UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CENTER FOR BIO-ETHICAL REFORM, INC.; *et al.*,

Plaintiffs,

v. No. 1:13-cv-00581-RJA

DENNIS R. BLACK, in his official capacity as Vice President for University Life & Services, State University of New York at Buffalo ("SUNY-Buffalo"); *et al.*,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs Center for Bio-Ethical Reform, Inc. ("CBR"), Gregg Cunningham, Darius Hardwick, Christian Andzel, Matthew Ramsey, and UB Students for Life (collectively referred to as "Plaintiffs"), by and through their undersigned counsel, hereby file this response to Defendants' objections (Doc. No. 19) to the magistrate judge's Report and Recommendation (Doc. No. 18), which properly recommended that the court deny Defendants' motion to dismiss (Doc. No. 11) (hereinafter "Defendants' motion"). *See* Fed. R. 72(b)(2) ("A party may respond to another party's objections within 14 days after being served with a copy.").

As demonstrated further below, the court should reject Defendants' objections, accept the well-reasoned Report and Recommendation of the magistrate judge, and deny Defendants' motion to dismiss. Similar to Defendants' original motion, Defendants' objections demonstrate a misapprehension of the relevant facts and law. Indeed, as alleged in the Complaint (Doc. No. 1) and demonstrated more fully in Plaintiffs' memorandum of law in opposition to Defendants' motion to dismiss (Doc. No. 14), Defendants have an affirmative duty under § 1983 to protect the *free speech rights* of those individuals engaged in First Amendment protected activity and are likewise forbidden from condoning and ratifying the actions of a raucous mob *intent on suppressing those free speech rights*, which is precisely what happened in this case.

I. The Report and Recommendation Properly Found that Defendants' Actions Amounted to a Denial of Plaintiffs' Right to Free Speech.

In their first objection, Defendants object to the portion of the Report and Recommendation in which the magistrate judge found that the Complaint properly alleges a claim under the First Amendment. (Defs.' Objections at 3). More precisely, Defendants object to the magistrate judge's conclusion that Plaintiffs:

> had communications with defendants that indicated that defendants were content to let the counter-protestors do what they could not do directly, because they did not like the content of the GAP exhibit. Plaintiffs thus have pled that what defendants did or allowed equated to a denial of the use of the reserved area, since their message was obstructed as much as if defendants had forbidden the GAP exhibit outright.

(Defs.' Objections at 3 [citing Report & Recommendation at 16]). Defendants complain that "the factual conclusion of the first sentence does not logically lead to the legal conclusion of the second sentence. This is because the R&R assumes a duty on the part of the defendants that does not exist under First Amendment law." (Defs.' Objections at 3). Defendants are mistaken. It is a clearly established principle of constitutional law that "[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*." *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (emphasis added); *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973) ("[T]he 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*.") (emphasis added); *see also Cox v. La.*, 379 U.S. 536 (1965) (holding that constitutional rights may not be denied simply because of hostility to their assertion or exercise). Consequently, "Section 1983 imposes an *affirmative duty* upon police officers to protect speakers who are airing opinions which may be unpopular." *Dunlap v. City of Chicago*, 435 F. Supp. 1295, 1298 (N.D. Ill. 1977) (emphasis added); *Manfredonia v. Barry*, 401 F. Supp. 762, 767-68 (E.D.N.Y. 1975) ("The federal Civil Rights Act, 42 U.S.C. § 1983, 'imposes on the states and their agents certain obligations and responsibilities. A police officer has a duty not to ratify and effectuate a heckler's veto nor may he join . . . [those] intent on suppressing ideas.'") (quoting *Glasson*, 518 F.2d at 899); *see generally Peck v. United States*, 470 F. Supp. 1003, 1016 (S.D.N.Y. 1979)

(noting that 42 U.S.C. § 1983 does not apply to claims against federal officials but acknowledging that the case law "speak[s] of a duty of local law enforcement officers owed to private citizens *to protect them in the exercise of their constitutional rights of expression*" under § 1983 "inasmuch as *failure to protect would be state action interfering with plaintiff's constitutional rights*") (emphasis added). And a "sheet holder" can silence and thus interfere with the right to free speech as much as a "bottle thrower." *See generally Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135 (1992) (striking down a county ordinance that assessed fees based on the content of speech, noting that "[t]hose wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit").

Here, as the allegations in the Complaint make clear (and as found by the magistrate judge), Defendants affirmatively condoned and ratified the disruptive conduct of a raucous mob of pro-abortion counter-protestors who were intent on suppressing Plaintiffs' speech based on the anti-abortion viewpoint expressed by Plaintiffs' message. Defendants' failure to protect Plaintiffs' constitutional right of expression violates the First Amendment.

Indeed, Defendants' objection creates a straw man by mischaracterizing "the legal proposition [at issue]," describing it as follows: "that State actors have a duty to intervene between contesting protestors, so that the speech of both can be projected," citing *Startzell v. City of Phila.*, 533 F.3d 183, 198 (3d Cir. 2008). (Defs.' Objections at 3). If the counter-protestors wanted *to engage in free speech activity* outside of the Student Union while Plaintiffs were permitted to engage in their speech activity, Plaintiffs would have no objection. Thus, contrary to Defendants' claim, Plaintiffs are not seeking to "exclude the counter-protestors from [engaging in 'contrary' or 'antagonistic' viewpoints in] the area around the [GAP display]." (*See* Defs.' Objections at 4; *see also* Defs.' Objections at 4-5 [mischaracterizing the claim as follows:

"Simply put, alleging that the defendants **could** have separated the counter-protestors from the plaintiffs, does not mean that they **should** have done so. This is especially so when there are no threats to the public order"]). As the alleged facts demonstrate, the relevant acts of the counter-protestors did *not* involve the exercise of free speech (thus, this is not simply a matter of "separating" groups expressing competing messages). Rather, the pro-abortion counter-protestors were engaging in disruptive acts designed to silence Plaintiffs' speech—and they had Defendants' blessing to do so. Indeed, it is axiomatic that "the right of free speech . . . does not embrace a right to snuff out the free speech of others." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969); *see also Startzell*, 533 F.3d at 198 ("The right of free speech does not encompass the right to cause disruption, and that is particularly true when those claiming protection of the First Amendment cause actual disruption of an event covered by a permit."); *see also Grider v. Abramson*, 180 F.3d 739, 751 (6th Cir. 1999) (noting that "the formally slated speakers [*i.e.*, those who had a permit to speak at the rally] possessed a *protected interest* in addressing their audience under orderly and audible conditions") (emphasis added).

Thus, not only do Defendants have the right "to prevent counter-protestors from disrupting or interfering with the message of the permit-holder," (Report & Recommendation at 15), they have an affirmative duty to protect the permit-holder (*i.e.*, Plaintiffs) *in the exercise of his or her constitutional right of expression*—a right that was being violated with impunity *precisely because* Defendants objected to Plaintiffs' message[1] and were thus not going to lift a finger to protect Plaintiffs' free speech rights. And worse yet, Defendants refused to lift a finger to stop the counter-protestors disruptive behavior and thus protect Plaintiffs' speech activity even

[1] "In light of the resistance university officials were showing toward Plaintiffs' speech activity, it was evident that the university did not approve of Plaintiffs' message." (Compl. at ¶ 33; *see also* Compl. at ¶¶ 28-32 [setting forth facts demonstrating that Defendants disfavored Plaintiffs' message]).

though the University has a policy prohibiting the very type of conduct engaged in by the counter-protestors.[2] Consequently, as the magistrate judge properly concluded, "Plaintiffs . . . have pled that what defendants did or allowed equated to a denial of the use of the reserved area, since their message was obstructed as much as if defendants had forbidden the GAP exhibit outright." (Report & Recommendation at 16).

In their objection, Defendants also confuse Plaintiffs' First Amendment claim with a distinct Due Process Clause claim, which Plaintiffs have not alleged. Thus, Defendants claim that *Startzell* "does not stand for the proposition that, in the absence of violence or intimidation, State actors have a **duty** to prevent such disruption." (Defs.' Obj. at 4). Consequently, Defendants appear to concede that if there were "violence or intimidation," then Defendants would have a duty to protect the free speech rights of Plaintiffs. But the duty owed under §1983 and the First Amendment *is the protection of the right to free speech*, *see supra*, not simply the protection from physical danger, as is the case with the "state-created danger" doctrine, which arises under the Due Process Clause and ***not*** the First Amendment. *See, e.g., Dwares v. City of N.Y.*, 985 F.2d 94, 99 (2d Cir. 1993) (holding that the individual officers could be liable under the Due Process Clause for the violence inflicted against the plaintiff because the officers, *inter alia*, "aided and abetted the depravation of Dwares's civil rights by allowing him to be subjected to prolonged assault *in their presence without interfering with the attack*") (emphasis added); *see also Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) (permitting a due process claim to go forward against the chief of police in a case in which a woman was killed by her estranged

[2] University policy provides as follows: "All members of a University community must share the responsibility for maintaining a climate in which diverse views can be expressed freely and without harassment. The University at Buffalo has traditionally supported the right of its students, faculty and staff to peaceful protest. Always implicitly is the understanding that demonstrators will not interfere with or violate the rights of others." (Compl. at ¶ 36).

husband after the chief had directed his officers to ignore her pleas that they stop the husband, thereby resulting in "an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community"). Consequently, similar to First Amendment claims arising under § 1983, *see Peck*, 470 F. Supp. at 1016 (acknowledging that under § 1983 a "failure to protect would be state action interfering with plaintiff's constitutional rights"), the "state-created danger" doctrine holds that the refusal of a state actor to prevent the harmful acts of others, particularly when those acts occur in the presence of the state actor, *is an affirmative act by the state* sufficient to trigger liability under the Constitution. However, the harmful acts prohibited under the First Amendment are acts that deprive a private citizen of the right to freedom of speech—and those acts need not be physical acts of violence, as is the case with claims arising under the Due Process Clause, which is not at all concerned with free speech.

Indeed, accepting Defendants' view of the law (*i.e.*, that only "violence or intimidation"[3] can trigger a duty to protect a private citizen's right to free speech) would permit—and in fact encourage—the loudest, most obstructionist heckler to silence any message that he disliked with impunity, including a message being conveyed by a speaker who acquired a permit to conduct the free speech activity, as in this case.[4] But thankfully, that is not the law (nor should it be).

[3] Even under Defendants' intimidation and violence theory, why wouldn't the counter-protestors' actions, which were quite confrontational, qualify as intimidation? Moreover, under a First Amendment claim (not Due Process Clause), what case law or logic supports Defendants' litmus test of violence and intimidation? Speech, and more particularly, free speech, is eliminated as much, if not more so, by obstruction and disruption as by violence and intimidation. Violence and intimidation often provoke political speech; obstruction and disruption physically prevent it. Defendants fail to explain their logic because there is none.

[4] This is precisely the reason why an injunction is required here. Plaintiffs will not expend the time, energy, and resources necessary to engage in their free speech activity on campus through the GAP display if University officials are going to allow pro-abortion counter-protestors to disrupt, obstruct, and silence Plaintiffs' message. Consequently, as a result of Defendants' unlawful actions, which have had a chilling effect on Plaintiffs' speech, Plaintiffs are currently suffering irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First

As alleged in the Complaint, Defendants—specifically including the University's chief of police—ignored Plaintiffs' *repeated* pleas to protect their free speech rights by stopping the disruptive conduct of the counter-protestors. (Compl. at ¶¶ 39-47, 49). In fact, the University police were under orders to allow the counter-protestors to silence Plaintiffs' speech activity.[5] (*See* Compl. at ¶ 41).

In sum, permitting, condoning, and thus ratifying the counter-protestors' disruptive conduct, which was designed to block Plaintiffs' signs and thus silence Plaintiffs' message, is no different than if Defendants themselves tore down the signs. The outcome is precisely the same: Defendants did not like Plaintiffs' message from the very beginning and wanted to hide the graphic signs from viewers. (*See* Compl. at ¶¶ 28-33 [threatening litigation to permit the GAP display in the first instance]). Defendants achieved their illicit objective by breaching their constitutional duty to protect Plaintiffs' right to freedom of speech and thus siding with the pro-abortion counter-protestors, who were violating the law and violating with impunity the University's own policy regarding the rights of students to engage in free speech activity on campus without interference. Indeed, Defendants took affirmative action to direct the police officers at the scene to ignore Plaintiffs' pleas for protection (*see* Compl. at ¶¶ 39-47, 49),

---

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[5] As stated in the Report & Recommendation:

> To summarize numerous paragraphs in the complaint, plaintiffs had repeated and sometimes heated communications with campus police to complain that the counter-protestors were interfering with their speech and that the police were doing nothing about it. The police, and defendants Tiberi and Schoenle in particular, repeatedly declined to take any action against the counter-protestors. "In fact, a university police officer told Plaintiff Ramsey that the officers were under orders not to stop the protestors' disruptive conduct."

(Report & Recommendation at 5).

thereby depriving Plaintiffs of their right to freedom of speech guaranteed by the First Amendment.

II. The Report and Recommendation Properly Found that Defendants' Actions Amounted to a Denial of Plaintiffs' Right to Equal Protection.

. In their second objection, Defendants object to the portion of the Report and Recommendation in which the magistrate judge found that the Complaint properly alleges a claim under the Equal Protection Clause of the Fourteenth Amendment. (Defs.' Objections at 8). Defendants' objection is incoherent, concluding that "the Complaint fails to allege that the plaintiffs were treated differently from any similarly situated group." (Defs.' Objections at 9).

The relevant and applicable principle of law was articulated by the U.S. Supreme Court in *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), in which the Court stated that "under 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." *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).

Here, the University has a clearly stated policy that applies to the forum at issue: "All members of a University community must share the responsibility for maintaining a climate in which diverse views can be expressed freely and without harassment. The University at Buffalo has traditionally supported the right of its students, faculty and staff to peaceful protest. Always implicit is the understanding that demonstrators *will not interfere with or violate the rights of others*." (Compl. at ¶ 36) (emphasis added). By permitting the pro-abortion protestors to interfere with and silence Plaintiffs' anti-abortion message, Defendants deprived Plaintiffs of their right to freely engage in their speech activity in this forum—*which Plaintiffs reserved*—

based on the viewpoint of their speech. Not only does this violate the Free Speech Clause of the First Amendment, but it also violates the Equal Protection Clause of the Fourteenth Amendment.

Indeed, in *Dwares v. City of N.Y.*, 985 F.2d 94, 99 (2d Cir. 1993), the court concluded that the plaintiff alleged sufficient facts for a violation under the Equal Protection Clause where the defendant officers intentionally permitted the plaintiff to be beaten and thus denied the plaintiff protection "because of the plaintiff's expression of ideas which are otherwise lawfully protected activity under the First Amendment." (internal quotations and citation omitted). Similarly, in this case, Defendants intentionally permitted the counter-protestors to impermissibly obstruct and silence Plaintiffs' speech and thus denied Plaintiffs protection—protection which is not only mandated by the First Amendment and §1983, but by the University's very own speech policy—"because of [Plaintiffs'] expression of ideas which are otherwise lawfully protected activity under the First Amendment" in violation of the Equal Protection Clause. Thus, by opening the forum (the Student Union) in general to student speech activity (*see* Compl. at ¶ 26), and allowing this activity to take place without obstruction or interference (*see* Compl. at ¶ 36), but then refusing to allow Plaintiffs to engage in their speech activity in this forum without obstruction or interference, Defendants violated the equal protection guarantee of the Fourteenth Amendment. *See Police Dep't of the City of Chicago*, 408 U.S. at 96.

CONCLUSION

The court should deny Defendants' motion to dismiss the Complaint.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.*
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
(734) 635-3756

/s/ David Yerushalmi
David Yerushalmi, Esq.
640 Eastern Parkway
Suite 4C
Brooklyn, New York 11213
dyerushalmi@americanfreedomlawcenter.org
(646) 262-0500

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, 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.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)