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

REFORM AMERICA (d/b/a Created Equal); and MARK HARRINGTON,

Plaintiffs,

v.

CITY OF DETROIT, *et al*.,

Defendants.

Case No. 19-12728

Hon. Laurie J. Michelson

Magistrate Judge
Elizabeth A. Stafford

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

David Yerushalmi, Esq.
2020 Pennsylvania Avenue NW, Suite 189
Washington, D.C. 20006
Tel: (646) 262-0500
dyerushalmi@americanfreedomlawcenter.org

Attorneys for Plaintiffs

CITY OF DETROIT LAW DEPARTMENT
Eric B. Gaabo (P39213)
Coleman A. Young Municipal Center
2 Woodward Avenue, 5th Floor
Detroit, Michigan 48226
(313) 237-3052
Gaabo@detroitmi.gov

Attorneys for Defendants

Plaintiffs Reform America (d/b/a Created Equal) and Mark Harrington ("Plaintiffs"), by and through undersigned counsel, hereby move this Court for summary judgment on all claims pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In support of this motion, Plaintiffs rely upon the pleadings and papers of record, as well as their brief and exhibits filed with this motion.

For the reasons set forth more fully in Plaintiffs' brief, there is no genuine dispute as to any material fact and Plaintiffs are entitled to judgment on their claims arising under the First, Fourth, and Fourteenth Amendments as a matter of law. Fed. R. Civ. P. 56(a).

Pursuant to E.D. Mich. LR 7.1, on October 8, 2020, a meet-and-confer was held in which Plaintiffs' counsel sought but did not receive concurrence from Defendants' counsel in the relief sought by this motion.

WHEREFORE, Plaintiffs hereby request that this Court grant this motion and enter judgment in their favor on all claims.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

Counsel for Plaintiffs

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

REFORM AMERICA (d/b/a Created Equal); and MARK HARRINGTON,

Plaintiffs,

v.

CITY OF DETROIT, *et al*.,

Defendants.

Case No. 19-12728

Hon. Laurie J. Michelson

Magistrate Judge
Elizabeth A. Stafford

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ISSUES PRESENTED

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.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th Cir. 1990)

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

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

Frisby v. Schultz, 487 U.S. 474 (1988)

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

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)

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

Reed v. Town of Gilbert, 576 U.S. 155 (2015)

Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011)

Terry v. Ohio, 392 U.S. 1 (1968)

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

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. Defendants' "restricted area" and "free speech area" restrictions violated Plaintiffs' rights protected by the First and Fourteenth Amendments, and the seizure of Plaintiff Harrington violated the Fourth Amendment. There is no genuine dispute as to any material fact and Plaintiffs are entitled to judgment on their claims as a matter of law.

STATEMENT OF FACTS[1]

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).

As part of its activities, Created Equal, and those who associate with Created Equal, including Plaintiff Harrington, engage in free speech activity to protest

[1] The declaration of Plaintiff Harrington ("Harrington Decl.") is attached as Exhibit 1. Excerpts from the deposition transcript of Defendant City of Detroit ("City Dep."), which designated Defendant Szilagy as its Rule 30(b)(6) witness, are attached as Exhibit 2. The exhibits to the City Deposition are referred to as "Dep. Ex." The declaration of Robert Muise ("Muise Decl.") is attached as Exhibit 3.

politicians and political candidates who support abortion. (*Id*. ¶¶ 5-6).

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).

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). 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).

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 support 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 support 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; *see also* City Dep. at 29:25 to 30:1-7; *see also id*. at 135:22-25 to 136:1-6).

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).

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).

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

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).

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).

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).

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; *see also* City Dep. at 54:3-16 [acknowledging no signs or barricades at the parking lot]).

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).

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; *see* City Dep. at 64:8-16).

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."[2] 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).

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).

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).

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."

[2] 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; *see also* Muise Decl. ¶ 4).

(City Dep. at 82:19-25 to 85:1-9, Dep. Ex. 3).

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.

(*Id*. ¶ 31). Because he "[didn't] have time for [this]," Defendant Szilagy directed his officers to arrest Plaintiff Harrington. (*Id*. ¶ 32; City Dep. at 67:20-25 to 68:1-3). 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). 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). Per the officers' direction, Plaintiffs proceeded to the "free speech area" located at Grand Circus Park. (*Id*. ¶¶ 35-36).

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).

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 R. Lach, accompanied by other officers, stopped Plaintiffs and told them that they could not cross the street and join the other protestors. (*Id*. ¶ 38).

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).

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).

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; *see* City Dep. at 28:23-25 to 29:1-11, Dep. Ex. 3).

"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. (*Id*. ¶ 44).

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; *see also* City Dep. at 114:18-25 to 115:1-23). Defendants permitted this "march" without inspecting each protestor or searching their persons and property for bombs or other criminal contraband. (Harrington Decl. ¶ 46; City Dep. at 117:12-25 to 118:1-8).

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; *see* City Dep. at 114:23-25 to 115:1-5).

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; City Dep. at 115:18-23; 121:25 to 122:1-19).

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. (*Id*. ¶ 50).

Shortly after this brief "march," Plaintiffs departed the area, frustrated by the "speech restrictions" enforced upon them by Defendants. (*Id*. ¶ 51).

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).

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).

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).

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).

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; *see also* City Dep. at 85:3-9).

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).

Defendants had no specific, security-based justification for the "speech restrictions." (City Dep. at 138:22-25 to 139:1-7). 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). 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). This was the City's understanding as well. (City Dep. at 88:24-25, 90:4-5). 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). Indeed, there was no violence. (City Dep. at 28:8-11, 19-22; 95:14-23; 124:5-7).

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). They were enforced by the City. (City Dep. at 29:12-24; 46:2-21; Harrington Decl., Ex. A). 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. (*Id*. at 95:24-25 to 96:1-11; 124:8-20; 132:1-8). In short, the City's policies, practices, and procedures were the moving force for the actions.

STANDARD OF REVIEW

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

ARGUMENT

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

Plaintiffs' First Amendment claim is 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. Plaintiffs' Speech Is Fully Protected by the First Amendment.

The first question is easily answered. Plaintiffs' pro-life expression (holding pro-life signs in public fora and distributing pro-life literature) 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"). 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. Defendants Restricted Speech in Traditional Public Fora.

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").

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). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). 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); *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).

Defendants enforcement of the "restricted area" fails under intermediate scrutiny (if content neutral) and strict scrutiny (if content based). The fact that a "candidate support corral" was permitted but not a "candidate opposition corral" demonstrates that the "restricted area" was a content-based restriction. Nonetheless, it fails intermediate scrutiny, as argued below.

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*, the Sixth Circuit 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."). Here, 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, including the sidewalk that was furthest from the entrance. And this was further demonstrated by the fact that Defendants permitted the same protestors to "march" along this sidewalk without employing any safety measures (searches, restricting backpacks or other bags, using a metal detector, *etc*.) before allowing the march. As noted, Defendants also permitted a "candidate support corral" within the

"restricted area," but there was no "candidate opposition corral." In sum, there was no substantial government interest for 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. 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.

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. 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 that it was wrong to support abortion and that it was wrong to support candidates that support abortion. This restriction was not necessary nor narrowly tailored to serve a compelling state interest. It fails strict scrutiny. *Reed*, 576 U.S. at 163.

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

As stated by the Sixth Circuit 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 v. Wayne Cnty., 805 F.3d 228, 256 (6th Cir. 2015) (*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" within a traditional public forum and granting certain protestors access to "free speech area 1" but denying Plaintiffs access to this traditional public forum 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 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(s). 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. And Plaintiff Harrington was not "disorderly," *see* Mich. Comp. Laws § 750.552 (disorderly person), he was objecting to the violation of his rights. Accordingly, because the order to depart was unlawful, so was the seizure. *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").

IV. Defendant City Is Liable for the Violations.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694-95 (1978), the Supreme Court affirmed that municipalities are liable under 42 U.S.C. § 1983 if municipal policy or custom was the "moving force" behind the alleged unconstitutional action. And "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly

be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983." *Id*. at 694. At the end of the day, "*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). Thus, acts "of the municipality" are "*acts which the municipality has officially sanctioned or ordered*." *Id*. at 480 (emphasis added).

Here, the City endorsed and approved and thus "officially sanctioned" the challenged restrictions. The City, through its police department, enforced the restrictions. If Plaintiffs violated any of the restrictions, they were subject to arrest by City police officers. In other words, the City's policies, practices, and procedures were the moving force for the violation of Plaintiffs' rights. Accordingly, the City is liable for the violations.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their motion.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

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