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' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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ISSUES PRESENTED

I. Whether Defendants violated Plaintiffs' 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 Defendants deprived Plaintiffs 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 Defendants deprived Plaintiff Harrington 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 individual Defendants are entitled to qualified immunity for depriving Plaintiffs of their clearly established constitutional rights.

V. Whether Defendant City is liable for violating Plaintiffs' constitutional rights when City policy was the moving force behind the violations and the challenged restrictions were sanctioned, endorsed, and approved by the City.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

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

Bays v. City of Fairborn, 668 F.3d 814 (6th Cir. 2012)

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)

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

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)

Defendants move this Court to dismiss this lawsuit, or in the alternative, to grant them summary judgment. (Doc. No. 24). Defendants' motion is factually and legally deficient. The Court should deny Defendants' motion and grant Plaintiffs' motion for summary judgment (Doc. No. 20).

STANDARD OR REVIEW

A motion to dismiss under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). To survive the motion, a plaintiff must allege facts sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). When considering a motion to dismiss, a court must accept as true all factual allegations. *Ctr. for Bio-Ethical Reform*, 648 F.3d at 369.

To grant Defendants' motion for summary judgment, Defendants must "show[] that there is no genuine dispute as to any material fact and [that they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

STATEMENT OF FACTS

Plaintiff Reform America ("Created Equal") is a pro-life organization that engages in First Amendment activity to expose the horrific truth about abortion. This activity includes, *inter alia*, displaying signs, handing out literature, and engaging in civil discussions with those who support abortion. Plaintiff Harrington is the President/Founder. (Harrington Decl. ¶¶ 1- 4 [Doc. No. 20-2]).

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).

On July 30, 2019, and July 31, 2019, the Democratic Party presidential candidates engaged in televised debates at the Fox Theatre located 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. (*Id.* ¶¶ 10-12). Plaintiffs wanted to influence the candidates and their supporters with their signs depicting abortion imagery. (*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 [Doc. No. 20-3]; *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, 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).

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 the officers, Plaintiffs proceeded along Fisher Service Drive to the other side of Woodward Avenue and were again stopped by City police officers, including 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 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."[1] Defendant Szilagy, the commander on the scene, 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 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

[1] In fact, Defendants had nothing to show. 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). Defendants continue to rely upon the "Ground Lease Agreement" that was executed in July 2015, as the authority for seizing Plaintiff Harrington, but the lease provides no such authority, and Defendants do not point to any specific provision that does. (*See, e.g.,* Defs.' Br. at 5-6 [citing generally to the lease agreement without citing to any specifics or any specific provision of the lease]). Per the terms of this 2015 agreement, "Tenant is a for-profit entity which wishes to construct a parking deck and a mixed-use building containing retail, office and residential uses, on land contained within the Overall Parcel, all as part of a comprehensive redevelopment containing a new arena for hockey and other events." (*See* Defs.' Ex. M, "Recitals" ¶ B [Doc. No. 24-14]). This lease has nothing to do with the 2019 Democratic presidential debates. Moreover, the City admitted during its deposition that it was not an agent for St. John's Episcopal Church. (*See* Defs.' Ex. A [City Dep. at 64:11-13 ("Q. Is the City or City Police Department an agentof St. John Episcopal Church? A. No.")] [Doc. No. 24-2]).

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

The officers rejected Plaintiff Harrington's request to be on the public sidewalk immediately in front of the church, telling Plaintiff Harrington that he and his fellow pro-lifers must move to the "free speech area" at Grand Circus Park, thereby denying Plaintiffs access to the public sidewalk across from the Fox Theatre. (*Id.* ¶ 31). Plaintiff Harrington protested, and Defendant Szilagy directed his officers to arrest him because he "[didn't] have time for [this]." (*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. (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 Plaintiffs did not comply, they would have been formally arrested. (*Id.* ¶ 34, Ex. A). Per the officers' order, 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; *see also* City Dep. at 28:23-25 to 29:1-11, Dep. Ex. 3). Consequently, if your message was pro-Democratic Party, you were ordered by City police officers to go to "area 1," and if your message was anti-Democratic Party, you were ordered to go to "area 2." (*See id.*). Plaintiffs preferred "area 1" because they believe it was a better location from which to express their views. (Harrington Decl. ¶ 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 protestors. (*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 "left-leaning" messages to "march" first. Once they were finished, the City police officers then allowed those with "right-leaning" messages to begin their "march." Defendants required Plaintiffs to "march" with the second ("right-leaning" 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. (Harrington Decl. ¶ 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 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" 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." (*Id.* 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." (*Id.* at 89:7-25 to 90:1-5, Dep. Ex. 7). This was the City's understanding as well. (*Id.* 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. (*Id.* 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. (City Dep. at 95:24-25 to 96:1-11; 124:8-20; 132:1-8).

ARGUMENT

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

Plaintiffs' First Amendment claim is reviewed in three steps: (1) the Court determines whether Plaintiffs' expressive activity is protected by the First Amendment; (2) the Court conducts a forum analysis to determine the proper constitutional standard to apply; and (3) 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). Moreover, all of the restrictions at issue were enforced by the City and thus constitute state action. *See, e.g., Bays v. City of Fairborn*, 668 F.3d 814, 819-20 (6th Cir. 2012) ("Fairborn officials engaged in state action by supporting and actively enforcing the solicitation policy in place at the Festival.").

A. Plaintiffs' Speech Is Fully Protected by the First Amendment.

The first question is easily answered. Plaintiffs' speech activity 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"); *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) (noting that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection") (citations omitted).

B. Defendants Restricted Speech in Traditional Public Fora.

The fora at issue (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). Moreover, "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; *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). And 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, the overly broad "restricted area" fails intermediate scrutiny.

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 it 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*.[2]

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

[2] As the video demonstrates, there were many pedestrians walking through the "restricted area," particularly along Montcalm Street. This can be seen most clearly in the video titled "Reform America v City of Detroit – Sign in Restricted Area." (Harrington Decl. ¶ 30, Ex. A). In fact, this video shows pedestrians crossing Woodward Avenue, walking toward the Fox Theatre, without any security screening. (*See id*.). Additionally, the video titled "Reform America v City of Detroit – Arrest Video" shows numerous pedestrians walking along the forbidden sidewalk immediately adjacent to Woodward Avenue. (*See id*. ¶¶ 30-34, Ex. A).

the entrance, but yet in front of the theatre.[3] The City admitted as much during its deposition. (*See* City Dep. at 88:24-25 [agreeing that there was "no information to indicate a specific credible threat to or associated with a 2019 Democratic Presidential primary debate"]; 90:4-5 [agreeing that there was nothing "to indicate there were any plans for violent actions targeting the debates or the protests"]). 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."

As stated by the Sixth Circuit:

> "[***M***]***ere speculation about danger***" is not an adequate basis on which to justify a restriction of speech. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990); *see also Turner Broad. Sys., Inc*., 512 U.S. at 664 (requiring that the government "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and

[3] Defendants' reliance on hearsay contained in news reports regarding unrelated incidents is misplaced. (*See* Defs.' Br. at 3-4 [citing Exhibits B, C, D, E, F, G, H, and I, to which Plaintiffs object as impermissible hearsay]; *see also id*. at 28-29 [citing Exhibits P and Q, to which Plaintiffs also object as impermissible hearsay]). Not only are these news reports impermissible hearsay (to which Plaintiffs object), *see* Fed. R. Evid. 801 & 802, the information is entirely irrelevant to the restrictions at issue here. There was no violence at the debates nor were there any official reports of suspected violence. None. The First Amendment demands more than speculation. The government should not be permitted to simply manufacture a safety interest after the fact and based upon unrelated hearsay contained in unrelated news reports.

> material way"). Although the government has an interest in crowd control, the defendants "must do more than simply posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc.*, 512 U.S. at 664 (internal quotation marks omitted); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1202 (9th Cir. 2009) ("[M]erely invoking interests is insufficient. The government must also show that the proposed communicative activity endangers those interests." (internal alteration marks and quotation marks omitted)), *cert. denied*, 130 S. Ct. 1706.

Saieg, 641 F.3d at 739 (emphasis added). 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 any claim of a threat was pure speculation), and this is further *evidenced* by the exceptions permitted. Moreover, this was a presidential candidate debate. It was not a contentious or violent KKK rally. Any effort to compare the peaceful protestors at the debate with violent agitators associated with KKK rallies is unavailing. (*See, e.g.,* Defs. Br. at 26, 28 [citing *Grider v. Abramson*, 180 F.3d 739, 750 (6th Cir. 1999) (upholding restrictions related to a contentious KKK rally)]). Unlike the current situation where there were no reports of violence nor any actual violence, in *Grider v. Abramson*, 180 F.3d 739 (6th Cir. 1999), there was *concrete* evidence of violence and threats of violence associated with the planned KKK rally. *Id.* at 743-44. As the Sixth Circuit stated in *Saieg*, "[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).

Consequently, Defendants' 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. *Bay Area Peace Navy*, 914 F.2d at 1229-30. Nevertheless, providing alternative speech areas does not cure the constitutional defects of the "restricted area." *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. . . ."); *Bays*, 668 F.3d at 825 ("The requirements for a time, place, and manner restriction are conjunctive, so it is unnecessary to reach the issue of whether Fairborn has left open ample alternative channels of communication. . . . The solicitation policy is unconstitutional because it is not narrowly tailored to serve a significant government interest.") (internal quotations and citation omitted). The "restricted area" fails intermediate scrutiny.

Additionally, because Defendants permitted a "candidate support corral" but not a "candidate opposition corral" within the "restricted area," the restriction is content and viewpoint based.[4] And because the restriction fails intermediate

[4] Similarly, the "march" was content- and viewpoint-based in that Defendants

scrutiny, it most certainly fails strict scrutiny, *see Reed*, 576 U.S. at 163, "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534.

Similarly, Defendants' "free speech area" (or "protest 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. (*See* Defs.' Br. at 26 [admitting that "[it] is true that the City did not permit Plaintiffs to cross Woodward Avenue to confront those on the other side, based on the message of those on each side"]).[5] 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). In sum, this restriction was not necessary nor narrowly tailored to serve a compelling state interest. It fails strict scrutiny. *Reed*, 576 U.S. at 163.

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separated the groups based on the content and viewpoint of their message. (*See* Defs.' Br. at 12 ["The left-leaning groups proceeded first, followed by the right wing groups."]).

[5] This is a viewpoint-based restriction, which is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). For example, there is no dispute that the candidates support abortion. (Harrington Decl. ¶ 9). Consequently, if a protestor had a pro-abortion/pro-choice message, the protestor was directed to "area 1." Because Plaintiffs' viewpoint was anti-abortion, they were forced to go to "area 2" and forbidden from entering "area 1." The subject of both messages is abortion. Yet, the protestor's *viewpoint* on this subject determined where he was able to express his message in a traditional public forum. *See id*. at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

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. . . . *Freedom of speech is a fundamental right*. Therefore, Wayne County's actions *are subject to strict scrutiny*. In determining whether individuals are "similarly situated," a court should not demand exact correlation, but should instead seek relevant similarity.

Bible Believers v. Wayne Cnty., 805 F.3d 228, 256 (6th Cir. 2015) (*en banc*) (internal quotations and citations omitted) (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[6] and granting certain protestors

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[6] Even if the Court were to consider the "candidate support corral" and the church parking lot non-public or limited-public forums, the challenged restrictions still fail constitutional scrutiny because they were viewpoint based. *See, e.g.*, *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, No. 19-1311, 2020 U.S. App. LEXIS 33518, at *1-2 (6th Cir. Oct. 23, 2020) (striking down challenged speech restrictions and stating that the government "has wider latitude to restrict speech in 'nonpublic forums' that have not been opened to debate," but noting that "[e]ven there, however, speech restrictions must be reasonable and viewpoint neutral").

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. Plaintiffs need not show actual "hostility" (although the video shows it) to advance an equal protection claim. Plaintiffs need only show the dissimilar treatment of individuals based on the content or viewpoint of their message. *See id*. This they have done in spades (*e.g.,* permitting a "candidate support corral" but not a "candidate opposition corral," granting supporters access to "area 1" but denying Plaintiffs access to this area, and permitting supporters to "march" first). Defendants violated the Equal Protection Clause 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 seize him. *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 Harrington, 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.[7] 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").

[7] The church parking lot was not "fenced or posted *farm* property of another person," Mich. Comp. Laws § 750.552 (1)(c) (emphasis added), as Defendants suggest. (Defs.' Br. at 33).

IV. The Individual Defendants Do Not Enjoy Qualified Immunity.[8]

The defense of qualified immunity does not shield Defendants Szilagy, Worboys, or Lach from liability for violating Plaintiffs' clearly established rights. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated the applicable standard as follows: government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. And "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted). "The test focuses on the *objective* legal reasonableness of an official's acts, and the qualified immunity defense fails if the official violates a clearly established right because 'a reasonably competent public official should know the law governing his conduct.'" *Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993) (quoting *Harlow*, 457 U.S. at 818-19) (emphasis added). And "officials

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[8] Qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, it does not apply to claims against a municipality, nor does it apply to claims against a defendant in his official capacity. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998); *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997) ("Qualified immunity . . . does not shield [the defendant] from the claims brought against him in his official capacity.").

can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court mandated a two-step sequence for resolving qualified immunity claims. First, a court must decide whether the facts alleged or shown by a plaintiff make out a violation of a constitutional right. And second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 201; *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (stating that courts have discretion to "decid[e] which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

Consequently, whether a right is "clearly established" is ultimately an *objective*, legal analysis. As stated by the Supreme Court, "By defining the limits of qualified immunity essentially in objective terms, *we provide no license to lawless conduct*." *Harlow*, 457 U.S. at 819 (emphasis added).

As set forth above, the Court should have little difficulty rejecting the officers' qualified immunity defense. Plaintiffs' First Amendment right to engage in their free speech activity free from overbroad and content/viewpoint-based restrictions in traditional public forums was clearly established by July 29, 2019. *See, e.g., Saieg*, 641 F.3d at 740-41; (Harrington Decl. ¶ 40 ["Officer Lach said

that he was giving us a 'legal order' to move. One of the pro-lifers who was with me commented that the order was unconstitutional, and Officer Lach responded, 'let it be unconstitutional then.'"]).

Additionally, case law clearly established prior to July 29, 2019, the right to be free from retaliation for protected speech, thereby negating any claim of qualified immunity. *See Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 821-25 (6th Cir. 2007) ("Because retaliatory intent proves dispositive of Defendants' claim to qualified immunity, summary judgment was inappropriate"). (*See, e.g.*, Compl. ¶ 82 ["In addition to enforcing the unlawful 'speech restrictions,' Defendant Szilagy directed the unlawful seizure of Plaintiff Harrington. This seizure was retaliatory."]; ¶ 89 ["Plaintiffs' constitutionally protected activity motivated Defendants' adverse actions. Thus, Defendants acted with a retaliatory intent or motive."]); *see also* Harrington Decl. ¶ 30 ["I responded to Commander Szilagy by pointing to an individual holding a political sign on the sidewalk right next to them, prompting Commander Szilagy to assert that he 'doesn't have time [for this].' Captain Worboys indicated that the individual with the sign was authorized to be in the 'restricted area' because he was a 'supporter.'"]). The officer Defendants do not enjoy qualified immunity.

V. 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. (*See, e.g.*, Defs.' Br. at 26 [admitting that "[it] is true that the *City* did not permit Plaintiffs to cross Woodward Avenue to confront those on the other side, based on the message of those on each side"] [emphasis added]). 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. *See Saieg*, 641 F.3d at 742 ("The City

may be held liable for the restriction of Saieg's free speech rights that the leafleting restriction caused."). The City is liable for the violations.

VI. Plaintiffs Are Entitled to the Relief Requested.

Plaintiff are entitled to declaratory and injunctive relief regarding the challenged restrictions—restrictions that Defendants considers part of the City's policies, practices, procedures, and training when providing security for events and thus will enforce similar restrictions in the future. (*See* City Dep. at 124:8-20). Additionally, because Plaintiffs have already suffered a constitutional harm, they are entitled to nominal damages against Defendants *as a matter of law*. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Saieg*, 641 F.3d at 741 ("In addition to declarative and injunctive relief, [the plaintiff] is entitled to nominal damages for the violation of his constitutional rights.").

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion and grant Plaintiffs' motion for summary judgment (Doc. No. 20).

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 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.