-51:1-20; Ex. B at 8:51:21-8:15:36). But she never specifically answered Officer Soulliere's questions about what exactly she did say to the guard, merely reiterating that she did not make a bomb threat, did not know what she had said to him that could have been misconstrued, and mentioned that he was the one who brought up alleged bombings at abortion clinics. *Id.* at 08:51:41-2, 08:51:43-08:52:31; Doc 36-3, 57:24-25 to 58:1-17. She also relayed her conversation with Parsley in which he told her about bombings for which she responded she was unaware of that activity. (Doc. 36, Ex. J at 57:24-25-58:1-17, Ex. B at 8:53:47-8:55:07; Ex. I at 42:18-25; 51:1-4; Ex. 1 at ¶18).

The senior officer on the scene, Sergeant Brooks, ordered Thames' arrest for making a terrorist threat. (Doc. 35, Ex. C at 30). Specifically, she was arrested for violating Michigan's anti-terrorism statute, Mich. Comp. Laws § 750.543m. Thames has not challenged the constitutionality of the statute. Officer Soulliere then handcuffed Thames. (Doc. 35, Ex. D at 30). After her arrest, Thames pleaded with the religious sister to come to her aid. (Doc. 36, Ex. J at 68:14-15). The religious sister told Officer Soulliere that she did not hear Thames make a bomb threat, implored him to question Thames and Parsley together so he could determine who was lying, and insisted that the ones that should be arrested were the clinic's owner and

staff who were the ones "killing God's children." (Doc. 36, Ex. J at 69:12-71:22). Officer Gatti told the religious sister that she was a "disgrace." (Doc. 36, Ex. K at 19:23-25-20:1-5). The officers did not take a written statement from the sister or from two other persons who were outside the clinic when the alleged threat was made. (Doc. 36, Ex. J at 59:13-25-60:1-13; Ex. L at 23:24-25 – 24:1-5).

After Thames' arrest, she was placed in the back of Officer Halaas' patrol vehicle, but when he was called away to respond to another incident, she was moved to Officer Soulliere's patrol vehicle. (Doc. 35, Ex. E at 08:57:35-09:01:49; Ex. F at 75-5). At the time she was placed in Officer Halaas' vehicle, Thames told him, "You got the wrong person," to which he replied, "Ma'am, I don't give a shit! I got to go!" (Doc. 36, Ex. O at 46:18-25 to 47:1-10). After her arrest, Officers Soulliere and Halaas searched her vehicle, but did not find any explosives or any other contraband. (Doc. 35, Ex. E at 08:57:36-09:02:50; Ex. F at 72-3.) The officers did not search the clinic, the adjacent parking lot, or nearby dumpster, nor did they use any bomb sniffing dogs. In fact, the Westland police department does not have any bomb sniffing dogs, but would have to call the state police for such a search. The officers did not impound Thames' vehicle.

Officers Gatti and Soulliere testified at their depositions that the City of Westland did not train them to distinguish between true threats and protected speech. (Doc. 36, Ex. J at 36:16-19, Ex. K at 117:4-7). Sergeant Brooks testified:

> 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.

(Doc. 36, Ex. at 29:20-25). At his deposition, Sergeant Brooks was asked why the officers did not search the surrounding vicinity of the abortion clinic for a bomb, and he responded:

> At that — at that point we were not concerned about a bomb being physically there at that particular time because of the amount of protesters and employees and patients of the clinic. The reason we were sent there was because of the threat.

(Doc. 36, Ex. L at 28:9-13). Sergeant Brooks was then asked, if the threat was credible, why did they not evacuate the clinic, and he responded, the "threat doesn't have to be credible according to the law." *Id.* at 16-17. In addition, at the scene of the arrest, Sergeant Brooks also said, "Anybody who has anything to do with this whole thing, [they're] fanatics." (Doc. 36, Ex. C at PgID 597).

Soulliere drove Thames to the Westland police station, booked and placed her in a holding cell where she remained over the weekend. (Doc. 36, Ex. O at 63:1-10). She was released Monday morning at 10:14 a.m. Thus, she was in police custody for a little over 49 hours. Thames did not eat or sleep during that time, although she was offered food. (Doc. 36, Ex. 1 at ¶¶ 25-

40). The holding cell had a cement slab for sleeping and a toilet which was visible to all. (Doc. 36, Ex. 1 at ¶¶ 25-40, Ex. G).

Officer Soulliere's report regarding Thames' arrest would not have come to the attention of the on-call detective that weekend, Detective Jerry Farrar, until Sunday because the report was not approved by a sergeant until after Detective Farrar's shift ended on Saturday. (Doc. 45, Ex. J at 18-21). Detective Farrar was handling a homicide investigation which began on Sunday morning, and thus, was not able to address Thames' case until Monday morning. (Doc. 45, Ex. I at 65:22-25-66:1-13; Ex. J at 19-21, 22-28, 39). Thames was unable to attend Mass on Sunday or receive the Eucharist. (Doc. 36, Ex. 1 at ¶ 34). Upon reviewing the case, Detective Farrar made the decision to release Thames finding that "though there was probable cause to arrest Kimberley, I find at this time there is insufficient evidence to charge her with a crime." (Doc. 45, Ex. J at 27:8-12).

Detective Farrar did not talk to the prosecutor before making his decision. *Id.* at 25:9-12. In his incident report, Detective Farrar wrote that he read Robert's written statement accusing Thames of stating "bombs, bombs, bombs on America. And bombs will blow up this building," and determined that "I do not see a direct threat where Kimberly threatened to bomb the clinic." (Doc. 36-3 at PgID 611). After her release, the police denied Thames' request that they take her to her car so she walked about a mile to her vehicle. (Doc. 36, Ex. 1 at ¶ 44).

After Thames' release, the City police department conducted an internal investigation, and concluded that Thames' arrest was reasonable and justified and was consistent with its policies, practices, and procedures. (Doc. 36, Ex. O at 49:5-10, 91:5-22, Ex. C). However, Officer Gatti received a verbal reprimand for telling the religious sister that she was a disgrace. (Doc. 36, Ex. O at 47:17-48:2). The Chief of Police, Jeff Jedrusik, reviewed the report of the internal investigation and accepted its findings. (Doc. 36, Ex. O at 44:6-25-45:1-3). Deputy Chief Brian Miller, the witness designated by the City pursuant to Federal Rule of Civil Procedure 30(b)(6), testified Thames' arrest and detention were consistent with the policies and practices of the police department. (Doc. 36, Ex. O at 86:1-10). However, Officers Gatti and Sergeant Brooks were cautioned to refrain from "[e]ngaging in political or religious/morality discussions with bystanders." (Doc. 36, Ex. C at 18).

Thames filed this 42 U.S.C. § 1983 lawsuit against the City of Westland; Police Chief Jeff Jedrusik; Officers Soulliere, Gatti, Tardif, and Brooks; Northland, Northland's CEO Chelian, Northland's employee Guilbernat, and John Doe, Northland's security guard. Northland, Chelian, and Guilbernat have been dismissed by prior order of the court. Thames' Complaint alleges violations of her Fourth, First, and Fourteenth Amendment rights and two related state law claims.

III. Standard of Law

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the

pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Redding v. St. Eward*, 241 F.3d 530, 532 (6th Cir. 2001). The Supreme Court has affirmed the court's use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995).

The standard for determining whether summary judgment is appropriate is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Amway Distributors Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir. 2003) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Redding*, 241 F.3d at 532 (6th Cir. 2001). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *see also National Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968); *see also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). Mere allegations or denials in the non-movant's pleadings will not meet this burden, nor will a mere scintilla of evidence supporting the non-moving party. *Anderson*, 477 U.S. at 248, 252. Rather, there must be evidence on which a jury could reasonably find for the non-movant. *McLean*, 224 F.3d at 800 (*citing Anderson*, 477 U.S. at 252).

IV. Analysis

A. Arresting Officers

1. Qualified Immunity

Defendant officers argue qualified immunity shields them from liability under § 1983. Qualified immunity "'protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Stanton v. Sims*, 571 U.S. 3, 4–5 (2013) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). It protects all officers except "the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (citation and internal quotation marks omitted). As the Supreme Court has explained, "[t]his accommodation for reasonable error

exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* (citation omitted). Indeed, qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments. . . ." *Stanton*, 571 U.S. at 5 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quotation marks omitted)).

The court employs a two-step inquiry in deciding qualified immunity questions. *Baynes v. Cleland*, 799 F.3d 600, 610 (6th Cir. 2015). "'First, viewing the facts in the light most favorable to the plaintiff, has the plaintiff shown that a constitutional violation has occurred? Second, was the right clearly established at the time of the violation? These prongs need not be considered sequentially.'" *Id.* (internal quotations marks and citation omitted). Where there is no showing of a constitutional violation, the officer is cloaked with qualified immunity and the court need not address the second prong. *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 992 (6th Cir. 2017) (citing *Pearson*, 555 U.S. at 232).

The court first considers the question of qualified immunity as to the four responding officers. Thames alleges five constitutional violations: (1) wrongful arrest in violation of the Fourth Amendment (2) retaliatory arrest in violation of the First Amendment, (3) violation of free exercise of religion in violation of the First Amendment, (4) violation of the Equal Protection Clause of the Fourteenth Amendment, and (5) conspiracy to violate constitutional rights. The court considers each alleged violation below.

2. Wrongful Arrest Claim under the Fourth Amendment

The court first considers whether the officers had probable cause to arrest Thames. If so, Defendant Officers are entitled to summary judgment on Thames' Fourth Amendment wrongful arrest claim. "Probable cause to make an arrest exists if the facts and circumstances within the arresting officer's knowledge were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Hoover v. Walsh*, 682 F.3d 481, 499 (6th Cir. 2012) (internal quotation marks and citation omitted). The Sixth Circuit has defined probable cause as "reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion." *Id.* (internal quotation marks and citation omitted). "The inquiry is an objective one; the existence of probable cause depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest regardless of the arresting officer's subjective state of mind." *Id.* at 500 n. 52 (internal quotations marks and citations omitted). "In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible." *Fridley v. Horrighs*, 291 F.3d 867, 872 (6th Cir. 2002) (quoting *Pyles v. Raisor,* 60 F.3d 1211, 1215 (6th Cir. 1995)).

Having set forth the standard of law for determining probable cause, the court turns now to the specific facts of this case to determine whether probable cause existed for the arrest. For the reasons set forth below, an issue of fact exists as to whether the

officers had probable cause to arrest Thames which precludes the entry of summary judgment for the arresting officers. The security guard accused Thames of making the following statement before her arrest: "*I prophesy bombs are going to fall and they're going to fall in the near future."* After her arrest, he reported she said, "*bombs, bombs, on America, and bombs will blow up this building*." The fact that the security guard arguably changed his story may call into question his credibility. Also, the religious sister present at the scene denied that Thames had made the statement. Thus, a reasonably prudent officer on the scene might doubt the security guard's story. Whether or not the security guard provided reasonably trustworthy information is a question of fact for the jury.

Nevertheless, assuming that a reasonably prudent officer would accept the security guard's version of events as true, the court considers whether these two statements give rise to probable cause for her arrest. Thames was arrested for violating Mich. Comp. Laws § 750.543m which provides in pertinent part:

> (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:
>
> (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
>
> (b) Knowingly makes a false report of an act of terrorism and communicates the false

> report to any other person, knowing the report is false.
>
> (2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

Mich. Comp. Laws § 750.543m(1)(a) criminalizes the "making [of] a terrorist threat" by threatening to "commit an act of terrorism" and the communication of that "threat to any other person." An "act of terrorism" is defined as a "willful and deliberate act" that would comprise a "violent felony," known to be "dangerous to human life," and that "is intended to intimidate or coerce a civilian population or influence or affect the conduct of government ... through intimidation or coercion." Mich. Comp. Laws § 750.543b(a). The Michigan Court of Appeals has held that:

> Given the plain and ordinary meaning of these terms, we are satisfied that the statutory provisions, when read together, prohibit only "true threats," as they encompass the communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.... Further, because the statutes require the existence of an intent to "intimidate or coerce," they extend beyond the type of speech or expressive conduct that is afforded protection by the First Amendment.

People v. Osantowski, 274 Mich.App 593, 603; *rev'd in part on other grounds*, 481 Mich. 103 (2008); *see also*

People v. Bally, No. 320838, 2015 WL 4169244, at *2–3 (Mich. Ct. App. July 9, 2015).

The Supreme Court also has addressed what distinguishes "true threats" from political hyperbole which is constitutionally protected speech. In *Watts v. United States*, a student at a public rally declared, "[a]nd now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. 705, 706 (1969). The Court held that the student was wrongfully convicted for allegedly threatening the President, because only a contextually credible threat to kill, injure, or kidnap the President constitutes a "true threat" punishable under the law. *Id.* at 708. Similarly, in *Virginia v. Black*, 538 U.S. 343 (2003), the Court struck down a statute banning cross-burning with the intent to intimidate, where a provision of the law, as interpreted by the State's model jury instructions, provided that burning of a cross in public view "shall be prima facie evidence of an intent to intimidate." *Id.* at 363-64. The Court held that the prima facie evidence provision of the cross-burning ban was unconstitutional under the First Amendment, because it effectively prohibited all cross-burning regardless of whether that conduct was intended to intimidate or merely constituted protected expression. *Id.* at 367. The Court explained that "[t]rue 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." *Id.* at 359.

Based on the above discussed Supreme Court precedent, and because Michigan law is clear that Mich. Comp. Laws § 750.543m only criminalizes "true threats" which involve a "serious expression of an intent to commit an act of unlawful violence," the court considers whether the statements allegedly attributable to Thames meet this threshold. First, the court considers her pre-arrest statement, "*I prophesy bombs are going to fall and they're going to fall in the near future.*" In considering this statement, the court gives the term "prophesy" its ordinary meaning. According to Merriam-Webster, prophesy means, "to utter by or as if by divine inspiration," "to predict with assurance or on the basis of mystic knowledge," or to "prefigure." An example of the word in its ordinary usage is Mark Twain's text in *A Connecticut Yankee*, "every time he *prophesied* fair weather it rained." 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. In the vague context allegedly used by Thames, at least a jury question exists as to whether it amounts to a true threat.

The evidence suggests that Defendant Officers did not consider the statement to be a true threat as they did not direct evacuation of the clinic, did not request the assistance of a bomb squad, did not request the assistance of a bomb sniffing dog, did not search the clinic for a bomb, did not search the surrounding area for a bomb, did not search the adjacent parking lot for a bomb, did not search the dumpster for a bomb, and did not impound Thames' vehicle for fear that a bomb might be planted in it.

The security guard did not make his written statement until after Thames was arrested. Even so, the court considers whether that statement amounts to a "true threat" which would give rise to probable cause for arrest. That statement was, "*bombs, bombs, on America, and bombs will blow up this building*." This statement presents a closer question than the first, but like the *"prophesy"* statement, it 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. Once again, the officers' failure to make any attempt to locate a bomb or vacate the clinic or surrounding vicinity suggests that an objectively reasonable officer on the scene might not view the statement as a true threat.

Having found that a jury question exists as to whether the security guard's allegations against Thames gave probable cause for her arrest, the court next considers whether the arresting officers are still entitled to qualified immunity. "[U]nder § 1983, an arresting agent is entitled to qualified immunity if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent." *Everson v. Leis,* 556 F.3d 484, 499 (6th Cir. 2009) (citations omitted). "[E]ven if a factual dispute exists about the objective reasonableness of the officer's actions, a court should grant the officer qualified immunity if, viewing the facts favorably to the plaintiff, an officer reasonably could have believed that the arrest was lawful." *Kennedy v. City of Villa Hills, Ky.,* 635 F.3d 210, 214 (6th Cir. 2011).

Viewing the facts in the light most favorable to Thames, a jury question exists as to whether a reasonable officer on the scene could have believed that her arrest was lawful. Also, all four of the arresting officers are potentially liable for the arrest. Sergeant Brooks ordered the arrest. Officer Gatti investigated the complaint at the scene. Officer Soulliere questioned Thames, placed her in handcuffs, searched her vehicle, transported her to the police station and initiated her booking. Officer Tardif took the security guard's written statement. 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. Village of Ottawa Hills*, 5 F. App'x 390, 395 (6th Cir. 2001). Based on the foregoing discussion, Defendant officers are not entitled to summary judgment on the wrongful arrest claim. A jury question remains as to whether there was probable cause for the arrest.

3. Retaliatory Arrest Pursuant to the First Amendment

Because Thames groups her First Amendment violations of freedom of speech and the right to free exercise of her religion together in her motion for partial summary judgment, the court likewise does so. As the Sixth Circuit has observed, "[f]ree exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts." *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 256 (6th

Cir. 2015). First, the court considers whether Thames has raised a genuine issue of material fact that Officers Soulliere, Gatti, Tardif, and Brooks violated her right to freedom of speech and free exercise of religion. Thames alleges that she was engaging in protected speech when she protested outside an abortion clinic based on her sincerely held religious beliefs.

Unlike wrongful arrest claims brought under the Fourth Amendment, motive is relevant to Thames' claim that Defendant officers arrested her in retaliation for her exercise of her First Amendment rights. The Sixth Circuit has identified three elements that a plaintiff must prove to establish a retaliatory arrest claim: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *City of Villa Hills*, 635 F.3d at 217.

An issue of law exists as to whether Thames must also prove a fourth element — that there was an absence of probable cause for her arrest — in order to prevail on her retaliatory arrest claim under the First Amendment. Although not identified by the parties, the issue is now before the Supreme Court. *Lozman v. City of Riveria Beach*, 681 F. App'x 746, *cert. granted*, 138 S. Ct. 447 (2017). Circuit courts are split on this question with the majority holding that the existence of probable cause bars a First Amendment retaliation claim. *See Peggy v. Herrnberger*, 845 F.3d 112, 119 (4th Cir. 2017)

(existence of probable cause bars First Amendment retaliation claim); *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) (same); *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002) (same); *but see Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013) (an arrest motivated by retaliatory animus is unlawful even if supported by probable cause).

The Sixth Circuit has "defer[red resolution" of the question of whether the absence of probable cause is an element of an ordinary retaliatory arrest claim. *City of Villa Hills*, 635 F.3d at 217, n.4.[1] The Supreme Court has ruled that probable cause is an element of a retaliatory prosecution claim, *Hartman v. Moore*, 547 U.S. 250 (2006), but has not yet ruled on whether the reasoning of *Hartman* extends to retaliatory arrest claims. The Court addressed the issue of whether *Hartman* extends to retaliatory arrest claims in *Reichle v. Howards*, 566 U.S. 658 (2012) and noted critical differences between the two constitutional torts, as the former involves decision-making by prosecutors who are entitled to absolute immunity, and the prosecutor's alleged animus is attenuated because in the ordinary case the key defendant is not the prosecutor who made the charging decision, while the latter typically involves only the arresting officer who bears the alleged animus. *Id.* at 667-69. While observing differences in rationale which might justify treating

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[1] *But see Barnes v. Wright*, 449 F.3d 709, 717-20 (6th Cir. 2006) (requiring absence of probable cause as an element of retaliatory arrest claim where arresting agents initiated grand jury proceedings and only arrested the plaintiff after the grand jury had indicted him.)

retaliatory arrest claims differently than retaliatory prosecution claims, the Court did not reach the issue because it found that the arresting officers were entitled to qualified immunity because at the time the defendant was arrested "it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation." *Id.* at 670.

Having already determined that there is a jury question as to whether the Defendant officers had probable cause to arrest Thames, the court must consider the remaining elements of a retaliatory arrest claim to determine if the Defendant officers are entitled to summary judgment. The first two elements are easily established. First, Thames engaged in conduct protected by the First Amendment. *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citations omitted); *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.") (citations omitted). Thames was protesting on a public sidewalk which the Supreme Court has recognized as "traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). There is no exception for public sidewalks adjacent to abortion clinics. *McDullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). Second, her arrest and 49-hour detention in a holding cell would deter a person of ordinary firmness from continuing to engage in that conduct.

The only question then is whether there is a causal connection between her pro-life activities and her arrest—that is, whether her arrest was motivated at least in part by her protected conduct. In support of her claim that the Defendant officers had retaliatory animus, Thames relies on the following evidence: (1) Sergeant Brooks who ordered the arrest, testified that "you can't say anything about bombs near a facility that performs abortions," (Doc. 36. Ex. L at 29:20-25); (2) Defendant Brooks referred to people who protest on behalf of the unborn as "fanatics," (Doc. 36, Ex. C at 10) (3) Defendant Gatti told the religious sister who was protesting alongside Thames that "You should not be in the position you are in, you're a disgrace, (Doc. 36, Ex. K at 19:23-25 to 20:1-5) and (4) Defendant Gatti testified, "the comments that were made by her, it's a very politically religiously charged issue." (Doc. 36, Ex. K at 34:11-12, 35:18-22). Also, the court considers the fact that the arresting officers did not evacuate the clinic or make any serious efforts to locate a bomb. Based on this evidence of animus against pro-lifers, Thames has raised a genuine issue of material fact in support of her First Amendment retaliatory arrest claim. As previously discussed, the right to be free from retaliation for expressive religious activity is clearly established; thus, Officer Gatti and Sergeant Brooks are not entitled to qualified immunity on Thames' First Amendment retaliatory arrest claim. Because there is no evidence of retaliatory animus on the part of Defendant Officers Tardif and Soulliere; however, they are entitled to summary judgment on the retaliatory arrest claim.

Thames argues that the Sixth Circuit's *en banc* decision in *Bible Believers* supports her First Amendment claim. In that case, Bible Believers had been proselytizing their religious message peacefully at an international Arab festival, but nevertheless, their signs and banners had led to a violent reaction from a group of adolescents at the festival who began hurling water bottles and other objects at them. 805 F.3d at 239-40. As a result, the police officers threatened to arrest the Bible Believers for disorderly conduct, if they refused to leave the festival. 805 F.3d at 256. The Sixth Circuit found the officer's threats to arrest the demonstrators violated the First Amendment. *Id.* at 256. Thames argues, in this case Defendant Officers acted more egregiously, as they did not merely threaten to arrest her, but actually did so. *Bible Believers* supports Thames' theory of liability because there is a question of fact as to whether Defendant officers lacked probable cause to arrest her.

Because there is a genuine issue of material fact as to whether Officer Gatti and Sergeant Brooks violated Thames' First Amendment rights, the next question is whether that right was clearly established at the time of the alleged injury. The Sixth Circuit has stated that "[t]he key determination is whether a defendant moving for summary judgment on qualified immunity grounds was on notice that his alleged actions were unconstitutional." *Grawey v. Drury*, 567 F.3d 302, 313 (6th Cir. 2009). The Sixth Circuit has emphasized the Supreme Court's admonition that the "'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Stamm v. Miller*, 657 F. App'x 492, 496

(6th Cir. 2016) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The specific action in question need not have been previously held to be unlawful, but the unlawfulness of the act must be apparent in light of pre-existing law. *Id.* Under *Bible Believers*, and Supreme Court precedent previously discussed, the law is clearly established that the police cannot arrest a person because of their objectionable protected free speech activity; thus, the arresting officers are not entitled to qualified immunity on Thames' retaliatory arrest claim brought under the First Amendment.

Lastly, the court considers Thames' claim that Defendant Officers violated her right to the free exercise of her religion because her weekend detention in the holding cell prevented her from attending Mass and receiving the Eucharist. This is not a separate constitutional tort, but relates to damages for her wrongful arrest and retaliatory arrest claims.[2]

4. Equal Protection Claim under the Fourteenth Amendment

Thames also seeks to recover for alleged violations of the Equal Protection Clause of the Fourteenth

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[2] For a lawful incarceration, a free exercise of religion claim requires than an inmate show that a condition of incarceration places a "substantial burden on the observation of a central religious belief or practice," *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989); *Living Water of Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007), *Barhite v. Caruso*, 377 F. App'x 508, 510 (6th Cir. 2010), and missing one religious service does not constitute a "substantial burden" on an inmate's right to the free exercise of her religion. *Gill v. DeFrank*, 8 F. App'x 35, 37 (2d Cir. 2001).

Amendment. 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." U.S. Const. amend. XIV, § 1. "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either 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) (internal citations omitted). Because the freedom of speech is a fundamental right, Defendants' conduct is subject to strict scrutiny review. *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 986 (6th Cir. 2012).

The Sixth Circuit has held that "[f]undamentally, the Clause protects against invidious discrimination among similarly-situated individuals or implicating fundamental rights." *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006). In order to prevail on her equal protection claim, Thames must prove intentional discrimination on the basis of her protected speech. *McCleskey v. Kemp,* 481 U.S. 279, 292 (1987). Unlike a Fourth Amendment wrongful arrest claim which does not allow consideration of an officer's subjective intent but is governed solely by the objective inquiry of whether or not probable cause existed, an equal protection claim considers whether an officer had discriminatory motivations. *Farm Labor Org. Comm. V. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002).

Here, Thames seeks to prove her equal protection claim on the basis that Defendant Officers allegedly singled her out for arrest because she was engaging in pro-life speech activity. In support of this claim, she relies primarily on the same evidence summarized above in support of her retaliatory arrest claim, namely (1) Officer Gatti's testimony that the arrest was justified because of the "very politically, religiously charged" issue of abortion and that the "threats that she made have been carried out in the past," (Doc. 36, Ex. K at 34:11-18), (2) Officer Gatti called the religious sister a "disgrace," (Doc. K at 19:23-25 to 20:1-5), (3) Sergeant Brooks' statement that those involved in the abortion debate are "fanatics," (Doc. 36, Ex. C at 10); (4) the Internal Investigation report statement that, "[f]amily planning centers across the country and across the world operate on a consistent heightened state of security. This is common knowledge amongst law enforcement agencies across the country and, based on this violent history, has lent itself to be a contributing factor when establishing enforcement actions in and around family planning centers," (Doc. 36, Ex. C at 15), and (5) Defendant Officers relied solely on the security guard's statements which were not credible because his statements varied.

Based on this record, there is a genuine issue of material fact as to whether Officers Gatti and Sergeant Brooks arrested Thames for her pro-life activity, and not because she made a "true threat." Significantly, Defendants failed to evacuate the abortion clinic or make any meaningful attempt to locate a bomb. As there is no evidence of discriminatory animus on the part of Tardif and Soulliere; however, they are entitled

to summary judgment on Thames' equal protection claim.

Having found a question of fact exists as to whether Officer Gatti and Sergeant Brooks violated Thames' equal protection rights, the next question is whether a constitutional right was clearly established. If not, as described above, Defendant Officers are entitled to qualified immunity. Just as with Thames' First Amendment retaliatory arrest claim, the law was clearly established that the police could not arrest a peaceful speaker engaged in protected speech on a public sidewalk. *See Bible Believers*, 805 F.3d at 258-60. Accordingly, the arresting officers are not entitled to qualified immunity on Thames' equal protection claim.

5. Conspiracy Count

Count five of the Complaint alleges that the Westland Defendants conspired with the Northland Defendants to violate Thames' First, Fourth, and Fourteenth Amendment rights pursuant to § 1983. Defendants seek summary judgment on this claim. Thames has not responded to the argument in her response brief, nor addressed the issue in her own motion for partial summary judgment. It appears that Thames has abandoned the claim. Even if not, there are no genuine issues of material fact as to Thames' conspiracy claim, and Defendants are entitled to summary judgment on this claim.

B. Municipal Liability

The court next considers whether the City of Westland may be liable for alleged violations of

Thames' Fourth, First, and Fourteenth Amendment rights. Municipalities are not entitled to qualified immunity, and thus, the City of Westland may be liable for alleged violations of Thames' Fourth, First, and Fourteenth Amendment rights if Thames can prove liability under *Monell*. Thames argues that that the arresting officers lacked probable cause to arrest her, and that the City's failure to train the officers on what constitutes a "true threat" was the motivating force behind the arrest, or that the City was liable because the Chief of Police ratified the conduct by approving an investigation of the incident which concluded that the arrest was reasonable and justified. Thames' municipal liability claim fails under either theory.

"To succeed on a municipal liability claim, a plaintiff must establish that his or her constitutional rights were violated and that a policy or custom of the municipality was the 'moving force' behind the deprivation of the plaintiff's constitutional rights." *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 573 (6th Cir. 2016) (citing *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 694 (1978)). Systematically failing to adequately train police officers can constitute a custom or policy that leads to municipal liability. *Miller v. Sanilac Cty.*, 606 F.3d 240, 255 (6th Cir. 2010).

However, "[t]he inadequacy of police training only serves as a basis for § 1983 liability 'where the failure to train amounts to *deliberate indifference* to the rights of persons with whom the police come into contact.'" *Slusher v. Carson*, 540 F.3d 449, 457 (6th Cir. 2008) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Most importantly, "'[t]o establish deliberate

indifference, the plaintiff 'must show prior instances of unconstitutional conduct demonstrating that the [City] has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Brown*, 844 F.3d at 573 (quoting *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005)). To succeed on a failure-to-train claim, a plaintiff must prove the following: (1) the training was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury. *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006) (citing *Harris*, 489 U.S. at 387)).

The standard for finding a municipality liable essentially amounts to the judicial determination that "the city itself [decided] to violate the Constitution." *Connick v. Thompson*, 563 U.S. 51, 61-62 (2011). "'A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train,' although there are rare circumstances in which 'the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.'" *Id.* (quoting *Connick*, 563 U.S. at 62, 64 (internal quotation marks omitted)). The Supreme Court has held that for police officers, it does not:

> suffice to prove that an injury or accident could have been avoided if an officer had had better or

> more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.

Harris, 489 U.S. at 391.

Thames argues that the City of Westland may be liable for her alleged constitutional deprivations because the City failed to train officers to distinguish "true threats" from political hyperbole, and ratified and sanctioned the arresting officers' alleged misconduct. Under the above precedent, the City of Westland cannot be liable under the failure to train theory of liability because Thames has not shown any pattern of alleged similar constitutional violations, or that this case is the rare case where the failure to train is so obvious that liability should be imposed even in the absence of such a history.

As to her claim that the City ratified the allegedly unlawful arrest and detention because the Chief of Police accepted an investigation finding that the arresting officers acted reasonably and in compliance with department policy, a similar argument was recently rejected by the Sixth Circuit in *Burgess v. Fischer*, 735 F.3d 462 (6th Cir. 2013). In that case, the plaintiff sued the Greene County Board of Commissioners on the theory, among others, that the municipality could be liable based on allegations of excessive force on the part of its deputy sheriffs where the Sheriff had approved an investigation which

exonerated his subordinate officers' use of force. *Id.* at 479. The Sixth Circuit rejected this theory of liability, stressing that *respondeat superior* liability is not available under *Monell*, and holding that the sheriff's "after-the-fact approval of the investigation, which did not itself continue cause or continue a harm against [plaintiff], was insufficient to establish the *Monell* claim." *Id.*

The Sixth Circuit explained that in order to establish *Monell* liability under a single-act theory, the plaintiff must prove that a "deliberate choice to follow a course of action is made from among various alternatives by the official . . . responsible for establishing final policy with respect to the subject matter in question." *Id.* (*quoting Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (6th Cir. 1986)). And furthermore, the course of action must be the "moving force" behind the plaintiff's harm, as for example where the final decision maker directed the destruction of material evidence or ordered the takedown in question. *Id.* Here, 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. Accordingly, the City of Westland is not liable under *Monell.*

C. Supervisory Liability

Thames argues that Chief Jedrusik is liable as he ratified and sanctioned the alleged police misconduct and failed to adequately train and supervise these officers with regard to distinguishing between a "true

threat" and protected speech. The doctrine of *respondeat superior* does not apply, however, in § 1983 lawsuits to impute liability onto supervisory personnel. *Turner v. City of Taylor,* 412 F.3d 629, 643 (6th Cir. 2005). To plausibly find supervisory personnel liable, the Sixth Circuit has explained the standard as follows:

> [T]he § 1983 liability of supervisory personnel must be based on more than the right to control employees. Section 1983 liability will not be imposed solely upon the basis of respondeat superior. There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.

Id. at 643 (internal citations omitted). In *Turner*, plaintiff sought to hold the police Commander responsible for excessive force and other constitutional violations, arising from plaintiff's alleged beatings and mistreatment in prison, under the theory of supervisory liability because the Commander investigated plaintiff's complaints and concluded there was no evidence to support his claims. *Id.* at 635. The Sixth Circuit ruled this was an inadequate basis for imposing supervisory liability because allegations that the Commander conducted an inadequate investigation and reached the wrong conclusion does not amount to a constitutional tort but merely sounds in negligence. *Id.* at 649; *see also Heyerman v. County of Calhoun,* 680

F.3d 642, 647 (6th Cir. 2012). The acts of one's subordinates or the mere failure to act standing alone are not enough to hold a supervisor liable. *Summers v. Leis,* 368 F.3d 881, 888 (6th Cir. 2004). Also, Thames' efforts to recover against Chief Jedrusik on the basis that he failed to properly train his subordinates is not actionable under § 1983 under the circumstances presented here. The Sixth Circuit has held that "a supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor 'either encouraged the specific incident of misconduct or in some other way directly participated in it.'" *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 470 (6th Cir. 2006) (internal citations omitted).

D. John Doe Defendant

In her Complaint, Thames names as a John Doe defendant, the security guard who alleges she made the bomb threat. Although the officer's name is now known, and Thames refers to the officer by his name in her motion for partial summary judgment, Thames never sought to amend her Complaint to add him as a party, and failed to serve him as required under Federal Rule of Civil Procedure 4(m). The Sixth Circuit has held that a civil action against a Doe defendant never commences where they were not identified by their real names or served with process. *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996) (citing *Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968)). Until a plaintiff amends her complaint to identify a John Doe defendant by his true name, "the John Doe allegations in the complaint are mere

surplusage." *Smith v. City of Chattanooga*, No. 1:08-cv-63, 2009 WL 3762961, at *5 (E.D. Tenn. Nov. 4, 2009) (collecting cases). Accordingly, the John Doe defendant shall be DISMISSED.

V. Conclusion

For the reasons set forth above, Defendants' motion for summary judgment (Doc. 35) is GRANTED IN PART and DENIED IN PART as set forth below:

IT IS ORDERED that Defendants' motion for summary judgment on Plaintiff's wrongful arrest claim (count three) is DENIED as to the arresting officers, Defendants Soulliere, Gatti, Tardif, and Brooks.

IT IS FURTHER ORDERED that summary judgment is DENIED as to Plaintiff's retaliatory arrest claim in violation of the First Amendment (counts one and two) as to Defendants Officer Gatti and Sergeant Brooks as genuine issues of material fact exist as to whether Thames' constitutional rights to engage in protected speech and to the free exercise of her religious beliefs were violated. However, summary judgment is GRANTED as to Defendant Officers Soulliere and Tardif on Plaintiff's retaliatory arrest claim (counts one and two) as there is no evidence of animus on the basis of Plaintiff's pro-life advocacy.

IT IS FURTHER ORDERED that summary judgment is DENIED as to Plaintiff's allegation that Defendant Officer Gatti and Sergeant Brooks denied her equal protection in violation of the Fourteenth Amendment (count four) because genuine issues of material fact exist as to whether these Defendants arrested her based on her pro-life advocacy. However,

because there is no evidence of discriminatory animus on the part of Defendant Officers Soulliere or Tardif, summary judgment is GRANTED as to these officers on the equal protection claim (count four).

IT IS FURTHER ORDERED that Defendants' motion for summary judgment as to Plaintiff's conspiracy claim (count five) is GRANTED.

IT IS FURTHER ORDERED that that summary judgment is GRANTED as to all claims against Police Chief Jeff Jedrusik as there is no basis for supervisory liability.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is GRANTED as to all claims against the City of Westland as there is no basis for *Monell* liability.

IT IS FURTHER ORDERED that Plaintiff's motion for partial summary judgment (Doc. 36) as to liability only is DENIED.

IT IS FURTHER ORDERED that John Doe is DISMISSED.

IT IS SO ORDERED.

Dated: April 20, 2018

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

* * *

[Certificate of Service Omitted in the
Printing of this Appendix]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 18-1576/1608/1695

[Filed January 10, 2020]

KIMBERLEY THAMES,	)
	)
Plaintiff-Appellee/ Cross-Appellant,	)
	)
v.	)
	)
CITY OF WESTLAND, ET AL.,	)
	)
Defendants-Appellants/ Cross-Appellees.	)
	)

O R D E R

BEFORE: BOGGS, BATCHELDER, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk