
NO. 21-2158

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ST. MICHAEL'S MEDIA, INC.,

Plaintiff-Appellee,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
For the District of Maryland at Baltimore

BRIEF OF APPELLANTS

JAMES L. SHEA
City Solicitor

RENITA L. COLLINS
HANNA MARIE C. SHEEHAN
Chief Solicitors, Litigation

MICHAEL REDMOND
Director, Appellate Practice Group
BALTIMORE CITY DEPARTMENT OF LAW
100 N. Holliday Street
Baltimore, Maryland 21202
(410) 396-7536
michael.redmond@baltimorecity.gov

Counsel for Defendants-Appellants Mayor and City Council of Baltimore, James Shea, and Brandon Scott

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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- 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.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2158 Caption: St. Michael's Media, Inc. v. The Mayor and City Council of Baltimore

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mayor and City Council of Baltimore
(name of party/amicus)

who is Appellant, 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:

Defendant, but non-Appellant, SMG is indirectly and partially owned by the Onex Corporation, which is publicly traded on the Toronto Stock Exchange (TSX:ONEX). However, SMG believes that the outcome of this litigation is likely to have negligible, if any, impact on its financials.

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/ Michael P. Redmond Date: 10/15/2021

Counsel for: Appellants

Print to PDF for Filing

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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- 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.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2158 Caption: St. Michael's Media, Inc. v. The Mayor and City Council of Baltimore

Pursuant to FRAP 26.1 and Local Rule 26.1,

James Shea
(name of party/amicus)

who is Appellant, 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:

Defendant, but non-Appellant, SMG is indirectly and partially owned by the Onex Corporation, which is publicly traded on the Toronto Stock Exchange (TSX:ONEX). However, SMG believes that the outcome of this litigation is likely to have negligible, if any, impact on its financials.

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/ Michael P. Redmond Date: 10/15/2021

Counsel for: Appellants

Print to PDF for Filing

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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- 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.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2158 Caption: St. Michael's Media, Inc. v. The Mayor and City Council of Baltimore

Pursuant to FRAP 26.1 and Local Rule 26.1,

Brandon Scott
(name of party/amicus)

who is Appellant, 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:

Defendant, but non-Appellant, SMG is indirectly and partially owned by the Onex Corporation, which is publicly traded on the Toronto Stock Exchange (TSX:ONEX). However, SMG believes that the outcome of this litigation is likely to have negligible, if any, impact on its financials.

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/ Michael P. Redmond Date: 10/15/2021

Counsel for: Appellants

Print to PDF for Filing

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Constitutional Provisions:

JURISDICTIONAL STATEMENT

Appellants Mayor and City Council of Baltimore, Mayor Brandon M. Scott, and City Solicitor James L. Shea, (collectively and individually, the "City") appeal from the district court's October 12, 2021, order granting Appellee St. Michael's Media, Inc., ("St. Michael's") a preliminary injunction. A.A. 188-89. Appellants filed their notice of appeal the following day. A.A. 190-91. This Court has jurisdiction to hear this interlocutory appeal of an order granting an injunction under 28 U.S.C. § 1292(a)(1). The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES

1. Did the district court err by disregarding the proprietary role of the government and the nonpublic nature of the forum when applying strict scrutiny?

2. Did the district court err in its finding of viewpoint discrimination which was based on analysis used in regulatory cases in public fora?

STATEMENT OF THE CASE

Appellee St. Michael's wants to hold a rally in a City-owned outdoor commercial concert venue on November 16, 2021 in order to protest a meeting occurring that day in a nearby hotel. The City elected not to rent the venue to St. Michael's because it fears the planned rally will result in violence, property damage, and the expenditure of already-scarce public safety resources. On October 12, 2021,

the U.S. District Court for the District of Maryland (Hollander, J.), entered a preliminary injunction that, in effect, prevents the City from refusing to rent the venue to St. Michael's. A.A. 188-89. On October 13, 2021, the City appealed the district court's injunction because it misapplied the law and relied on baseless speculation surmised from an incomplete record, and if allowed to remain in place, it could place a tremendous financial burden on the City, result in civil unrest and deaths. A.A. 190-91

I. FACTUAL BACKGROUND

St. Michael's wants to rent the City-owned, waterfront, MECU Pavilion at Pier VI ("MECU Pavilion", "Pier VI", or the "Pavilion"), a performance venue located in Downtown Baltimore, in order to protest a meeting of the United States Conference of Catholic Bishops ("USCCB" or "U.S. Bishops") that will be taking place at a hotel next door to the venue on November 16, 2021. A.A. 112-15. Although St. Michael's rented this venue from the City in 2018 to protest the USCCB meeting that year, this year St. Michael's plans to hold a much larger rally and has invited two headline speakers that have a history of advocating political violence and inciting riots. A.A. 115-25.

Specifically, this year St. Michael's plans to bring 3,000 people to the venue, and the scheduled speakers include Steven Bannon and Milo Yiannopoulus. A.A. 112-15. These two speakers have a well-documented history of advocating political

violence and engendering, if not outright inciting, civil unrest. A.A. 118 - 21. Because the City fears that this event will result in violence, property damage, and additional strains on its already over-worked and under-staffed police force, the City refused to rent its concert venue to St. Michael's. A.A. 118-24.

In November 2018, Appellee held an event at Pier VI, which they claim occurred without incident. A.A. 112. Wishing to hold this same event again, on or about June 16, 2021, Appellee began to negotiate terms for holding a similar event at Pier VI on November 16, 2021. A.A. 115. It is Appellee's assertion that this rally will be "peaceful" and that its purpose and location were designed to take place "at the same time and immediately adjacent to the United States Conference of Catholic Bishops ["USCCB" or "U.S. Bishop's"] Fall General Assembly." A.A. 27. Notably, however, while the 2018 event had approximately 300 to 400 attendees,[1] the proposed 2021 event, according to Plaintiff, is projected to have approximately 3,000 people, nearly ten times the size of the previous gathering. A.A. 123. In preparation for the 2021 event, on or about June 22, 2021, Plaintiff wired a $3,000 deposit to SMG (also known as "Royal Farms Arena"), the company that manages Pier VI for the City, to reserve the date while negotiations for the space were still ongoing. A.A. 116. On or about July 14, 2021, SMG sent a draft contract to Plaintiff that included the statement "Please sign and return…for

[1] St. Michael's has claimed that 900 people attended the 2018 event.

execution." A.A. 116. The contract was not signed or executed at this time, as Plaintiff continued to correspond with SMG regarding various contract terms, including when doors would open, when the event would begin and end, and additional costs to host the event. A.A. 116-18.

At some point during the summer of 2021, Plaintiff began advertising its confirmed speakers for the event. A.A. 48-50; 118-19. Those confirmed speakers included Steve Bannon and Milo Yiannopolous. A.A. 48-50. Because of the impact that those speakers and the event could have on the City, during the week of July 19, 2021, Michael G. Huber, Chief of Staff to Mayor Brandon Scott, contacted SMG and instructed them to cease discussions with St. Michael's regarding the space. A.A. 48-50; 118-25. Prior to the contract being finalized and executed, on or about August 5, 2021 SMG contacted St. Michael's and informed it that they would no longer be able to host the event at Pier VI and that the $3,000 deposit would be returned. A.A. 125. St. Michael's then contacted SMG, who referred it to City Solicitor James L. Shea, a co-defendant in this action. A.A. 125.

On August 6, 2021, Michael Voris, the president and founder of St. Michael's Media, contacted Solicitor Shea via telephone and requested the rationale for withdrawing the space for the November 16 event. A.A. 125. Solicitor Shea informed Mr. Voris that the City had concerns regarding disruptions and violence that could result in Baltimore City from the event. A.A. 51-52; 125-26. Further,

Solicitor Shea informed Mr. Voris that this information was obtained by the City via publicly available sources. A.A. 51-52; 125-26. At no point in time during this conversation did Solicitor Shea indicate that the event was being cancelled due to the religious beliefs or political viewpoints of St. Michael's. A.A. 125-27. Rather, it was conveyed that the City chose not to host the event due to the fact that guest speakers could incite disruption and violence in the City. A.A. 125-26. The call terminated and, approximately two and a half weeks later on August 27, 2021, St. Michael's sent a demand letter to the Baltimore City Law Department threatening legal consequences if St. Michael's was not permitted to use the space for its event. A.A. 29. This lawsuit and the subject request for preliminary injunction subsequently followed. A.A. 8-42.

With such a prominent group of controversial individuals on the St. Michael's program, as soon as the City became aware of the plan to use the Pavilion for a rally that included speakers known for encouraging violent actions that have resulted in injuries, death, and property damage, the City instructed SMG not to move forward with the event out of a legitimate fear that it would incite violence in the heart of downtown Baltimore. A.A. 48-50. The City did not instruct SMG to cease discussions with St. Michael's due to their religious convictions or viewpoint– rather, as the owner of the venue, the City terminated negotiations due to the very real potential that they would use that platform to incite violence and public

disruption. A.A. 48-52. The proposed program would not occur in a vacuum and, when the event was cancelled and to this day, the City had and still has very real concerns of costly violence and disruption occurring. A.A. 48-52. St. Michael's makes claims that the individuals who will be coming to the rally are individuals seeking to pray the rosary and protest the USCCB, and that the event previously occurred without issue. A.A. 112-13. The fact of the matter is, however, that the previous 2018 event was not only ten times smaller than what Appellee is proposing this year but also, did not include speakers that are specifically known for inciting violent behavior, insurrection, and disruption. A.A. 118-23.

II. PROCEDURAL HISTORY

After briefing and argument, the district court ruled that the City's venue "is a nonpublic forum or a limited public forum," A.A. 172 n.30, and admitted that restricting access to a nonpublic or limited public forum "need only be reasonable," *id*. (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 808-09 (1985)) (emphasis in original); *see also* A.A. 154. The district court nonetheless disregarded the commercial, nonpublic nature of the forum and applied strict scrutiny to the City's decision to refuse to rent to St. Michael's because the district court, applying standards typically saved for public, regulatory cases, held that the decision constituted viewpoint discrimination. *See* A.A. 154-58.

SUMMARY OF ARGUMENT

The district court erred as a matter of law when it failed to conclusively identify the MECU Pavilion as a nonpublic forum, despite case law and factual analysis that demands such a conclusion. The MECU Pavilion *is* a nonpublic forum and therefore, the City has greater latitude in determining who can use the space, as long as those determinations are reasonable and viewpoint neutral, which, in this case, they were.

The City's ownership of MECU Pavilion is proprietary and, therefore, the City properly utilized commercial, viewpoint neutral justifications for electing not to host St. Michael's event. Significantly, the lower court also erred when it determined that the City engaged in viewpoint discrimination due to its speculative conclusion that the City engaged in post hoc justifications for the cancelling of Appellee's event. The City's reasons were rational and viewpoint neutral. The court's conclusion failed to considered the nature of the role of the City and the selectivity of the forum, as required by law. Instead, it applied tests like the "heckler's veto", used in regulatory cases, as justification for its decision.

ARGUMENT

Standard of Review

"[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited

circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (internal quotation marks omitted). Although this Court must review the grant or denial of a preliminary injunction for abuse of discretion, cases are "replete with references to the particularly exacting application of standards that apply to that discretion." *Sun Microsystems, Inc. v. Microsoft Corp.*, 333 F.3d 517, 524 (4th Cir. 2003), *abrogated in other grounds by Amazon.com, Inc. v. WDC Holdings LLC*, No. 20-1743, 2021 WL 3878403 (4th Cir. Aug. 31, 2021). The abuse of discretion standard "is not a rule of perfunctory appellate review but one of careful scrutiny." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 815 (4th Cir. 1992). "Particularly where the appeal is from a grant of preliminary injunction, which represents the exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it[,] the standard of appellate review must not be reduced to the largely meaningless ritual of the typical 'abuse of discretion' standard." *Id.* at 815.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary remedy" that "shall be granted only if the moving party clearly establishes entitlement to the relief sought." *Di Biase*

v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017). Moreover, when a district court grants a preliminary injunction based on an erroneous application of law, the lower court's legal determinations are reviewed de novo. *See, e.g., Sanmartin Prado v. Whitaker,* 747 F. App'x 941, 942 (4th Cir. 2019) ("We review legal issues de novo.").

I. The district court erred as a matter of law when it failed to conclusively rule that the MECU Pavilion at Pier VI is a nonpublic forum.

The lower court has a problem with labels. Although "labeling" people or things in modern society is not particularly popular, in this case, it is necessary. Labels exist and persist because they serve an important purpose—they define who and what something is to ensure order and consistency. The lower court's failure to label Pier VI as a nonpublic forum constituted clear error and led to further inconsistency and error in the balance of the memorandum opinion.

The lower court correctly found that its analysis turns on the forum of the proposed speech. A.A. 142. Pivotal to any First Amendment free speech analysis is a categorization of the forum in which the speech would take place. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc*., 473 U.S. 788, 797 (1985). "Nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* at 799-800. As such, non-public forums are not allotted the same free speech protections as public forums. *Id.* at 797.

However, the court improperly stated that the subject venue is *either* a nonpublic forum *or* a limited public forum. A.A. 154. Those two forum labels are not interchangeable as they can lead to vastly different results. The district court urges that a finding of viewpoint discrimination can eliminate the need for labeling a forum, citing to this Court's recent decision in *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019). A.A. 145. However, that case is clearly distinguishable from the case at bar. In *Davison*, the forum at issue was a Facebook page comment section that this Court conclusively found was a public forum. *See, id*. at 682. In this case, the nature of the forum and the role of the City are at the heart of the controversy below and affects the tests that should be applied in assessing *whether* viewpoint discrimination is behind the City's decision to cancel the St. Michael's event. The mislabeling directly led to the lower court's finding of viewpoint discrimination where this is no evidence of targeting or disfavoring viewpoints, only reasonable concerns about disruptive and costly crowds. In short, without a proper identification of the forum, the lower court put the cart before the horse and created a zebra.

A. The Subject Venue is Not a Public Forum, Limited or Otherwise.

The lower court is correct that the Fourth Circuit at times groups designated forums with limited forums; however, it limits both types of those forums to venues where permission to use the venue is not selective, *e.g*., community centers, libraries, and public schools. *See Goulart v. Meadows*, 345 F.3d 239, 250 (4th Cir. 2003).

Pier VI is nothing like a library, community center, or public school. Permission must be obtained, and access is only granted to a carefully selected group of performers/events. A.A. 150-152. Further, speakers are not admitted as a matter of course—this is essential to the determination of a public forum of any type. *See* A.A. 151 and *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 47 (1983) (speakers must be admitted as matter of course to transform government property into a public forum). Therefore, Pier VI cannot be a designated or limited forum because, as the lower court admits, no speaker is admitted as a matter of course.

B. MECU Pavilion is a Nonpublic Forum.

The Supreme Court has been consistent for decades that facilities owned by the government that are not open to the general public are considered nonpublic forums, subject to a lower level of scrutiny than traditional public forums such as sidewalks, streets and parks. *See Perry,* 460 U.S. at 47 (1983). The Court recognizes that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981). *See also Greer v. Spock*, 424 U.S. 828 (1976) (military base is a non-public forum for First Amendment purposes); *Adderly v. Florida*, 385 U.S. 39 (1966) (jail or prison is a non-public forum for First Amendment purposes); *Jones v. North Carolina Prisoner's Union*,

433 U.S. 119 (1977) (same); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on City transit cars and buses are non-public forum for First Amendment purposes).

Government-owned property, which is not by tradition or designation a forum for public communication, is governed by different standards. *See Perry Education Ass'n*, 460 U.S. at 4. Thus, in addition to time, place, and manner regulations, the government may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Id.* Therefore, implicit in the concept of a nonpublic forum "is the right to make distinctions in access on the basis of subject matter and speaker identity." *Id*. at 49. The Supreme Court has noted that these distinctions may not be permitted for a public forum but are necessary and inescapable so as to allow a nonpublic forum to be used for activities compatible with the intended purpose of the property. *Id*.

Here, the lower court acknowledges that the MECU Pavilion is a City-owned commercial entertainment facility. A.A. 150-51. "The Pavilion is a commercial, proprietary facility owned by the City and operated by a private company, largely as a for-profit music and entertainment venue." *Id*. The MECU Pavilion is a nonpublic forum and ONLY a nonpublic forum—that label matters. The lower court even admitted that access is granted only by selective criteria and the forum's purpose is

commercial—no speaker is granted access as a matter of course. "Use of the Pavilion is not 'granted as a matter of course' to any performer. *Perr*y, 40 U.S. at 47." A.A. 150.

Government-owned stadiums and piers with facilities used for meetings and entertainment, like the MECU Pavilion, are considered nonpublic forums. *See, e.g.*, *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 23 (1st Cir. 2002) (pier owned by Port Authority used as commercial fishery, conference center, eateries and offices constituted nonpublic forum); *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 150 F.3d 95, 99 (7th Cir. 1998) (Navy Pier, government owned navy facility used as recreational and commercial center is nonpublic forum); *Pomicter v. Luzerne Cty Convention Ctr. Auth*., 939 F.3d 534, 539-41 (3d Cir. 2019)(concourse of the Mohegan Sun Arena is a nonpublic forum); *United Church of Christ v. Gateway Econ. Development Corp. v. Greater Cleveland*, 383 F.3d 449, 453 (4th Cir. 2002)(plazas and interior streets within a sports complex are a nonpublic forum), *Florida Gun Shows v. City of Fort Lauderdale*, No. 18- 345-FAM, 2019 WL 20249, *10 (S.D. Fl. 2019) (War Memorial Auditorium owned by city which did not honor a reservation for upcoming gun show considered nonpublic forum). There is no question that the MECU Pavilion is a nonpublic forum.

C. The Lower Court Cherry Picked Parts of Various Tests to Arrive At Its Viewpoint Discrimination Conclusion.

1. The City's Interest in the MECU Pavilion is Proprietary.

The lower court even cites to many of the above same cases in the memorandum opinion to support her (correct) conclusion that the MECU Pavilion is a nonpublic forum. A.A. 153. Based on this finding, the City was entitled to a review of its actions on a lower level of scrutiny; the City's actions were to be upheld so long as they were reasonable and viewpoint neutral. *See Perry*, 40 U.S. at 4. However, the opinion is then highjacked with the erroneous conclusion that the label does not matter and that it *may* be a limited public forum allowing the lower court to shoehorn in inapplicable cases that it used to opine about the potential for viewpoint discrimination. A.A. 154-171. In doing so, the lower court completely ignored the City's proprietary role and provided its own unfounded motivations for the City's decision. A.A. 172.

Significantly, this is a case about a commercial, nonpublic forum – not a public forum, not a designated forum, not a limited forum, and yet, the majority of cases cited in support of the lower court's conclusion that the City engaged in viewpoint discrimination do not involve commercial nonpublic forums. A.A. 92-95. For instance, as discussed above, this case is not analogous to *Davison,* 912 F.3d at 81 because that case involved a public forum, *i.e.*, a Facebook comment section where anyone is able to post. It is also distinguishable from the other cases cited by

the court: *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of Virginia Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (flags displayed on government issued license plates); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (resources for costs of publishing a school newspaper in a public university); and *Goulart*, 345 F.3d 239 (4th Cir. 2003) (permission to use a community center). None of the cases relied upon by the court involve private commercial venues such as Pier VI where the government's role is proprietor in a commercial non-public venue. As has been demonstrated, it is the selective access as well as the proprietary role of the government that changes the standard and lowers the court's scrutiny. The lower court missed this point entirely. This is legal error, for the nature of the nonpublic forum allows for a kind of selectivity and involves commercial interests and motivation that are not present in a traditional, designated or limited or any type of public forum and it is this commercial interest and selectivity that goes to the heart of whether the city's decision was viewpoint based.

As the Supreme Court has found, when the government acts as a proprietor in a commercial venture, as opposed to a regulator, its restrictions are subject to a lower level of scrutiny. *See United States v. Kokinda*, 497 U.S. 720, 725 (1990). When acting in a proprietary capacity, the government has a "freer hand" than when it restricts or bans activities pursuant to a law or regulation. *See National Aeronautics*

and Space Admin. v. Nelson, 52 U.S. 134, 148 (2011). This is for good reason, because when the government is not acting as a regulator, imposing a heightened scrutiny on it interferes with the government's proprietary need to compete with private entities. *See Gilles v. Blanchard*, 477 F.3d 4, 470 (7th Cir. 2007) ("[c]ourts hesitate to impose in the name of the Constitution extravagant burdens on public [entities] that private [entities] do not bear."). Therefore, when the government is acting as a proprietor, state action is not unconstitutional unless it is unreasonable or "arbitrary, capricious, or invidious." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

While it is true that the government cannot suppress speech due to opposition to its viewpoint, the fact is that in this case the City has made no statement in opposition to the group's views, nor has it favored any countervailing views. The role of the government in a nonpublic forum can effect and/or lessen the need for viewpoint neutrality. For instance, in *Wisconsin Interscholastic Athletic Assoc.v. Gannett*, 658 F.3d 614 (7th Cir. 2011), in the context of broadcast journalism for a publicly owned television station, the Seventh Circuit noted that

> while the First Amendment requires viewpoint neutrality in many other contexts, that constraint is inapplicable here. Instead, *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), holds that in the sort of situation presented before us, viewpoint neutrality is inapplicable.

Id. at 622.

Therefore, the role of the city in this case is pivotal to the decision and yet was nearly ignored by the court below – only a handful of cases relied on by that court involve the government acting in a proprietary role and they do not involve the same circumstances as this case. A.A. 99. *See, e.g.*, *Atlanta Journal and Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1301, 1307, 1310-11 (11th Cir. 2003)(advertisements that criticize the government or where access to the racks were denied "for any reason whatsoever", but court found that government was viewpoint neutral) and *Child Evangelism Fellowship of MD v. Montgomery County Public Schools*, 457 F.3d 376, 385 (4th Cir. 2006)(access to a public school's take home flyer distribution where government admitted it excluded flyers "because of the group's evangelical proselytizing mission").

Here, other than the lower court's conjecture, there was no evidence, suggestion, or proof in the record below that the City is hostile to the religious or other views of the Appellee and its proposed attendees. The Court need look no further than the fact that the City allowed this same group to host an event at the MECU Pavilion in 2018 protesting this same U.S. Bishops conference held at a nearby private venue. The only issues raised by the City were valid financial and real public safety concerns—the City has never changed its stance on that issue and cannot control what guests neighboring private venues invite to their forums. A.A. 27-28. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 72–3 (1994)

(explaining, in declining to apply strict scrutiny to "an injunction that restricts only the speech of antiabortion protestors," that "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based").

As the lower court acknowledges, "the Supreme Court has made clear that the 'principal inquiry' in assessing a claim of view point discrimination is 'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" A.A. 158. Again, the City hosted this same event in 2018—it obviously has no issue with Appellee's viewpoint.

2. The City Did Not Engage in Post Hoc Rationalization in Cancelling the Appellee's Event

Presumably due to the absence of such evidence of viewpoint discrimination, the court below then looks to "various factors" in an effort to look behind the City's reasonable basis and find "a pretext for viewpoint discrimination." In doing so, the lower court dives 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. A.A. 158. There is simply no evidence of this in the record below.

Even the cases cited by the lower court support the City's position. It cited to *Am. Freedom Defense Initiative v. Wash. Metro Area Transit Auth.*, 901 F.3d 35 (D.C. Cir. 2018). However, in that case, the D.C. Circuit Court of Appeals found

the claims of viewpoint discrimination failed because, like in the case at bar, there was a reasonable explanation for the cancellation. Here, the City has been clear and consistent that it is concerned about potential violence, property damages, and other costly impacts based on the history of the speakers planned for the rally—not the viewpoint of the speech proposed. There is simply no evidence in the record that the City has allowed speakers with a history of past violent events to be featured guests at the MECU Pavilion.

There is certainly no evidence that the decision was ad hoc. The mayor's chief of staff, Michael Huber makes clear that those financial and safety concerns were the reason for the cancellation he ordered in mid-July, 2021. A.A. 48-50.

The City did not engage in post hoc rationalization. It did not offer one justification while relying on another. The opposite is true. From the very start, the City's concerns centered on the history of the speakers attending the event; that is, the repeated, proven track record of the speakers invited to speak at the event. The court posits that the fact that Michael Huber and Jim Shea did not use the understaffed police department as a concern but the City later argued it in its brief is not offering one reason, then using another – the likelihood of riots obviously implicates the need to use the understaffed police department – they go hand in hand. A.A. 48-52.

Similarly, the fact that Shea and Huber did not mention size but the issue was raised later was not offering one reason then using another – the size of the crowds expected is DUE to the speaker's ties to January 6 – it is all related to the initial justification for the decision. A.A. 48-52. The City did not offer one justification at first and then another to defend itself – its initial basis explains and relates to the later, more specific issues of police staffing and crowd size.

The lower court relied on another out-of Circuit case, *Ridley v. Mass. Bay Trans. Auth*., 390 F.3d 5 (1st Cir. 2004)(*partially abrogated on other grounds by Mata v. Tam*, __ U.S. __, 137 S. Ct. 1744 (2017). A.A. 158. But, again, that case supports the City's position. The *Ridley* court articulated a three-part test to determine if post hoc rationalization was at play. A.A. 158-59. (1) statements made by government officials concerning the reasons for an action; (2) disparate treatment towards people or things sharing the characteristic that was the nominal justification for the action; and (3) a "loose or nonexistent fit" "between the means and ends. 390 F.3d at 86.

Here, the City has been clear from the beginning that its concerns were rooted in cost and public safety. In light of the recent events of January, which resulted in damage to government property and death of police officers, any mention of that event or "insurrection" could only be meant to convey the City's public safety concerns. Further, there was no evidence in the record below that the City has treated

Appellee any different than a similar group seeking to rent its facility. Finally, there is no loose fit between our ends and means—if the event is cancelled, it will not be held in the City's facility.

3. The City Was Acting in a Viewpoint Neutral Manner When it Cancelled Appellee's Event

The district court stated that "the government may restrict access to a nonpublic forum or a limited public forum, even on the basis of subject matter and speaker identity, so long as 'the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral*.'" (internal citations omitted) (emphasis in original) A.A. 154. "Viewpoint-based discrimination occurs when a government official 'targets not subject matter, but particular views taken by speakers on a subject.'" *Robertson v. Anderson Mill Elementary Sch.*, 989 F. 3d 282, 290 (4th Cir. 2021) (quoting *Rosenberger*, 515 U.S. at 829). A.A. 155. Content-based restrictions on speech are to be evaluated under a strict scrutiny standard when the forum is a traditional public forum. As discussed *supra*, the district court found that Pier VI is *not* a traditional public forum but rather is a nonpublic forum. A.A. 154. In fact, content-based restrictions may be applied in a nonpublic or limited public forum. A.A. 154. Despite stating that the City venue is a nonpublic forum, and there is no evidence of the favoring or targeting of views, the district court then erroneously entered into an analysis on the basis of viewpoint discrimination. A.A. 154-172. In doing so, the court indicates that it considered the City's opposition

filed in response to Plaintiff's Motion for Preliminary Injunction and extracts excerpts that discussed the "incendiary and hateful rhetoric" of some of those individuals scheduled to speak at the event. A.A. 159. The court states it took into consideration both Michael Huber and James L. Shea's affidavits in making this determination. A.A. 159. However, this does not appear to be the case.

In discussing viewpoint discrimination, the district court considered two issues – the danger imposed by "unfettered discretion" and the heckler's veto doctrine. A.A. 160. The district court first focused on the unfettered discretion issue. A.A. 160. Despite there being no analogous precedent from this Court, or others, to hang its hat on, the district court relies on mostly regulatory cases, many of which involved public fora, to argue that the City exercised "unfettered discretion" with respect to its commercial decision to deny the use of a nonpublic forum to Plaintiff. A.A. 160-62. Indeed, the district court admits that "in the context of a nonpublic or limited public forum, the unbridled discretion analysis **is not identical to the analysis in a public forum**." A.A. 161. Generally, the unfettered discretion test is utilized in permitting and regulatory cases, not in cases such as this one where the City is a commercial owner of a nonpublic forum exercising its contractual right to cancel an event. For instance, each case referenced in the lower court's memorandum involves a public forum, regulation, or expressly found that the government did not engage in viewpoint discrimination. *See, e.g., Child Evangelism*

of MD, 457 at 386-76 (public school flyer distribution system); *Summum v. Callaghan*, 130 F.3d 906, 910 (10th Cir. 1997)(placement of displays in front of county courthouse determined to be a public forum); *Atlanta Journal and Const.*, 322 F.3d at 1307 (court found that the government's decision was viewpoint neutral)

As the Court acknowledged, the "unfettered discretion" test applies when public officials do not have any regulatory guidelines given to them by the government on which to base decisions regarding access to a public forum. A.A. 160-167. This test is typically applied to regulations in a traditional public forum – such as a sidewalk or public park – where the danger of censorship is greater than in a commercial, nonpublic venue. Despite citing no precedent applying this test to a proprietary government decision in a nonpublic forum, the Court relies on *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), to support this decision. A.A. 160. The Court does this despite discounting this case previously in its opinion. A.A. 153-54. *Southeastern Promotions* is opposite to this case – it involved a theater that was open to any member of the public – and *was* classified as a public forum – which was a not-for-profit venue with no commercial interests at stake. *Southeastern Promotions*, 420 U.S. 546 (1975). The Court also heavily relies on *Child Evangelism Fellowship of Md, Inc. v. Montgomery County Public Schools*, 457 F.3d 367 (4th Cir. 2006), to argue that the "unfettered discretion" test is appropriate in a nonpublic forum. A.A. 154-172, *passim*. However, that case is also plainly

distinguishable to the one here as it involved access to a school's take home flyer distribution. *Child Evangelism of Md*, 457 F.3d 367 (4th Cir. 2006). Again, in *Child Evangelism of Md*, there were no commercial interests involved. Further, the Fourth Circuit admitted in *Child Evangelism of Md* that although restrictions in a nonpublic forum are not insulated from the test "more official discretion is permissible" because "discretionary access is a defining characteristic" of a nonpublic forum. *Id*. at 387. This analysis is precisely why the label of the forum and the role of the government is important, as *Child Evangelism of Md* did not involve commercial interests, although the Fourth Circuit categorized the forum as a nonpublic or limited forum. Here, inapposite to the *Child Evangelism of Md* case, the district court had before it a contractual relationship that determines when the City can overrule SMG – who is the sole operational manager of the venue. A.A. 97-87. The contract itself, in fact, affords the City very little discretion at all in how it may interfere with SMG's selection process for event bookings. A.A. 111. Specifically, there is only one contractual provision in the contract between the City and SMG that allows it the ability to overrule SMG as the sole operation manager of the venue – a single contract provision hardly constitutes an exercise of unbridled discretion. A.A. 111.

On the basis of this, the district court accused the City of "ad hoc" discretion despite an incomplete record of the City's relationship with SMG being developed and the district court also failed to consider "the characteristic nature and function

of the forum" as is required by law to apply the proper test. *Child Evangelism of Md.*, at 387. The district court also stated that the City "presented somewhat shifting justifications for its actions, with little evidence to show that the decision was premised on these justifications." A.A. 164. This is simply not the case based on the record. The City's cancellation was consistent with its contract with SMG and it was not a delegation or exercise of unfettered or unbridled discretion, nor was the cancellation done and then justified via "post hoc" means. Overall, the City's decision was not "post hoc" nor was it "ad hoc" – the City's decision was a reasonable, viewpoint neutral position based on concerns that were consistent throughout the case and the City's cancellation of the event was an exercise of its contractual right with SMG.

4. The Lower Court's Application of the Heckler's Veto Doctrine is Wholly Inappropriate in This Case

The district court makes much ado about how the City has effectively invoked a "heckler's veto" to justify its cancellation of St. Michaels' event. This assertion is, simply put, incorrect and the application of the heckler's veto doctrine is completely inappropriate in this case. In fact, such an application has no precedent and would be totally opposite to current existing precedent. Once again, the issues of labels arise – the heckler's veto applies when the government is acting as a regulator for a public forum, not when it is acting as a proprietor of a private commercial space. The application of the heckler's veto doctrine has no basis in law

with regard to a nonpublic forum where access is selective and content-based decisions are permitted and necessary.

A restriction based on listener-reaction is not inherently viewpoint discriminatory. In *Boos v. Barry*, 485 U.S. 312 (1988), the Supreme Court established that a speech restriction based on listener reaction may be viewpoint-neutral. In that case, the District of Columbia prohibited the display of signs critical of a foreign embassy on sidewalks within 500 feet of the embassy's entrance. Although the Court concluded that the ordinance was an impermissible *content restriction in a traditional public forum, it first determined that the restriction was viewpoint-neutral because* it did "not favor either side of a political controversy." *Boos*, 485 U.S. at 319. Speech restrictions based on listener response, unless they fall within the "secondary effects" exception, are content-based restrictions, which are generally invalid in open public forums, but permissible in limited public forums. Second, every speech restriction based on listener response is not a heckler's veto. If the restriction based on listener reaction operates in a viewpoint-neutral fashion, as described above in *Boos*, then it is not a heckler's veto.

While discussing the issue of the heckler's veto doctrine, and in a tenuous attempt to apply it as another "factor" in its finding of viewpoint discrimination, the lower court cites a case about parade permit fees, Ninth Circuit law about an ordinance prohibiting any person from unreasonably interfering with permittee's use

of public park, a Seventh Circuit case about protests on highway overpasses, and a second circuit case involving a Christian evangelist who brought a § 1983 action against city and police department personnel, alleging violations of his First Amendment and Due Process rights to demonstrate at annual parade and festival celebrating the lesbian, gay, bisexual, and transgender (LGBT) community. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *see Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006); *see Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005); *see Deferio v. City of Syracuse*, 306 F. Supp. 3d 492 (N.D.N.Y. 2018), respectively. None of these cases are even remotely similar to the one at bar – they involve issues of ordinances, permitting, and public forums. The City agrees with the Court that "Fourth Circuit case law makes clear that permitting a heckler's veto is a content-based restriction on speech" and content-based restrictions are allowed in a nonpublic forum; certainly, where the government is acting in a proprietary fashion. A.A. 163. The Court further admits that it is not aware of any Fourth Circuit clarifications on "whether or when the heckler's veto amounts to viewpoint discrimination." *Id*. Instead, the district court then embarks on an analysis of other circuit law, none of which apply the test to a nonpublic, commercial venue such as Pier VI.

The Ninth Circuit case on which the district court relies, *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489 (9th Cir. 2015), acknowledges this

lack of application – "[t]he County's decision to reject SeaMAC's ad as part of a single, blanket decision to reject all submitted ads on the Israeli–Palestinian conflict negates any reasonable inference of viewpoint discrimination. To be sure, excluding all speech on a particular subject—whatever the viewpoint expressed—is content discrimination, but it's not viewpoint discrimination. Content discrimination is generally forbidden in a traditional or designated public forum, but it's permissible in a limited public forum, which is what we are dealing with here. **In a limited public forum, the government may impose content-based restrictions on speech as a 'means of 'insuring peace' and 'avoiding controversy that would disrupt' the business of the forum.** That is all the County did here." *Id*. at 502 (emphasis added) (internal citations omitted). With regards to Pier VI, the forum is less public than *Seattle Mideast* and therefore demands even more selective access as it is a nonpublic forum.

Further, the court admits "to my knowledge, the Fourth Circuit has not clarified whether or when the heckler's veto amounts to viewpoint discrimination." A.A. 163. The Court then fails to consider the viewpoint neutral and content-neutral nature of the City's actions and instead engages in its own "ad hoc" discussion of why it believes the City's actions amounted to a heckler's veto. A.A. 162-166. However, this type of judicial quarterbacking ignores the evidence presented by the City and ignores the fact that the burden of proof in an injunctive matter is on the

movant. In essence, the district court ignored the City's affidavits as well as the information that the City presented in its opposition and responses to Plaintiff's motion. The Court focuses on Mr. Huber and Solicitor Shea's declarations as clear evidence that the City engaged in post hoc justifications and that the City also invoked the heckler's veto. The facts do not support this. Mr. Huber's affidavit lists *some* of the issues that were taken into consideration when the City opted to cancel the event. A.A. 48-50. Specifically, he references "secondary effects" and the impact they could have on the surrounding areas. Further, Mr. Huber's affidavit is supported by publicly available information about events where Steve Bannon and Milo Yiannopoulous have spoken or were scheduled to speak that ended in violence, disruption, and great cost to the locality at which it occurred. This information was known to Mr. Huber at the time the City instructed SMG to discontinue negotiations with Appellees. This is not a mystery – it was stated in Mr. Huber's affidavit as well in the City's arguments. With regards to Solicitor Shea, his declaration states that he informed Michael Voris "that the City was concerned that the proposed event would cause disruptions based on publicly available media reports and other public information about the Church Militant and the confirmed speakers for the event." A.A. 51-52. Again, this information was not hidden. The City elaborated on the various reports and information that the City considered prior to cancelling the event. What the district court now seems to imply is that since the City did not disclose

every single detail it considered when opting to cease negotiations with SMG that it must have engaged in a post hoc justification for its decision. This is, simply put, incorrect based on all of the information in the record.

CONCLUSION

For all these reasons, Appellants Mayor and City Council of Baltimore, Mayor Brandon M. Scott, and City Solicitor James L. Shea respectfully request that this Court reverse the district court's judgment and vacate the preliminary injunction.

Respectfully submitted,

JAMES L. SHEA
City Solicitor

RENITA L. COLLINS
HANNA MARIE C. SHEEHAN
Chief Solicitors

/s/ Michael Redmond
MICHAEL REDMOND
Director, Appellate Practice Group
BALTIMORE CITY DEPARTMENT OF LAW
100 N. Holliday St., Ste. 101
Baltimore, MD 21202
Tel: (410) 396-7536
Michael.Redmond@baltimorecity.gov

Counsel for Appellants

Dated: Oct. 21, 2021

CERTIFICATE OF COMPLIANCE

1. This document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   this document contains 7,372 words.

2. This document complies with the typeface requirements because:

   This document has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: October 21, 2021

/s/ Michael Redmond

MICHAEL REDMOND
Director, Appellate Practice Group
BALTIMORE CITY DEPARTMENT OF LAW
100 N. Holliday St., Ste. 101
Baltimore, MD 21202
Tel: (410) 396-7536
Michael.Redmond@baltimorecity.gov

Counsel for Appellants