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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

NATHAN DAVID WILSON, *et al.*,

Plaintiffs,

v.

CITY OF MOSCOW, *et al.*,

Defendants.

Case No. 3:22-cv-421-CWD

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case involves the egregious and selective enforcement of an unconstitutional law to punish Plaintiffs for engaging in core political speech that is critical of the government. There is no genuine dispute of material fact such that Plaintiffs are entitled to judgment as a matter of law on their claims arising under the First and Fourteenth Amendments to the U.S. Constitution.

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).

Plaintiffs, the movants for summary judgment, have an initial burden of showing “the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323. A genuine issue of material fact exists if a reasonable juror could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To survive Plaintiffs’ motion, Defendants must “come forward with *specific facts* showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and quotation marks omitted) (emphasis added). To demonstrate a genuine issue, Defendants must present sufficient evidence upon which a jury could reasonably find in their favor; a “scintilla of evidence” is insufficient. *Liberty Lobby*, 477 U.S. at 252.

ARGUMENT

I. Municipal Liability.

Municipal liability attaches when a constitutional violation results from the municipality's customs, policies, and/or practices. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Such a custom, policy, or practice may be either “explicitly adopted” or “tacitly authorized.” *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986); *see also Harris v. City of Roseburg*, 664 F.2d 1121, 1130 (9th Cir. 1981) (“‘Official policy’ within the meaning of *Monell* [encompasses situations] where a municipality impliedly or tacitly authorized, approved, or encouraged illegal conduct by its police officers.”) (internal quotations and citation omitted). This is true so long as “the decision to adopt that particular course of action is properly made by that government’s authorized decisionmakers.” *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986). Liability under *Monell* also attaches where there is evidence of a “widespread practice that . . . is so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (internal quotations omitted). For the liability to attach, the policy or custom must be a “moving force” behind the constitutional violation. *Harper v. L.A.*, 533 F.3d 1010, 1026 (9th Cir. 2008). And “[w]here the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law, resolving issues of fault and causation is straightforward because proof of such a violation establishes that . . . the municipal action was the moving force behind the injury of which the plaintiff complains.” *Id.* (internal citation and quotations omitted).

With these principles in mind, we turn to the claims advanced by Plaintiffs.

II. First Amendment.

A. Protected Speech.

“The First Amendment affords the broadest protection to . . . political expression in order ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”¹ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Plaintiffs’ speech, as expressed through the posting and messaging of the Soviet Moscow protest decals (Statement of Material Facts [“SMF”] ¶¶ 11-18, 85), is core political speech protected by the First Amendment. *See id.*; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (recognizing “that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values”) (internal quotations and citations omitted); *Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) (“[S]ign displays . . . are protected by the First Amendment.”); *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (observing that signs conveying political messages are “absolutely pivotal speech”); *see also Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (holding that a speech restriction on a military base as applied to certain decals posted on vehicles entering the base violated the First Amendment).

¹ In the “civil disobedience” paper that Plaintiff Seamus Wilson, a juvenile at the time, wrote as part of the County’s agreement to dismiss the case against him, he described the protections of the First Amendment as follows: “Even if they were advertising material, I had permission to post them. That permission came from a bunch of dead, white guys wearing wigs, along with the full ratification of the states. That permission has since been upheld by the courts and defended by millions of men and women, hundreds of thousands of whom who have sacrificed their lives to defend it. And that’s the strongest political permit I could ever hope for.” (Seamus Decl. ¶ 41, Ex. A, at Ex. 3 to Statement of Material Facts ¶ 85 [“SMF”]).

B. Unconstitutional Prior Restraint (Plaintiffs Nathan and Seamus Wilson).²

The City Ordinance operates as a prior restraint on speech as it requires Plaintiffs Nathan and Seamus Wilson to obtain a permit (written governmental approval) before being allowed to engage in their political expression on City property.³ See *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 698 (6th Cir. 2020) (holding that the sign ordinance was a prior restraint because the right to display a sign that did not come within an exception depended on obtaining either a permit or a variance); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 79 (D.D.C. 2012) (“WMATA imposed a prior restraint because it prevented Plaintiffs from displaying their ad in WMATA stations . . .”). “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases).

Prior restraints on speech are almost uniformly invalid, as “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Under the doctrine of prior restraint, the government may not enforce licensing schemes that give unfettered discretion to public officials to pick and choose who may speak (and thus grant them unfettered discretion to selectively punish those who do). See *Staub v. City of Baxley*, 355 U.S. 313, 322-24 (1958) (collecting cases).

² In its ruling on Defendants’ motion to dismiss, the Court held that Plaintiff Rory Wilson was collaterally estopped from asserting the prior restraint claim. (Mem. Decision & Order at 12, 19, Dkt. 57). However, the Court held that Plaintiffs Nathan and Seamus Wilson may proceed on this claim. (See *id.* at 11, 19).

³ The City ordinance at issue is Title 10, Chapter 1, Section 22 (referred to herein as the “City Ordinance”). This ordinance states, in relevant part, “No notice, sign, announcement, or other advertising matter shall be posted on public property or public right-of-way without prior approval, in writing, from the governmental entity owning or controlling such public property or public right-of-way.” (SMF ¶ 64).

In order to regulate competing uses of forums for speech, the government may impose a permit requirement on those wishing to use the forum for expressive activity such as holding a march, a parade, a rally, or in this case, posting messages on City property. *See Cox v. N.H.*, 312 U.S. 569, 574-76 (1941). However, such a permit scheme must meet certain constitutional requirements. To begin, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. *See United States v. Grace*, 461 U.S. 171, 177 (1983). A government regulation that allows arbitrary application is “inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.” *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). Indeed, “the mere existence of the licensor’s unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988). To prevent this risk, “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license [*i.e.*, written approval, as in this case]” must contain “narrow, objective, and definite standards to guide the licensing authority.” *Shuttlesworth*, 394 U.S. at 150-51.

Here, the City Ordinance establishes a licensing scheme whereby any person who desires to post a decal, notice, or sign (First Amendment activity) on City property must first obtain written approval. The ordinance is constitutionally infirm because it does not specify how to obtain such approval nor does it impose any limits upon the government officials who would be responsible for enforcing the ordinance’s approval-based regime (leaving aside the fact that it has never been enforced until Plaintiffs posted decals that were critical of the City, further demonstrating the harm

caused by such unlawful permitting schemes). Indeed, “[n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served.” *Niemotko v. Md.*, 340 U.S. 268, 272 (1951). As the City admits, “[t]here is no written procedure with objective criteria for obtaining the City’s consent/written permission to post advertising matter on City property pursuant to Title 10, Chapter 1, Section 22.” (SMF ¶ 30). Consequently, the City Ordinance violates the First Amendment as a matter of law and should be enjoined. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560-62 (1975) (striking down the licensing scheme for the use of a municipal theater for lack of procedural safeguards); *Staub*, 355 U.S. at 325 (striking down an ordinance that made “enjoyment of speech contingent upon the will of the Mayor and Council of the City”); *Shuttlesworth*, 394 U.S. at 150–51 (striking down an ordinance that granted “virtually unbridled and absolute power to prohibit any ‘parade,’ ‘procession,’ or ‘demonstration’ on the city’s streets or public ways”). In addition to injunctive relief, Plaintiffs Nathan and Seamus Wilson are entitled to declaratory relief and damages⁴ for the harm they suffered as a result of Defendants’ enforcement against them of an unconstitutional ordinance.

This result (enjoining the ordinance) is particularly warranted here as there is a long-standing and widely employed custom and practice of posting “advertising matter”—including core political speech—on City property, and the absence of such safeguards demanded by the First Amendment permits government officials to target speech they dislike, as in this case. The City’s

⁴ Plaintiffs are entitled to nominal damages as a matter of law. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Uzuegbunam v. Preczewski*, 592 U.S. 279, 283 (2021) (holding that “an award of nominal damages by itself can redress a past injury”); *Saieg v. City of Dearborn*, 641 F.3d 727, 741 (6th Cir. 2011) (“In addition to declarative and injunctive relief, [the plaintiff] is entitled to nominal damages for the violation of his constitutional rights.”).

speech-restricting ordinance is unconstitutional on its face and as applied to restrict Plaintiffs' political speech.

Indeed, the values protected by the First Amendment are offended when citizens like Plaintiffs are required to seek prior approval from a government official before expressing their views, especially without strict limits on the official's discretion and particularly when those views are critical of the officials themselves. *See Staub*, 355 U.S. at 325 (striking down ordinance that made "enjoyment of speech contingent upon the will of the Mayor and Council of the City"); *Shuttlesworth*, 394 U.S. at 150–51 (striking down ordinance that granted "virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways"); *Conrad*, 420 U.S. at 560–62 (striking down licensing scheme for use of municipal theater for lack of procedural safeguards); *Watchtower Bible & Track Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–67 (2002) (striking down ordinance that required speaker to get a permit before engaging in door-to-door advocacy); *see also Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1943) (opining that the "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved"). And this is even more troubling as the City has, by custom, policy and practice, long permitted speakers to post expressive materials like those used by Plaintiffs on City property. (*See* SMF ¶¶ 19-29, 57, 58, 59, 76-79 [setting forth facts demonstrating the longstanding and widespread practice of posting expressive materials on City property that continues today]).

Despite the Supreme Court's admonishments to the contrary, local governments continue to enact laws, like the City Ordinance, that function as prior restraints because they give local censors unbridled authority to exclude disfavored speakers from the public square (or to punish

those who use it). Where similar ordinances have been subjected to legal challenge, they have failed to withstand scrutiny because conditioning the exercise of First Amendment rights on the subjective whims of government officials is among the most fundamental evils of a prior restraint. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225–26 (1990) (ordinance requiring a more onerous inspection regime for sexually oriented businesses); *Epona, LLC v. Cnty. of Ventura*, 876 F.3d 1214, 1222–26 (9th Cir. 2017) (ordinance requiring that conditions be met “to the satisfaction of the appropriate decision-making authority”); *Baker v. City of Fort Worth*, 506 F. Supp. 3d 413, 421–25 (N.D. Tex. 2020) (ordinance requiring permission of city council to post any “handbill, sign, poster or advertisement”); *Driver v. Town of Richmond ex rel. Krugman*, 570 F. Supp. 2d 269, 272 (D.R.I. 2008) (ordinance requiring approval of Chief of Police to post a sign); *Lawson v. City of Kankakee*, 81 F. Supp. 2d 930, 935 (C.D. Ill. 2000) (ordinance requiring consent of the city); *Bella Vista United v. City of Phila.*, No. 04-1014, 2004 WL 825311, at *3–5 (E.D. Pa. Apr. 15, 2004) (ordinance requiring permission from the city); *see also Lusk v. Vill. of Cold Spring*, 475 F.3d 480, 491–92 (2d Cir. 2007) (invalidating sign-posting ordinance that froze speech for impermissible duration during pendency of permitting process). The City Ordinance’s “prior approval, in writing” requirement commits the same evil. It confers upon City officials the unfettered discretion to regulate expression, without establishing clear and objective criteria, procedures, or time frames for seeking “approval” or for determining its grant or denial. The City’s prosecution of Plaintiffs further demonstrates why these safeguards are necessary; without them, viewpoint-based prosecutions are permitted because the lack of objective criteria emboldens officials to selectively enforce this ordinance against speakers they dislike. Here, despite the documented absence of enforcement of the City Ordinance prior to Plaintiffs’ prosecutions—or in other words, despite the absence of documentation of the City granting permission, constructive

or otherwise, to all other members of the public to post decals, handbills, and other signage on public property without first obtaining the City’s “prior approval, in writing” notwithstanding the longstanding and widespread practice of such postings—the City and its police officers and prosecutor acted swiftly and specifically to punish Plaintiffs for their speech.

In the final analysis, the City Ordinance, facially and as applied to punish Plaintiffs’ speech, is an unconstitutional prior restraint in violation of the First Amendment. Plaintiffs Nathan and Seamus Wilson are entitled to summary judgment for the violation of their constitutional rights as the ordinance used to punish them for their speech is facially invalid.

C. Retaliation.

Typically, to advance a First Amendment retaliation claim, the plaintiff must show that (1) “he engaged in constitutionally protected activity,” (2) “as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity,” and (3) “there was a substantial causal relationship between the constitutionally protected activity and the adverse action.” *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022); *see also Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (describing the third element as “(3) the protected activity was a substantial motivating factor in the defendant’s conduct—*i.e.*, that there was a nexus between the defendant’s actions and an intent to chill”).

Plaintiffs were exercising their right to free speech by protesting through the public display of their decals the City’s draconian COVID-19 restrictions, and Plaintiffs’ arrests/citations/prosecutions for doing so would “chill a person of ordinary firmness from continuing to engage in the protected activity.” The first two elements are not at issue. Typically, the third element requires the plaintiff to establish the absence of probable cause. *Hartman v.*

Moore, 547 U.S. 250, 252 (2006); *Nieves v. Bartlett*, 587 U.S. 391, 404 (2019). However, there are exceptions to this requirement that apply in this case, as discussed further below.

Before turning to the exceptions, it is important to note, yet again, that the ordinance the City enforced against Plaintiffs’ First Amendment activity (the City Ordinance) is unconstitutional. *See supra*. Consequently, because the City Ordinance is facially invalid, there was no probable cause to enforce it against Plaintiffs’ expressive activity in the first instance. *See, e.g., Sandul v. Larion*, 119 F.3d 1250 (6th Cir. 1997) (shouting “f--k you” and extending middle finger to abortion protestors was protected speech and could not serve as a basis for criminal liability).

Nonetheless, in *Lozman v. City of Riviera Beach*, 585 U.S. 87 (2018), the plaintiff alleged that the City deprived him of his First Amendment rights by retaliating against him for his lawsuit against the City and his criticisms of public officials. The Court noted that “Lozman’s speech is high in the hierarchy of First Amendment values,” *id.*, similar to Plaintiffs’ speech at issue here.

As the Court noted:

An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an *ad hoc*, on-the-spot decision by an individual officer. An official policy also can be difficult to dislodge. A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.

Id. at 100. Here, retaliation against Plaintiffs for their speech activity has been “elevated to the level of official policy.” Accordingly, Plaintiffs need not prove an absence of probable cause to maintain their First Amendment retaliation claim in this case. *See id.* at 101 (“Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest”). That is, this is not a “typical retaliatory arrest claim” with no evidence of a broader retaliatory policy against the

plaintiff. Defendants retaliated against Plaintiffs based on their speech critical of the City and the City's animus toward members of Christ Church, which includes Plaintiffs. The City's singular and selective enforcement of an unconstitutional ordinance against Plaintiffs' speech violates the First Amendment's guarantee against retaliation for protected speech. The facts of this case demonstrate, without exception, that it is and has been a widespread custom and practice in the City to post messages, including messages addressing matters of public interests, on City poles and other City property. Yet, the City only ever prosecuted Plaintiffs for engaging in this expressive activity. This broader retaliatory policy is thus demonstrated by the following:

- The posting of messages on public property is a widely-accepted and longstanding custom and practice in the City—a prototypical college town. (SMF ¶¶ 19-29, 57, 58, 59, 76-79).
- Plaintiffs are the first individuals that the City has *ever* charged/prosecuted for engaging in this widely-accepted and longstanding custom and practice—a practice that continues today without prosecutions. (SMF ¶¶ 75, 76, 79, 80, 86, 88, 89).
- Plaintiffs Rory and Seamus Wilson are the first individuals ever arrested by Defendants for allegedly violating the City Ordinance. (SMF ¶¶ 32-45, 76, 79, 80).
- Plaintiff Rory Wilson is the first individual Defendants Gunderson and Nunes ever handcuffed for violating the City Ordinance. (SMF ¶¶ 36, 37, 75, 76, 80).
- The City Ordinance, which served as the basis for the prosecution of Plaintiffs, is an unconstitutional prior restraint on speech. (*See supra* § II.B.).
- Plaintiffs' speech—the Soviet Moscow protest decals—was critical of the City's enforcement of its draconian COVID-19 restrictions—restrictions that threatened First Amendment rights to speech, assembly, and the free exercise of religion. (SMF ¶¶ 5-19).
- Plaintiffs are members of Christ Church. (SMF ¶ 6).

- Members of Christ Church were arrested by City police officers for engaging in an outdoor Psalm sing—an activity protected by the First Amendment—for allegedly violating the City’s COVID-19 restrictions. The City eventually dropped the charges. (SMF ¶¶ 5-10).
- The City adopted a slogan, “Enforced Because We Care,” to justify its COVID-19 restrictions. (SMF ¶ 11).
- Plaintiffs’ Soviet Moscow protest decals expressly criticized the City’s slogan. (SMF ¶¶ 13-16, 18, 46, 47).
- The City prosecuted Plaintiffs for engaging in speech that was critical of the City, but have never prosecuted individuals for posting speech critical of Christ Church or for posting any other message of public concern or interest. (SMF ¶¶ 13-16, 18, 46, 47, 56, 58, 59, 75, 76, 79, 80, 86, 88, 89, 90).
- A City attorney responsible for prosecuting Plaintiffs for violating the City Ordinance as a result of the posting of the Soviet Moscow protest decals referred to members of Christ Church as “assholes” and the church’s activity as “bullshit.” (SMF ¶ 82).
- The harsh treatment that Plaintiffs Rory and Seamus Wilson received by the City police officers was unwarranted under the circumstances. (SMF ¶¶ 35-47).
- On multiple occasions, when City workers were deployed to “clean” the City’s property of advertising matter, the workers either only removed Plaintiffs’ protest decals or left in place advertising matter that was expressly critical of Christ Church. (SMF ¶¶ 51-54, 56-59).
- The City targeted the removal of Plaintiffs’ message while permitting messages critical of Plaintiffs, their church, and their religious community to remain. (SMF ¶¶ 51-54, 56-59).
- In comparison to other advertising matter posted on City property, the protest decals were easy to remove, left no residue or discoloration, and caused no damage whatsoever to the

property upon which they were posted. This is further evidenced by the fact that while the City's police report claimed the posting of "89 individual stickers," when City workers were deployed to remove them later that day, they found only "17 stickers." (SMF ¶¶ 13, 51, 55). And it is further evidenced by the declaration of Ms. Dixon, who witnessed the City workers' efforts (*i.e.*, scraping) to remove other decals. (Dixon Decl. ¶ 6 [showing images of workers scraping decals with razor blades] at Ex. 6 to SMF).

- The very week of Plaintiff Rory Wilson's trial for violating the City Ordinance, protestors posted dozens of flyers/posters expressing a pro-abortion view throughout the City; yet, no one was punished or prosecuted for this wide-spread posting. (SMF ¶ 90).
- Defendant Waters expressed his animus toward Plaintiffs' message, and the treatment of Plaintiffs Rory Wilson (handcuffing him and forcing him to the ground) and Seamus Wilson (interrogating the juvenile with a flashlight in his face) by Defendants Gunderson, Nunes, and Waters was entirely inappropriate. (SMF ¶¶ 33-47).
- The prosecutor (Liz Warner) assigned to the cases against Plaintiffs expressed her animus toward Plaintiffs, their church, and their religious community. (SMF ¶ 82).
- The County dismissed the charge against Plaintiff Seamus Wilson (who, as a minor, would be prosecuted by the County rather than the City) upon his writing of a paper *critical* of his treatment by the City. (SMF ¶ 85).

The animus of City officials toward Plaintiffs and their religious community and the disparate treatment they received for engaging in expressive activity critical of the City are clearly established. The selective enforcement of the City Ordinance against Plaintiffs in light of the facts and circumstances of this case compels one conclusion: the City used this as an opportunity to retaliate against Plaintiffs for exercising their rights under the First Amendment.

Finally, as this Court noted in its Memorandum Decision and Order denying Defendants’ motion to dismiss, another exception to the lack of probable cause requirement arises when the “plaintiff alleges that he was arrested or prosecuted ‘when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.’” (Mem. Decision & Order at 14 [quoting *Nieves*, 587 U.S. at 407], Dkt. 57). This situation “typically occurs in the context of minor criminal violations, where ‘probable cause does little to prove or disprove the causal connection between animus and injury,’” as in this case. (*See* Mem. Decision & Order at 14 [quoting *Nieves*, 587 U.S. at 407], Dkt. 57). In *Nieves*, the Supreme Court used jaywalking to illustrate the point:

[A]t many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual’s retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest.

Id.

Here, the same is true of the unlawful charges brought against Plaintiffs for posting the protest decals on City property without “prior approval, in writing.” The evidence overwhelmingly shows, without contradiction, the disparate and selective enforcement of the City Ordinance against Plaintiffs. (*See* SMF ¶¶ 19-29, 57, 58, 59, 76-79 [setting forth widespread policy, practice, and custom of posting “advertising matter” on City property]; ¶¶ 75, 76, 79, 80, 86, 88, 89 [setting forth disparate and selective enforcement of City Ordinance]; ¶¶ 36-43, 46, 47, 51, 52, 53, 54, 56, 57, 58, 59, 82 [setting forth evidence of animosity toward Plaintiffs and members of Christ Church]).

In sum, Plaintiffs are entitled to summary judgment on their First Amendment retaliation claim.

D. Content- and Viewpoint-Based Restriction on Speech.

“The [Supreme] Court has adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for [expressive] purposes.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Forum analysis has traditionally divided government property into three general categories: traditional public forums, designated public forums, and nonpublic forums.⁵ *Id.* Once the forum is identified, the Court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

A public forum is created, as in this case, when the government “intentionally open[s] a nontraditional forum for public discourse.” *Id.* at 802. To discern the government’s intent, courts “look[] to the policy and practice of the government” as well as “the nature of the property and its compatibility with expressive activity.” *Id.* Here, the City has long permitted the posting of signs and other “advertising matter” on its property as a matter of custom, policy, and practice. (SMF ¶¶ 19-29, 57, 58, 59, 76-79). The property is plainly compatible with the speech at issue. (*See id.*). Indeed, the City Ordinance expressly permits this form of expression (upon written approval). (SMF ¶ 64). In sum, a forum for speech has been created.

“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *see Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws . . . are presumptively unconstitutional.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). And

⁵ Some courts treat a nonpublic forum and a limited public forum the same for purposes of applying the appropriate level of scrutiny. *See, e.g., Miller v. City of Cincinnati*, 622 F.3d 524, 535-36 (6th Cir. 2010); *see also Flint v. Dennison*, 488 F.3d 816, 830-31 (9th Cir. 2007) (describing a “limited public forum” as “a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics”) (internal citations and quotations omitted).

“[v]iewpoint discrimination is . . . 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.” *Rosenberger*, 515 U.S. at 829. Accordingly, “[t]he principle that has emerged from [Supreme Court] cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted). Indeed, even in a nonpublic forum, viewpoint discrimination is prohibited. *See Brown v. Cal. DOT*, 321 F.3d 1217, 1222 (9th Cir. 2003) (citation omitted) (finding that state highway overpass fences were not a public forum but affirming a preliminary injunction against the California Department of Transportation’s policy of allowing American flags but prohibiting other signs and banners on the fences as a violation of the First Amendment); *Nieto v. Flatau*, 715 F. Supp. 2d 650 (E.D.N.C. 2010) (holding that a speech restriction on a military base, a nonpublic forum, was viewpoint based as applied to anti-Islam decals posted on vehicles entering the base in violation of the First Amendment); *see also Matal v. Tam*, 582 U.S. 218 (2017) (holding that the Patent and Trademark Office engaged in viewpoint discrimination when it denied the registration mark of a rock group because the government office found it “offensive”).

Here, Defendants’ disparate and adverse actions against Plaintiffs (arrests, citations, and prosecutions) were based on the content and viewpoint of the message Plaintiffs sought to convey, in violation of the First Amendment. The utter lack of enforcement of the City Ordinance against others illustrates this point, without contradiction, in spades. (*See, e.g.* SMF ¶¶ 13-16, 18, 46, 47, 56, 58, 59, 75, 76, 79, 80, 86, 88, 89, 90). And so too does the fact that Plaintiffs were punished

for speech critical of the City, yet the City allowed speech critical of Plaintiffs, their Church, and their religious community. (SMF ¶¶ 51-54, 56-59).

III. Fourteenth Amendment.

A. Selective Prosecution.

To state an equal protection claim based upon a theory of selective prosecution, Plaintiffs must allege (1) that others similarly situated have not been prosecuted for the same conduct and (2) that the prosecution is based on an impermissible motive. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (“[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.”) (internal quotations and citations omitted). Plaintiffs have set forth uncontested, material facts showing that the conduct for which they were arrested/charged is routinely engaged in by other members of the community. That is, others similarly situated (*i.e.*, persons who have posted fliers or signs or other “advertising matter” on City property) have not been arrested or prosecuted for the same conduct,⁶ and the arrests and prosecutions of Plaintiffs were based on Plaintiffs’ religion / religious beliefs and the exercise of their constitutional right to engage in speech critical of the City (*i.e.*, the impermissible motive). The absence of probable cause is not necessary to advance these claims. *See Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997) (“The courts have long held that a selective enforcement claim may be available even where there is

⁶ The ordinance does not require the posting of a certain number of signs or flyers nor does it require a police officer to observe the posting in order to trigger a violation. (See SMF ¶ 64); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (“In determining whether individuals are ‘similarly situated,’ a court should not demand exact correlation, but should instead seek relevant similarity.”). The “relevant similarity” here is posting signs or flyers in violation of the City Ordinance.

probable cause for prosecution.”); *see generally United States v. Armstrong*, 517 U.S. 456, 464 (1996). Defendants’ animus toward Plaintiffs, their Church, and their religious community is well established. (*See supra* § II.B.).

B. Equal Protection.

By denying Plaintiffs access to a forum for speech (*i.e.*, punishing Plaintiffs for accessing the forum) based on the content and viewpoint of their message, Defendants violated the equal protection guarantee of the Fourteenth Amendment (in addition to violating the First Amendment, as argued above). The principle of law at issue here was articulated by the Supreme Court as follows: “[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.” *Police Dep’t of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972); *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities in a forum violates the Equal Protection Clause). That is precisely what happened in this case. (*See also supra* § II.B.).

In the final analysis, it is clearly established that the City has a longstanding and widespread custom, policy, and/or practice of permitting individuals and groups to post “advertising matter” on City property—a custom, policy, and/or practice that continues today—yet, only Plaintiffs were ever arrested/charged/prosecuted for engaging in this form of expression. It is also important to note that Plaintiffs were punished for speech critical of the City, yet others are permitted wide latitude to use this forum to engage in speech critical of Plaintiffs, their church, and their religious community. And this animus toward Plaintiffs’ message and Plaintiffs’ church and religious community is evidenced by the words and actions of Defendants, the prosecutor, and even the City

workers charged with removing “advertising matter” from City property. In short, Plaintiffs are entitled to summary judgment on their claims arising under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, judgment should be entered in Plaintiffs’ favor on the issue of liability and for nominal damages as a matter of law and the case should proceed to the compensatory damages phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2026, 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.

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