No. 21-2158

In the United States Court of Appeals for the Fourth Circuit

ST. MICHAEL'S MEDIA, INC.,

Plaintiff–Appellee,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; JAMES SHEA; BRANDON M. SCOTT; AND SMG;

Defendants–Appellants.

On Appeal from the U.S. District Court,
District of Maryland
No. 1:21-cv-02337-ELH

ANSWERING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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No. 21-2158 Caption: St. Michael's Media, Inc. v. Mayor and City Council of Baltimore et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

St. Michael's Media, Inc.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Marc J. Randazza Date: October 19, 2021

Counsel for: St. Michael's Media

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STATEMENT OF THE ISSUES

1. Did the District Court err in failing to find that the MECU Pavilion is a "non public forum?"

2. Did the District Court err in finding that Appellants possessed and exercised unfettered discretion in cancelling Appellee's planned November 16, 2021 rally at the MECU Pavilion?

3. Did the District Court err in finding that Appellants engaged in viewpoint-based discrimination in cancelling Appellee's planned rally when the only record evidence for doing so was the alleged threat of counter-protesters engaging in violence due to the viewpoints of Appellee and two of the planned speakers for the rally?

4. Did the District Court err in finding that Appellants failed to satisfy strict scrutiny in cancelling Appellee's planned rally?

STATEMENT OF THE CASE

1.0 Factual Background

This case is about a group of people who want to hold a prayer rally in a public forum.[1] The City of Baltimore owns that forum. The City government objects to two of the speakers at the prayer rally. Therefore, the City of Baltimore has done everything in its power to prohibit the prayer rally, using shifting rationales that all violate the First Amendment. The District Court saw the City's conduct for what it was and imposed a Preliminary Injunction that permits the rally to go forward. This Court should uphold that injunction.

That group of people is St. Michael's Media ("St. Michael's") – a Catholic organization, which often criticizes the Church's leadership. Two of its main disputes with the Church are that it has not done a good

[1] One of the issues for this Court is "what kind of forum" is it. Appellee takes the position that it is a designated public forum. *See Sons of Confederate Veterans v. City of Lexington*, 722 F.3d 224, 230 (4th Cir. 2013) (noting that a designated public forum "is a nonpublic government site that has been made public and 'generally accessible to all speakers'") (quoting *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 382 (4th Cir. 2006)); *see also Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). (Foundational case.)

job of caring for victims of sexual abuse by priests and that it is relatedly financially corrupt. (A.A. 10, ¶8.)

In November of 2018, The United States Conference of Catholic Bishops ("the Bishops" or "USCCB") held its General Assembly at the Baltimore Waterfront Marriott. St. Michael's wished to protest the Assembly in a peaceful and prayerful manner. And it did. Peacefully.

The MECU Pavilion[2] (also known as Pier VI) is an outdoor amphitheater designed to hold 4,600 people. (S.A. Vol. 1 at 498.)[3] The Pavilion is across a channel of water from the Marriott. (A.A. 9, ¶9; S.A. Vol. 1 at 435.) Given the proximity to the Marriott, and the natural barrier between the two facilities, St. Michael's identified the Pavilion as the ideal place, indeed the only place, to hold the rally, where it would communicate its message while causing no disruption. (S.A. Vol. 2 at

[2] The early parts of the Record mistakenly referred to this sometimes as "Royal Farms Arena," which is managed in the same way, by the same entity, but is not the same place.

[3] Citations to Appellee's Supplemental Appendix are in the form of "S.A. Vol. [x] at [page number]."

776-777, 789-790, & 796-797.) St. Michael's approached SMG,[4] the entity to which Baltimore has delegated management duties for the Pavilion. St. Michael's rented the Pavilion and held its rally without a single negative incident.[5] However, it was replete with *positive* incidents. People who were victims of clergy sexual abuse spoke at the Rally. (S.A. Vol. 2 at 770-771.) These victims, who formerly were afraid to speak out, felt comfortable. (S.A. Vol. 2 at 773-774.) Victims felt that for the first time, they were no longer "invisible." (S.A. Vol. 2 at 790 & 841-843.) The event was a resounding success, with victims feeling seen and embraced, rather than being made to feel like they should feel shame for being victims. (S.A. Vol. 2 at 841-842.) Some of the Bishops, the very targets of the protest, even crossed the narrow footbridge from the Marriott to the Pavilion to join the protesters and to pray with them. There could be no better example of an effective and peaceful protest.

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[4] SMG is the entity to which the City of Baltimore has delegated management of the MECU Pavilion. The record may also have some confusion, as it has also been known as "Royal Farms." In the record, where "Royal Farms" is used, the Appellate Court should understand that this means "SMG."

[5] Some counter-protesters did show up. They were offered hospitality by St. Michael's, and there were no negative incidents at all. (S.A. Vol. 2 at 840-841, 955-956.)

The Bishops are scheduled to hold their Assembly, again, on November 16, 2021. Given the success of the prior event, St. Michael's contacted SMG to repeat it. SMG sent St. Michael's a contract, and the parties agreed on all of the terms, save a few minor modifications. (S.A. Vol. 1 at 374; S.A. Vol. 2 at 954 & 1005.) SMG was prepared to go through with the event, had complied with many of the terms of the contract already, and both parties acted as if the event was a done deal.

Then, the City of Baltimore got word that some of the Catholics and sex abuse victims coming to speak were people that the City leaders do not like. Namely, Steve Bannon and Milo Yiannopoulos. Both are known to be controversial, but this does not make them any less Catholic, nor any less entitled to First Amendment rights. Bannon plans to speak about the Bishops' financial corruption, which has been employed to deprive sex abuse victims of compensation. (S.A. Vol. 2 at 956-959.) Yiannopoulos was sexually abused by a priest when he was 11, and wishes to lend his voice to aid and comfort other victims. (S.A. Vol. 2 at 809-810.) Of course, these are not the only speakers. James Grein is not as well known, but testified that the 2018 event helped him overcome the abuse he suffered as a child. (S.A. Vol. 2 at 770-771, 774.) Father Paul

Kalchik is the same. (S.A. Vol. 1 at 529-530, ¶¶8-9 & 12-13; S.A. Vol. 2 at 790.) Other members wish to attend in order to pray for the Bishops, but all witnesses testified that they abhor violence, would never engage in it, and would prevent it. (S.A. Vol. 1 at 527-610.) Father Kalchik made it clear that he would rather suffer violence himself than visit it upon others. (S.A. Vol. 2 at 791-792.) The Christian ethos of "turn the other cheek" is strong in the organization. (S.A. Vol. 2 at 792.)

The organization and its members wish to criticize the power structure of the Catholic Church reaching the Church's leadership, without interfering with the Bishops' meeting. (S.A. Vol. 2 at 782-783, 844-845.) St. Michael's rally will include praying the Rosary; an explicitly religious demonstration. (A.A. 10, ¶12.) St. Michael's intends to "protest" the Bishops by praying for them, hoping to change their hearts. (S.A. Vol. 2 at 967-973). Yet Baltimore cannot abide such a thing.

What is Baltimore's objection? This remains unclear, as the City has offered what the District Court identified as "shifting rationales." (A.A. 164, 170-171.) First, Baltimore claimed that St. Michael's "had ties to January 6th." (A.A. 11, ¶21; S.A. Vol. 2 at 947-948.) The City claimed to have found such "ties" through normal Internet searches. (A.A. 11,

¶21; A.A. 48-49, ¶4.) St. Michael's was unable to replicate these results. (A.A. 11, ¶22; S.A. Vol. 2 at 948.) In fact, St. Michael's retained an expert[6] to try to replicate the results. He could not do so either. No such "ties" are in the record.

After that rationale wilted under the slightest exposure to logic, the City shifted gears and then claimed that the mere presence of Messrs. Bannon and Yiannopoulos would have such a strong effect on the people of Baltimore, that the populace of this city would be incapable of controlling themselves and they would attack St. Michael's prayer rally. (S.A. Vol. 1 at 444-447; A.A. 48-50.) The City has not provided any evidence for this either.[7]

The City claims to have come to this conclusion on July 19, 2021. (A.A. 49, ¶6.) However, the City apparently decided to wait until August

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[6] The District Court rejected Dr. James P. Derrane, as an expert. However, the Court slightly misapprehended Derrane's role. His role was to use his training and experience as an FBI agent not only to assess danger, but also to try to replicate the City's findings. Surely if a non-FBI agent were able to uncover these "ties," then an FBI agent would be able to at least find as much evidence as a layperson. However, he could not replicate the City's findings. (S.A. Vol. 1 at 628-635.)

[7] The District Court, observing that there was no evidence of even potential counter-protesters, found that "[t]he City cannot conjure up hypothetical hecklers and grant them veto power." (A.A. at 167.)

5, 2021 to cancel the rally. On that date, SMG notified St. Michael's that the City wanted the rally canceled. (A.A. 11, ¶19.) The City ordered SMG to "cease talks with … St. Michael's … to use the MECU Pavilion." (A.A. 51, ¶3.) In an email exchange between Shea and SMG's Teresa Waters, Waters asked the City if it cancelled the rally pursuant to Paragraph 11 of the management contract between the City and SMG, which reads:

> 11. **Schedule of Events, Objections.** During the Term, Operator shall use good faith efforts to advise City each month during the event season as to the dates of events and the artists or users for scheduled events. Operator agrees that it will not allow any public event to be held at the Facilities which utilizes artists that have not performed at a similarly situated venue owned or operated by Live Nation. The City shall provide Operator with notice of any objections or complaints that result from a public event held at the Facilities. Prior to booking any such objectionable performer at the Facilities in future years, the Operator will provide the City with notice, at which time the City shall have 48 hours to object to such performer, and the Operator will not book such objectionable performer unless the Operator has provided assurances to the City that the issues giving rise to the objections and complaints will be addressed in a manner satisfactory to the City.

(S.A. Vol. 1 at 413.) Shea responded by saying "the City's basis for the decision to decline to provide a forum for the event encompasses more than the provision you cite." (*Id.*) The City never articulated what this "more" is and subsequently retracted any claim there was "more." The

only "more" is the unconstitutional objection to the presumed viewpoint of some of the speakers who expect to be at the event.

The City now takes the position that this "Paragraph 11" is the sole source of the City's authority to cancel the event. (*See* Appellants' Brief at p. 37.) St. Michael's is not an "artist[] that ha[s] not performed at a similarly situated venue owned or operated by Live Nation," as St. Michael's held the same prayer rally at the Pavilion in 2018. There were no "objections or complaints", and St. Michael's is not an "objectionable performer." The sole authority the City relies upon for the power to cancel Appellee's rally does not contain any such authority, and thus the City's act seems to be, on its face, *ultra vires*.

City Solicitor James Shea told Mr. Voris that his office received reports that St. Michael's had "ties to the January 6 [2021] riot." (A.A. 11, ¶21.)[8] Mr. Voris told Shea that this was false and asked for the source of any such reports. (*Id.*) Shea responded that he had not found any such reports himself, but that unspecified "people" had told him such reports were "widely available on the internet." (*Id.*) Such reports are not "widely available." (A.A. 11, ¶22.) No one other than Shea has ever so

[8] No such "reports" are in the record.

much as hinted that St. Michael's took part in the January 6 riot. (*Id.*) No one could reasonably believe that such reports existed, and it appears that no one ever truly told Shea that such reports existed. (*Id.*)

St. Michael's hired a former FBI agent, Dr. James P. Derrane, who was tasked with security for the Republican National Convention and the Pope's visit to New York City to assess the threat. (S.A. Vol. 1 at 627; S.A. Vol. 2 at 914-918.) He used the methodology the City claimed it used, and even with his years of training and experience, he was unable to do replicate the City's supposed results.[9]

Shea then claimed that his office conducted a "risk assessment" and determined that St. Michael's posed a "risk of violence," including potential property damage, and a threat to safety. (A.A. 11-12, ¶23.)[10] He also mentioned that the proximity of the Pavilion to "high-scale

[9] The District Court failed to appreciate Dr. Derrane's expert report and testimony for relying on the same kind of internet searches that Shea and the City allegedly conducted. Like Appellants, Dr. Derrane did not rely on non-public information. He reviewed the information that Appellants had available to them and relied on, and he found nothing to suggest a security threat posed by Appellee's rally. (S.A. Vol. 1 at 628-635.)

[10] Appellants have not disclosed any details of their risk assessment and there is no support for a conclusion that Appellee's rally poses a security risk. (S.A. Vol. 1 at 635.)

properties" was a factor in deciding to cancel the rally.[11] (*Id.*) Shea provided no evidence. (A.A. 12, ¶24.) Even though the same rally was held in 2018, Shea responded "well, a lot has changed in three years." (A.A. 12, ¶25.) The only thing that the record suggests has changed is that the City Government has changed, and thus its commitment to First Amendment principles is at odds with the prior administration.

There are no official means of challenging Shea's decision, nor did Shea provide any informal means for doing so. (A.A. 12, ¶32.) No criteria for cancellation were identified. (A.A. 12, ¶33.) There was no investigative or fact-finding process. (A.A. 12, ¶34.) There was no true risk of violence. (A.A. 13, ¶35.) The sole reason SMG refuses to fulfill its contractual obligations with St. Michael's is because the City ordered it to terminate the contract, without any due process. (A.A. 13, ¶40.)

After St. Michael's filed suit, the City came up with still yet another rationale – it was concerned about the possibility of *other people* committing violence because Steve Bannon or Milo Yiannopoulos were to

[11] Shea's classist notion that the rally would be more acceptable if it were in a poor neighborhood seems distasteful, to put it mildly.

speak at the rally, citing inadmissible media articles[12] that discuss either politically-charged statements from these speakers or times where they drew counter-protesters who became violent. (S.A. Vol. 1 at 444-446.) The City then came up with *another* post hoc reason – that it canceled the contract because of an opinion Mr. Voris gave in a video about the 2020 Presidential election. (S.A. Vol. 1 at 443-444.). Simultaneously, the City denies that viewpoint has anything to do with its decision. (Appellants' Brief at pgs. 31-43.)

After the District Court issued a temporary restraining order enjoining the City from interfering with the contract between SMG and St. Michael's, those two parties resumed planning the rally. (S.A. Vol. 1 at 428.) SMG sent a completed contract to St. Michael's for signature. (S.A. Vol. 1 at 428, 476.) St. Michael's accepted the terms, re-sent its deposit, and signed the contract on September 16, 2021. (*Id.*) SMG then suddenly declined to countersign because the City forbade it from doing so. (S.A. Vol. 1 at 428.)

[12] As the District Court noted, "the City's concerns about the speakers and the potential 'secondary effects' were based primarily if not entirely on 'available media reports,'" yet Appellants did not provide any specific information about threat assessments. (A.A. 119.)

The City argued that the rally could take place "elsewhere," but has never reasonably suggested anywhere else. Shea's comments about the proximity to upscale properties suggests that perhaps a lower socio-economic neighborhood would be better, in the City's eyes. (A.A. 11-12, ¶23.) At oral argument, the City Solicitor's office suggested that the event could take place on the street, in front of the Marriott hotel. (S.A. Vol. 2 at 846-847.) The City did not explain why blocking a street, during a work day, and trying to fit 3,000 people on a sidewalk would make things better. Meanwhile, uncontroverted testimony at the hearing showed that this location would not be at all acceptable. (*Id*. & S.A. Vol. 2 at 853-854.) Further, this "suggestion" did not come in the form of a stipulation that the City would approve a permit for a demonstration in the middle of the street or on the sidewalks.

The purpose of the rally is to St. Michael's views to the Bishops in a format and in a venue that they cannot ignore. (A.A. 13, ¶42.) Praying the Rosary will express the rally-goers' refutation of the Bishops' claim to un-challenged legitimacy. (A.A. 13, ¶43.) Conducting the rally at a different time or place would neuter the communicative and religious significance of the rally. (*Id*.) The rally will provide an opportunity for

victims of sexual abuse at the hands of Catholic bishops to be heard. (S.A. Vol. 1 at 527-538.) St. Michaels abhors violence; the November 16 prayer rally will be peaceful. (S.A. Vol. 1 at 527-610.) Yiannopoulos, one of the "controversial" speakers, condemned the use of violence and testified he is not the "provocateur" from years past. (S.A. Vol. 1 at 539.) Yet, here we are, with the City continuing to shift rationales and to move the goalposts in order to try to suppress this event.[13] (*See* Doc. No. 26-3.)

2.0 Procedural History

St. Michael's filed its Complaint on September 13, 2021 (S.A. Vol. 1 at 194), naming the City, the Mayor, and Solicitor Shea as defendants, along with a motion for a temporary restraining order. (S.A. Vol. 1 at 207). St. Michael's brought claims for violations of the rights of free speech, free assembly, free exercise of religion, and the establishment clause. (S.A. Vol. 1 at 194.) The Court granted the temporary restraining order in part on September 14, 2021, and enjoined the City from

[13] The City argued that Yiannopoulos has not drawn violent counter-protestors since 2017 is because "the pandemic" put a damper on protests. (S.A. Vol. 2 at 887-888.) This ignores the nationwide riots of the Summer of 2020—the existence of which underscores the fatal logical flaw in this argument.

"prevent[ing] St. Michael's from conducting and making arrangements for its planned November 16, 2021 rally." (S.A. Vol. 1 at 255.)

On September 15, 2021, St. Michael's amended its Complaint to add a specific performance claim against SMG (A.A. 8), and an amended motion for a preliminary injunction (A.A. 25). Appellants opposed on September 23, 2021 (A.A. 43). St. Michael's filed its reply on September 27, 2021 (A.A. 60). Appellants filed a "Supplemental Memorandum" on September 28, 2021. (A.A. 86.)

On September 30 and October 1, 2021, the District Court held an evidentiary hearing on the motion for a preliminary injunction. St. Michael's presented witness testimony and provided declarations[14] prior to the hearing (S.A. Vol. 1 at 524-649). Appellants declined to put on any evidence. On October 12, 2021, the District Court granted the motion in part, declining to enjoin SMG but ordering that Appellants, "their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of this

[14] The City stipulated, on the record, to these declarations being entered in lieu of live testimony. (S.A. Vol. 2 at 769.) Nevertheless, all declarants were available to be cross examined, and the City stipulated to their testimony being accepted into evidence (S.A. Vol. 2 at 769.)

injunction, shall not prohibit or impede SMG from entering into a contract with St. Michael's for plaintiff's use of the MECU Pavilion for its planned rally on November 16, 2021." (A.A. 188-189.) This order was accompanied by a memorandum in which the District Court found that the MECU Pavilion was either a nonpublic forum or a limited public forum (A.A. 142-154); that St. Michael's was likely to prevail on the merits of its free speech and free assembly claims because the City engaged in viewpoint-based discrimination (A.A. 154-174); that the remaining preliminary injunction factors favored St. Michael's (A.A. 183-185); and that SMG and St. Michael's had not yet entered into a contract (A.A. 174-183). However, the Court made it clear that it expected the parties to contract (S.A. Vol. 2 at 1225.) The District Court also required St. Michael's to provide a $250,000 bond as a security. (A.A. 189.)

SUMMARY OF ARGUMENT

The District Court correctly found that Appellants engaged in unfettered discretion and viewpoint-based discrimination when it forced SMG to cancel its contract with Appellee to hold the planned November 16 rally at the MECU Pavilion. The MECU Pavilion is a designated public forum, as it is a government-owned venue dedicated to various forms of expressive speech by the public, and there is no record evidence of the Pavilion being limited only to certain kinds of speech.

Appellants provided no details as to what authority it had over SMG concerning use of the Pavilion and the only authority it cites does not allow it to take the actions it did, creating a strong inference that there are no safeguards against viewpoint-based discrimination.

The only record evidence as to Appellants' motives in cancelling Appellee's rally is that Appellants were allegedly concerned about unidentified counter-protesters causing damage in response to the political viewpoints of Appellee and two of the planned speakers for the rally. Appellants openly admit that they are supporting a heckler's veto, which is unconstitutional viewpoint-based discrimination.

Whether because the MECU Pavilion is a designated public forum or Appellants engaged in viewpoint-based discrimination, Appellants must satisfy strict scrutiny. There is no evidence to support Appellants' assertions of potential violence or property damage resulting from Appellee's rally, and there is no evidence of the City attempting to take less-restrictive measures aside from outright cancelling the rally.

ARGUMENT

1.0 Legal Standard

A decision on a motion for a preliminary injunction is reviewed "for an abuse of discretion[,] review[ing] the district court's factual findings for clear error and … its legal conclusions de novo." *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). An abuse of discretion occurs where a district court "misapprehends or misapplies the applicable law." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). "Clear error occurs when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Harvey*, 532 F. 3d 326, 336 (4th Cir. 2008).

"[A]buse of discretion is a deferential standard, and so long as 'the district court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse' even if we are 'convinced that we would have weighed the evidence differently." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land,* 915 F.3d 197, 213 (4th Cir. 2019) (quoting *Walton v. Johnson*, 440 F.3d 160, 173 (4th Cir. 2006) (en banc) and *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985)); *see also Centro Tepeyac v. Montgomery Cty.*, 722 F.35 184, 192 (4th Cir. 2013) (en banc) (finding that if the court "applied a correct preliminary injunction standard, made no clearly erroneous findings of material fact, and demonstrated a firm grasp of the legal principles pertinent to the underlying facts," no abuse of discretion occurred).

Where the lower court's findings "are supported by facts in the record, and reflect reasonable inferences from those facts," they are not subject to reversal under clear-error review. *Baxter v. Comm's of Internal Revenue Serv.*, 910 F.3d 150, 159 (4th Cir. 2018). "To be clearly erroneous, a decision must … strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *United States S.E.C. v. Pirate Investor LLC*, 580 F.3d 233, 243-44 (4th Cir. 2009).

2.0 The District Court Correctly Found that St. Michael's Showed a Probability of Prevailing on its Free Speech and Free Assembly Claims

2.1 The MECU Pavilion is a Designated Public Forum

Appellants own the MECU Pavilion. The City delegates management to SMG. (A.A. 46-50.) Courts use a three-part test to determine whether the First Amendment will protect St. Michael's: (1) whether the speech is protected; (2) the nature of the forum where the speech is to occur and the proper standard for restrictions in that forum; and (3) whether the government justification satisfies the applicable standard. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 797 (1985). Only the second and third parts are at issue; there is no serious dispute that the speech is protected.

As to the forum, there are three categories of government spaces: (1) traditional public forums; (2) designated public forums; and (3) non-public forums. Traditional public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate," and restrictions on speech in them are subject to strict scrutiny, meaning the Government must "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve

that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). The typical traditional public forum is a public park, street, or sidewalk. *See Hassay v. Mayor of Ocean City*, 955 F. Supp. 2d 505, 519 (D. Md. 2013) (Hollander, J.). Similar to the MECU pavilion in this case, a government-owned open-air amphitheater is a public forum. *Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244, 249 (D.P.R. 2002) (finding that open amphitheater was a *traditional* public forum).

A *designated* public forum "is a nonpublic government site that has been made public and 'generally accessible to all speakers.'" *Sons of Confederate Veterans v. City of Lexington*, 722 F.3d 224, 230 (4th Cir. 2013) (quoting *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 382 (4th Cir. 2006)). This kind of forum "may be made available 'for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.'" *Id.* The Government makes property a public forum when it "purposefully open[s it] to the public, or some segment of the public, for expressive activity." *ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005). "As long as a dedicated public forum remains open, 'it is bound by the same standards as apply in a traditional public forum,'" *i.e.,* the

Government must satisfy strict scrutiny. *City of Lexington*, 722 F.3d at 231 (quoting *Perry*, 460 U.S. at 46).[15]

A non-public forum is "[p]ublic property which is not by tradition or designation a forum for public communication," such as an airport or an election polling place. *See Perry*, 460 U.S. at 45-46. A non-public forum may be identified by whether "opening it to expressive conduct would 'somehow interfere with the objective use and purpose to which the property has been dedicated.'" *Davison v. Randall*, 912 F.3d 666, 681-82 (4th Cir. 2019) (quoting *Mote*, 423 F.3d at 443). Even in a non-public forum, a speech restriction must be "'reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Multimedia Pul'g Co. of S.C. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154-159 (4th Cir. 1993) (quoting *Perry*, 460 U.S. at 46).

The Supreme Court explained the designated public forum doctrine in *Southeastern Promotions v Conrad*, 420 U.S. 546 (1975). In that case,

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[15] There is also a sub-category of designated public forums known as limited public forums, which exist where "the government creates a channel for a specific limited type of expression where one did not previously exist." *Child Evangelism*, 457 F.3d at 382. The Pavilion is not a limited public forum. It hosts all kinds of speech like live music (S.A. Vol. 1 at 507-509), stand-up comedy (*id.* at 510-514), and the same kind of prayer rally that St. Michael's had in 2018.

a municipal auditorium was rented out by the city for a wide variety of expressive activities, but the city prohibited a production of "Hair," citing the production's nudity, tacit approval of drug use, sexual themes, and bad language. *Id.* at 561. The Court found the auditorium to be a designated public forum, and the city's refusal to permit use of its auditorium to be an unconstitutional prior restraint. *Id.* at 557-58, 562. The degree of protection afforded to an event in a public forum is not dependent upon how meritorious the speech might be. *See Norma Kristie, Inc. v. Oklahoma City*, 572 F. Supp. 88, 91-92 (W.D. Okla. 1983) (finding publicly owned convention center managed by private company was designated public forum, and contest for female impersonators in "Miss Gay American Pageant" entitled to full First Amendment protections).

The MECU Pavilion is a designated public forum. It is dedicated to general use by the public for a wide variety of reasons. The Royal Farms (SMG) website, operating the Pavilion for the City, advertises:

> Royal Farms Arena is Baltimore's premier multi-use sports and entertainment facility and is a great place to host a wide variety of events. Our flexible and dynamic space has the ability to accommodate major concerts, family shows, sporting events, college commencements, conferences, corporate events and political function … We can also facilitate booking

> your event at the legendary MECU Pavilion … MECU offers the perfect space to enjoy entertainment along Baltimore's famed Inner Harbor.

(S.A. Vol. 1 at 474.)[16] The City allows a wide variety of people to use the venue for a wide variety of purposes. Indeed, St. Michael's held the **same** rally for the **same** purpose in 2018;[17] thus the November 16 rally falls within the purposes to which the Pavilion has been dedicated.[18]

A public forum does not lose this status merely because not all members of the general public can physically access it at all times.

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[16] This statement refers primarily to the MECU Arena, a separate venue. However, the Pavilion is mentioned in the same breath, and there is no material difference in the purpose of the two venues. Further, even on the limited record, the use of the arena for diverse reasons and speakers is established, including live music, stand-up comedy, and prayer rallies. (S.A. Vol. 1 at 507-514.)

[17] Appellants argue that the November 16 rally is distinct because more people are planned to attend. The event is scheduled for a maximum of 3,000 people, and the MECU Pavilion accommodates 4,500. (S.A. Vol. 1 at 498.) As the City would allow others to book to this capacity, denying St. Michael's the right to do so is viewpoint-based, unconstitutional discrimination.

[18] The City argues that this is different because different speakers will be there this time (Appellants' Brief at pgs. 15-17) and that more people will come to this event. St. Michael's had planned on 3,000 attendees in the 4,600 capacity pavilion. (S.A. Vol. 1 at 498.) How the City can argue that different speakers changes the analysis is confusing. The "more attendees" argument seems unlikely to pass muster, when the Pavilion is designed for 4,600. (*Id.*) Further, the City has abandoned the logically bankrupt argument that 3,000 elderly people praying the rosary will somehow be a greater source of violence than a smaller number.

Goulart v. Meadows, 345 F.3d 239 (4th Cir. 2003) dealt with publicly owned community centers requiring permission to use. However, "the Recreation Coordinators at the community centers make only ministerial judgments because they are allowed to deny an application only if it is 'not in accordance with the provisions outlined in the [Use Policy].' In other words, if a proposed user falls within the confines of the Use Policy, the application will be granted." *Id.* at 250-51. Once the Government decides a forum is open to a prayer rally, it cannot discriminate on the contents of the prayers, or on the basis of who will be praying.

Appellants' cases are inapposite. The City appears to have found a number of cases where piers were not determined to be public forums, and thus it seems to ask for a per se rule that "piers are not public forums." However, the mere fact that the MECU Pavilion is on a pier is irrelevant. There is no rule governing piers that makes piers a different class of forum.

New Eng. Reg'l Council of Carpenters v. Kington, 284 F.3d 9 (1st Cir. 2002) dealt with a *fishing pier* that was traditionally used for commercial fishing but had expanded to include a conference center, eateries, and offices. The court found "the dominant character of the

property is still that of a commercial fishery" the commercial fishery at most "tolerates the presence of some members of the public on the Fish Pier." *Id.* at 22-23. Accordingly, this pier was one that was dedicated to one industry, with some tolerance for visitors. Notably missing was an affirmative act showing a government intent to designate the property "as a place for public expression." *Id.* at 23. In contrast, the MECU Pavilion is dedicated specifically for expressive speech; it is not a fishing pier that private businesses happened to form around.

Appellants shift to another pier and cite *Chicago Acorn v. Met. Pier & Expo. Auth.*, 150 F.3d 695, 699 (7th Cir. 1998), which dealt with a government-owned pier containing public and non-public facilities and found that *private* meeting rooms within one of the facilities were not designated public forums. There, the entire pier was managed as a commercial entity, and that conduct occurring at one facility could have economic effects for another facility; "[s]electivity and restriction are of the essence of the commercial strategy that informs the MPEA's management of the pier." *Id.* at 700. Therefore, *that* pier was a mixed-use complex that happened to be owned by the city; it was not an amphitheater that happened to be found on a pier. Here, the City does

not curate who may book which events at the Pavilion as part of a comprehensive strategy for the economic area. Rather, nearly any member of the public may book nearly any kind of event there. That the City makes some money from ticket sales is not enough to bring the Pavilion in line with the cases the City cites.

The City then shifts to an inapplicable unreported case. The court in *Fla. Gun Shows v. City of Fort Lauderdale*, No. 18-62345-FAM, 2019 U.S. Dist. LEXIS 26926 (S.D. Fla. Feb. 19, 2019) found that an auditorium was a non-public forum because the government previously denied use of the venue to other events that it found to be unsuitable and that "access to the venue is not open to all who apply for a lease." *Id.* at *29-30. There is no evidence of such selectivity here.[19] In fact, there is no record evidence at all that the City has ever denied **anyone** the right to use the facility prior to its objection to a peaceful prayer rally. St. Michael's appears to be the first party to suffer under the new Mayor's new censorship regime. It should also be the last.

[19] *Pomicter v. Luzerne Cty. Covnention Ctr. Auth.*, 939 F.3d 534, 539-41 (3d Cir. 2019) does not help Appellants, as the plaintiffs there *conceded* that the space in question was a non-public forum.

United Church of Christ v. Gateway Econ. Development Corp. v. Greater Cleveland, 383 F.3d 449 (4th Cir. 2002), dealt with a sports arena used specifically for sporting events; only people who were actually interested in the games were allowed to stay. *Id*. at 453. In contrast, the Pavilion is hosts a wide variety of expressive speech, from music, to comedy, to prayer rallies. Exclusion of St. Michael's is unconstitutional.

Directly on point is *Cinevision Corp. v. Burbank*, 745 F.2d 560 (9th Cir. 1984), which dealt with a municipally-owned amphitheater. The promoter plaintiff and the City had a contract which allowed performances at the amphitheater, and the contract provided that the City could cancel any performance "which has the potential of creating a public nuisance or which would violate any State law or City ordinance." *Id*. at 565 (emphasis removed). The City rejected several of the performances, claiming they would "attract narcotics users to the community." *Id*. at 566.

The Court stated:

> by granting Cinevision access to the Bowl for the presentation of music by a variety of performers, the City transformed publicly owned property into a public forum for expressive activity, even if the expressive activity is promoted by a single entity. Moreover, assuming that, as the City claims, the Starlight Bowl is 'remote, fenced, seldom used, and locked

> when not in use,' that does not affect its status as a public forum; the auditorium in dispute in *Southeastern Promotions* was similar in most respects.

Id. at 570.[20] If a venue that is remote and locked up when not in use is a designated public forum, then the MECU Pavilion, located in the heart of Baltimore and used for expressive purposes year-round, is a designated public forum as well. Detailed contractual negotiations with the owner of the venue did not make the venue a non-public forum. Baltimore, like Burbank, cannot exercise unfettered discretion in restricting Appellee's use of the MECU Pavilion.

Int'l Soc. For Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth., 691 F.2d 155, 159-61 (3d Cir. 1982) does not support the City's position that government-owned property used to generate revenue is a non-public forum. *Krishna* dealt with a state-owned football stadium that was leased on a long-term basis for the exclusive use on certain days by the New York Football Giants, where plaintiff desired to solicit charitable contributions from patrons. *Id.* at 158. The stadium

[20] At least in that case, the City could conjure up "narcotics users" who might show up. In this case, the City has only claimed that people who do not like Yiannopoulos or Bannon will lose control of themselves, and that the City would rather suppress the rally than simply enforce the law against these hypothetical people.

was not opened to the public for charitable solicitation. *See also Marilyn Manson v. N.J. Sports & Exposition Auth.*, 971 F. Supp. 875, 888 (D.N.J. 1997) ("Whereas in *Krishna v. NJSEA*, the NJSEA clearly did not open Giants Stadium to citizens to solicit charitable contributions, in this case it is undisputed that the NJSEA has opened Giants Stadium to performers in musical events. Where the government chooses to open a forum for a particular type of communicative activity, the government has created a limited public forum to that extent, and the government's restrictions on the content of speech are subject to strict scrutiny.") Thus, *Krishna* is inapposite.

Similarly, *Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 700 (7th Cir. 1998), noted that, regarding the theater in *Southeastern Promotions*, "any member of the public was welcome who would pay the admission price." *Chicago Acorn* also noted that subject matter of dedicated public forum can be limited by character (*e.g.* theatrical performance). 150 F.3d at 700. Here, the Pavilion is not limited in character and is open to any who meets the price (contract requirements). Thus, *Chicago Acorn* does not favor the City.

2.2 Appellants Exercised Unfettered Discretion

Even if, as the City argues, the Pavilion is a "publicly owned private forum," the City's authority to exclude speakers from it cannot constitutionally be unlimited, with no standards at all except the government's taste. Regardless of the type of forum, "there is broad agreement that … investing governmental officials with boundless discretion over access to the forum violates the First Amendment." *Child Evangelism*, 457 F.3d at 386. "For this reason, even in cases involving nonpublic or limited public forums, a policy … that permits officials to deny access for any reason, or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny." *Id.* at 387. A "corollary of the prohibition on viewpoint discrimination is the principle that administrators may not possess unfettered discretion to burden or ban speech, because 'without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or view-point of the speaker.'" *Child Evangelism Fellowship v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1068 (4th Cir. 2006) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988)).

Rules without guardrails—where the City can veto any event it wants—impermissibly permit the government to use claimed neutral standards in pretextual and censorial ways, "hiding the suppression from public scrutiny." *Child Evangelism*, 457 F.3d at 386. The City took the shifting positions that it has the unilateral authority to cancel any contract on a whim, or that its sole authority to do so (Paragraph 11 of its contract with SMG) is very narrow, but that it may exercise such authority irrespective of the narrow language. In either scenario, the entire regulation (blanket veto or Paragraph 11) should be struck down as facially unconstitutional, as well as unconstitutionally applied in this case.

The government may not "condition speech on obtaining a license or permit from a government official in that official's boundless discretion." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (deciding whether an official has unbridled discretion in setting permit fee for public events, parades, or assemblies); *see Se. Promotions v. Conrad*, 420 U.S. 546 (1975) (addressing whether municipal board charged with leasing city auditorium had unbridled discretion); *Saia v. People of N.Y.*, 334 U.S. 558, 559-60 (1948) (addressing whether licensing use of amplifiers gave police chief unfettered discretion); *Am. Entert. v.*

City of Rocky Mount, 888 F.3d 707, 720 (4th Cir. 2018) (deciding licensing scheme for sexually oriented businesses gave licensing official unfettered discretion). The extreme skepticism towards unfettered discretion applies both to official policies and ad hoc determinations. *See Summum v. Callaghan*, 130 F.3d 906, 910 (10th Cir. 1997).

The City has not identified any standards used to determine when it may order SMG to cancel a contract for use of the MECU Pavilion, whether under Paragraph 11 or otherwise. Shea refused to answer when directly asked. (A.A. 12, ¶33.) The City claims unfettered discretion to deny any event at the MECU Pavilion for any reason, despite dedicating it as a public space for expression. Meanwhile, nothing in the record suggests that it ever used this discretion against anyone but St. Michael's.

By its own rationale, the City could permit one political candidate to hold a rally, but not her opponent. This unfettered discretion is constitutionally infirm and requires application of strict scrutiny. If the Fourth Circuit has ever upheld such governmental discretion, St. Michael's has not found it despite a diligent search.

The City argues that the full extent of its discretion is Paragraph 11. (Appellants' Brief at p. 37.) If that is true, then James Shea was not forthcoming. Moreover, if Paragraph 11 is it, then the City acted *ultra vires*. Paragraph 11 refers to "artists that have not performed at a similarly situated venue owned or operated by Live Nation" (S.A. Vol. 1 at 413), but this does not apply to St. Michael's, which held exactly the same kind of prayer rally at the MECU Pavilion in 2018. Nor is there any evidence of any "objections or complaints" from the 2018 rally, or that St. Michael's is an "objectionable performer." (*Id.*)[22] Taking the City's argument at face value, it appears to claim the ability to invoke a provision regardless of whether that provision applies. That is merely a different flavor of unfettered discretion.

Relatedly, Appellants argue they should be held to a lower level of scrutiny because they are a "proprietor" of MECU Pavilion instead of a "regulator." (Appellants' Brief at pgs. 28-29.) This argument is inconsistent, as they have exercised the unilateral authority to disallow any event for any reason. But, even if Appellants were functioning solely

[22] That the City may take issue with two speakers does not make St. Michael's, as a whole, objectionable. Neither is there any record support that those speakers are, in fact, objectionable.

in a proprietary capacity, they still may not exercise unfettered discretion. *See Atlanta Journal and Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1301, 1310-11 (11th Cir. 2008).[23] There is also, as the District Court noted, no emergency that excuses standard-less censorship of speech. (A.A. 166.)

The City cannot use "private" where it helps and "public" where it does not. "The Supreme Court never has circumscribed forum analysis solely to government-owned property." *Davison v. Randall*, 912 F.3d 666, 682-683 (4th Cir. 2019). Certainly, the converse is true – that government ownership, with management delegated to a private entity will not flip the analysis. Private property is a public forum when the government retains substantial control over the property by regulation or contract. *See, e.g., Conrad*, 420 U.S. at 547, 555 (finding "a privately owned Chattanooga theater under long-term lease to the city" was a "public forum[] designed for and dedicated to expressive activities");

[23] Appellants insist that the unfettered discretion doctrine is applied differently to them because the MECU Pavilion is for-profit. (Appellants' Brief at pgs. 36-37.) But they provide no support for the proposition that there is a difference between a non-public forum and a non-public forum *with commercial interests*. There is no legal distinction between the two, and the exercise of unfettered discretion in either one is unconstitutional.

Christian Legal Soc'y Chapter v. Martinez, 561 U.S. 661, 679 (2010) ("this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech"); *First Unit. Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002) ("forum analysis does not require that the government have a possessory interest in or title to the underlying land. Either government ownership or regulation is sufficient for a First Amendment forum of some kind to exist"). Government ownership triggers Constitutional obligations. The District Court correctly found that Appellants possessed unfettered discretion and exercised it in ordering SMG to cancel its contract with St. Michael's.

Once SMG participated in the City's censorship, it too was a "state actor." When the government acts jointly with a private entity, as it does here, the private entity is a state actor. *See*, *e.g., Lugar v. Edmondson Oil Co.*, 457 U. S. 922, 941-942 (1982). Further, when the government "delegates its obligations to a private actor, the acts conducted in pursuit of those delegated obligations are under color of law." *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4th Cir. 2000). Baltimore delegated management of the forum to SMG (S.A. Vol. 1 at 522

¶4.) Further, A private entity can qualify as a state actor when the government compels the private entity to take a particular action, *see, e.g., Blum v. Yaretsky*, 457 U. S. 991, 1004-1005 (1982). Here, the record shows that the Government compelled SMG to take a particular action, refuting the contract. (S.A. Vol. 1 at 332-334.) Once SMG did the government's bidding, it became a de-facto state actor. Of course, its joint exercise with the government and the government's delegation of duties to it, also made it a "state actor.". *See also* (S.A. Vol. 1 at 726-727.)

2.3 Appellants Engaged in Viewpoint Discrimination

Because the MECU Pavilion is a public forum, the Government must pass strict scrutiny. But, even if the Pavilion were not a public forum, Appellants' restriction on Appellee's speech, namely not allowing St. Michael's to conduct its rally, is impermissible because it is viewpoint-based. Either way, the City is wrong.

A restriction on speech is content-based when it seeks to restrict a particular subject matter. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Any restriction on speech based on the message conveyed is presumptively unconstitutional. *See Turner B'casting Sys. v. FCC*, 512 U.S. 622, 641-43 (1994). This presumption

becomes stronger when a government restriction is based not just on subject matter, but on a particular viewpoint expressed about that subject. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). The government cannot impose restrictions on speech where the rationale for the restriction is the opinion or viewpoint of the speaker. *See Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). A content-based restriction on speech must satisfy strict scrutiny, meaning it furthers a compelling government interest and is narrowly tailored to achieve that interest. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). "The 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Saltz v. City of Frederick*, Civil Action No. ELH-20-0831, 2021 U.S. Dist. LEXIS 88283, at *42-43 (D. Md. May 10, 2021) (Hollander, J.) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Because of this, "'a viewpoint-based restriction of private speech rarely, if ever, will withstand strict scrutiny review.'" *Id.* (quoting *Greater Balt.*

Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 721 F.3d 264, 288 (4th Cir. 2013)).[24]

The Supreme Court recognizes that "[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017); *see also Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) (en banc) (finding government enacted heckler's veto by failing to protect, and eventually removing, evangelical group at Arab International Festival who "parad[ed] around with banners, signs, and tee-shirts that displayed [anti-Muslim sentiments] associated with" their religious beliefs); *see Gerber v. Herskovitz*, 2021 U.S. App. LEXIS 27674, *34-35, 2021 Fed. App. 0219P, *21-22 (6th Cir.) (approving of *Bible Believers* and finding that synagogue members could not assert §1983 claims against government for permitting anti-Israel picketers to demonstrate outside synagogue). Viewpoint neutrality requires the Government not only to

[24] The government cannot deter speech, assembly, or religious exercise based on content or viewpoint. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61-63 & n.5 (1963) (state decency commission told book distributors that particular publications were objectionable and it had the power to recommend action by the attorney general - this was unconstitutional); *cf. Chernin v. Lyng*, 874 F.2d 501, 502-03, 506-08 (8th Cir. 1989) (government told employer it would have to fire employee to obtain government inspection services, so employee entitled to due process).

refrain from overt discrimination based on viewpoint of speech, but also to "provide adequate safeguards to *protect* against the improper exclusion of viewpoints." *Child Evangelism Fellowship*, 457 F.3d at 384.

An open admission of viewpoint-based discrimination from the government is not necessary to show its existence. "[T]he government rarely flatly admits it is engaging in viewpoint discrimination." *Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004), *partially abrogated on other grounds by Tam*, 137 S. Ct. 1744. Courts, thus, use various factors to determine if the government's justification for a restriction on speech is pretextual, including "consideration of statements made by government officials concerning the reasons for an action;[25] disparate treatment towards people or things sharing the characteristic that was the nominal justification for the action; a 'loose or nonexistent' 'fit between means and ends'; the historical background of

[25] Appellants claim these factors do not show any viewpoint-based discrimination, but their argument fails at the outset. The only evidence in the record as to the rationale for the City blocking the rally is disagreement with the political viewpoints of Steve Bannon, Milo Yiannopoulos, and Mr. Voris. They claim that they were really concerned with potential violence resulting from expression of these viewpoints, but that is merely a rephrasing of their misapplied "secondary effects" argument that they have now abandoned on appeal.

the decision; the specific sequence of events leading up to the decision; departures from normal procedures or substance; and post hoc rationalization." (A.A. 158-159) (quoting *Ridley*, 390 F.3d at 86).

Appellants argue they are permitted to engage in viewpoint-based discrimination because the MECU Pavilion is a "commercial non-public venue," and the City is only a proprietor. (Appellants' Brief at p. 28.) The record challenges this conclusion. However, even if it were true, Appellants provide no authority for the proposition that the government may freely engage in viewpoint-based discrimination, because there is no such authority. Even in a non-public forum, the government may only engage in viewpoint-based discrimination if it can satisfy strict scrutiny. And as explained above, the City is not merely acting as the proprietor of the MECU Pavilion, but rather as the judge and jury to decide what speech is acceptable there – seemingly for the first time in the history of the MECU Pavilion. The City's citation to *Wis. Interscholastic Ath. Ass'n v. Gannett Co.*, 658 F.3d 614 (7th Cir. 2011) is inapposite. That case dealt with a public school athletics organization entering into an exclusive contract with a private company for streaming sports games, and the dispute arose over private companies streaming the games despite this

contract. The court's decision hinged on the fact that the government plaintiff was engaged in a program for dissemination of *government speech* through a private actor, and thus it was permitted to discriminate on the basis of viewpoint. *Id*. at 623. The court did not even engage in the public forum analysis, finding it inapplicable. *Id*. The dispute here deals with use of a physical space, not a dispute over streaming rights, and the City has never even suggested that its control over who performs at the MECU Pavilion is a form of government speech.

Mayor Scott's Chief of Staff, Michael G. Huber, declared that speakers confirmed for the November 16 rally include "*Steve Bannon and others whose speaking engagements and statements have a track record inviting protesters and counter protesters and supporting the January 6 attack on the Capitol in Washington, D.C. According to available media reports, their events and statements have a demonstrated history of inciting property destruction, physical assaults, and other violence, i.e., secondary effects.*" (A.A. 48-49, ¶4 (emphasis added).) Huber tellingly failed to identify any such "media reports." Appellants cite some articles they found, after the fact, as though they are conclusive evidence that the speakers will be violent. However, even if they were properly considered,

none claim that Messrs. Bannon or Yiannopoulos incited audiences to imminent lawless action. Rather, they discuss either politically charged speech not made in front of a crowd (none of which constitutes a true threat or any other category of unprotected speech), or instances of *others*, wishing to shut them down, becoming violent.[26] There is not a scintilla of evidence to suggest that these speakers have engaged in *unprotected* speech before, much less that they will on Nov. 16. The alleged danger of violence is purely theoretical and insufficient to outweigh Plaintiff's First Amendment rights. "If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public." *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557, 575 (1980) (Brennan, J., concurring).

Appellants did not argue that St. Michael's or anyone at the November 16 rally will engage in conduct that is not protected by the

[26] Some of these articles may falsely characterize Bannon or Yiannopoulos's speech as encouraging others to violence, but neither has ever been charged with such conduct and a newspaper's biased reporting on an unpopular public figure is not a substitute for legal analysis. The Court should never accept a newspaper's legal conclusions.

First Amendment. They provide no evidence of any predicted speech that will incite rally-goers to violence or contain "fighting words" (to the extent such things even exist anymore). The primary concern Appellants express in presenting this fictitious scenario is the *possibility* of a *counter-protest*, meaning violence committed not by St. Michael's, but others politically allied with the City or the Bishops – who dislike some of the speakers and wish to censor St. Michael's. The City claims to be concerned that third parties will be so offended by the speech at the rally that they will lose control of themselves and attack the rally-goers.[27] This means that Appellants' restriction on Appellee's speech is based on *past* unpopular viewpoints, specifically that their speech will give such offense to third parties that these third parties will become violent. Appellants thus admitted they are trying to effectuate an unconstitutional heckler's

[27] The City has raised the specter of counter-protesters, but has never made any attempt to identify them, even after a two-day evidentiary hearing. One of the main purposes of St. Michael's holding its rally at MECU Pavilion is to ensure that U.S. Bishops cannot avoid their history of covering up for the sexual abuse of minors by Catholic priests. Do Appellants fear that a violent gang of pedophilia advocates will attack? St. Michael's does not say this to be glib; it is forced to speculate as to the identity of counter-protesters because Appellants do not identify any, nor do they even claim to have received reports of possible counter-protesters. These violent agitators are figments of the Government's imagination or, more likely, a pretext for its viewpoint-based discrimination.

veto. The City should, instead, tell its friends not to attack St. Michael's, or the City should act to protect the peaceful prayer adherents.

"Historically, one of the most persistent and insidious threats to First Amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order." *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). "A heckler's veto involves burdening speech 'simply because it might offend a hostile mob.'" *Bennett v. Metro. Gov't & Davidson Cnty.*, 977 F.3d 530, 544 (6th Cir. 2020) (quoting *Forsyth*, 505 U.S. at 134-35). Granting a heckler's veto is an impermissible and unconstitutional content-based restriction.[28] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). The Government has a responsibility to permit controversial speech even when there could be a

[28] Courts have subsequently found that allowing a heckler's veto is a viewpoint-based, not merely a content-based, restriction on speech. *See Bible Believers*, 805 F.3d at 228 (finding that "[t]he heckler's veto is precisely that type of odious viewpoint discrimination"); *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 502-03 (9th Cir. 2015) (finding that "[a] claimed fear of hostile audience reaction could be used as a mere pretext for suppressing expression because public officials oppose the speaker's point of view. That might be the case, for example, where the asserted fears of a hostile audience reaction are speculative and lack substance, or where speech on only one side of a contentious debate is suppressed").

hostile reaction by others. *See, e.g., Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005); *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973); *Grider v. Abramson*, 994 F. Supp. 840, 845-46 (W.D. Ky. 1998). "'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.'" *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The Supreme Court has recognized that "[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker." *Id.* at 460-61.

"When a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals … If the speaker, at his or her own risk, chooses to continue exercising the constitutional right to freedom of speech, he or she may do so without fear of retribution from the state, for the speaker is not the one threatening to breach the peace or break the law." *Bible Believers*, 805 F.3d at 252. The *Bible Believers*

court noted that the plaintiffs, who were expressing religious beliefs at a festival and were physically attacked by protesters, may have conveyed their message in a manner that was "vile and offensive to most everyone who believes in the right of their fellow citizens to practice their faith of his or her choosing; nonetheless, they had every right to espouse their views." *Id*. at 254-55. The court found it impermissible for the police not to prevent the violence against the speakers, but rather to tell them to leave the festival for "being disorderly" by allegedly causing violence. *Id*. at 255. It concluded that the government "effectuated a heckler's veto, thereby violating the Bible Believers' First Amendment rights." *Id*.

Imagine if all a white supremacist needed to do to end a "Black Lives Matter" rally would be to get very angry at the content of the rally. Would the City do what it is doing now, or would it abide its duty to suppress the threat, but permit the rally? Imagine if anti-Semites were angered at the presence of a synagogue. Would Baltimore cave to the anti-Semites and shut down the synagogue? Or would it exercise its duty to protect the building and those therein?

These analogies are apt, as the City's argument is that third parties will instigate violence in response to the predicted content and viewpoint

of the speeches. Rather than protect St. Michael's from such alleged violence, Appellants wish to prevent St. Michael's from speaking. Just as in *Bible Believers*, any allegedly offensive message communicated at Appellee's rally will "not advocate, condone, or even embrace imminent violence or lawlessness," and so no restriction is warranted. *Id*. at 244. Appellants' conduct is a heckler's veto and is unconstitutional.

Appellants claim that Baltimore police are understaffed and that the rally would require significant diversion of police.[29] A group's First Amendment rights is not contingent on whether a city's budget can accommodate them.[30] It would serve as a perverse end-run around the First Amendment to allow a city to fabricate a security threat, use a police officer relying on non-specific "training, education, and experience" to make an arbitrary prediction of the number of police needed to secure the public against this fictitious threat (A.A. 53-54), as a basis for

[29] As the District Court noted, there is no evidence to suggest that Appellants considered the burden on police when deciding to cancel Appellee's rally. (A.A. 123.)

[30] This also seems to defy belief. The Baltimore Police budget rose by $28 million this year. *See* Daniels, Keith, "Defund police? Not in Baltimore – Mayor Scott increases city police budget" Fox 25 News (May 27, 2021) available at https://foxbaltimore.com/news/local/baltimore-taxpayers-oppose-mayors-proposed-budget-particularly-police-spending.

censoring a religious rally.[31] Further, it is premature to even predict what security measures would be necessary – as making that assessment this far in advance is poor policing.

The District Court correctly observed that there was no evidence that the alternative justifications provided by the City after St. Michael's filed suit, including the location of the MECU Pavilion,[32] the size of the planned rally, and staffing issues with Baltimore police, were factors that Appellants considered in deciding to cancel the rally. (A.A. 168-169.) Rather, they are post hoc rationalizations that further evidence this viewpoint-based restriction on Appellee's speech.

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[31] The City's witness claimed that they need 196 police officers to protect the rally. (A.A. 53-54, ¶4.) Leonidas held off 100,000 soldiers at Thermopylae with only 300 men. Meanwhile a commonsense review of the site, shown in the Injunction, will show that there seems hardly enough room to put 196 police officers in the way to barricade the Pavilion. (S.A. Vol. 1 at 435; A.A. 55.)

[32] Indeed, if there is any doubt that the City is simply inventing justifications, its argument made at the District Court about risks of drowning should tear that doubt away. The Pavilion is surrounded on three sides by water. Thus, any of these phantom pro-pedophilia protesters will need to cross a very long and open parking area to approach, or they will need to engage in amphibious assault operations. The City tried to use this geographic location as a negative, claiming that there will be some kind of riot, where all of Appellee's attendees will be driven into the harbor, where they will drown. (S.A. Vol. 1 at 456-457.)

Appellants characterize this observation as "div[ing] deep into the business and commercial decision of the city, second-guessing its only explanation, that of cost and public safety, and hypothesizing that the City engaged in post hoc rationalization." (Appellants' Brief at p. 31.) If the City actually had a reason to cancel the rally other than disagreement with the viewpoint of St. Michael's and its speakers, and a desire to enact a heckler's veto, it would have provided evidence of this. It could have had a City official testify to such during the preliminary injunction hearing, but it chose not to do so.[33] And, again, the City never provided a single piece of evidence that any violence or property damage was likely to result from the rally going forward. On the record before it, the District Court correctly concluded there the City's actions were viewpoint-based discrimination.

[33] Presumably, the reason the City did not bring Commissioner of Operations Sheree Briscoe to the hearing is because her testimony was so wildly un-believable that she would have been forced to perjure herself if put on the stand. Claiming that it would take 196 police officers to keep the peace makes no sense. The aerial photos of the pavilion are in the record. (S.A. Vol. 1 at 435; A.A. 55.) How many of these hypothetical attackers are going to lay siege to the MECU pavilion to prevent some elderly people from praying the rosary? Where would the City even place nearly 200 police officers?

To remove any doubt as to Appellants' motives, Appellants argued below that, even if St. Michael's were to have no guest speakers at the rally, cancellation would be justified because of "the recent statements by Mr. Voris regarding January 6." (S.A. Vol. 1 at 456.) Appellants do not contend that Mr. Voris or St. Michael's were in any way involved in the January 6, 2021 riot. They alleged only that Mr. Voris referred to the participants as "patriots." (S.A. Vol. 1 at 443.) They alleged that St. Michael's "promoted and exalted these rioters in its broadcast from that evening" (*id.*), but they are lying. (S.A. Vol. 2 at 950-951.)

Although it did not say this, St. Michael's would have every right to say so, if it wanted to. St. Michael's would have the right to call for revolution, tarnation, or mandatory pineapple on pizza if it wanted to. But, it did no such thing and never condoned any violence. The video in question quoted former President Trump's calling on everyone involved to be peaceful, highlighted Catholics peacefully praying the "Our Father" on the Capitol lawn, and pointed out the hypocrisy of those who condemned the events of January 6 while refusing to condemn the nationwide violence caused at Antifa and Black Lives Matter events, which St. Michael's has also routinely denounced. Furthermore, this

video was published on January 6, before the extent of violence became known. (S.A. Vol. 1 at 443-444, n.5.) Appellants do not argue that St. Michael's spurred anyone to participate in the riot nor caused it – they simply (falsely) claim that Michael Voris had an opinion about that day that they do not like (which is not even an accurate description of his comments). This is a stunning admission of unconstitutional motive that we rarely see from the government.

Appellants insist at great length that they did not engage in viewpoint-based discrimination, but they fail to show any clear error committed by the District Court in finding otherwise. The District Court made numerous factual findings based on a record that did not have the benefit of discovery, where Appellants chose not to put on any witnesses at a two-day evidentiary and chose not to provide information the District Court expressly asked from them. Their argument is essentially that it was clear error for the District Court not to draw all possible inferences in favor of Appellants, and not to take their unsupported attorney argument at face value. Appellants do nothing to establish that the District Court's factual findings were in any way erroneous, much less

"wrong with the force of a five-week-old, unrefrigerated dead fish." *Pirate Investor LLC*, 580 F.3d at 243-44.

The District Court correctly found that Appellants engaged in impermissible viewpoint-based discrimination.

2.4 The City Failed to Satisfy Strict Scrutiny

Appellants fail to address the issue of strict scrutiny, but their actions are subject to it. The Government must show its restriction furthers a compelling government interest and is narrowly tailored to achieve that interest. *Bennett*, 564 U.S. at 734. It cannot.

Any governmental interest in ensuring public safety is not furthered by not allowing St. Michael's to hold its rally, nor to moving it to the sidewalk in front of the Marriott, as the City argued (S.A. Vol. 2 at 846-847), nor to moving it to a lower socio-economic class neighborhood, as Jim Shea suggested. (A.A. 11-12, ¶23.)

Appellants never received any information that could lead them to believe St. Michael's is in any way violent or that allowing the rally to go forward would even potentially lead to violence. Appellants' restriction is not narrowly drawn either, as Appellants made no effort to negotiate a safer means of conducting the rally, such as by requesting that

St. Michael's excise the two speakers that Appellants claim are especially problematic.[34] Appellants argue that St. Michael's may hold its rally at a different location, but (1) forbidding a speaker from using its chosen public forum as a venue is not a narrowly drawn restriction; and (2) holding the rally at a different time or in a different place would make Plaintiff's speech ineffective for its intended purpose. *See Schenk v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377-79 (1997) (finding that imposition of 15-foot "buffer zone" against protesters on sidewalks outside healthcare clinics was not narrowly tailored).

The District Court correctly found that Appellants could not satisfy strict scrutiny and that St. Michael's had shown a probability of prevailing on its free speech and free assembly claims.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's order granting Appellee's Motion for a Preliminary Injunction to the extent that the District Court entered a preliminary injunction

[34] Appellants refer to alleged violence associated with only two speakers, Steve Bannon and Milo Yiannopoulos, while the rally will feature at least 10 others with whom Appellants have voiced no objection. (A.A. 49, ¶5.) This solution would not be Constitutional either, but it would at least be *more* narrowly tailored than censoring the whole event.

against Appellants. It should find that the forum is a designated public forum, where the City may not engage in viewpoint-based discrimination, nor support a heckler's veto. This Court should send a clear message that the prayer rally must be permitted.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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