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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' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT [Dkt. 67]**

INTRODUCTION

Defendants' opposition is a "Hail Mary" pass that was thrown out of the back of the endzone. In other words, it fails, and it never had a chance of succeeding as the facts and law overwhelmingly favor Plaintiffs.

To survive Plaintiffs' motion, Defendants were required to "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. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). Moreover, pursuant to Local Civil Rule 7.1(c), Defendants were required to "file a separate statement . . . of

all material facts which the responding party contends are in dispute.” L. Civ. R. 7.1(c). Defendants’ filing (Dkt. 68-8) fails to refute Plaintiffs’ detailed statement of material facts (SMF, Dkt. 67-2). Instead, Defendants offer what amounts to four broadly stated legal conclusions (Dkt. 68-8). Accordingly, Plaintiffs’ material facts are not disputed, including the following:

- 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]).

- 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).

- The City prosecuted Plaintiffs for engaging in speech that was critical of the City, but it has 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 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 from the defendant 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. (SMF ¶¶ 13, 51, 55; Dixon Decl. ¶ 6 [showing images of workers scraping other decals with razor blades], Dkt. 67-8).
- 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).

ARGUMENT

I. Defendants’ Municipal Liability Argument Is Wrong as a Matter of Fact and Law.

Defendants erroneously argue that “plaintiffs have not established that a ‘policy or custom’ caused the alleged violation” of constitutional rights. (Defs.’ Opp’n at 9). It is well established that municipal liability attaches when a constitutional violation results from the municipality’s customs, policies, and/or practices, which obviously includes the enforcement of a city ordinance. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978). Here, Defendants arrested¹ and

¹ When the defendant police officers detained Plaintiffs Seamus and Rory Wilson (Rory was handcuffed), Plaintiffs were not free to leave. (SMF ¶ 36-44). An “arrest” is a “seizure” under the Fourth Amendment. *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) (“When an officer makes

(selectively) prosecuted Plaintiffs pursuant to an unconstitutional *city ordinance* for engaging in political speech critical of the City. The City and its officials (prosecutor and police officers) were enforcing the City Ordinance, which was the “moving force” for the constitutional violations. The City cannot escape liability.² *See Harper v. L.A.*, 533 F.3d 1010, 1026 (9th Cir. 2008).

II. Defendants Fail to Address Plaintiffs’ Challenge to the City Ordinance as an Unconstitutional Prior Restraint on Speech.

To begin, Defendants do not refute (nor could they) the claim that Plaintiffs’ speech, as expressed through the posting and messaging of the Soviet Moscow protest decals (SMF ¶¶ 11-18, 85), is core political speech protected by the First Amendment. *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”); *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). This is particularly true because 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). And not until the City’s prosecution of Plaintiffs did Defendants ever seek to prohibit, let alone arrest or prosecute,

an arrest, it is a ‘seizure’ under the Fourth Amendment”). 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).

² It is noteworthy that Defendants do not argue that the defendant police officers enjoy qualified immunity, nor could they as the officers violated clearly establish rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating that government officials 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”).

someone for engaging in this form of expression in this forum. (See SMF ¶¶ 75, 76, 79, 80, 86, 88, 89). And even more to the point, Defendants do not address Plaintiffs’ claim that the City Ordinance is an unconstitutional prior restraint on speech. As such, Defendants have abandoned any such opposition.³ Instead of addressing Plaintiffs’ argument on this claim (see Pls.’ Br. at 4-9), Defendants opted to argue that the ordinance is content-neutral and not overbroad on its face (Defs.’ Opp’n at 10-13). That is not the same argument. An overbreadth challenge focuses on the overly broad scope of the law sweeping in protected expression, whereas a prior restraint challenge focuses on the unbridled, subjective discretion vested in licensing officials before the speech occurs. See *Epona Ltd. Liab. Co. v. Cty. of Ventura*, No. CV 16-6372 DMG (PLAx), 2019 U.S. Dist. LEXIS 227245, at *9 (C.D. Cal. Dec. 12, 2019) (“[D]espite Defendant’s assertion to the contrary, cases that present an ‘unbridled discretion’ challenge are *not* ‘akin to an overbreadth challenge.’ . . . The case Defendant cites for this proposition, *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992), instead notes that in a case involving unbridled discretion, ‘[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.’. . . Therefore, in unbridled discretion cases, successful facial challenges ‘express[] the conclusion that the statute could *never* be applied in a valid manner.’”) (internal citations and quotations omitted).

³ While a non-moving party’s failure to oppose summary judgment “does not excuse the moving party’s affirmative duty under Rule 56 to demonstrate its entitlement to judgment as a matter of law,” *Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003), it is well settled that claims or arguments not raised in opposition to summary judgment are deemed abandoned, see *Coleman v. Bank of N.Y. Mellon*, 798 F. App’x 131, 132 (9th Cir. 2020) (finding that the party abandoned claims “by failing to provide any argument regarding these claims in his opposition to defendants’ motion for summary judgment”); *Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008) (observing that claims not raised by a party in opposition to summary judgment are deemed abandoned). Defendants also fail to address Plaintiffs’ argument that the City created a forum for speech. (Pls.’ Br. at 15-17).

The City Ordinance operates as a prior restraint on speech as it requires the speaker to obtain a permit (written governmental approval) before being allowed to engage in expression on City property. It is clearly established that “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). The City admits that “[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). Thus, the City Ordinance violates the First Amendment as a matter of law and can never be applied in a valid manner.

C. Retaliation, Selective Enforcement, and Equal Protection.

Defendants first argue that Plaintiffs’ retaliation claim fails because Defendants had probable cause to arrest/prosecute Plaintiffs pursuant to the City Ordinance. However, because the City Ordinance is facially invalid, there was no probable cause to enforce it against Plaintiffs’ expressive activity in the first instance. *Members of City Council v. Taxpayers*, 466 U.S. 789, 797-98 (1984) (“[A] holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner.”); *see also 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 establishing probable cause).

Additionally, as we noted in our brief, 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). The undisputed facts show that Plaintiffs were engaging in First Amendment activity, that they were subject to adverse action (arrest/prosecution) that would certainly chill a person of ordinary firmness from continuing the activity, and there was a causal connection between the protected activity and the adverse action. Indeed, Plaintiffs were not arrested/prosecuted because they wore face coverings (a City COVID requirement) while walking the streets in the early morning hours. They were arrested/prosecuted for free speech activity that others have engaged in (and continue to engage in) for decades without suffering such similar adverse consequences.

As Plaintiffs also noted in their opening brief (*see* Pls.' Br. at 14, and this Court noted in its Memorandum Order and Decision on Defendants' motion to dismiss, *see* Mem. Decision & Order at 14, Dkt. 57), the evidence overwhelmingly and without contradiction shows that Plaintiffs were arrested/prosecuted when other similarly situated individuals who engaged in speech not critical of the City (and often critical of Christ Church) were not. 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 the 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]).

Defendants wrongly seek to justify their disparate and selective enforcement of the City Ordinance against Plaintiffs by offering a laundry list of assertions that are either false or not relevant to the legal inquiry. Defendants list the following:

- 1) the culprit was identified by photo; 2) there were multiple witnesses to the crime (including both law enforcement witnesses and a civilian reporting party); 3)

physical evidence of the crime that was found on the culprit's person; 4) the culprits admitted the crime, 5) the degree of the crime involved 80+ stickers, on items that pose safety risks, on items that serve a function such as newspaper stands, a traffic box, historical district signs, and a post office box, and on items where there were no other postings present, such as certain poles, trees, benches, and trash cans; 6) where the crime was documented so thoroughly; or 7) where the harm caused by the crime was so extensive (obstruction to traffic devices, and clean-up time/efforts).

(Defs.' Opp'n at 18). Defendants' attempt to distinguish Plaintiffs from the countless number of others who were permitted to engage in political speech in this forum without punishment fails as a matter of law.⁴ Under the law, the "similarly situated" inquiry focuses on "*relevant*" similarity. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause . . . keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."); *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.'") (citation omitted). The "relevant similarity" here is posting signs or flyers on City property, which Defendants assert violates the City Ordinance (but apparently *only* if you are Plaintiffs criticizing the City). To violate the City Ordinance, there is no requirement that the "culprit [be] identified by photo," or that there be "multiple witnesses to the crime," or that "physical evidence of the crime [be found] on the culprit's person," or that the "the culprits admitted the crime." Moreover, the ordinance doesn't have a threshold number of postings required before its prohibitions are triggered. Indeed, the City prosecuted Plaintiff Rory Wilson for just one count of violating the ordinance, and the very week that his trial commenced, dozens of pro-abortion flyers (more than the 17 protest decals the City workers claimed to have

⁴ Perhaps Defendants should have added that *this* offense unlike others was committed (1) by two brothers named Rory and Seamus, (2) who were wearing face coverings resembling hijabs, (3) under the light of a waning gibbous moon, (4) on October 6, 2020. These unique tidbits are just as irrelevant as the ones provided by Defendants.

removed) were posted on City property throughout the City, yet no one was prosecuted for this. (SMF ¶¶ 79, 90). And the very suggestion that the City has no idea of the identity of the “culprits” who have in the past posted (and continue to post to this day) “advertising matter” on City property in violation of the ordinance is demonstrably false, as evidenced by the City’s own admissions. (SMF ¶ 28 [“For many postings (‘advertising matter’) that have appeared on City property, the identity of the individual responsible for the posting is or was available as the contact information is often included on the posting”]; ¶ 26 [“There were no arrests nor complaints from the City or its officials, including Defendants, for the postings related to Aspen the lost dog referenced in ¶ 25 even though the person responsible for posting the fliers (Jim Mital) was publicly known.”]). Finally, the asserted “harm” caused by the few decals that remained for the City workers to remove is demonstrably false: City workers only found 17 such decals when they went out later *that* day, and the undisputed evidence shows that Plaintiffs’ decals are simple to peel off, unlike other postings that require City workers to use razor blades to remove, and Plaintiffs’ decals were posted “at locations where other decals, stickers, and handbills were or have been posted in the past, including locations such as City light poles, parking poles, and signs.” (SMF ¶¶ 13, 17, 51, 55; Dixon Decl. ¶ 6 [showing images of workers scraping decals with razor blades], Dkt. 67-8).

Defendants’ erroneous argument that Plaintiffs were not “similarly situated” also serves as the foundation for their opposition to Plaintiffs’ selective prosecution claim (Defs.’ Opp’n at 20 [“As discussed, there are no others similarly situated.”]) and Plaintiffs’ equal protection claim (*id.* at 22 [“Here, as discussed above, there is no evidence that plaintiffs were treated differently than others similarly situated because no one else was similarly situated.”]). Accordingly, Defendants’ argument fails for these claims as well.

Defendants also assert that Plaintiffs' equal protection claim is a "class-of-one" claim. (*Id.* at 21). *It is not*. When the government treats an individual disparately "as compared to similarly situated persons and that such disparate treatment . . . burdens a fundamental right," which includes the First Amendment, such treatment violates the equal protection guarantee of the Fourteenth Amendment. *Believers v. Wayne Cnty.*, 805 F.3d 228, 256 (6th Cir. 2015) (en banc). This is what the undisputed facts reveal in this case. *See also Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[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."); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (discriminating among speech-related activities in a forum violates the Equal Protection Clause).

CONCLUSION

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 September 22, 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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