No. 21-2206

In the United States Court of Appeals for the Fourth Circuit

ST. MICHAEL'S MEDIA, INC.,

Plaintiff–Appellant,

v.

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

Defendants–Appellees.

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

BRIEF OF APPELLANT

Marc J. Randazza
Jay M. Wolman
RANDAZZA LEGAL GROUP, PLLC
2764 Lake Sahara Drive, Suite 109
Las Vegas, Nevada 89117
Tel: (702) 420-2001
ecf@randazza.com

David S. Wachen
WACHEN LLC
11605 Montague Court
Potomac, Maryland 20854
Tel: (240) 292-9121
Fax: (301) 259-3846
david@wachenlaw.com

Counsel for Appellant St. Michael's Media, Inc.

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. 21-2206 Caption: St. Michael's Media, Inc. v. Mayor and City of Baltimore, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

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

who is 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:

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

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

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

Signature: /s/ Marc J. Randazza Date: October 29, 2021

Counsel for: St. Michael's Media, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Appellant St. Michael's Media, Inc. appeals from the District Court's Order of October 12, 2021, denying in part Appellant's motion for a preliminary injunction. (ECF 46.) Appellants filed its notice of appeal on October 25, 2021. (ECF 77.) This Court has jurisdiction to hear this interlocutory appeal of an order denying an injunction 28 U.S.C. § 1292(a)(1). The District Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

STATEMENT OF THE ISSUES

1. Did the District Court err in finding that there was no contract between SMG and St. Michael's where the parties had agreed on all material terms, St. Michael's had already begun performance, and only the ceremonial act of affixing signatures remained?

2. Did the District Court err by finding that the parties had agreed to a material term, yet declining to order specific performance of at least that one material term?

3. Did the District Court err in requiring St. Michael's to post a $250,000 bond where there was no record evidence of any potential danger posed by the rally St. Michael's planned to hold and the District

Court made no findings that there was a likelihood of violence or property damage?

STATEMENT OF THE CASE[1]

1.0 Factual Background

This case is about a group of people who want to hold a prayer rally in a public forum. The City of Baltimore owns that forum, and Baltimore delegates management of the forum to SMG.

The City government objects to two of the speakers at the prayer rally. Therefore, the City of Baltimore has done everything in its power to prohibit the prayer rally, using shifting rationales that all violate the First Amendment.[2] In doing so, it compelled SMG to repudiate its contract with St. Michael's for use of the forum. The District Court saw the City's conduct for what it was and imposed a Preliminary Injunction that permits the rally to go forward. However, it made erroneous findings regarding the existence of a contract between SMG and St. Michael's and imposed an excessive bond without support.

---

[1] For the sake of judicial economy, and because this appeal should be consolidated with the prior-filed appeal filed by the City, No. 21-2158, which has a complete record, citations to the record in this brief will be made to the "Joint" Appendix in that appeal ("A.A. [page number]") and the Supplemental Appendix there ("S.A. Vol. [x] at [page number]").

[2] The unconstitutional nature of the City's actions is the subject of prior-filed appeal filed by the City, No. 21-2158.

Appellant St. Michael's Media ("St. Michael's") is a Catholic organization that wished to book the MECU Pavilion[3] (also known as Pier VI, an outdoor amphitheater designed to hold 4,600 people), for a prayer rally on November 16, 2021. (A.A. 8 & 10, ¶¶3, 10; S.A. Vol. 1 at 498.) St. Michael's approached SMG,[4] the entity to which Baltimore has delegated management duties for the Pavilion, to book the event. St. Michael's already held a similar event at the Pavilion, booked through SMG, in 2018. (A.A. 10, ¶13.) St. Michael's held this prior rally without a single negative incident.[5] (A.A. 10, ¶13.)

SMG booked St. Michael's for the November 16 rally and, relying on SMG's acceptance of the booking, St. Michael's paid a $3,000 deposit. (A.A. 10, ¶14.) St. Michael's then spent weeks communicating with SMG regarding the logistics of the rally. (*Id.*) St. Michael's also began publicly

---

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

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

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

promoting the rally, resulting in thousands of reservations and booking over a dozen speakers. (*Id.*)

SMG sent St. Michael's the **final** contract for review on July 14, 2021. (S.A. Vol. 1 at 403.) On July 15, 2021, St. Michael's responded that it had one "slight correction" to the agreement and informed SMG that it was in the process of obtaining a certificate of insurance and the remaining deposit amount. (S.A. Vol. 1 at 402.) Thereafter, SMG and St. Michael's had some discussion on expenses under the contract – how much it would cost to open the doors earlier than anticipated and to remain at the rally site for a few hours after the rally concluded. (S.A. Vol. 1 at 398-401.)

On July 20, 2021, SMG informed St. Michael's that, per the contract, it was not permitted to directly sell tickets–ticket sales must go through Ticketmaster. (S.A. Vol. 1 at 397.) **SMG enforced the contract**. St. Michael's performed under the contract's terms. (*Id.*)

The contract mandated actions being taken by the parties *weeks* prior to the event taking place, and they have actually taken place. For example, Paragraph 11 of the agreement requires St. Michael's to procure insurance at least 30 days prior to the event. (S.A. Vol. 1 at 482.)

St. Michael's performed this duty. (S.A. Vol. 1 at 496.) The parties were performing, prior to a ceremony of signatures. Thereafter, on August 2, SMG requested some additional details. (S.A. Vol. 1 at 390-391.) St. Michael's agreed to each and every remaining issue posed by SMG, and SMG sent St. Michael's another finalized document, which contained the terms the parties had already confirmed. (*Id.*)

St. Michael's operated and incurred expenses on the understanding that this meeting of the minds between it and SMG would mature into a formal written agreement. (A.A. 10-11, ¶16.) Notwithstanding the formality, St. Michael's reasonably understood that a contractual relationship existed between it and SMG. (*Id.*) St. Michael's understood that the only thing left was the ceremonial act of the parties affixing their signatures. (S.A. Vol. 2 at 954 (Mr. Voris testifying that "I'm of the I think pretty solid understanding that you don't have to physically sign a piece of paper for there to be a contract. That's more or less just ceremonial.") and 1005 (Mr. Voris testifying that, prior to August 5, 2021, the contract with SMG was a "done deal.").) SMG's general manager, Frank Remesch, testified as follows:

> Q: So you testified that it was your understanding that the City was telling you not to sign the contract.

A: Per the email, correct.

Q: Absent that, would you have signed the contract?

A: I probably would have spoken to counsel, … SMG's counsel.

…

Q: Other than signing it, is there something else that needs to be done with it?

A: **No, I think that would be it**.

(S.A. Vol. 1 at 722.)[6]

Then the City, exercising unilateral authority as the owner of the MECU Pavilion, ordered SMG to cancel its contract with St. Michael's. (A.A. 49, ¶6.) However, SMG did not notify St. Michael's of this until August 5, 2021. (A.A. 11, ¶19.) The City ordered SMG to "cease talks with … St. Michael's … to use the MECU Pavilion." (A.A. 51, ¶3.) When St. Michael's inquired with the City as to why this happened, it first claimed that St. Michael's "had ties to January 6th." (A.A. 11, ¶21.) The City claimed to have found such "ties" through normal Internet searches. (*id*; A.A. 48-49, ¶4.) St. Michael's was unable to replicate these results.

[6] The Court found Remesch's testimony credible. (S.A. Vol. 1 at 727.)

(A.A. 11, ¶22; S.A. Vol. 2 at 948.) In fact, St. Michael's retained an expert[7] to try to replicate the results. He could not do so either. No such "ties" are in the record.

After that rationale wilted under the slightest exposure to logic, the City shifted gears and then claimed that the mere presence of Messrs. Bannon and Yiannopoulos would have such a strong effect on the people of Baltimore, that the populace of this city would be incapable of controlling themselves and they would attack St. Michael's prayer rally. (S.A. Vol. 1 at 444-447; A.A. 48.) The City has not provided any evidence for this either, aside from inadmissible media articles[8] that discuss either politically-charged statements from these speakers or times where they

[7] The District Court rejected Dr. James P. Derrane, as an expert. However, the Court slightly misapprehended Derrane's role. His role was to use his training and experience as an FBI agent not only to assess danger, but also to try to replicate the City's findings. Surely if a non-FBI agent were able to uncover these "ties," then an FBI agent would be able to at least find as much evidence as a layperson. However, he could not replicate the City's findings. (S.A. Vol. 1 at 627.)

[8] As the District Court noted, "the City's concerns about the speakers and the potential 'secondary effects' were based primarily if not entirely on 'available media reports,'" yet Appellees did not provide any specific information about threat assessments. (S.A. Vol. 1 at 119.)

drew counter-protesters who became violent. (ECF 25-1 at 8-10.)[9] The City then came up with *another* post hoc reason – that it canceled the contract because of an opinion Mr. Voris gave in a video about the 2020 Presidential election. (S.A. Vol. 1 at 443-444.)

After the District Court issued a TRO enjoining the City from interfering with the contract between SMG and St. Michael's, those two parties resumed planning the rally. (ECF 19-2.) SMG, yet again, sent a completed contract to St. Michael's for signature. (S.A. Vol. 1 at 428, 476.) St. Michael's accepted the terms, re-sent its deposit, and signed the contract on September 16, 2021. (*Id.*) SMG then declined to countersign because the City forbade it from doing so. (S.A. Vol. 1 at 428.)

2.0 Procedural History

St. Michael's filed its operative, Amended Complaint on September 15, 2021, asserting claims against the City, the Mayor, and Solicitor Shea for violations of the rights of free speech, free assembly, free exercise of religion, and the establishment clause, as well as a claim for specific performance against SMG. (A.A. 8.) On the same day, it filed an

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

amended motion for a preliminary injunction seeking to prevent the City from interfering with the November 16 rally and requiring SMG to perform on its contract with St. Michael's. (A.A. 25.) Appellees opposed on September 23, 2021. (A.A. 43.) St. Michael's filed its reply on September 27, 2021. (A.A. 60.) Appellees filed a "Supplemental Memorandum" on September 28, 2021. (A.A. 86.)

On September 30 and October 1, 2021, the District Court held an evidentiary hearing on the motion for a preliminary injunction. St. Michael's presented witness testimony and provided declarations[10] prior to the hearing (S.A. Vol. 1 at 524-649; A.A. 99.) Appellees declined to put on any evidence. On October 12, 2021, the District Court granted the motion in part, declining to enjoin SMG but ordering that the City, "their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of this injunction, shall not prohibit or impede SMG from entering into a contract with St. Michael's for plaintiff's use of the MECU Pavilion for its

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

planned rally on November 16, 2021." (A.A. 188.) This order was accompanied by a memorandum in which the District Court found, in relevant part, that SMG and St. Michael's had not yet entered into a contract (A.A. 174-183.) However, the District Court made it clear that it expected the parties to contract. (S.A. Vol. 2 at 1225.) The District Court also required St. Michael's to provide a $250,000 bond as a security. (A.A. 188.)

SUMMARY OF ARGUMENT

The District Court erroneously found that SMG and St. Michael's had not entered into a contract by the time it decided Appellant's motion for a preliminary injunction. The parties had already agreed to all material terms; St. Michael's reasonably understood that a contract existed and relied to its detriment on this understanding; St. Michael's had already begun to perform on the contract; and SMG even sent a final version of the contract to St. Michael's, with nothing left to do but sign it, and St. Michael's manifested its acceptance by signing it. The only one who did not want the contract to be signed was the City. It was legally erroneous for the District Court to find that a counter-signature by SMG, the offering party, was required for a contract to exist.

At the very least, the District Court did make a specific finding that SMG and St. Michael's had agreed that the event could take place with $2 million in insurance coverage. Accordingly, even if the entire agreement is not enforced, at least this provision should be the subject of a specific performance order.

The District Court also erred by finding that a $250,000 bond was justified. It made no findings that any of the City's allegations as to danger posed by the November 16 rally were credible and expressed skepticism as to the City's evidence. Under such circumstances, there was no factual basis to require such a significant bond.

ARGUMENT

1.0 Legal Standard

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

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Harvey*, 532 F. 3d 326, 336 (4th Cir. 2008).

Regarding the specific performance claim, this appeal only seeks a review of the District Court's legal conclusions as to whether the facts constitute an enforceable contract, thus this issue should be reviewed de novo. Contract interpretation is a question of law. *Johanssen v. Dist. No. 1 – Pac. Coast Dist.*, 292 F.3d 159, 171 (4th Cir. 2002); *see also Hendricks v. Central Reserve Life Insurance Co.*, 39 F.3d 507, 512 (4th Cir. 1994) (noting that "[w]here a case turns simply upon a reading of the document itself, there is no reason to believe that a district court is in any better position to decide the issue than is an appellate court"); *and see Rowland v. Sandy Morris Fin. & Estate Planning Servs., LLC*, 993 F.3d 253, 257 (4th Cir. 2021) (finding that whether an arbitration agreement was formed was a question of state contract law reviewed *de novo*).

With respect to the bond issue, the District Court's decision is reviewed for clear error.

2.0 The District Court Correctly Erroneously Found There was No Contract to Enforce Between SMG and St. Michael's

From mid-June to early August 2021, SMG coordinated with St. Michael's to make arrangements for the November 16 rally. (S.A. Vol. 1 at 375-412.) However, as the owner of the MECU Pavilion, the City of Baltimore reserved the exclusive right to force the cancellation of any contracts SMG entered into for use of the venue. (S.A. Vol. 1 at 414.) That is precisely what the City did. SMG even mentioned to the City that St. Michael's had held a similar event in 2018 without incident, had already paid a deposit, and had already begun distributing tickets for the event. Yet the City was unmoved and insisted on suppressing the rally. (*Id.*) SMG then did precisely what the City told them to do – which was a violation of St. Michael's First Amendment rights. (A.A. 172.)

Under Maryland law, formation of a contract requires the mutual assent of the parties. *Cochran v. Norkunas*, 398 Md. 1, 919 A.2d 700, 708 (Md. 2007). "Manifestation of mutual assent includes two issues: (1) intent to be bound, and (2) definiteness of terms." *Id.* "A contract is formed when an unrevoked offer made by one person is accepted by another." *County Comm'rs for Carroll Cnty. v. Forty W. Builders, Inc.*, 178 Md. App. 328, 941 A.2d 1181, 1209 (Md. Ct. Spec. App. 2008)

(internal quotation marks omitted). "An 'offer' is the 'manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" *Prince George's Cnty. v. Silverman*, 58 Md. App. 41, 472 A.2d 104, 112 (Md. Ct. Spec. App. 1984). Acceptance may be manifested by actions as well as by words. *Porter v. General Boiler Casing Co.*, 284 Md. 402, 396 A.2d 1090, 1095 (Md. 1979) (stating that "[t]he purpose of a signature is to demonstrate 'mutuality or assent' which could as well be shown by the conduct of the parties").

By August 2, 2021, SMG and St. Michael's had entered into an enforceable contract. They were merely discussing modifications to small details, such as an additional fee for opening the doors of the MECU Pavilion earlier. (S.A. Vol. 1 at 390-391, 398-402.) By this point, the parties had already started performing on material terms of the contract to Appellant's detrimental reliance, including following SMG's instruction that ticket sales had to go through a third-party, Ticketmaster. (S.A. Vol. 1 at 397.) The contract also required St. Michael's to acquire insurance, which it did before there were any signatures. (S.A. Vol. 1 at 482, 496-497.) After the District Court entered

a TRO against the City, SMG reaffirmed this understanding by sending a draft contract to St. Michael's (an offer), which St. Michael's then signed (acceptance). (S.A. Vol. 1 at 428-434, 495.) The only reason SMG declined to counter-sign is that its counsel, who also work for and represent the City in an obvious conflict of interest, instructed it not to. (S.A. Vol. 1 at 428-434.)

Signatures on a contract are not necessary for there to be a contract. *See NeighborCare Pharmacy Servs., Inc. v. Sunrise Healthcare Ctr., Inc.*, No. JFM-05-1549, 2005 U.S. Dist. LEXIS 34404, 2005 WL 3481346, at *2 (D. Md. Dec. 20, 2005). "'The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.'" *Id*. (quoting 17A Am. Jur. 2d Contracts § 34 (2004)). It is a true statement of the law that parties can enter into contractual negotiations with the caveat that there is no deal at all until signatures are affixed, making the signature of each party a condition precedent to the formation of the contract. *See All State Home Mortg., Inc. v. Daniel*, 187 Md. App. 166, 181 (2009). This is an exception that proves the rule, however, as the existence of a signature is not normally considered a condition precedent. *Id*. Here, there is nothing in the record suggesting that such a term is in

the contract, or was even hinted at during the creation of the contract. The customary term that would be expected to contain such a provision, Paragraph 19(c), only requires that amendments be executed.

An analogous case is *Marilyn Manson v. N.J. Sports & Exposition Auth.*, 971 F. Supp. 875, 889 (D.N.J. 1997). It dealt with a music concert trying to book a government-owned venue, with the venue requesting that controversial musician Marilyn Manson be removed from the concert, only to relent in a phone call. *Id.* at 881-82. The concert then began distributing advertisements featuring Manson, and the venue approved of them. *Id.* at 882. Afterward, however, the venue insisted that Manson had to be removed from the concert, and attempted to cancel the entire even when the concert refused. *Id.* at 882-83. The court credited testimony from the plaintiff that:

> contracts in the concert music industry are not reduced to writing until a late date. Additionally, the Court observes that the NJSEA appeared to express continued assent to OzzFest '97 and Marilyn Manson playing at Giants Stadium on June 15, 1997 when the NJSEA approved an advertisement displaying all of the relevant details about the concert including Marilyn Manson's performance. Thus, notwithstanding the NJSEA's apparent policy of not becoming bound until a formal contract is signed, plaintiffs have a reasonable likelihood of success on the merits. Moreover, were a jury to find that no contract was formed,

> plaintiffs would have a reasonable likelihood of success on a promissory estoppel theory.

Id. at 889. Just as in *Manson*, St. Michael's operated under the reasonable expectation that it had reached an agreement with SMG, SMG also acted in accordance with this understanding, and St. Michael's did so to its own detriment. A valid contract existed between SMG and St. Michael's, and SMG should be estopped from claiming otherwise.

The District Court erred in finding that signatures were necessary for a contract to exist. It found that the contract between SMG and St. Michael's contained a term making signatures a condition precedent, but no facts support this finding. (A.A. 178-182.) The District Court even acknowledged that "SMG and plaintiff were headed towards finalizing the terms of a contract, and the City intervened to cancel the event before the contract was finalized," and "the parties were obviously engaged in earnest negotiations until the City called the matter to a halt." (A.A. 182-183.) But the actions of SMG and St. Michael's show more than mere negotiations; they show actions taken in reliance on the existence of a contract. The District Court's insistence that signatures were necessary for the existence of a contract was legally erroneous, and it abused its discretion in finding that St. Michael's did not have a probability of

prevailing on its specific performance claim. At the very least, this Court should find that the $2 million insurance requirement is binding on SMG, as St. Michael's performed this contractual obligation and the District Court acknowledged this obligation. (A.A. 189) (stating in preliminary injunction that "Plaintiff shall verify with the City that it has obtained $2 million in insurance, **as agreed to during contract negotiations** ….") (emphasis added.)

Furthermore, the City has used SMG as a glove to wear when it wants to engage in unconstitutional conduct, then remove when St. Michael's tries to make the City account for this conduct. As the City was the sole reason SMG did not enter into a contract with St. Michael's, and the City forced SMG to cancel it over protest, SMG's repudiation of the contract is state action. When the government compels the private entity to take a particular action, it is properly analyzed as the government's agent or a government actor for the purposes of §1983. *See, e.g., Blum v. Yaretsky*, 457 U. S. 991, 1004-1005 (1982). Here, the record shows that the Government compelled SMG to refuting the contract. (S.A. Vol. 1 at 332-334.) Its joint exercise with the government and the government's delegation of duties to it, also made it a "state actor." (S.A.

Vol. 1 at 522, ¶4, 726-727; *see also Lugar v. Edmondson Oil Co.*, 457 U. S. 922, 941-942 (1982) (finding that when the government acts jointly with a private entity, the private entity is a state actor).) The glove of the City is a state actor, and it was erroneous for the District Court to ignore how the City was using its glove to engage in viewpoint censorship, while disregarding the expressed intent of the glove itself.

3.0 The Other Preliminary Injunction Factors Favor St. Michael's

While the District Court did not make findings as to the remaining preliminary injunction factors on the specific performance claim, there is ample record evidence for this Court to determine they weigh in favor of a preliminary injunction as to this claim. Given the time constraints in this matter, remanding to the District Court to make findings as to these factors would foreclose St. Michael's from obtaining effective relief.

As for the second factor, irreparable harm, the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). When a plaintiff seeks injunctive relief for "an alleged violation of First Amendment rights, a plaintiff's irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment

claim." *WV Assn'n of Club Owners and Fraternal Srvs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Thus, because Appellant showed a likelihood of success on its First Amendment claims, the District Court found it established irreparable harm.

This presumption applies with equal force regarding the specific performance claim against SMG, as Appellant's First Amendment rights will be harmed just as significantly if SMG is not required to enter into a contract with St. Michael's, thus allowing the rally to go forward. This has become especially apparent over the course of litigation, as Appellees have shown that the City is using SMG as a mere instrument to carry out its own censorship of Appellant. Injunctive relief against the City is pointless if the City can choose not to be bound by it simply by putting on a glove. To this day, it is still engaging in viewpoint-based discrimination by preventing the rally to go forward, and at this point the only way to ensure that Appellant may exercise its First Amendment rights is by requiring SMG to honor its agreement with St. Michael's.

As for the balance of equities, Courts "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding" of injunctive relief. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24

(2008). In other words, the Court must determine whether the harms faced by the plaintiff in the absence of an injunction outweigh the potential harm to the defendant if the injunction is issued. *See Mt. Valley Pipeline, LLC v. Western Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019).

The balance tips in Appellant's favor. Without an injunction against SMG, St. Michael's and its adherents will be deprived of their First Amendment rights. Meanwhile, Appellees will suffer no harm if St. Michael's obtains injunctive relief. An injunction will merely restore the rights guaranteed by the U.S. Constitution. There is no evidence the City of Baltimore will suffer any hardship, because Appellees have not shown any likelihood that violence will result from the rally. SMG will not suffer any hardship, and will instead be allowed to perform the now-existing Contract with St. Michael's, which it was planning to do anyway before the City unconstitutionally interfered.

As for the final factor, whether the injunction would be against the public interest, the public interest "favors protecting First Amendment rights." *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 632 (S.D.W.V. 2013); *see also Carey v. FEC*, 791 F. Supp. 2d 121, 135-36 (D.D.C. 2011);

Mullin v. Sussex Cnty., 861 F. Supp. 2d 411, 428 (D. Del. 2012). Moreover, the unconstitutional regulation being enforced by Appellees in this case has the potential to harm nonparties because it will limit or infringe upon the rights granted to them by the First Amendment as well. *See Wolfe Fin. Inc. v. Rodgeres*, 2018 U.S. Dist. LEXIS 64335, at *49 (M.D.N.C. April 17, 2018) (*citing McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir. 2015)).

St. Michael's has shown that its First Amendment rights are being infringed and that the public interest favors protecting those rights. There is no demonstrated danger to public health or safety by allowing the rally to go forward, as Appellees have not shown any violence or property destruction is a likely result of it. The public interest favors the issuance of an injunction against SMG that will allow Appellant's rally to go forward.

4.0 The District Court Required an Excessive Bond

A bond should be required only if the enjoined party will suffer harm from the issuance of the injunction. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 285 (4th Cir. 2002). The purpose of a bond "is to enable a restrained or enjoined party to secure indemnification for any

costs … and any damages that are sustained during the period in which a wrongfully issued equitable order remains in effect." 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE §2954 (Apr. 2021). Appellees have not suffered, and will not suffer, any damages resulting from the Preliminary Injunction. The injunction simply allows St. Michael's to conduct its peaceful rally.

In its briefing and during the preliminary injunction hearing, the City failed to articulate any reasonable prospect of violence or property damage occurring as a result of the November 16 rally. All it had was a series of inadmissible media articles discussing how two of the planned speakers for the rally had been subjected to heckler's vetoes, as well as a police officer mentioning that Baltimore police were short-staffed and ongoing litigation concerning completely unrelated protests that had turned violent. (S.A. Vol. 1 at 467-469.) This was the only evidence weighed against numerous attendees and speakers of the rally providing declarations and live testimony that St. Michael's was peaceful and no one involved with the rally had any intention of engaging in or encouraging any form of violence.

Despite this paucity of evidence for the City's assertions of potential violence, the District Court found that "Defendants have articulated real, serious harms that could result if, as a result of a wrongfully issued injunction, disruption and violence ensue at the rally." (A.A. 187.) The District Court did so without making any findings as to why the City's assertions were credible, and despite acknowledging that St. Michael's had already acquired an insurance policy for $2 million (double the bond Appellees requested) pursuant to its contract with SMG, with the City as an insured party. (S.A. Vol. 1 at 279, ¶11, 496-497.) Indeed, in discussing how the City was enacting a heckler's veto, the District Court stated that "[t]he City cannot *conjure up hypothetical hecklers* and grant them veto power." (A.A. 167) (emphasis added.) And in addressing the media articles cited by the City as its *sole evidence* that violence could result from Steve Bannon and Milo Yiannopoulos speaking at the rally, the District Court made no finding as to their accuracy, noting admission of these articles into evidence "does not mean that the content of a particular exhibit is necessarily accurate." (A.A. 119, n.19.) The District Court did not grant credence to the City's unfounded, hypothetical concerns about unidentified hecklers. Yet it found that these

unsupported assertions of potential violence warranted a $250,000 bond. It was an abuse of discretion to require such a large security to insure against the dangers posed by phantoms.

The District Court had no factual basis to require a bond of $250,000. Appellees presented no evidence of potential violence resulting from the rally, and thus there was no factual basis for requiring anything higher than a nominal bond. The District Court abused its discretion in requiring this bond.

CONCLUSION

The Court should reverse the District Court's order denying Appellant's motion for a preliminary injunction as to the specific performance claim; remand with instructions to grant the motion as to this claim. In the alternative, at the very least, this Court should find that the $2 million insurance requirement is binding on SMG, as St. Michael's performed this contractual obligation and the District Court acknowledged this obligation. Further, this Court should reverse the District Court's imposition of a $250,000 bond; and remand with instructions to impose only a $2,500 bond.

Respectfully Submitted,

/s/ Marc J. Randazza

Marc J. Randazza
Jay Marshall Wolman
RANDAZZA LEGAL GROUP, PLLC
2764 Lake Sahara Drive, Suite 109
Las Vegas, Nevada 89117

David S. Wachen
WACHEN LLC
11605 Montague Court
Potomac, Maryland 20854

Counsel for Appellant
St. Michael's Media, Inc.

Dated: October 29, 2021.

CERTIFICATE OF COMPLIANCE

1. This document complies with the 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, certificate of counsel, addendum, and attachments), this document contains 5,343 words.

2. This document complies with the typeface requirements because it has been prepared using Microsoft Word in 14 point Century Schoolbook font.

/s/ Marc J. Randazza
Marc J. Randazza
Counsel for Appellant