
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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

To be clear, the City has nothing but the greatest respect and sympathy for the victims of childhood sexual abuse, and the City sincerely hopes that they are able to voice fully whatever concerns they have in an appropriate forum. The City has absolutely no position on, nor any interest in, the inner workings or budgetary concerns of the Catholic Church, its hierarchy, or the bishops therein, and has no reason to support or suppress any views about the same. Indeed, the City is not in the business of trying to suppress any views.

The City is, however, in the business of running its own non-public concert/performance venue to generate revenue to fund vital public services. Any incident of violence at said venue would be extremely burdensome and detrimental for that business, both in terms of legal liability and negative publicity. The City retains the right to refuse to rent that venue for events that pose too great a risk of violence, disruption and/or injury. The 3,000-person rally that Appellee St. Michael's Media, Inc. ("St. Michael's" or "Church Militant") seeks to hold poses such a risk.

The City's basis for concluding that Church Militant's proposed event poses such a risk are not due to any disagreement of City officials with any political view of the group, but rather stem from the group's own words and actions. Specifically, St. Michael's/Church Militant's leadership publicly praised

extreme acts of political violence that directly resulted from a previous rally, and then invited an organizer of that political violence to participate in the rally it seeks to hold in Baltimore. Although St. Michael's insists that it only wants to hold a "prayer rally," like the one it held in 2018, the significant increase in size, the public praise for political violence, and the prominent role of a man currently being held in contempt of Congress for refusing to answer questions about his involvement in a recent rally-turned-riot all suggest that Church Militant had less prosaic intentions.

The City's fears were not based on rumors, speculation, or allegedly biased media reports, but on St. Michael's own words, and on Steven Bannon's own words. On January 6, 2021, Michael Voris, the founder and President of St. Michael's/Church Militant, broadcast a video of the horrific scenes of political violence unfolding in Washington D.C., and stated, in praise of the rioters:

> Thousands of American patriots fed up with the results of the fraudulent election stormed to the Capitol building today . . . it appears that Joe Biden and his Marxist allies have been denied their fraudulent certification at least one day.

See Post-Election Special: Storming the Capitol, Church Militant (Jan. 6, 2021), https://www.churchmilitant.com/news/article/post-election-special-storming-the-capitol (last accessed Oct. 28, 2021) (these statements from Mr. Voris begin

at roughly the 4:00 minute mark of the video, after several minutes of footage of rally-goers assaulting police and graphic video of a woman who had been shot).[1]

As detailed in its opening brief, the City also has security concerns because St. Michael's included Milo Yiannapoulos in its 2021 program. He too has a history of headlining and hosting events that have ended in violence and property destruction. *See* Daniel Gilbert, *Milo Yiannopoulus at UW: A speech, a shooting and $75,000 in police overtime*, The Seattle Times (March 26, 2017, updated March 27, 2017), https://www.seattletimes.com/seattle-news/crime/milo-yiannopoulos-at-uw-a-speech-a-shooting-and-75000-in-police-overtime/ (last accessed Nov. 1, 2021) and Madison Park and Kyung Lah, *Berkeley protests of Yiannopoulos caused $100,000 in damage*, CNN.com (Feb. 2, 2017), https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html (last accessed Nov. 1, 2021); William Wan, *Milo's appearance at Berkeley led to riots. He vows to return this fall for a week-long free-speech event*, The Washington Post (Apr. 26, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/26/milos-appearance-at-berkeley-led-to-riots-he-vows-to-return-this-fall-for-a-week-long-free-speech-event/ (last accessed Nov. 1, 2021). Although Mr. Yiannapoulos has

[1] St. Michael's assertion that this praise came before it was known that the riot was violent is obviously false. App. Ans. Br. 51-52. The video in which Mr. Voris makes these statements graphically displays the violence.

identified himself as an abuse victim, that does not make his past violent and destructive events any less concerning to the City.

St. Michael's decision to invite Steven Bannon to headline its event, increased the City's concern that violent acts were anticipated, as Mr. Bannon has likewise publicly admitted to playing a role in organizing the rally turned riot on January 6, 2021, and on January 5, 2021, explicitly stated on his podcast that the plan was for the following day's rally to turn violent:

> All hell is going to break loose tomorrow. Just understand this. All hell is going to break loose tomorrow. It's gonna be moving. It's gonna be quick.

See Steve Bannon, *Bannon's War Room*, EP 631 – Pandemic: One Day Away (Jan. 5, 2021), https://www.listennotes.com/podcasts/bannons-war-room/ep-631-pandemic-one-day-away-HzwlUt3Od0k/ (last visited Sept. 19, 2021). (Bannon's comments regarding the following day start at approximately the 29:40 mark of the episode).[2]

[2] Mr. Bannon's support for the use of political violence is well known. He was suspended from Twitter because he said that he would "put the heads [of Dr. Anthony Fauci and FBI Director Christopher Wray] on pikes. Right. I'd put them at the two corners of the White House as a warning to federal bureaucrats." Jaclyn Diaz, *Twitter Permanently Suspends Steve Bannon Account After Beheading Comments*, npr (Nov. 6, 2020), https://www.npr.org/2020/11/06/932052602/twitter-permanently-suspends-steve-bannon-account-afterbeheading-comments (last accessed Sept. 17, 2021).

The City feared that Mr. Voris, Mr. Bannon, and Mr. Yiannapoulos intended to attempt to foment some similar act of political violence at the rally they planned in Baltimore. Given their own well-documented words and actions, this fear was, and is, perfectly reasonable. Nor were these fears pretextual. This is exactly the sort of "disruption" that the City said it feared at the time it refused to rent to St. Michael's, *see* A.A. 48-52, and this is exactly what the City attempted to explain to the district court, even citing these very quotations from Mr. Voris and Mr. Bannon, *see* S.A. 443-45.

And while these fears may not allow the City to prevent Mr. Voris or Mr. Bannon from organizing an event in a public forum available to all speakers - a park, a public plaza, or the sidewalk outside City Hall[3] - these very reasonable fears are more than enough to justify the City's decision not to host an event in a non-public concert/performance venue, the primary purpose of which is to generate revenue. Indeed, the risk of liability from this event is so objectively large that Church Militant's own insurance broker has not yet been able to find any insurer willing to underwrite the minimum comprehensive liability coverage of $10 million for a price that Church Militant is willing to pay.

[3] St. Michael's supporters, in relatively small numbers, have been loudly exercising their right of free speech, successfully and without any City interference, immediately outside the Baltimore City Law Department's offices and in front of the state courthouses in Baltimore during the course of this litigation.

A cursory review of the Appellee's brief reveals that even after being given the opportunity to rebut the City's arguments that the MECU Pavilion at Pier VI is a nonpublic forum, that the City's restrictions were reasonable, and that the City did not engage in viewpoint discrimination, Appellee is unable to do so based on the record before both it and the district court. Failing to support its arguments with actual facts and applicable law, Appellee has been reduced to name-calling[4] and unsupported speculation.

As detailed in the City's opening brief and further below, the MECU Pavilion is a non-public commercial venue. There is no evidence in the record to indicate the Pavilion is open to all speech activities and the Appellee's 1000+ page supplemental appendix contains not one word to support their claims that it is. Instead, the district court found and the record reveals that the City's ownership of the Pavilion is commercial in nature and the class of renters is both selective and restrictive, as allowed by law. There is no evidence of viewpoint discrimination in this record and such a conclusion is based only on conjecture and projection. Contributing to this erroneous and unsupported finding is the application of the "unfettered discretion test" to the Pavilion, which is not a public forum. Furthermore, the City was not acting in a regulatory or law making capacity--only a commercial one. These facts

[4] *See* App. Ans. Br. 51 wherein the Appellee says the City is "lying." Because they are unable to support their arguments with the record, Appellee has been reduced to simply lashing out.

matter and dictate a very different result. Finally, the Appellee's "heckler's veto" analysis was wholly inappropriate, not based on analogous precedent and unequivocally inapplicable to this case.

ARGUMENT

I. THE MECU PAVILION IS SOLELY A NON-PUBLIC FORUM.

A. The City's Commercial Ownership Strategy for the Pavilion is Selective and Restrictive.

In its opening brief, the City cited controlling Fourth Circuit precedent and analogous cases from other jurisdictions to prove that the MECU Pavilion is a government owned commercial nonpublic venue. Appellee's answering brief contains no applicable law to contradict any of the City's arguments or the district court's factual findings. *See* App. Ans. Br. 20-30.

The district court's memorandum opinion made clear that "...the Pavilion appears to qualify as a nonpublic forum…[t]he 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." The district court went on to note that the City's characterization of the Pavilion as "selective" and "commercial" is supported by the record. A.A. 150. Most significantly, the district court found that the "use of the Pavilion is not 'granted as a matter of course'" to any performer, citing to *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). A.A. 151.

There is ample evidence in the record that the Pavilion is limited to only those speakers/performers that are selected by the Pavilion's operator, SMG. The district court found and the record is undisputed that any performer wishing to rent the Pavilion must negotiate a contract with SMG. A.A. 151. This is confirmed by the Appellee's own continuing extended contract negotiation with SMG for the rental of the facility covering a number of topics. A.A. 151. Further, the contract between SMG and the City states that SMG cannot rent the facility to performers who have not performed at similar venues. A.A. 151. And, SMG must provide the City with notice of any bookings and give the City the opportunity to object. A.A. 151. The district court agreed that all of these factors support the conclusion that the Pavilion is a commercial facility that limits those allowed to rent the same. A.A. 151-52. As it held, "[t]he record simply does not support the conclusion [advanced by Appellee] that 'nearly any' member of the public may book 'nearly any' kind of event at the Pavilion." A.A. 151.

The fatal problem with the Appellee's forum analysis is that it completely misrepresents the nature of the Pavilion. *See* App. Ans. Br. 20-30. As stated above, the arguments advanced in its answering brief were rejected by the district court. Undaunted, the Appellee continues to attempt to shoe horn the Pavilion into a designated public forum (as it must for the inapplicable standards it is promoting to apply). In a weak and misguided attempt to distinguish analogous nonpublic forum

cases like those cited in the City's opening brief, the Appellee completely misses the mark and argues "[h]ere, 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." App. An. Br. 27. Appellee has no factual support for that assertion, because none exists. To the contrary, the district court rejected this argument and in addition to the reasons articulated above, found that:

> the discussions between St Michaels and SMG **in 2021** involved commercial considerations of the type **that would not be typical of a public space available to all comers**. For example, when St. Michael's sold tickets to the rally, SMG warned St. Michael's that this would require the rally to be reclassified as a ticketed event sold only through Ticketmaster.

A.A. 151 (emphasis added).[5] Thus, the district court found that because St. Michael's was negotiating a contract for a private event, via SMG, who was under a contract with the City that stated that the operator could not book the venue for an artist atypical for a similar venue, and the City had a contractual right to object, the Pavilion cannot be a designated public forum. A.A. 150-151.

[5] Because St. Michael's did not wish to hold an event with open access, *i.e.,* a public event, they elected to cease ticket sales so that only people who registered with St. Michael's could attend the rally. S.A. 390, 397.

B. The Cases Cited By St. Michael's Media Are Inapposite and, In Fact, Confirm the MECU Pavilion's Non-Public Nature.

As a further illustration that the Appellee's forum argument lacks any merit are the cases it asserts are "directly on point" which are not even in the right ballpark. App. Ans. Br. 28. Appellee relies on *Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244, 249 (D.P.R. 2002). However, *Firecross Ministries* involved a municipal ordinance that specifically banned performances of a political or religious nature. *Id.* at 246. Further, the subject forum was a public recreational complex that was free and open to the public. *Id.* at 248. The open and free nature of the facility was a central factor relied on by that court to determine the venue was a public forum. *Id.* at 249. As the district court properly found, the MECU Pavilion is not a public and free space; it is a commercial facility that requires a negotiated contract and other contractual criteria for entry. A.A. 150-51. Further, the City's actions here are not as the result of an ordinance enacted as a part of the City's legislative authority, but that of a commercial business owner. A.A. 150. Therefore, MECU Pavilion is not a public forum.

The City does agree with Appellee's assertion that "[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)). And, as the record

shows and the lower court found, the MECU Pavilion is not generally available to all speakers. A.A. 150-51. The fact that the Appellee is still attempting to negotiate its use of the Pavilion with SMG for the 2021 event to this day is evidence of that.

To that end, the Appellee's reliance on *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) is misplaced. App. Ans. Br. 22-23. The district court rejected Appellee's attempt to interject *Southeastern Promotions* into the forum analysis here. A.A. 153. "The instant case is distinguishable from *Southeastern*...which is cited by St. Michael's." *Id*. The district court is not alone. Nearly every case across multiple circuits has ruled that *Southeastern Promotions* does not apply to venues that are commercial in nature and where the public cannot gain open access. *See, e.g.*, *Chicago Acorn v. Metropolitan Pier and Exposition Authority*, 150 F.3d 695, 700 (7th Cir. 1998) (with respect to the municipally leased theatre in *Southeastern Promotions*, "any member of the public was welcome who could pay the admission price [conversely] [s]electively and restriction are the essence of the commercial strategy that informs [the management of Navy Pier]"); *Goulart v. Meadows*, 345 F.3d 239, 249 (4th Cir. 2003)(the *Southeastern Promotions* venue was "designed for and dedicated to expressive activities"). Appellees have certainly not cited any contrary authority on this point. And, as detailed above, the MECU Pavilion is similar to Navy Pier in that selectively and restriction are the essence of the City's commercial strategy. The contracting

process, restrictions on who SMG can allow to rent the venue, and the City's contractual ability to reject performers establish this.

The very nature of the theatre in *Southeastern Promotions* proves that it has no relation to the MECU Pavilion in the context of forum analysis. The *Southeastern Promotions* theatre was founded and operated with this restriction:

> **It will not be operated for profit, and no effort to obtain financial returns above the actual operating expenses will be permitted**. Instead its purpose will be devoted for cultural advancement, and for clean, healthful, entertainment which will make for the upbuilding of a better citizenship.

420 U.S. at 549 n.4 (emphasis added). No such restriction applies to the MECU Pavilion as the district court conclusively held that the MECU Pavilion is a commercial facility that the City owns to make a profit. A.A. 150-51.

For similar reasons, Appellee's reliance on *Kristie, Inc. v. Oklahoma City*, 572 F. Supp. 88 (W.D. Okla. 1983) also rings hollow. Again, that case involved a facility that was generally open to the public. *Id.* at 90. This fact was crucial to that court finding that it was a public forum. *See, id.* at 91-92. Further, the case involved the municipality's failure to issue a permit--the instant case is not a permit case. *Id*. at 89. The Appellee's inability to find a forum case in this circuit to support its claim that the MECU Pavilion is a public forum is both compelling and damning.

Next, Appellee appears to argue that it somehow has unfettered access to the MECU Pavilion because it used it for a different event in the past. App. Ans. Br.

24. Because St. Michael's at this point is refusing to engage in a forum analysis based on the actual record of the case, it bears noting that as of this writing, they are still negotiating a contract with SMG for a 2021 event--evidencing the fact that the MECU Pavilion is both selective and restrictive on what types of events it holds. *See Chicago Acorn*, 150 F.3d 695, 700 (7th Cir. 1998)(selectivity and restrictions for a commercial venue indicate it is a nonpublic forum). Plaintiff continues to ignore the important fact that it is seeking to rent a commercial facility that just happens to be owned by the City. A.A. 150-51. *See Marcavage v. City of Chicago*, 659 F.3d 626, 633 (7th Cir. 2011)("[i]t's nature is one of private enterprise with tangible public benefit...")

Further, Appellee ignores the fact that it seeks to have an entirely different event in 2021--one featuring speakers whose past events have ended in violence, disruption, and death. A.A. 118-121. The proposed event is not the simple "prayer rally" that it represents it to be. It is certainly not the "same event" that Appellee held in 2018 in terms of its size, the violent incitement of the speakers involved, and the Appellee's own recent cheering of violence on government owned property.

Appellee appears fixated on the fact that the City cites to a number of cases that involve municipal piers, even going as far to argue that the City is seeking a *per se* rule that piers are nonpublic forums. *See* App. Ans. Br. 24. However, the mere fact that the MECU Pavilion is on a pier is irrelevant for forum analysis purposes.

We agree that "[t]here is no rule governing piers that makes piers a different class of forum." *See* App. Ans. Br. 24. Nor has the City ever argued that all piers are any particular type of forum despite the Appellee's use of quotes around the statement with noticeably no cite to any of the City's filings. The cases that are actually on point (those involving selective and restrictive access to a commercial forum) dictate that the MECU Pavilion is a nonpublic forum, regardless of whether it is on a pier or in the middle of a City block.

Further, Appellee's attempt to distinguish *Fla. Gun Shows v. City of Fort Lauderdale*, No. 18-62345-FAM, 2019 U.S. Dist. LEXIS 26926 (S.D. Fla. Feb. 19, 2019), by claiming that the municipality there was selective in who could use its venue, falls flat. App. Ans. Br. 27. Again, the Appellee has elected to ignore the fact that the City's contractual agreement with SMG proves the restriction and selectivity the City has the right to exercise over the MECU Pavilion. A.A. 150-51.

Appellee again fails to deliver on its promise of a case "directly on point" when it cites *Cinevision Corp. v. Burbank*, 745 F.2d 560 (9th Cir. 1984). App. Ans. Br. 28-29. *Cinevision* involved an amphitheater similar to the one referenced in *Southeastern Promotions*, *i.e.*, it was designated for theater use by the city code, it was public, and openly accessible. *Id.* at 570. Therefore, the result of the analysis is the same as with *Southeastern Promotions*--it has no relation to the MECU

Pavilion, a private commercial venue used to create revenue for the City with contractually selective and restrictive access.

Appellee attempts to latch onto the fact that the promoter in *Cinevision* engaged in contractual negotiations with the owner. However, the 9th Circuit made clear that the nature of the forum was public and the City had no contractual right to reject the proposed concerts. *Id*. at 566 n.3, 570. So, again, by its very terms, the theater in that case is the opposite of the MECU Pavilion, a venue with selective and restrictive criteria to further the commercial interests of the City.

II. THE CITY HAS NEITHER ENGAGED IN VIEWPOINT DISCRIMINATION WITH RESPECT TO APPELLEE, NOR HAS THE CITY ENACTED A "HECKLER'S VETO."

Appellee argues that the City engaged in viewpoint discrimination based on conjecture and speculation. This argument includes a misplaced accusation that the City implemented a content-based restriction on Appellee's speech. App. Ans. Br. 37-38. Appellee is missing the mark entirely on this issue as the facts and precedent show that MECU Pavilion is a non-public forum. What Appellee fails to understand is that content-based restrictions are not only permissible in nonpublic fora, but are essential to maintain control over the forum. A.A. 154, 163. Appellee's have repeatedly attempted to argue, via shoehorning in inapposite and inapplicable cases, that the City has "provided no authority for the proposition that the government may freely engage in viewpoint based discrimination, because there is no such authority."

App. Ans. Br. 41. Such an argument, at its heart, would be utterly absurd and the City has never made such an assertion. What the City has argued, however, is the correct standard for cases such as the one at bar – that the government's commercial decision to not move forward with an event in a nonpublic, commercial forum need only be reasonable. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 808-09 (1985)("[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or only reasonable limitation...")(emphasis in original). The City discussed this at length in its initial briefing. Br. at 32–41. As such, the decision the City made in the instant case is permissible and the fact that the speakers involved are controversial does not transform this into an instance of viewpoint discrimination.

Appellee further misses the target when it states that "[e]ven in a non-public forum, the government may only engage in viewpoint-based discrimination if it can satisfy strict scrutiny. . . . [T]he 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 . . . ." App. Ans. Br. 41. Such a dramatic contention is ridiculous, as the City is not engaging in viewpoint discrimination, and any analysis regarding viewpoint discrimination needs to account for the selective access considerations of a non-public forum. Rather, the City is arguing that the "tests" and "factors" utilized by Appellee and the district court to second-guess the City's business decision, cannot

and do not prove viewpoint discrimination. With regards to the cases Appellee cites to in their answering brief, the factors and tests cited are specifically taken from cases involving public forums and cases involving racial discrimination, which are completely and utterly incongruent with the facts of this case. *See Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985)(discussing First Amendment protections for a police officer who publicly performed in blackface while off duty and how employer disciplinary action was not justified); *Bennett v. Metro. Gov't & Davidson Cnty*, 977 F.3d 530 (6th Cir. 2020)(employment action involving racially charged speech of employee alleging retaliation in violation of the First Amendment with Court finding that employee's speech in particular instance was not part of highest level of speech protected under First Amendment); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)(conviction of individual found guilty of violating a city ordinance after delivering a speech deemed a violation of ordinance reversed); *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005)(discussing restriction on speech of a protestor on a public pedestrian overpass above a busy highway and the effect it had on motorists on the public roadway); *Smith v. Ross*, 482 F.2d 33 (6th Cir. 1973)(civil rights case involving deputy sheriff who told members of an interracial band that they would be evicted as black residents were not welcome and unrest could occur as a consequence of their presence); *Grider v. Abramson*, 994 F. Supp. 840 (W.D. Ky. 1998)(crowd control measures and restrictions on speakers not a violation of

First Amendment in a public rally setting where procedures narrowly tailored to further interest of public safety); *Snyder v. Phelps*, 562 U.S. 443 (2011)(anti-homosexual demonstrations near service member's funeral in a public forum are protected by the First Amendment).

Plowing forward, Appellee once again misapplies precedent in a dramatic fashion, and cites to a case about commercial speech. *See Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980)(discussing constitutionality of a regulation that totally banned promotional advertising by a utility company). In doing so, Appellee claims "[i]f 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) (J.Blackmun, concurring). This is true in a public forum, not in the MECU Pavilion. Here, the projected size and nature of the event proposed by Appellee had changed rather drastically since the event that occurred in 2018. A.A. 123. The City must be able to predict, to some extent at least, what resources will be needed to preserve the venue and to guarantee the safety of participants as well as the surrounding area. These considerations are not forbidden by the First Amendment and are indeed one of the defining characteristics of a nonpublic forum which is, by definition and law, access selective. *See* Br. 26–28.

Appellee continues to make much ado about the idea that the City has somehow invoked a "heckler's veto" to put a stop to their event. As explained previously, the City has done no such thing. Br. 25–30. Appellee relies heavily on *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) which is inapplicable to the case at bar. *Bible Believers* involved Evangelical protestors at an event that was not only in a public forum, but was also "free to the public." *Id.* at 235. The event, a cultural festival which celebrates the Arab heritage of the City of Dearborn, was specifically held on public streets and was hosted by the City of Dearborn. *Id*. at 234–35. In *Bible Believers*, a group of Evangelical Christians who were protesting the event were asked to leave the event by local police. *Id*. at 255. The Sixth Circuit found that this request was inappropriate as it constituted a heckler's veto, as the police did not make any effort to prevent harm from coming to these individuals but rather asked them to leave and therefore violated their First Amendment rights. *Id.* Appellee once again misses the target by relying on *Bible Believers* – the events in that case occurred in a public forum where *any* member of the public could attend and involved a group of individuals who regularly engaged in "street preaching." *Id*. at 236. Specifically, these individuals "**opted to walk the public streets and sidewalks**, spreading their message to those who passed by." *Id*. at 236. Appellee appears to invoke this case to imply that they should be entitled to the use of the nonpublic forum in this case and that denying

access - even when reasonable concerns regarding public safety exist - would constitute a heckler's veto.

Once again, Appellee completely misses the most significant factor controlling this matter – the nonpublic nature of the forum. Appellee also launches into an off base hypothetical by asking this Court to

> [i]magine 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?

App. Ans. Br. 47. Hypotheticals such as this are an attempt to stir the Court into frenzy of controversial and emotional scenarios that are inapplicable here while also purposefully ignoring the fact that while some may consider Appellee a controversial group, that alone does not pigeon-hole the case at bar into a viewpoint discrimination analysis. Tellingly, what is missing from Appellee's analysis on this issue is a specific case on point because one does not exist, as the application of the heckler's veto doctrine to this case would turn well-settled precedent on its head. Content-based restrictions are permissible and an aspect of the defining characteristics of a nonpublic forum and, as stated by the lower court "Fourth Circuit case law makes clear that permitting a heckler's veto is a content-based restriction on speech." A.A. 163. Appellee's repeated failure to recognize the difference

between events occurring in a public forum or in a nonpublic forum seemingly informs its analysis of the alleged "heckler's veto" enforced by the City. This analysis is, in a single word, incorrect.

Appellee again switches focus from the concept of a heckler's veto to the idea that the City engaged in "post hoc rationalizations" to justify its decision to withdraw from negotiating for Appellee's event. They seem to imply that because each and every item that was consulted by City employees was not named in their declarations that somehow those items were not consulted in the decision-making process. This is simply ridiculous, and the City already discussed in its opening brief, at length, why this is simply not true. Br. 31-34. Further, and an issue Appellee continues to focus on, is that despite providing evidence to the contrary via the pleadings it submitted, Appellee insists that the City did not provide adequate evidence that it did not engage in viewpoint discrimination. That is just false. The City provided sworn affidavits as to exactly why it made the decision that it did. *See* A.A. 48-52 (Chief of Staff Michael Huber citing "a demonstrated history of inciting property destruction, physical assaults, and other violence," and City Solicitor James Shea explaining that the City's reasonable fear of such "disruptions [was] based on publicly available media reports and other public information about Church Militant and the confirmed speakers for the event," i.e., their own words). These affidavits also provided sworn evidence that the only viewpoint discrimination of which

Appellee accused the City played absolutely no role in the City's decision. *See* A.A. 52 (Solicitor Shea explaining that he had no contact with the Catholic Church or its bishops and that they "played no role whatsoever in the [City's] decision"). Moreover, what it appears both Appellee and the lower court ignored, however, is that with regards to preliminary injunctions it is not the burden of the non-movant to provide evidence to deny the injunction but rather it is the burden of the movant to provide the evidence that the injunction should be granted. *Winter v. Nat. Res. Def. Counsel, Inc.*, 555 U.S. 7, 19–20 (2008). Appellee did not do so as it wrongfully focused on improper and inapplicable law and did not demonstrate that the City engaged in viewpoint discrimination when Appellee's event was cancelled. Thus, Appellee failed to carry its burden of proof; the district court's erroneous ruling should be overturned for this reason alone.

III. THE CITY'S ACTIONS HERE ARE NOT SUBJECT TO STRICT SCRUTINY.

The Appellee asserts that the City failed "to address the issue of strict scrutiny, but their actions are subject to it." App. Ans. Br. 53. This is, simply put, incorrect, as strict scrutiny only applies when viewpoint discrimination is actually present. As has been discussed *supra*, in a nonpublic forum, the City *may* apply content-based restrictions, such as barring advocates of political violence who have previously planned and praised rallies that turn into riots. As the lower court found that the MECU Pavilion was *not* a traditional public forum, but rather is a nonpublic forum,

the City's content-based restrictions were necessary and legally permissible. A.A. 154. The City's decision was based on viewpoint neutral means and Appellee has utterly failed to provide either law or facts to the contrary that would support the upholding of the lower court's decision.

CONCLUSION

St. Michael's Media, Inc., a.k.a. Church Militant, has attempted to frame their event as a simple prayer rally to support sex abuse victims. The City wishes it were so simple. However, St. Michael's Media's decision to change its 2021 event to include speakers who have advocated and incited political violence shifted the focus of the event away from those innocent victims and raised valid safety concerns to the City.

The MECU Pavilion at Pier VI sits in the heart of downtown Baltimore. It is part and parcel of the economic engine of the City of Baltimore known as the Inner Harbor. The undisputed record proves that MECU Pavilion is a commercial non-public venue from which the City generates revenue to fund City services. To that end, the City has elected to be selective and restrictive about who and what renters are allowed to use the facility to maintain the good commercial reputation of the facility; allowing an event that may end in destruction and/or violence does not meet those goals. It is error to treat this decidedly commercial property like a public forum, *e.g.*, a street or sidewalk. That would not only mischaracterize the nature of the venue but also ignore the City's rights as a commercial property owner. The

Seventh Circuit's statements are instructive, and the City urges this Court to use them as a guide.

> We doubt that the plaintiffs want to destroy the amenities or impair the commercial viability of [MECU Pavilion]. What good would it do them? It would accelerate what is now a nationwide trend toward the privatization of public property. If the First Amendment handcuffs the effective exploitation of commercially valuable public property, the government will have an incentive to sell it to a private company, which will not be cabined by the First Amendment.

Chicago Acorn, 150 F.3d at 704.

For the reasons stated above and in the City's opening brief, the district court erred when it granted St. Michael's Media, Inc.'s amended motion for preliminary injunction. The City respectfully requests that this Court reverse that decision.

Respectfully submitted,

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Dated: November 1, 2021

CERTIFICATE OF COMPLIANCE

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