No. 21-1552

United States Court of Appeals for the Sixth Circuit

REFORM AMERICA DBA CREATED EQUAL; MARK HARRINGTON,

PLAINTIFFS-APPELLANTS,

v.

CITY OF DETROIT, MI; DARIN SZILAGY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE COMMANDER, CITY OF DETROIT POLICE DEPARTMENT; **KURT WORBOYS,** INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE CAPTAIN, CITY OF DETROIT POLICE DEPARTMENT; AND **R. LACH,** INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER, CITY OF DETROIT, MI, POLICE DEPARTMENT

DEFENDANTS-APPELLEES,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE LAURIE J. MICHELSON

Civil Case No. 19-12728

APPELLANTS' PRINCIPAL BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

Attorneys for Plaintiffs-Appellants

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
2020 PENNSYLVANIA AVENUE NW
SUITE 189
WASHINGTON, D.C. 20006
(646) 262-0500

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiffs-Appellants state the following:

Plaintiff-Appellant Reform America is a nonprofit corporation. It does not have a parent corporation and no publicly held company owns 10% of its stock.

Plaintiff-Appellant Mark Harrington is an individual, private party.

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

AMERICAN FREEDOM LAW CENTER

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

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this Court hear oral argument. This case presents for review important legal issues regarding the right of private citizens to engage in speech protected by the First Amendment in a public forum.

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

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INTRODUCTION

The right to freedom of speech is not a right to catharsis. It is the right to have your voice heard, particularly when exercising that right in a traditional public forum. When the government imposes restrictions based on the viewpoint of the speakers, regardless of whether the government agrees or disagrees with that viewpoint and regardless of whether the forum is a public or nonpublic forum, the restriction must satisfy strict scrutiny. Strict scrutiny requires the government to further interests of the highest order by means narrowly tailored in pursuit of those interests. That standard is not watered down; it really means what it says. It is the most demanding test known to constitutional law.

Intermediate scrutiny of content-neutral speech restrictions is also not a pushover. To meet the requirement of narrow tailoring under intermediate scrutiny, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. In sum, the First Amendment is a meaningful brake on the power of government to restrict speech.

Defendants' "restricted area" and "free speech area" restrictions violated Plaintiffs' rights protected by the First and Fourteenth Amendments under both intermediate and strict scrutiny, and the seizure of Plaintiff Harrington violated the

Fourth Amendment. The Court should reverse the district court and remand the case for entry of judgment in Plaintiffs' favor.

STATEMENT OF JURISDICTION

On September 18, 2019, Plaintiffs filed this action, alleging violations arising under the First, Fourth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (Compl., R.1, Pg. ID 1-27). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

Following the close of discovery, the parties filed cross-motions for summary judgment.

On June 1, 2021, the district court entered an order granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment. (Op. & Order, R.33, Pg. ID 889-917). Judgment was entered in favor of Defendants and against Plaintiffs. (J., R.34, Pg. ID 918).

On June 2, 2021, Plaintiffs timely filed a notice of appeal, seeking review of the district court's Order. (Notice of Appeal, R.35, Pg. ID 919-21). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether Plaintiffs are entitled to judgment as a matter of law against Defendants for violating their rights protected by the Free Speech Clause of the First Amendment as a result of the speech restrictions enforced during the 2019 Democratic

Party presidential candidate debates held in the City of Detroit ("City").

II. Whether Plaintiffs are entitled to judgment as a matter of law against Defendants for depriving them of the equal protection of the law guaranteed by the Equal Protection Clause of the Fourteenth Amendment as a result of the speech restrictions enforced during the 2019 Democratic Party presidential candidate debates held in the City.

III. Whether Plaintiff Harrington is entitled to judgment as a matter of law against Defendants for depriving him of his right to be free from unreasonable seizures guaranteed by the Fourth Amendment when City police officers physically restrained him without lawful authority during the 2019 Democratic Party presidential candidate debates held in the City.

IV. Whether the district court erred by granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment.

STATEMENT OF THE CASE

I. Procedural Background.

On September 18, 2019, Plaintiffs filed this action, alleging violations arising under the First (freedom of speech), Fourth (unlawful seizure), and Fourteenth (equal protection) Amendments to the United States Constitution and 42 U.S.C. § 1983. (Compl., R.1, Pg. ID 1-27).

The alleged violations arose as a result of the speech restrictions enforced by

Defendants during the 2019 Democratic Party presidential candidate debates, which were held at the Fox Theatre in the City of Detroit, Michigan.

Following the close of discovery, the parties filed cross-motions for summary judgment.

On June 1, 2021, the district court entered an order granting Defendants' motion for summary judgment and denying Plaintiffs' motion for summary judgment. (Op. & Order, R.33, Pg. ID 889-917). Judgment was entered in favor of Defendants and against Plaintiffs. (J., R.34, Pg. ID 918).

Plaintiffs timely filed a notice of appeal, seeking review of the district court's Order. (Notice of Appeal, R.35, Pg. ID 919-21). This appeal follows.

II. Decision Below.

The district court rejected Plaintiffs' challenge to the "restricted area," concluding that "the City's restricted zone was a reasonable restriction on the time, place, and manner of [Plaintiffs'] speech because the restriction was content neutral, narrowly tailored to serve significant government interests, and left open adequate alternative channels for communication." (Op. & Order at 9-21, R.33, Pg. ID 897-909).

The district court rejected Plaintiffs' challenge to the "City's policy of separating protestors of opposing viewpoints," concluding that the policy was content neutral and "narrowly tailored because it directly and materially advanced the interests

of maintaining safety and order amongst the protestors and the public and allowed ample channels of communication." (*Id*. at 21-24, R.33, Pg. ID 909-12).

The district court rejected Plaintiffs' equal protection claim, concluding that "Defendants did not treat [Plaintiffs] differently than any similarly situated persons." (*Id*. at 25-26, R.33, Pg. ID 913-15).

Finally, regarding Plaintiff Harrington's Fourth Amendment Claim, the district court "assume[d] without deciding that Harrington was seized," and concluded, nonetheless, that "it was reasonable for [Defendant Szilagy] to believe that the protestors were trespassing on private property and that the lessee of that property had asked him to remove the protestors. Therefore, Szilagy and his officers reasonably believed Harrington and the other protestors were committing a crime and the brief seizure of Harrington was lawful." (*Id*. at 27-28, R.33, Pg. ID 915-16).

III. Statement of Facts.

Plaintiff Reform America ("Created Equal") is a nonprofit corporation incorporated under the laws of Ohio. It is a pro-life organization that engages in First Amendment activity in an effort to expose the horrific truth about abortion. This activity includes, *inter alia*, displaying signs, handing out pro-life literature, and engaging in civil discussions with those who support abortion. Plaintiff Mark Harrington is the President/Founder of Created Equal. (Harrington Decl. ¶¶ 1- 4, R.20-2, Pg. ID 158-59).

As part of its activities, Created Equal, and those who associate with Created Equal, including Plaintiff Harrington, engage in free speech activity to protest politicians and political candidates who support abortion. (*Id*. ¶¶ 5-6, R.20-2, Pg. ID 159).

On July 30, 2019, and again on July 31, 2019, the Democratic Party presidential candidates engaged in televised debates at the Fox Theatre located at 2211 Woodward Avenue in the City. The debates were televised nationally by CNN. All of the Democratic presidential candidates publicly support abortion, including late term abortions. (*Id*. ¶¶ 7-9, R.20-2, Pg. ID 159).

On July 30, 2019, and again on July 31, 2019, Plaintiffs went to the City with pro-life signs and messages to protest the pro-abortion policies and positions of the Democratic presidential candidates. A photograph of some of the signs used by Plaintiffs during the debates appears below:

(*Id*. ¶¶ 10-12, R.20-2, Pg. ID 159-60). Plaintiffs wanted to influence the candidates and their supporters with their signs depicting abortion imagery. These signs convey the powerful message that abortion is intrinsically evil and immoral. (*Id*. ¶¶ 13-14,

R.20-2, Pg. ID 160).

Location was important for Plaintiffs for three primary reasons. First, Plaintiffs' *physical* presence at the Fox Theatre, particularly with their signs, presented a lasting and strong visual image of their opposition to the pro-abortion policies and positions of the candidates and those who supported the candidates. This visual image was an essential part of Plaintiffs' message. Second, Plaintiffs wanted to be in aural and visual range of the Fox Theatre in order to express their pro-life message to the candidates and to those persons who attended the debates and supported the candidates. And third, Plaintiffs wanted access to the candidates and attendees of the debates to show them their signs, to converse with them, and to distribute to them their pro-life literature. (*Id*. ¶ 15, R.20-2, Pg. ID 161; *see also* City Dep. at 29:25 to 30:1-7, R.20-3, Pg. ID 185; *see also id*. at 135:22-25 to 136:1-6, R.20-3, Pg. ID 201).

On day 1 (July 30, 2019), Plaintiffs arrived at a drop off location along Fisher Service Drive in the City. They arrived at approximately 6 pm, which was two hours before the debate was scheduled to commence. (Harrington Decl. ¶ 16, R.20-2, Pg. ID 161).

Upon arriving at the drop off location, Plaintiffs tried to go directly to the Fox Theatre via the public sidewalk along Woodward Avenue but were stopped by City police officers, including Officer J. Everitt, who informed Plaintiffs that they could

not enter the "restricted area." (*Id*. ¶ 17, Ex. A, R.20-2, Pg. ID 161, 175).

The "restricted area" was marked by barricades and manned at various locations by armed City police officers. (*Id*. ¶ 18; *see also* R.20-3, City Dep. at 29:12-19, Pg. ID 185). The area incorporated boundaries along Fisher Service Drive, Woodward Avenue, Montcalm Street, Witherell Street, Adams Avenue, and Park Avenue. (Harrington Decl. ¶ 19, Ex. B, R.20-2, Pg. ID 161-62, 177; City Dep. at 17:7-25 to 25:1-12, Dep. Ex. 3, R.20-3, Pg. ID 182, 207).

A person with a ticket to the debate could enter the "restricted area." There were no apparent entry points into the "restricted area" for the ticket holders. The City police officers did not require those entering the "restricted area" to undergo a magnetometer-based or other type of security screening. The officers only asked to see a ticket. (Harrington Decl. ¶ 21, Ex. A, R.20-2, Pg. ID 162, 175).

After being turned away by Officer Everitt, Plaintiffs proceeded along Fisher Service Drive to the other side of Woodward Avenue and were again stopped by City police officers. More specifically, Plaintiffs were stopped by Defendant Worboys, who warned Plaintiffs that they would be "ticketed and arrested" if they attempted to enter the "restricted area." Defendant Worboys told the pro-lifers that they "can stand outside the barriers and talk all day," pointing to several remote areas where Plaintiffs could go. Plaintiffs protested, noting that there was no one in those areas for Plaintiffs to talk to. Defendant Worboys told Plaintiff Harrington that "talking to a person is not

a right." He proceeded to warn Plaintiffs that if they did not follow his orders, he would arrest them for disorderly conduct and disobeying a lawful order of a police officer. (*Id*. ¶ 22, Ex. A, R.20-2, Pg. ID 162-63, 175).

Plaintiffs did not want to be arrested so they departed the area and continued to walk along the perimeter of the "restricted area" to try and find a location that was within aural and visual range of the Fox Theatre. (*Id*. ¶ 23, R.20-2, Pg. ID 163).

Plaintiffs proceeded along Fisher Service Drive and turned right onto Witherell Street. They entered the parking lot of St. John's Episcopal Church and followed it to an area that they believed was outside of the "restricted area" (there were no barricades, officers, or signs stating "no trespassing") but as close to the Fox Theatre as they could get without breaching the "restricted area." This area was at the corner of Montcalm Street and Woodward Avenue. (*Id*. ¶ 24, R.20-2, Pg. ID 163; *see also* City Dep. at 54:3-16 [acknowledging no signs or barricades at the parking lot], R.20-3, Pg. ID 187).

At this location, Plaintiff Harrington noticed that the perimeter of the "restricted area" was outside the steel fence surrounding the church. Plaintiff Harrington also noticed several vehicles in the church parking lot, including a radio station vehicle, several other media vehicles (ABC, FOX, Comcast), and a video billboard truck running political ads for Democratic presidential candidate Bill deBlasio. A news reporter was also standing in the parking lot near the fence with his cameraman

shooting a video. (Harrington Decl. ¶ 25, Ex. A, R.20-2, Pg. ID 163-64, 175).

Upon arriving at this location, Defendant Worboys told Plaintiffs that they could not stand at this location either. Defendant Worboys said that it was private property, and that "they [the church] don't want you here." However, no one from the church, including any occupant or agent of the church, was present. No such person (occupant or agent of the church) told Plaintiffs to depart from this area. (*Id*. ¶ 26, Ex. A, R.20-2, Pg. ID 164, 175; *see* City Dep. at 64:8-16, R.20-3, Pg. ID 188).

When Plaintiff Harrington protested, pointing out the news media and others who were engaging in speech activity on this property, Defendant Worboys claimed that "they were allowed to be here." Plaintiff Harrington asked to see proof, and Defendant Worboys responded, "I don't need to show you anything."[1] Defendant Szilagy, who was the commander on the scene and who said that Defendant Worboys answers to him, stepped in and said that Plaintiffs have to leave this area and go to the public areas. (*Id*. ¶¶ 27, 28, Ex. A, R.20-2, Pg. ID 164, 175).

In response to Defendant Szilagy, Plaintiff Harrington pointed to the public sidewalk directly in front of him as a public area, but Defendant Szilagy insisted that Plaintiffs must go to where the "rest of the protestors are. . . . There is no one [here] doing any type of protesting." (*Id*. ¶ 29, Ex. A, R.20-2, Pg. ID 164, 175).

[1] Defendants did not produce any lease agreement or other such agreement showing that the church property was leased for this event. (City Dep. at 65:19-25 to 66:1-10, Dep. Ex. 5, R.20-3, Pg. ID 208-36; *see also* Muise Decl. ¶ 4, R.20-4, Pg. ID 253-54).

Plaintiff Harrington responded to Defendant Szilagy by pointing to an individual holding a political sign ("Delaney for President 2020") on the sidewalk right next to them, prompting Defendant Szilagy to assert that he "doesn't have time [for this]." Defendant Worboys indicated that the individual was authorized to be in the "restricted area" because he was a "supporter." (*Id*. ¶ 30, Ex. A, R.20-2, Pg. ID 165, 175).

In fact, there was a "candidate support corral" that was permitted within the "restricted area" so that "the candidates can have their chosen people in that area to be in the backdrop . . . of the venue, so they could be in front of Fox Theater." (City Dep. at 82:19-25 to 85:1-9, Dep. Ex. 3, R.20-3, Pg. ID 190-91, 207).

Below is a photograph of City police officers, including Defendant Worboys, rejecting Plaintiff Harrington's request to be on the public sidewalk right in front of him and telling Plaintiff Harrington that he and his fellow pro-lifers must move to the "free speech area" at Grand Circus Park, thus denying Plaintiffs access to the public sidewalk across from the Fox Theatre.

(Harrington Decl. ¶ 31, R.20-2, Pg. ID 165-66). Because he "[didn't] have time for

[this]," Defendant Szilagy directed his officers to arrest Plaintiff Harrington. (*Id.* ¶ 32, R.20-2, Pg. ID 166; City Dep. at 67:20-25 to 68:1-3, R.20-3, Pg. ID 189). A City police officer grabbed Plaintiff Harrington's wrist, pulled his arms behind his back, and proceeded to place him in handcuffs. Photographs of City police officers seizing Plaintiff Harrington appear below:

(Harrington Decl. ¶ 33, R.20-2, Pg. ID 166). After being seized and handcuffed, Plaintiff Harrington acquiesced to Defendant Szilagy's demand that he and his fellow pro-lifers leave the area. If they did not obey the officers' command, the pro-lifers would have been formally arrested. (*Id.* ¶ 34, Ex. A, R.20-2, Pg. ID 167, 175). Per the officers' direction, Plaintiffs proceeded to the "free speech area" located at Grand Circus Park. (*Id.* ¶¶ 35-36, R.20-2, Pg. ID 167).

Upon arriving at the "free speech area," Plaintiffs briefly stopped in the area identified as "free speech area 1" ("area 1"). After this brief stop, Plaintiffs crossed the street and went to the area identified as "free speech area 2" ("area 2"). (*Id.* ¶ 37, Ex. B, R.20-2, Pg. ID 167, 177).

Realizing that "area 1" was a more favorable area to express their message, Plaintiffs decided to cross the street and return to "area 1." As they were crossing the

street, Plaintiffs were stopped by City police officers. More specifically, Defendant Lach, accompanied by other officers, stopped Plaintiffs and told them that they could not cross the street and join the other protestors. (*Id*. ¶ 38, R.20-2, Pg. ID 167-68).

In response, one of the pro-lifers asked Defendant Lach if the area they were being denied access to had been reserved, and Defendant Lach told them, "No . . . we just don't want any issues," referring to the fact that Plaintiffs' message was pro-life and would therefore not agree with the viewpoints expressed by the other protestors located in "area 1." (*Id*. ¶ 39, Ex. A, R.20-2, Pg. ID 168, 175).

Defendant Lach told Plaintiffs that he was giving them a "legal order" to move. One of the pro-lifers commented that the order was unconstitutional, and Defendant Lach responded, "let it be unconstitutional then." Plaintiffs complied with the order because they did not want to be arrested. (*Id*. ¶¶ 40, 43, Ex. A, R.20-2, Pg. ID 168).

Consequently, if you expressed a viewpoint that was in accord with the political views of the Democratic Party based on the perception of the City police officers charged with enforcing this restriction, you were permitted to go to the William Cotter Maybury Monument area of Grand Circus Park ("area 1"). And if you expressed a viewpoint that was not in accord with the political views of the Democratic Party based on the perception of the City police officers charged with enforcing the restriction, you had to proceed to the area of Grand Circus Park that was southwest of Woodward Area ("area 2"). (*Id*. ¶¶ 41-42, R.20-2, Pg. ID 168-69; *see* City Dep. at

28:23-25 to 29:1-11, Dep. Ex. 3, R.20-3, Pg. ID 184-85).

"Area 1" was the preferred location because it was visible from the Fox Theatre and it was closer to the area designated for the media, which was the parking lot area directly in front of the Fox Theatre, thus affording the protestors in "area 1" a better location from which to express their views.[2] (Harrington Decl. ¶ 44, R.20-2, Pg. ID 169-70).

At one point on July 30, 2019, Defendants permitted protestors, including Plaintiffs, to briefly enter the "restricted area" and walk past the Fox Theatre. Defendants permitted this "march" only after everyone participating in or attending the debate was inside and unable to view the marchers. A photograph of Plaintiffs participating in the "march" appears below:

(*Id*. ¶¶ 45-48, R.20-2, Pg. ID 170-71; *see also* City Dep. at 114:18-25 to 115:1-23, R.20-3, Pg. ID 197). Defendants permitted this "march" without inspecting each protestor or searching their persons and property for bombs or other criminal

[2] The district court's conclusion that "there is no evidence to support the notion that the east side of the park [*i.e.*, 'area 1'] was a more favorable position for demonstrating" (Op. & Order at 26, R.33, Pg. ID 914) is wrong.

contraband. (Harrington Decl. ¶ 46, R.20-2, Pg. ID 170; City Dep. at 117:12-25 to 118:1-8, R.20-3, Pg. ID 198).

This "march" was brief, and it was inconsequential because Defendants ensured that the timing of it was such that all of the candidates and debate attendees were inside the Fox Theatre, and the national media, including CNN, were able to turn their cameras and attention away from the theatre for this brief interlude or were already broadcasting from inside so that the media coverage would not be impacted by Plaintiffs' pro-life message. (Harrington Decl. ¶ 47, R.20-2, Pg. ID 170; *see* City Dep. at 114:23-25 to 115:1-5, R.20-3, Pg. ID 197).

City police officers also divided the protestors for this "march" based on the content and viewpoint of their message, permitting those with pro-Democratic Party messages, as perceived by the officers, to "march" first. Once they were finished, the City police officers then allowed those with anti-Democratic Party messages, as perceived by the officers, to begin their "march." Defendants required Plaintiffs to "march" with the second (anti-Democratic Party message) group. (Harrington Decl. ¶ 49, R.20-2, Pg. ID 171; City Dep. at 115:18-23; 121:25 to 122:1-19, R.20-3, Pg. ID 197, 199).

This brief "march" did not permit Plaintiffs to express their message in any meaningful way because the officers quickly ushered the protestors past the Fox Theatre. While this action (*i.e.*, permitting the brief "march") did nothing to protect or

promote free speech, it undermined Defendants' safety concerns for erecting the "restricted area" in the first instance by allowing protestors access to the traditional public forums directly in front of the Fox Theatre without requiring any special security screening or inspections. (Harrington Decl. ¶ 50, R.20-2, Pg. ID 171).

Shortly after this brief "march," Plaintiffs departed the area, frustrated by the speech restrictions enforced upon them by Defendants. (*Id*. ¶ 51, R.20-2, Pg. ID 172).

Plaintiffs returned to the City on July 31, 2019 (day 2) for the second debate. Plaintiffs proceeded directly to the "free speech area" at Grand Circus Park. There were considerably less protestors on day 2. As a result, Plaintiffs went to "area 1" because it was the preferred location within the "free speech area." (*Id*. ¶ 52, R.20-2, Pg. ID 172).

Plaintiffs occupied "area 1" for approximately 40 minutes without incident. One of the pro-lifers with Plaintiffs began using a bullhorn. Bullhorns were permitted on day 1. In fact, a rock band was allowed to perform on day 1 in the "free speech area," and its music was much louder than the bullhorn. (*Id*. ¶ 53, R.20-2, Pg. ID 172).

Shortly after Plaintiffs began using the bullhorn, City police officers approached and ordered them to stop, telling Plaintiffs that "the option is to go over there (referring to "area 2") or come with us," meaning that Plaintiffs had to move to "area 2" or they would be arrested. (*Id*. ¶ 54, R.20-2, Pg. ID 172).

Rather than face arrest, Plaintiff Harrington told the officers that they would move, and they did. Shortly thereafter, Plaintiffs departed the area for good. (*Id*. ¶ 55, R.20-2, Pg. ID 172).

Defendants' speech restrictions had the effect of sanitizing and cleansing the Fox Theatre image for the national media, and thus for those viewers across the country who tuned in to watch the debates, particularly through CNN. More specifically, the speech restrictions had the effect of sanitizing and cleansing the areas immediately in front of and adjacent to the Fox Theatre of any messages that were critical of the Democratic presidential candidates and the positions and policies they supported. In particular, Defendants' speech restrictions ensured that Plaintiffs' message, specifically including their signs, would be hidden from the CNN camera shots, the viewers of the debates, the candidates, and those who attended the Fox Theatre for the debates. (*Id*. ¶ 59, R.20-2, Pg. ID 173; *see also* City Dep. at 85:3-9, R.20-3, Pg. ID 191).

Defendants' speech restrictions as set forth in this motion prohibited Plaintiffs from expressing their message to their intended audience. The restrictions operated to marginalize and thus silence Plaintiffs' message, thereby causing irreparable harm. (Harrington Decl. ¶¶ 58, 60, R.20-2, Pg. ID 173).

Defendants had no specific, security-based justification for the speech restrictions. (City Dep. at 138:22-25 to 139:1-7, R.20-3, Pg. ID 202). According to

the FBI: "We have no information to indicate a specific credible threat to or associated with a 2019 Democratic Presidential primary debate." (City Dep. at 88:4-25, Dep. Ex. 6, R.20-3, Pg. ID 191, 237-41). The Detroit Crime Commission concluded: "Analysts did not see any items to indicate there were any plans for violent actions targeting the debates or protests." (City Dep. at 89:7-25 to 90:1-5, Dep. Ex. 7, R.20-3, Pg. ID 192, 242-47). This was the City's understanding as well. (City Dep. at 88:24-25, 90:4-5, R.20-3, Pg. ID 191-92). Moreover, the protestors on all sides of the issues were peaceful throughout the two debate days. Plaintiffs neither engaged in any violence nor did they witness any other protestors engaging in any violence. (Harrington Decl. ¶ 57, R.20-2, Pg. ID 172-73). Indeed, there was no violence. (City Dep. at 28:8-11, 19-22; 95:14-23; 124:5-7, R.20-3, Pg. ID 184, 193, 199).

The restrictions at issue were approved, endorsed, and sanctioned by the City. (City Dep. at 95:3-13; 100:14-25 to 102:1-9; 104:1-25 to 105:1-4, Dep. Ex. 10, R.20-3, Pg. ID 193-96, 248-50). They were enforced by the City. (City Dep. at 29:12-24; 46:2-21, R.20-3, Pg. ID 185-86; *see also* Harrington Decl., Ex. A, R.20-2, Pg. ID 175). All of the actions at issue were consistent with how the City trained its police officers, and they were consistent with the City's policies, practices and procedures. (City Dep. at 95:24-25 to 96:1-11; 124:8-20; 132:1-8, R.20-3, Pg. ID 123, 199, 200). In short, the City's policies, practices, and procedures were the moving force for the actions.

STANDARD OF REVIEW

This Court reviews *de novo* an appeal from a grant of summary judgment. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 242 (6th Cir. 2015). Summary judgment is appropriate when there exists no genuine dispute with respect to the material facts and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. However, "[t]he facts must be viewed in the light most favorable to the non-moving party and the benefit of all reasonable inferences in favor of the non-movant must be afforded to those facts." *Bible Believers*, 805 F.3d at 242 (reversing the grant of summary judgment by the district court in favor of the defendants and remanding for entry of judgment in favor of the plaintiffs).

Because this case implicates First Amendment rights, this Court must closely scrutinize the record without *any* deference to the district court. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995) (requiring courts to "conduct an independent examination of the record as a whole, without deference to the trial court" in cases involving the First Amendment); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

SUMMARY OF THE ARGUMENT

All of the restrictions on Plaintiffs' speech during the 2019 Democratic Party presidential candidate debates held within the City were enforced by Defendants and thus constitute state action, thereby triggering constitutional protections.

Defendants' enforcement of the "restricted area" was content- and viewpoint-based and thus fails strict scrutiny. Alternatively, Defendants' enforcement of the "restricted area" fails intermediate scrutiny in that it was not narrowly tailored to serve significant government interests, it burdened more speech than necessary, and it failed to leave open adequate alternative channels for communication by denying Plaintiffs' access to their intended audience.

Similarly, Defendants' enforcement of the "free speech area" restriction was content- and viewpoint-based and fails under strict scrutiny, and this restriction also fails intermediate scrutiny as it was not narrowly tailored to serve significant government interests, it burdened more speech than necessary, and it failed to leave open adequate alternative channels for communication by denying Plaintiffs' access to their intended audience.

By permitting a "candidate support corral" but not a "candidate opposition corral" for demonstrators, permitting favored First Amendment activity within the "restricted area," and granting certain similarly situated demonstrators access to "free speech area 1" but denying Plaintiffs access to these areas, which include traditional

public fora, based on the content and viewpoint of Plaintiffs' message, Defendants deprived Plaintiffs of the equal protection of the law in violation of the Fourteenth Amendment.

Finally, Defendants' seizure of Plaintiff Harrington fails under the Fourth Amendment as Defendants lacked probable cause to arrest him for trespassing as a matter of law. Moreover, Defendants were enforcing an unlawful, viewpoint-based restriction on speech, which applied to the church parking lot. This "state action" violated the First Amendment; therefore, the seizure was unlawful.

ARGUMENT

I. Defendants Violated Plaintiffs' Right to Freedom of Speech.

Plaintiffs' First Amendment claim is essentially reviewed in three steps. First, the Court determines whether Plaintiffs' expressive activity is protected by the First Amendment. Second, the Court conducts a forum analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the Court determines whether the challenged restriction comports with the applicable standard. *Saieg v. City of Dearborn*, 641 F.3d 727, 734-35 (6th Cir. 2011).

A. First Amendment Analysis.

The first question is easily answered. Plaintiffs' pro-life expression (holding pro-life signs in public fora, distributing pro-life literature, and engaging in civil discussions about pro-life issues) is fully protected by the First Amendment. *Hill v.*

Colo., 530 U.S. 703, 714-15 & 710 n.7 (2000) (recognizing that petitioners' "leafletting, ['bloody fetus'] sign displays, and oral communications are protected by the First Amendment"); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment"); (*see also* Op. & Order at 8, R.33, Pg. ID 896 ["Created Equal's conduct, namely holding anti-abortion signs and distributing literature, is clearly protected speech"]). Moreover, "speech on public issues," such as Plaintiffs' pro-life speech, "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted).

B. Forum Analysis.

The majority of the fora in question (public streets and sidewalks within the City) are indisputably traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora.") (internal citation omitted); *see also Saieg*, 641 F.3d at 734 ("Public streets and sidewalks are quintessential public forums for free speech.") (internal quotations and citations omitted). "In general, then, the government's ability to permissibly restrict expressive conduct on public streets and sidewalks *is very limited*." *Id*. (internal quotations and citation omitted) (emphasis added); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005)

(striking down a city ordinance and stating, "Constitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public's use of streets and sidewalks for political speech").

The status of the "candidate support corral" and the church parking lot within the restricted area is not so clear cut. As the district court noted, "The restricted area encompassed about eight square blocks and included both private property owned or controlled by Olympia and CNN, and public streets and sidewalks." (Op. & Order at 2, R.33, Pg. ID 890). But, as noted, Defendants enforced the restrictions throughout the *entire* "restricted area." Defendants' enforcement of the restrictions was thus state action, thereby triggering constitutional protections. Additionally, the "corral" was located adjacent to the public sidewalk immediately in front of the Fox Theatre, giving those favored persons (and favored viewpoints) within the "corral" complete access to the public sidewalk, which remained open for their direct view to the theatre and "so they could be in front of Fox Theater." The district court assumed that the "corral" was private property and thus the restriction enforcing it did not raise any legitimate First or Fourteenth Amendment concerns. (*See, e.g.,* Op. & Order at 10-11, R.33, Pg. ID 898-99). As discussed further below, the court was wrong.

C. Constitutional Standards.

Content-neutral time, place, or manner restrictions of speech in a public forum must survive intermediate scrutiny. That is, "[t]ime, place, and manner restrictions

may be enforced even in a *traditional public forum* so long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Saieg*, 641 F.3d at 735 (holding that the content-neutral "leafleting restriction does not satisfy this standard") (internal quotations, punctuation, and citation omitted). And providing an alternative "free speech area" does not provide a universal cure for constitutional defects. That is, "laws regulating public fora cannot be held constitutional simply because they leave potential speakers alternative fora for communicating their views." *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984); *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 607 ("[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . ."); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("[A]lternative mode[s] of communication may be constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened' [and a]n alternative is not ample if the speaker is not permitted to reach the 'intended audience.'").

Content-based restrictions must survive strict scrutiny. In other words, "[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Strict scrutiny is the

"most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It "requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' . . . That standard 'is not watered down'; it 'really means what it says.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021)) (internal citation omitted).

Supreme Court "precedents thus apply the most exacting scrutiny to regulations that suppress, *disadvantage*, or *impose differential burdens* upon speech because of its content." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (emphasis added); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotations and citation omitted); *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

A regulation "would be content based *if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred*." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotations and citation omitted) (emphasis added); *see also Glendale Assocs. v. NLRB*, 347 F.3d

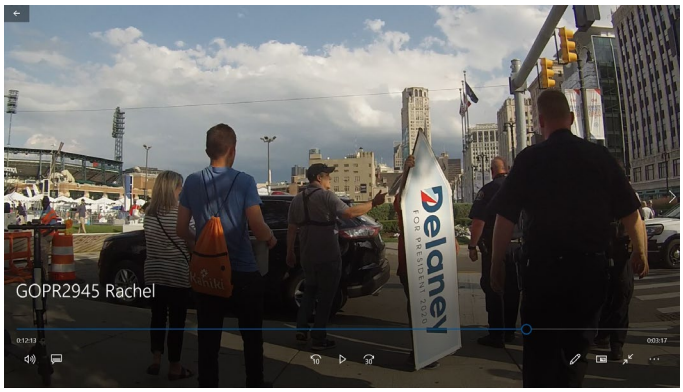
1145, 1155 (9th Cir. 2003) ("A rule is defined as a content-based restriction on speech when the regulating party must examine the speech to determine if it is acceptable."). Thus, to demonstrate that a restriction is content based does not require the challenger to present evidence that the government censor either agreed or disagreed with the content or viewpoint of the speaker. The restriction is content based if in order to enforce the regulation, the government official had to consider the content or viewpoint of the speech. That is plainly what happened here.

D. "Restricted Area" Analysis.

1. Strict Scrutiny.

The district court was wrong to conclude that Defendants' "restricted area" was a content-neutral regulation of First Amendment activity. (Op. & Order at 12, R.33, Pg. ID 900). The restriction was not only content-based, which is prohibited in a public forum, it was viewpoint-based, which is prohibited in all forums, including nonpublic forums. *See Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 491 (6th Cir. 2020) (striking down restrictions on advertisements on transit authority property, a nonpublic forum, and noting that restrictions on speech in a nonpublic forum must be reasonable and viewpoint neutral).

The "Delaney sign" holder issue is just one example. This individual was obviously permitted into the restricted area, which was lined with barricades and police officers, and he was on the public sidewalk.



(Harrington Decl. ¶¶ 22, 30, Ex. A ["Reform America v City of Detroit – Plaintiff Harrington Video"], R.20-2, Pg. ID 162-63, 165). Defendant Worboys is heard on the video defending the sign holder's presence within the "restricted area" because he was a "supporter." (*Id*. ¶ 30, Ex. A ["Reform America v City of Detroit – Arrest Video" at 04:02 to 04:10], R.20-2, Pg. ID 165, 175). The presence of the deBlasio sign truck is additional evidence of the City favoring "supporters" within the "restricted area."[3] (*Id*. ¶ 25, Ex. A ["Reform America v City of Detroit – Arrest Video" at 01:38 to 01:43], R.20-2, Pg. ID 163, 175). And there is no dispute that a "candidate support corral" was permitted within the "restricted area" so that "the candidates can have their chosen people in that area to be in the backdrop . . . of the venue, so they could be *in front of Fox Theater*."[4] (City Dep. at 82:19-25 to 85:1-9, Dep. Ex. 3, R.20-3, Pg.

[3] Defendants permitted news reporters to shoot video from the church parking lot (*see* Harrington Decl. ¶ 25, R.20-2, Pg. ID 163-64), and shooting video is First Amendment activity, *see ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.").

[4] The reasonable inference drawn from this is that the "candidate support corral"

ID 190-91, 207) [emphasis added]).

The First Amendment is implicated here with regard to the restrictions, including the "candidate support corral" and the use of the church parking lot for favored speech, because *the City was enforcing these restrictions*. As stated by this Court in *Bays v. City of Fairborn*, 668 F.3d 814 (6th Cir. 2012):

> "It is undisputed that [First Amendment] protections . . . are triggered only in the presence of state action and that a private entity acting on its own cannot deprive a citizen of First Amendment rights." *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000). Fairborn argues that there is no state action in this case because the solicitation policy found in the Terms and Conditions attached to the booth application is attributable to the FAA and Lions Club, the private groups that organize the Festival, and not to Fairborn. They further argue that the enforcement of the policy by Fairborn officials does not transform the private policy into state action.
>
> On the question of state action, *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005), is controlling. In *Parks*, similar to the Festival in Fairborn, the city of Columbus issued a permit to a private entity, the Columbus Arts Council, to hold a festival on public streets in downtown Columbus. *Parks*, 395 F.3d at 645. Parks attended the festival and wore a sign with a religious message before being told to leave by an off-duty police officer who had been hired by the Arts Council to serve as security. *Id*. at 646. As in *Parks*, the Fairborn officers in this case were dressed in their official police uniforms, identified themselves as officers, and threatened arrest. *Id*. at 652. According to *Parks*, "all of these factors combined create the presumption of state action." *Id*. Perhaps more importantly, the Fairborn officials in this case supported and enforced the solicitation policy, just as the city agents in *Parks* "supported the [private entity's] permitting scheme" challenged in that case. *Id*. at 653. In this case, Fairborn officials engaged in state action

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encompassed portions of the public sidewalk. That is, the public sidewalk and street to the front of the Fox Theatre were *cleared by the City* to facilitate the free speech activity of the "supporters."

> by supporting and actively enforcing the solicitation policy in place at the Festival.

Bays, 668 F.3d at 819-20. Here, the City and its police officers "engaged in state action by supporting and actively enforcing" the "candidate support corral" and church parking lot restrictions, as well as the other restrictions at issue.

The district court dismisses both *Bays* and *Parks*, claiming that "in both of those cases, it was already established that the festival was a public forum and the only question was whether there was state action where the city granted a permit for the festival and the local police provided security. But these cases do not apply when an event is held on private property, which is not considered a forum for First Amendment purposes, even if municipal police officers provide security for the event." (Op. & Order at 10-11, R.33, Pg. ID 898-99). The district court misses the import of these cases. *Bays* and *Parks* make plain that *all* of the restrictions at issue here—including the "candidate support corral" restriction, whereby "supporters" are permitted within the restricted area and given a prime location in the "corral," and the church parking lot restriction, which similarly favored the speech of "supporters"—are *state action*, thereby triggering First Amendment protection, including the prohibition on viewpoint-based restrictions.[5] Viewpoint discrimination by the

[5] Contrary to the district court's conclusion (*see* Op. & Order at 9-11, R.33, Pg. ID 897-99), this case is nothing like *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), which simply involved the issue of whether protestors could distribute literature at a privately owned shopping center because the public was generally invited to use it.

government is unlawful regardless of the nature of the forum or whether a forum was created in the first instance. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), for example, the Supreme Court held that the Patent and Trademark Office violated the free speech rights of the lead singer of the rock group, "The Slants," when it found that the mark could not be registered on the principal register because it was used as a derogatory term for Asian persons. The Court found that the restriction on the petitioner's commercial speech was viewpoint based and thus offended the First Amendment. *See id*. There was no public forum involved.

In sum, government speech restrictions on content in a public forum or viewpoint *regardless of the forum* must survive strict scrutiny. As noted, "[v]iewpoint discrimination is . . . an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. As discussed in greater detail below, the restrictions fail intermediate scrutiny. And for similar reasons, they absolutely fail strict scrutiny. *Reed,* 576 U.S. at 163 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

2. Intermediate Scrutiny.

Defendants' enforcement of the "restricted area" also fails under intermediate scrutiny, which is not a pushover. *See McCullen*, 573 U.S. at 495.

In *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990), for example, the Coast Guard imposed a 75-yard security zone around a pier during the Navy Fleet Week Parade. The court held that the zone burdened substantially more speech than was necessary because there was no tangible threat to security. *Id*. at 1227-29. Further, the court held that there were no ample alternative means of communication because the intended audience was not accessible by land or any other means. *Id*. at 1229-30.

In *Service Employee International Union, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966 (C.D. Cal. 2000), during the Democratic National Convention ("DNC"), the City of Los Angeles set up a secured zone that only people with a ticket to the convention or Secret Service credentials could enter, and a demonstration zone 260 yards from the DNC. The court held that the secured zone was not narrowly tailored to serve a significant government interest because the secured zone covered much more area than was necessary to ensure safety. *Id*. at 971-72. Further, the court held that the demonstration zone was not an adequate alternative because the speakers could not reach their intended audience from 260 yards away. *Id*. at 972-73.

Finally, in *Saieg*, this Court struck down a content-neutral restriction on leafletting, applying intermediate scrutiny and concluding as follows:

> Even though the leafleting restriction is content neutral and might provide ample alternative means of communication, the policy is not a reasonable time, place, and manner restriction. Within the inner perimeter, *the restriction does not serve a substantial governmental*

> *interest, as evidenced by the defendants' willingness to permit sidewalk vendors and ordinary pedestrian traffic on the same sidewalks where they prohibited Saieg from leafleting*.

Id. at 740-41 (emphasis added); *see also City of Ladue v. Gilleo,* 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

Regarding the government's "substantial interest" for imposing the challenged restrictions in the first instance, the record reveals that there was no credible threat to justify the broad restriction that prevented Plaintiffs and other peaceful protestors from accessing the public sidewalks in front of Fox Theatre. (*See* City Dep. at 88:9-25; 89:10-25 to 90:1-5, R.20-3, Pg. ID 191, 192). The fact that Defendants permitted the same protestors to "march" along this sidewalk without requiring searches, restricting backpacks or other bags, using a metal detector, or employing other similar security measures before allowing the march is fatal to Defendants' claim that the restrictions were necessary or narrowly tailored. As stated by the Supreme Court, "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, *not simply that the chosen route is easier*." *McCullen*, 573 U.S. at 495 (emphasis added).

As noted by the Supreme Court:

> The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."

Id. at 486. Here, Defendants plainly "sacrificed" Plaintiffs' speech "for efficiency" in violation of the First Amendment.

Moreover, Defendants' (and the district court's) reliance on hearsay contained in news reports regarding threats associated with unrelated incidents is speculative and inadmissible. *See* Fed. R. Evid. 801 & 802; (*see* Op. & Order at 13, R.33, Pg. ID 901 [accepting Defendants' reliance on news reports and thus dismissing the threat assessments *made specifically for the Fox Theater event*]). As stated by this Court, "[M]ere speculation about danger is not an adequate basis on which to justify a restriction of speech." *Saieg*, 641 F.3d at 739 (internal quotations omitted). Furthermore, the video shows that there were many pedestrians walking through the "restricted area," particularly along Montcalm Street. (Harrington Decl., Ex. A ["Reform America v City of Detroit – Sign in Restricted Area"], R.20-2, Pg. ID 175). The video shows pedestrians crossing Woodward Avenue and walking toward the Fox Theatre without any security screening. (*See id.*). And the video shows numerous pedestrians walking along the forbidden sidewalk immediately adjacent to Woodward

Avenue. (*See id*., Ex. A ["Reform America v City of Detroit – Arrest Video"], R.20-2, Pg. ID 175).

The district court dismisses the fact that many pedestrians were walking on the public sidewalk that Plaintiffs were not permitted to use, and the fact that many pedestrians were walking throughout the restricted area. (Op. & Order at 15, R.33, Pg. ID 903). The main point of Plaintiffs' argument regarding the presence of these pedestrians is this: Defendants did not require those entering the "restricted area" to undergo a magnetometer-based or other type of security screening. Nothing. (Harrington Decl. ¶ 21, Ex. A, R.20-2, Pg. ID 162, 175). Thus, the "restricted area" was hardly a sealed, locked-down, high security area.

In the final analysis, there was no substantial (let alone compelling) government interest for completely closing off the public sidewalks in front of Fox Theatre for peaceful protestors carrying signs and distributing literature (*i.e.*, there was no identified safety threat), and this is further evidenced by the exceptions permitted. *See Saieg*, 641 F.3d at 740-41. The restriction was overbroad in its size and scope and thus not narrowly tailored. *Frisby*, 487 U.S. at 485 ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."). And the alternative "free speech area" was inadequate because Plaintiffs were unable to reach their intended audience with their message. The "restricted area"

fails constitutional scrutiny.[6]

The district court's conclusion that ample alternatives existed for Plaintiffs to express their message also fails for at least two reasons. First, as the Supreme Court has long held, "the streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. N.J.*, 308 U.S. 147, 163 (1939); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 55 (1983) ("In a public forum . . . all parties have a constitutional right of access. . . ."). And second, the fact that *other* places were available to Plaintiffs for their protest activity does not license Defendants to prevent Plaintiffs from being where *Plaintiffs wanted to protest*, particularly when there were options available to Defendants to permit this, as we saw with the permitted "march" and the permitted "corral." Simply put, because the restrictions were not narrowly tailored, the availability of "ample alternatives" is irrelevant. *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 607 ("[B]ecause we have already found that the

[6] Because the restrictions fail intermediate scrutiny, they necessarily fail strict scrutiny. As noted, the exemptions permitted undermine Defendants' asserted interests. As stated by the Supreme Court, "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotations and citation omitted).

Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . .").

E. "Free Speech Area"—Separation of Protestors Analysis.

Defendants' "free speech area" restriction whereby protestors were granted access to certain public fora (or denied access to such fora) based on the content and viewpoint of their speech plainly fails strict scrutiny. The district court's conclusion that this restriction was content neutral is wrong as a matter of fact and law. Indeed, the restriction was not only content based, it was viewpoint based. Two protestors, for example, could have signs addressing the subject of abortion. However, if you were anti-abortion (and thus expressed a view on an issue that was inconsistent with the views of the Democratic Party candidates), like Plaintiffs, then you were required to protest in "area 2," and if you were pro-abortion (and thus expressed a view on an issue that was consistent with the views of the Democratic Party candidates), then you were required to protest in "area 1." Accordingly, Plaintiffs were unable to enter "area 1," which is a traditional public forum, and were thus unable to express their message via literature distribution and discussions with persons in this area because of the viewpoint of Plaintiffs' message.

In *McCullen v. Coakley*, 573 U.S. 464 (2014), the Court noted that the "buffer zones . . . made it substantially more difficult for petitioners to distribute literature" and to have close, personal conversations, thus "depriv[ing] petitioners of their two

primary methods of communicating. . . ." *Id*. at 488. That is precisely the situation caused here by Defendants' "free speech area" restrictions. *See also Meyer v. Grant*, 486 U.S. 414, 424 (1988) (observing that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse"); *Schenck*, 519 U.S. at 377 (invalidating a "floating" buffer zone around people entering an abortion clinic partly on the ground that it prevented protestors "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[H]anding out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection."); *Schenck*, 519 U.S. at 377 ("Leafletting [is a] classic form[] of speech that lie[s] at the heart of the First Amendment").

Accordingly, the district court was wrong when it concluded that Plaintiffs were "able to exercise the full range of free expression [in the free speech area], including holding signs, chanting, and speaking with passersby." (Op. & Order at 23, R.33, Pg. ID 911). As noted by the Court in *McCullen*, "It is thus no answer to say that petitioners can still be 'seen and heard' by women within the buffer zones. . . . If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message." *McCullen*, 573 U.S. at 489-90.

The same is true here. Thus, "[w]hen the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* at 488-89.

In the final analysis, there was no threat of violence nor actual violence to justify the content- and viewpoint-based restriction within the "free speech area" (*i.e.*, no compelling state interest). This restriction, whereby the content/viewpoint of Plaintiffs' message was considered anti-Democratic Party, prohibited Plaintiffs from accessing a traditional public forum (the sidewalk and public park in "area 1")—a location Plaintiffs favored—and it prohibited Plaintiffs from interacting with those protestors who support the candidates' pro-abortion positions, thereby denying Plaintiffs the opportunity to convince them via close, personal conversations and distributing literature that it was wrong to support abortion and that it was wrong to support candidates that support abortion. This restriction was viewpoint based, and it was not necessary nor narrowly tailored to serve a compelling state interest. It fails strict scrutiny. *Reed*, 576 U.S. at 163. Indeed, it fails intermediate scrutiny. *See generally McCullen*, 573 U.S. 464.

II. Defendants Deprived Plaintiffs of the Equal Protection of the Law.

As stated by this Court in *Bible Believers v. Wayne County*:

> To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate

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

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

Here, by permitting a "candidate support corral" but not a "candidate opposition corral" for demonstrators, permitting favored First Amendment activity within the "restricted area" (church parking lot activity and Delaney sign holder), and granting certain demonstrators access to "free speech area 1" (all of these are similarly situated demonstrators) but denying Plaintiffs access to these areas, which include traditional public fora ("area 1"), based on the content and viewpoint of their message, Defendants deprived Plaintiffs of the equal protection of the law in violation of the Fourteenth Amendment.

III. Defendants Unlawfully Seized Plaintiff Harrington.

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

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

Terry v. Ohio, 392 U.S. 1, 9 (1968) (citation omitted) (emphasis added).

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

Here, there is no reasonable dispute that Plaintiff Harrington was seized by Defendants within the meaning of the Fourth Amendment. Plaintiff was physically restrained and placed in flex cuffs. *Terry*, 392 U.S. at 19, n.16. Consequently, "[w]hen an officer makes an arrest, it is a 'seizure' under the Fourth Amendment, and

the arrest is a violation of a right secured by the amendment if there is not probable cause." *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987).

"'[P]robable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Mich. v. DeFillippo*, 443 U.S. 31, 37 (1979). "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it." *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (citation omitted).

Thus, whether Plaintiff Harrington's constitutional rights were violated hinges on whether there was probable cause to arrest him in the first instance. *See Alman v. Reed*, 703 F.3d 887, 896 (6th Cir. 2013) (concluding that police officers lacked probable cause in § 1983 case). And "[w]hen no material dispute of fact exists, probable cause determinations are legal determinations that should be made" by the court. *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005).

To determine whether probable cause existed for seizing Plaintiff, we must first analyze the alleged crime of trespass. *See, e.g., Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302-04 (6th Cir. 2005) (concluding that there was a genuine dispute of material facts which would permit a reasonable jury to find that the officers lacked probable cause when they arrested the plaintiff for burglary and analyzing the

elements of the Ohio burglary statute to reach that conclusion); *Thompson v. Ashe*, 250 F.3d 399, 408-09 (6th Cir. 2001) (finding probable cause for arresting the plaintiff for trespassing after analyzing the facts in light of the specific elements of the Tennessee criminal trespass statute); *United States v. Reed*, 220 F.3d 476, 478-79 (6th Cir. 2000) (finding probable cause for arresting the defendant for trespassing after analyzing the facts in light of the elements of the municipal trespass ordinance). The district court concluded that probable cause existed for the seizure without analyzing the elements of the trespass statute, stating, "The parties focus their debate on the law of trespass and who can be an agent of a property owner, but resolving these questions is unnecessary." (Op. & Order at 28, R.33, Pg. ID 916). The court is mistaken. *See supra*.

In order to be guilty of trespassing, Plaintiffs must enter or remain on "the lands or premises of another without lawful authority *after having been forbidden to do so by the owner or occupant or the agent of the owner or occupant*." Mich. Comp. Laws § 750.552(1)(a) & (b) (emphasis added). None of these conditions were met. Defendant Szilagy was not the "owner or occupant or the agent of the owner or occupant" of the church.[7] He simply did not want "to go through the burdensome

[7] "In Michigan, the test for a principal-agent relationship is whether the principal has the right to control the agent." *Little v. Howard Johnson Co.*, 183 Mich. App. 675, 680, 455 N.W.2d 390, 393 (1990). The City police officers were not "agents" of the church or any other private entity during the debates.

process of law enforcement"[8] required to ensure that Plaintiffs were in fact violating the law. Indeed, using Defendant Szilagy's own words, he "d[idn't] have time [for this]." (Harrington Decl. ¶ 30, Ex. A, R.20-2, Pg. ID 165, 175). But that is no excuse to violate fundamental constitutional rights.

Moreover, as demonstrated above, Defendants were enforcing an unlawful, viewpoint-based restriction on speech, which applied to the church parking lot. *See supra* sec. I. This "state action" violated the First Amendment, and thus the arrest was unlawful. *See Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997) (finding that the officer did not have probable cause to arrest the individual because "protected speech cannot serve as the basis for a violation of any of the . . . ordinances at issue").

In sum, because the order to depart was unlawful, so was the seizure.

CONCLUSION

Based on the foregoing, this Court should reverse the district court and grant summary judgment in Plaintiffs' favor on all claims.

[8] In his dissent in *Bible Believers v. Wayne County,* 765 F.3d 578, 600 (6th Cir. 2014), Judge Clay made the relevant observation that "[t]he majority retreats from our commitment in *Saieg* to the principle that the First Amendment cannot be shut out of [the] Festival, and by so doing provides a blueprint for the next police force that wants to silence speech *without having to go through the burdensome process of law enforcement*." (emphasis added). Judge Clay wrote the majority opinion for the *en banc* decision in *Bible Believers v. Wayne County*, 805 F.3d 228, 242 (6th Cir. 2015), which reversed the earlier panel decision.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

/s/ *David Yerushalmi*
David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 10,442 words, excluding those sections identified in Fed. R. App. P. 32(f).

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

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

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	Page ID	Description
R.1	1-27	Complaint
R.20-2	158-177	Exhibit 1: Declaration of Plaintiff Mark Harrington
	175	Exhibit A: Videos on USB Flash Drive (filed in the traditional manner): (1) "Reform America v City of Detroit – Arrest Video" (2) "Reform America v City of Detroit – Free Speech Zone Restriction" (3) "Reform America v City of Detroit – Media in Church Lot" (4) "Reform America v City of Detroit – Plaintiff Harrington Video" (5) "Reform America v City of Detroit – Sign in Restricted Area."
	176-77	Exhibit B: Map of Restricted Area
R.20-3	178-250	Exhibit 2: City of Detroit Deposition Excerpts and Deposition Exhibits
	203-06	Deposition Exhibit 1: Notice of Deposition
	207	Deposition Exhibit 3: Map
	208-36	Deposition Exhibit 5: Ground Lease Agreement
	237-41	Deposition Exhibit 6: FBI Threat Briefing
	242-47	Deposition Exhibit 7: Detroit Crime Commission Threat Assessment
	248-50	Deposition Exhibit 10: Detroit Police Department Policy for Special Events

R.20-4	251-54	Exhibit 3: Declaration of Robert J. Muise
R.33	889-917	Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment
R.34	918	Judgment
R.35	919-21	Notice of Appeal