NO. 13-1635

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

BIBLE BELIEVERS; **RUBEN CHAVEZ**, aka RUBEN ISRAEL; **ARTHUR FISHER**; **JOSHUA DELOSSANTOS**,
Plaintiffs-Appellants,

v.

WAYNE, COUNTY OF; **BENNY N. NAPOLEON**, in his official capacity as Sheriff, Wayne County Sheriff's Office; **DENNIS RICHARDSON**, individually and in his official capacity as Deputy Chief, Wayne County Sheriff's Office; **MIKE JAAFAR**, individually and in his official capacity as Deputy Chief, Wayne County Sheriff's Office,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE PATRICK J. DUGGAN
CASE NO. 2:12-cv-14236-PJD-DRG

APPELLANTS' REPLY BRIEF

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

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVENUE NW
SUITE 201
WASHINGTON, D.C. 20006
(646) 262-0500

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

Defendants/Appellees ("Defendants") offer this court a tendentious (and at times false and misleading) view of the facts[1] and law in a feckless attempt to avoid the clear constitutional violations at issue—constitutional violations, which, if not remedied by this court, will imperil our first liberties. *Nesmith v. Alford*, 318 F.2d 110, 121 (5th Cir. 1963) (noting that our freedoms "will all be imperiled" and that "liberty is at an end" when police officers are permitted to arrest the victims of violence because their speech is deemed "offensive and provocative" by those engaging in the violence).

FACTUAL AND LEGAL ISSUES NOT IN DISPUTE

There are several fundamental issues to which Plaintiffs and Defendants agree. Therefore, these issues, which are set forth below, are *not* in dispute for purposes of this appeal.

[1] Defendants' assertion that "Plaintiffs submitted a highly edited and stylized video that was created in anticipation of litigation" is false. (*See* Defs.' Br. at 4). The video submitted by Plaintiffs was high-definition *segments* of the "raw" footage that Defendants submitted—video that is part of the record on appeal. (*Compare* R-20-2: Israel Decl. at ¶¶ 18-34, Ex. B [Video, Chapters 1-6], Pg ID 177-80, App., *with* R-28: Defs.' Ex. A [Video], App.). Plaintiffs' video was not edited or changed in any way from the "raw" footage. Additionally, Defendants complain that Plaintiffs highlighted (and noted that this court may take judicial notice of) the fact that the 2013 Arab Festival was canceled. (Defs.' Br. at 4 n.1). Plaintiffs' reasons for this are essentially twofold: (1) it completes the record; and (2) it explains why Plaintiffs did not pursue with this court a request for an immediate injunction.

- ***Plaintiffs' speech activity at the 2012 Arab Festival is fully protected by the First Amendment.*** (Defs.' Br. at 20 ["Counsel previously agreed that the activities at issue are protected by the Free Speech [C]lause of the First Amendment."]). Plaintiffs' *message* (even if exceedingly offensive to the listeners/viewers at the Arab Festival, Defendants, and even Defendants' counsel)[2] and the *manner* in which it was expressed (via message-bearing shirts, signs, banners, and even with a symbolic pig's head on a pole[3]) were permissible in the forum at issue.[4] (*See* Defs.' Br. at 12

[2] Defendants apparently believe that if they highlight to this court the statements that they deem most offensive (*see, e.g.*, Defs.' Br. at 10 [referring to Muhammad as a "liar, false prophet, murderer, child molesting pervert"], 14 [quoting Plaintiffs as stating, "Your prophet is nothing but an unclean swine, your prophet married a seven-year old girl, your prophet is a pedophile, your prophet teaches you not to believe in Jesus as the Christ"]) that this will convince the court that Plaintiffs should be punished for their speech. The problem, of course, with this tactic—one that apparently succeeded with the district court—is that the *very opposite is true*: such speech deserves the *greatest* protection under the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (citations omitted); *Street v. N.Y.*, 394 U.S. 576, 592 (1969) ("It is *firmly settled* that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") (emphasis added).

[3] No doubt Defendants' reason for highlighting the "decapitated pig's head on a spike with flies" (*see* Defs.' Br. at 14) is to evoke an emotional response and objection to Plaintiffs' speech. However, it must be noted that at no time did Defendants request that this symbolic item be put away or removed for any content-neutral reason (similar, for example, to how Defendants requested that Plaintiffs not use a bullhorn—a request to which Plaintiffs promptly complied, *see* n.4, *infra*).

[4] Defendants' argument, which misleadingly implies that Plaintiffs used a bullhorn throughout the festival to express their message, is a thinly-veiled attempt to create a *false* impression that the bullhorn was the basis (or even *a* basis) for suppressing

["Plaintiff's (sic) further admit that, '[t]here was no prohibition on carrying signs or banners or wearing t-shirts displaying expressive religious messages on the public sidewalks . . . ."]); *see Hill v. Colo.*, 530 U.S. 703, 714-15 & 710, n.7 (2000) (holding that "sign displays . . . are protected by the First Amendment" and stating that "[t]he fact that the messages conveyed by [the sign displays, which included "bloody fetus signs,"] may be offensive to their recipients does not deprive them of constitutional protection").

- ***The forum in which Plaintiffs engaged in their protected speech activity is a traditional public forum***. (Defs.' Br. at 23, n.9 [acknowledging that "[t]he nature of the forum is not at issue here"—it is a traditional public forum]); *see 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."); *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005) (holding that the city's "streets remained a traditional public forum" during an arts festival). And in a traditional public forum, Plaintiffs' right to express their message free from government interference is at its *highest* point in our

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Plaintiffs' speech. (*See, e.g.*, Defs.' Br. at 12, 14, 33 [stating "like the defendants in *Startzell* [*v. City of Phila.*, 533 F.3d 183 (3d Cir. 2008)], [Plaintiffs were] using a bullhorn to create a disruption"]). Indeed, contrary to Defendants' claim, the undisputed record evidence reveals that while Plaintiffs *initially* and only *briefly* (less than 14 minutes) used a bullhorn *upon their arrival*—and they did so based on the fact that they were permitted to use a bullhorn at the festival the year prior—when a Wayne County deputy instructed Plaintiffs not to do so, Plaintiffs immediately ceased using it. (R-28: Defs.' Ex. A [Video] at 14:38, App.). Consequently, the only "manner" of speech at issue here is the peaceful and silent expression of Plaintiffs' unpopular message via signs, slogans, and symbols.

constitutional landscape. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) ("[S]peakers can be excluded from a public forum *only* when the exclusion is *necessary* to serve a *compelling* state interest and the exclusion is *narrowly drawn* to achieve that interest.") (emphasis added); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) ("Constitutional concerns are heightened further where, as here, the [government] restricts the public's use of streets and sidewalks for political speech."); *see also Perry Educ. Ass'n v Perry Local Educators*, 460 U.S. 37, 55 (1983) ("[I]in a public forum . . . all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers. . . .").

- ***Defendants had a substantial law enforcement presence at the 2012 Arab Festival***. "The Wayne County Sheriff's Department provided thirty-four (34) Deputy Sheriffs and nineteen (19) reserve officers . . . . The force included a mounted unit with six (6) horses [and] a mobile command post. . . ." This force was "larger than the Sheriff's Department contribution to the World Series or the President of the United States when he visits Michigan" and "is considerably greater than the security force allocated to similar size Festivals. . . ." (Defs.' Br. at 9).

- ***The disruptive "counter protestors"—as Defendants themselves described the hecklers—were mostly minors***. (*See* Defs.' Br. at 12, n.7 ["Most of the counter protestors engaged in assaultive or disruptive behavior were minors . . . ."]).

- ***Despite the substantial law enforcement presence, Defendants' own police records reveal that Defendants gave two verbal warnings, temporarily detained two individuals, and issued one citation***. As Defendants set forth in their brief (citing Defendants' Post-Operation Report):

  - "Verbal warning to [a minor] for throwing bottle at protestors. Released to mother."
  - "Out of Custody [minor] . . . for assaulting protestors. Released to mother."
  - "Out of Custody to subject . . . for assaulting protestors (Bible Believers)."
  - "Citation C-481526 issued to subject . . . for disorderly conduct (disturbing the peace). Threw bottle at protestors (Bible believers)."
  - "Verbal warning given to Subject . . . for Disorderly. When asked to leave protestor's area from causing a disturbance, subject ignored reserve unit 3532. Unit 3532 attempted to escort subject from the area and subject yanked his arm away."

(Defs.' Br. at 13-14; *see* R-13-9: Defs.' Ex. I [Post-Operation Report], Pg ID 115-16). This is consistent with Plaintiffs' observations (*i.e.*, "[W]e did not observe the Wayne County deputies arresting the Muslim attackers and taking them away in handcuffs. . . .") and what the local media reported that day (referring to an interview with Defendant Jaafar): "No official arrests were made, and Jaafar and his team was please (sic) overall with the outcome."[5] (R-20-2: Israel Decl. at ¶¶ 32, 33, Pg ID 179-80).

[5] Consequently, Defendants' repeated, self-serving claim that there were "multiple arrests" (Defs.' Br. at 22; *see also* Defs.' Br. at 15 [claiming that the counter protestors "were arrested, cited, charged, and prosecuted"], 26 [claiming that "Defendants made a number of arrests"], 33 [claiming that Defendants "responded by

FACTUAL ISSUES THAT MUST BE CONSTRUED IN PLAINTIFFS' FAVOR

For purposes of this appeal, the court must construe the factual record and all reasonable inferences drawn from that record in Plaintiffs' favor, *Siggers-El*, 412 F.3d at 699, including the following:

- Defendants falsely claim that they "*asked* [Plaintiffs] to leave and safely *escorted* [them] out of the Festival." (Defs.' Br. at 15 [emphasis added], *see also* Defs.' Br. at 16 ["Appellees escorted Appellants away from the Festival."], 27 ["asking Plaintiffs-Appellants' (sic) to leave the festival was a precaution"], 28 [claiming that "Defendants did act to protect Plaintiffs and made the discretionary judgment call to do so by escorting Plaintiffs from the scene"]). Indeed, the video evidence demonstrates without dispute that ***the only reason why Plaintiffs halted their free speech activity and departed the festival area was because Defendants threatened to cite and arrest them for disorderly conduct if they did <u>not</u> do so***. (R-20-2: Israel Decl. at ¶¶ 27-30, Ex. B [Video at Chapter 4] [recording Defendant

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arresting a number of the attendees"], 37 [claiming that there were "numerous arrests [and] citations"]), is simply not true, as evidenced by Defendants' own reports and the video of the incident itself. And the reason for the lack of arrests—despite Defendants' threat to arrest Plaintiffs *en masse* if they did not halt their constitutionally protected activity and leave the area—is quite evident: Defendants sided with the counter protestors and Defendant Jaafar—the "*All American Muslim*" television star—did not want to upset his local Muslim community. (*See* R-20-2: Israel Decl. at ¶ 35, Pg ID 180). At a minimum, these facts—and the inferences drawn from them— must be construed in Plaintiffs' favor. *Siggers-El v. Barlow*, 412 F.3d 693, 699 (6th Cir. 2005) (requiring the reviewing court to consider the evidence and draw all reasonable inferences in favor of the non-moving party).

Richardson stating, "If you don't leave we are going to cite you for disorderly."], Pg ID 179, App.).

- ***Defendants acted with a retaliatory motive because they believe that Plaintiffs' message is offensive***. (*Compare* Defs.' Br. at 30-31 [incorrectly claiming that "[n]o such evidence in the record supports such an inference."]). In a 2012 televised segment of "*All American Muslim*," Defendants Jaafar and Richardson were on camera discussing the 2011 Arab Festival. During this conversation, Defendants Jaafar and Richardson discussed Plaintiffs' signs and banners, describing Plaintiffs' message as "offensive." (R-20-2: Israel Decl. at ¶ 35, Pg ID 180). Shortly after Plaintiffs arrived at the festival and continuing for approximately the first hour while they were expressing their message, Defendant Jaafar was repeatedly telling Defendant Richardson that Plaintiffs had to be removed and that he (Defendant Richardson) needed to do something about it. (R-20-2: Israel Decl. at ¶ 22, Pg ID 178). Defendants pejoratively referred to Plaintiff Bible Believers as "a radical group" that will "show up at the festival trying to provoke our staff in a negative manner and attempt to capture the negativity on video camera." (R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival], Pg ID 100). And while speaking with Plaintiff Israel at the 2012 Arab Festival, Defendant Richardson criticized Plaintiffs for their speech, motioning toward the Christians and stating, "Look at your people here. Look it, look it. This is crazy." (R-20-2: Israel Decl. at ¶

27, Ex. B [Video at Chapter 4], Pg ID 179, App.). *See, e.g., Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 824 (6th Cir. 2007) (reversing grant of qualified immunity in a case in which law enforcement officials temporarily detained abortion protestors and during the detention expressed disdain for the protestors' use of graphic images to convey their message and stating that "Supreme Court decisions . . . recognize that government actions may not retaliate against an individual for the exercise of protected First Amendment freedoms") (internal quotations and citation omitted).

ARGUMENT

I. Defendants' Threat to Arrest and Cite Plaintiffs for Disorderly Conduct Based upon the Crowd's Reaction to Plaintiffs' Speech Is Not a Content-Neutral Restriction on Speech.

The sum and substance of Defendants' argument is that their restriction on Plaintiffs' speech (*i.e.*, threatening to arrest and cite Plaintiffs for disorderly conduct if they did not cease their speech activity and leave the festival area) was "content-neutral" and "not an impermissible heckler's veto." (Defs.' Br. at 19-40). Consequently, Defendants seek to justify their restriction as a content-neutral, time, place, and manner restriction. (*See* Defs.' Br. at 23-24). Neither the facts nor the controlling law support Defendants' position.

Indeed, Defendants misapprehend the well-established "heckler's veto" doctrine. Defendants essentially argue that because *they* did not object to Plaintiffs'

message (an argument that itself is not supported by the record as noted previously and as discussed further below) and were only acting *in response* to the "crowds of people who were in disagreement" with that message (*see* Defs.' Br. at 13 [citing Defendants' own "Post-Operation Report"]), their restriction on Plaintiffs' speech was content-neutral. This argument is wrong as a matter of well-established law. When the government takes action to regulate speech based on a listener's or viewer's negative response or reaction to that speech, the government's actions *are content-based*. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). ("Listeners' reaction to speech is not a content-neutral basis for regulation."). No attempt to distinguish *Forsyth County* on its facts can change this conclusion. Indeed, this principle of law transcends the permit scheme at issue in *Forsyth County*.[6] *See, e.g.*, *Grider v. Abramson*, 180 F.3d 739, 749 (6th Cir. 1999) (reviewing the constitutionality of an emergency crowd control plan designed to enforce civic order in the city during a KKK rally and acknowledging that "the Supreme Court has dictated that government regulation of speech or assembly activities by speakers, motivated by anticipated *listener reaction* to the *content* of the implicated communication, is *not* content-neutral") (citing *Forsyth Cnty.*, 505 U.S. at 134-36);

[6] The claim—repeated here by Defendants [*see* Defs.' Br. at 29, n.11])—that Plaintiffs' reliance on *Forsyth County* as precedent for this *fundamental principle* of First Amendment jurisprudence is "disingenuous" demonstrates a troubling misapprehension of the law. As demonstrated in the text above, the "heckler's veto" doctrine is *not* limited to just fee-based, prior restraints as Defendants incorrectly assert. (*See* Defs.' Br. at 29, n.11; *see also* R-34: Op. & Order at 17, Pg ID 311).

Startzell v. City of Phila., 533 F.3d 183 (3d Cir. 2008) (reviewing the constitutionality of the police response to counter protestors who were engaging in disruptive conduct at an "OutFest" and acknowledging that "[a] heckler's veto is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience" and further stating that the heckler's veto analysis "may apply to situations where police restrict speech that is taking place") (citing, *inter alia*, *Forsyth Cnty.*, 505 U.S. at 134-35).[7]

Indeed, the "heckler's veto" doctrine was explained in great detail in *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780 790 (9th Cir. 2008), a case in which the court held that the Los Angeles County Sheriff Department's threatened application of a criminal statute to restrict the plaintiffs' speech (displaying aborted baby pictures on the sides of trucks that drove on the public streets adjacent to a middle school and that caused a disruption within the school) was unconstitutional because the sheriffs were acting in response to the adverse reaction caused by the plaintiffs' controversial message. The court explained the "heckler's veto" doctrine as follows:

> The disruptions caused by the Plaintiffs' conduct were all a result of the students' reactions to Plaintiffs' message. Assistant Principal Roberts stated that he saw two or three girls cry and that he heard several angry boys discuss throwing rocks at Plaintiffs' truck. Roberts also stated that the faculty had more difficulty than normal getting children into classes.

[7] It should not go unnoticed that Defendants rely on *Grider* and *Startzell* as support for their speech restriction here. (*See* Defs.' Br. at 25, 26, 33).

There is some evidence that students discussed Plaintiffs' display of images of first-term aborted fetuses during class time. Finally, the children did not go into the school as quickly as usual. Some students stopped in the street momentarily and stared at the truck, causing traffic congestion. These incidents were all reactions to the message displayed on Plaintiffs' truck.

In *Forsyth County v. Nationalist Movement*, [505 U.S. 123, 134 (1992)], the Supreme Court emphasized that "[l]isteners' reaction to speech is not a content-neutral basis for regulation"—in other words, the First Amendment does not permit a heckler's veto. *Forsyth County* struck down an ordinance as unconstitutionally content-based because the statute based parade fees on the estimated cost of maintaining public order during the event. Because the size of the fee "depend[ed] on the administrator's measure of the amount of hostility likely to be created by the speech based on its content," the ordinance unconstitutionally burdened speech that was "***unpopular with bottle throwers***." *Id*.

As the cases cited above indicate, *Forsyth County* was not the first or only case to hold that a regulation that depends upon listeners' reaction to speech is not a content-neutral regulation. In *Cox v. Louisiana*, [379 U.S. 536 (1965)] for example, the Supreme Court held that police could not justify shutting down a civil rights demonstration on public sidewalks as a breach of the peace on the ground that there was a "fear of violence . . . based upon the reaction of the group of white citizens looking on from across the street." 379 U.S. at 550. Like *Forsyth County*, *Cox* rested on the premise that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id*. at 551 (quoting *Watson v. City of Memphis*, [373 U.S. 526, 535 (1963)]).

* * * *

Here, *the government did not prospectively gauge the effect of the message* (and ban it accordingly), *but instead waited for, and then responded to, listeners' reactions*. ***Whether prospectively, as in Forsyth County, or retrospectively, as in the case before us, the government may not give weight to the audience's negative reaction***.

To account for *Cox* and similar cases, our inquiry must focus on the reason for the government's restriction of speech. If listeners react to speech based on its content *and the government then ratifies that*

reaction by restricting the speech in response to listeners' objections, then the restriction is content-based. *Cf. Ovadal v. City of Madison*, 469 F.3d 625, 630 (7th Cir. 2006) (holding that the removal of a protester carrying large signs on busy highway overpass is content-based if his "*message* angered drivers who then reacted and were distracted from the task of driving safely" but content-neutral if his "*presence* on that day and under those driving conditions created a 'spectacle' that led some drivers to be distracted from the task of safely navigating the Beltline") (emphases in original).

Nor is the reaction of listeners a secondary effect of speech that can be regulated under *City of Renton v. Playtime Theatres*, Inc., [475 U.S. 41, 46 (1986)]. *See Boos v. Barry*, [485 U.S. 312, 321(1988)] ("The emotive impact of speech on its audience is not a 'secondary effect.'"); *see also Crawford v. Lungren*, 96 F.3d 380, 385 (9th Cir. 1996) ("The Supreme Court has defined secondary effects as being correlated with, *but not directly a consequence of*, the impact of the speech.") (emphasis added).

Section 626.8, if it applied to Plaintiffs' conduct in this case, would appear to be just the kind of accession to the heckler's veto outlawed by the case law. *Plaintiffs' speech was permitted until the students and drivers around the school reacted to it, at which point the speech was deemed disruptive and ordered stopped under § 626.8. This application of the statute raises serious First Amendment concerns*.

We are mindful that this case involves a special circumstance, the presence of children. In particular, the evidence suggests that children were distracted by the Plaintiffs' pictures, and this distraction perhaps posed a danger as students crossed the streets around the school. Children may well be particularly susceptible to distraction or emotion in the face of controversial speech, and may not always be expected to react responsibly. These considerations, among others, might conceivably support the proposition that the heckler's veto principle is less sweeping where the targeted audience is children.

There is, however, no precedent for a "minors" exception to the prohibition on banning speech because of listeners' reaction to its content. It would therefore be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children. . . .

> Unless we create a new exception to the "heckler's veto" doctrine (which we do not do), applying § 626.8 to Plaintiffs' speech would be unconstitutional.

Ctr. for Bio-Ethical Reform, Inc., 533 F.3d at 788-90 (footnotes omitted) (emphasis added). Thus, similar to the Los Angeles County Sheriff Department's unconstitutional application of a California criminal statute to restrict the plaintiffs' speech in *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Department*, Defendants' threat to arrest and cite Plaintiffs for disorderly conduct based upon the crowd's adverse and criminal reaction (*i.e.*, Plaintiffs' speech was "unpopular with bottle throwers") is similarly unconstitutional. *See also Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.") (citations and quotations omitted).

This fundamental principle of law was also reinforced by this circuit more than a decade before *Forsyth County* (but after *Cox*) in *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975), a case in which the court described the proper police response when faced with a situation in which an angry mob of hecklers opposes a speaker's message: "A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take

reasonable action to protect . . . persons exercising their constitutional rights." And in *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973), the court observed that "the Supreme Court has often emphasized in related contexts [that] state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights."[8] *See also Dunlap v. City of Chicago*, 435 F. Supp. 1295, 1298 (N.D. Ill. 1977) ("Section 1983 imposes an affirmative duty upon police officers to protect speakers who are airing opinions which may be unpopular.").

In the final analysis, Defendants' order to Plaintiffs that they cease their protected speech activity in this traditional public forum under threat of arrest for

[8] The cases relied upon by Defendants do not reverse nor alter this well established and fundamental principle of First Amendment jurisprudence. *See, e.g., Startzell v. City of Phila.*, 533 F.3d 183 (3d Cir. 2008) (restricting disruptive conduct at an "OutFest"); *Potts v. City of Lafayette*, 121 F.3d 1106 (7th Cir. 1997) (upholding an operations order targeted at the "secondary effects" of bringing personal items into a KKK rally to prevent injury and further noting that "[n]othing in the record suggests that the [police officials] disagreed with the content of the message of the KKK or other groups expected to attend the rally"). In *Grider v. Abramson*, 180 F.3d 739 (6th Cir. 1999), for example, the court upheld an emergency crowd control plan that included, *inter alia*, the use of metal detectors and crowd control barricades to prevent potential violence that might erupt while two competing demonstrations, one of which was a KKK rally, were taking place. This emergency plan did not license the police to arrest the scheduled speakers at these rallies because the listeners in the crowd might disagree with the speaker's message. Indeed, the security measures were put in place in large measure to *protect* the speakers. In sum, cases upholding restrictions that applied to individuals who were engaging in (or might engage in) disruptive or impermissible conduct *on the basis of the conduct itself* (a content-neutral restriction) do not license the government to restrict the peaceful exercise of free speech based on the *disruptive conduct of the listener or viewer* who finds the speech offensive (a content-based restriction).

disorderly conduct based on the listener's reaction to that speech is a content-based restriction[9] that cannot withstand strict scrutiny in violation of the First Amendment.[10]

II. Defendants Violated the Free Exercise Clause and the Equal Protection Clause.

While Plaintiffs fully addressed their free exercise and equal protection claims in their opening brief (*see* Appellants' Br. at 25-28, 43-44), a few comments in reply

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[9] In fact, the restriction is best viewed as viewpoint based, which is the most egregious form of content discrimination. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Defendants claim that "[t]he Festival is replete with examples of Christians and non-Muslim groups that peacefully engage in expressing their message without any interference by" Defendants. (Defs.' Br. at 20; *see also* Defs.' Br. at 46 [noting that Defendants did not "take similar action against peaceful Christian religious speech and expressive activities"]). However, "[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). "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." *Rosenberger*, 515 U.S. at 829 (emphasis added). Consequently, when speech "fall[s] within an *acceptable subject matter* otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) (emphasis added).

[10] To satisfy strict scrutiny, Defendants bear the burden of "prov[ing] that the proposed alternatives will not be as effective as the challenged [restriction]." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). "[T]o ensure that speech is restricted no further than necessary . . . the court should ask whether the challenged [restriction] is the least restrictive means among available, effective alternatives." *Id*. Here, Defendants could have provided—*but refused to*—an adequate law enforcement presence to deter the hecklers, and Defendants could have actually arrested (*i.e.*, placed in handcuffs and physically removed from the festival)—*but refused to*—the most disruptive hecklers. Instead, Defendants threatened to arrest Plaintiffs and all of their companions if they didn't leave the area. In short, Defendants' actions do not survive strict scrutiny—the highest level of scrutiny under the law—by any reasonable man's measure.

are warranted in light of Defendants' assertions.

As Defendants admit, "The Festival is replete with examples of Christians and non-Muslim groups that peacefully engage in expressing their message *without any interference* by" Defendants. (Defs.' Br. at 20 [emphasis added]; *see also* Defs.' Br. at 46 [noting that Defendants did *not* "take similar action against peaceful Christian religious speech and expressive activities"]). This admission, borne out by the facts, demonstrates that Defendants indeed targeted Plaintiffs' "religious speech and expressive activities" for disfavored treatment in violation of the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (holding that the "covert suppression of particular religious beliefs" and the targeting of disfavored religious conduct for "distinctive treatment" violate the Free Exercise Clause, and such treatment "cannot be shielded by mere compliance with the requirement of facial neutrality").

Similarly, by permitting certain "religious speech and expressive activities" in this traditional public forum, but prohibiting Plaintiffs' "religious speech and expressive activities" because they are considered offensive and unacceptable to the community, Defendants also violated the Equal Protection Clause. *Police Dep't of the City of Chicago 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 public forum violates the Equal Protection Clause).

III. The County Is Liable for the Constitutional Violations.

The constitutional violations at issue are *not* the product of two rogue deputies operating independently and without County authority. Rather, County policy and practice authorized Defendants Richardson and Jaafar to do precisely what they did here: threaten to arrest and cite Plaintiffs for engaging in their speech activity because a hostile crowd objected to Plaintiffs' message, thereby causing a disturbance. In short, County policy and practice were the "moving force" behind these constitutional violations. *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978) (holding that municipalities are liable under § 1983 if municipal policy or custom was the "moving force" behind the alleged unconstitutional action); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986) ("*Monell* is a case about responsibility.").

Indeed, municipal policy or practice can be *applied* in a manner that violates the Constitution such that the municipality is liable. As this court noted in a case relied upon by Defendants, "[T]he constitutionality of a law enforcement measure . . . taken in furtherance of a criminal justice enforcement agency's inherent public safety responsibilities, *must be evaluated relative to the actual impact that measure had upon a particular plaintiff*." *Grider*, 180 F.3d at 748 (emphasis added).

The order forcing Plaintiffs to cease their constitutionally protected activity under threat of arrest was issued pursuant to County "policy" that was in effect at the 2012 Arab Festival. This fact is evidenced by (1) the County's agreement—signed on behalf of the County by Defendant Napoleon's authorized representative—to provide law enforcement for the Arab Festival pursuant to, *inter alia*, the "rules and regulations of the [American Arab Chamber of Commerce] *and* the Wayne County Sheriff's Department," (R-20-3: Muise Decl. at ¶ 3, Ex. A [Agreement] [emphasis added], Pg ID 191; R-1: Compl. at ¶ 28, Pg ID 8; R-8: Answer at ¶ 28 [admitting facts], Pg ID 40); (2) its stated mission to "keep the peace" at the festival "in the event there is a disturbance," (R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival], Pg ID 100); (3) its assertion in its Arab Festival "Operations Plan"—a plan submitted to and thus ratified by Defendant Napoleon—that Plaintiff Bible Believers is a "radical group" that intends to engage in provocative conduct at the Arab Festival, (R-13-5: Defs.' Ex. E [Wayne County Sheriff's Office Operations Plan for Arab Festival], Pg ID 100); (4) its Corporation Counsel's warning to Plaintiffs that if their speech has "the tendency to . . . disturb the peace" then Plaintiffs will be held "criminally accountable," and further warning Plaintiffs that the County "cannot protect everyone from the foreseeable consequences that come from speech that is designed and perhaps intended to elicit a potentially negative reaction,"

(R-13-8: Defs.' Ex. H [County's Response], Pg ID 113);[11] and (5) the County's similar actions during the 2011 Arab Festival in which it failed to protect Plaintiffs' right to free speech and instead reinforced the actions of those who engaged in violence in response to Plaintiffs' message, (R-20-2: Israel Decl. at ¶¶ 9-13, Ex. A [Letter to Wayne County], Pg ID 175-76, 182-84).

In sum, the evidence demonstrates without any reasonable dispute that it was the "execution" of the County's policy and practice that inflicted the constitutional injuries at issue here. (*See* Defs.' Br. at 42 [citing *Monell*, 436 U.S. at 694 & *Okla. City v. Tuttle*, 471 U.S. 808, 823 (1985), for the proposition that a municipal is liable "when execution of a government's policy . . . inflicts the injury" and there is "[an] affirmative link between the policy and the particular constitutional violation alleged"]).[12]

Moreover, in addition to the municipal liability discussed above, declaratory and injunctive relief against the County (and its relevant law enforcement officials

[11] The Corporation Counsel's letter was written on behalf of—and in response to a letter addressed to—Defendant Napoleon in his official capacity as "Wayne County Sheriff" and Robert A. Ficano in his official capacity as "Wayne County Executive." (*See* R-20-2: Israel Decl. at ¶¶ 12-13, Ex. A [Letter to Wayne County], Pg ID 175-76, 182-84; R-13-8: Defs.' Ex. H [County's Response], Pg ID 113).

[12] *Okla. City v. Tuttle*, 471 U.S. 808 (1985), makes it clear that the "policy" at issue need not be facially unconstitutional to be the "moving force" that causes the constitutional injury in order to impose municipal liability. *See id*. at 824 ("But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.").

sued in their official capacities, such as its Sheriff) for threatening to enforce a criminal law (disorderly conduct) that halted Plaintiffs' speech activity is entirely proper and warranted. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452 (1974) (permitting an as applied constitutional challenge to a Georgia criminal statute to proceed against "the Solicitor of the Civil and Criminal Court of DeKalb County [and] the chief of the DeKalb County Police," among others, in a case in which the petitioner was *threatened* by the police with arrest for violating the criminal trespass law if he did not stop distributing anti-Vietnam War handbills on the exterior sidewalk of a Georgia shopping center). Indeed, there is no question that Plaintiffs' speech cannot be criminally punished as disorderly conduct as a matter of clearly established constitutional law. *See Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

CONCLUSION

Plaintiffs respectfully request that the court reverse the district court's grant of Defendants' motion for summary judgment, reverse the court's denial of Plaintiffs' cross-motion for summary judgment, and enter judgment in Plaintiffs' favor.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

/s/ David Yerushalmi
David Yerushalmi, Esq.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5,976, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

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