No. 21-2206

In the United States Court of Appeals for the Fourth Circuit

ST. MICHAEL'S MEDIA, INC.,

Plaintiff–Appellant,

v.

THE 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

REPLY BRIEF

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TABLE OF CONTENTS

1.0 INTRODUCTION 1

2.0 ARGUMENT 2

2.1 THE CITY IS NOT A PROPER PARTY TO RESPOND TO THE SPECIFIC PERFORMANCE ASPECT OF THIS APPEAL 2

2.2 THE DISTRICT COURT ERRED IN FINDING THERE WAS NO LIKELIHOOD OF SUCCESS ON THE SPECIFIC PERFORMANCE CLAIM 3

2.3 THE PRELIMINARY INJUNCTION FACTORS FAVOR ST. MICHAEL'S 13

2.3.1 Irreparable Harm 13

2.3.2 Balance of Equities and Public Interest 13

2.4 THE DISTRICT COURT ERRED IN REQUIRING THE $250,000 BOND 16

2.4.1 Bonds Can be Waived 16

2.4.2 The District Court Misapplied the Law 16

2.4.3 The City's Arguments are Unavailing 18

2.4.4 The City's "Evidence" is Dishonest and Unhelpful 19

2.5 THIS APPEAL IS NOT MOOT 21

3.0 CONCLUSION 30

TABLE OF AUTHORITIES

CASES

All State Home Mortg., Inc. v. Daniel,
187 Md. App. 166 (2009) 4, 5

Aronson & Co. Fetridge,
181 Md. App. 650 (2008) 5

Blum v. Yaretsky,
457 U. S. 991 (1982) 15

Candle Factory, Inc. v. Trade Assocs. Grp., Ltd.,
23 F. App'x 134 (4th Cir. 2001) 17

Cochran v. Norkunas,
398 Md. 1, 919 A.2d 700, 708 (Md. 2007) 3, 6, 7, 8, 9

County Comm'rs for Carroll Cnty. v. Forty W. Builders, Inc.,
178 Md. App. 328, 941 A.2d 1181 (Md. Ct. Spec. App. 2008) 3

Elliott v. Kiesewetter,
98 F.3d 47 (3d Cir. 1996) 16

Falls Garden Condo. Ass'n v. Falls Homeowners Ass'n,
441 Md. 290 (2015) 7

FEC v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007) 16

Fleet Feet, Inc. v. Nike, Inc.,
986 F.3d 458 (4th Cir. 2021) 28, 30

Goldstein v. Chestnut Ridge Volunteer Fire Co.,
218 F.3d 337 (4th Cir.2000) 14

Hoechst Diafoil Co. v. Nan ya Plastics Corp.,
174 F.3d 411 (4th Cir. 1999) 16, 17, 18

International Controls Corp. v. Vesco,
490 F.2d 1334 (2d Cir. 1974) 17
Leaders of a Beautiful Struggle v. Baltimore Police Dep't,
2 F.4th 330 (4th Cir. 2021) 26
Lopez v. Gonzales,
549 U.S. 47 (2006) 21
Lugar v. Edmondson Oil Co.,
457 U. S. 922 (1982) 15
Manhattan Cmty. Access Corp. v. Halleck,
139 S. Ct. 1921 (2019) 14
NeighborCare Pharmacy Servs., Inc. v. Sunrise Healthcare Ctr., Inc.,
No. JFM-05-1549, 2005 U.S. Dist. LEXIS 34404, 2005 WL 3481346
(D. Md. Dec. 20, 2005) 4
Peoples Drug Stores, Inc. v. Fenton Realty Corp.,
191 Md. 489 (1948) 7
Porter v. General Boiler Casing Co.,
284 Md. 402, 396 A.2d 1090 (Md. 1979) 4
Prince George's Cnty. v. Silverman,
58 Md. App. 41, 472 A.2d 104 (Md. Ct. Spec. App. 1984) 4
Reserve Ins. Co. v. Duckett,
249 Md. 108 (1968) 8
Tandon v. Newsom,
__ U.S. __, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021) 26
Wilson v. Dallas,
403 S.C. 411, 743 S.E.2d 746, 749 (S.C. 2013) 19

OTHER AUTHORITIES

"Travis Scott, History of Hyping Chaos PRAISED FANS WHO GOT HURT AT SHOWS," TMZ (November 10, 2021) 22

1 Joseph M. Perillo, Corbin on Contracts §2.8 (Rev. ed 1993) 7

17A Am. Jur. 2d Contracts § 34 (2004) 4

Appellee, BLACK'S LAW DICTIONARY (6th ed.) 2

Mark A. Geistfeld, ... 25

Stacey A. Hyman, *Comment: The James Frey Scandal: A Million Frivolous Lawsuits*, 17 SETON HALL J. SPORTS & ENT. L. 211, 234 (2007) 19

Victoria Albert, "Travis Scott, Drake, Live Nation, others sued by concertgoers over crowd surge at Astroworld music festival," CBS (Nov. 8, 2021)..... 22

1.0 INTRODUCTION

Baltimore, arguing on behalf of Appellee SMG, claims mootness because SMG signed a contract. That misses the point. St. Michael's sought specific performance because SMG showed that its word is of no value. SMG exploited the lower court's error to step in as the City's agent to try to censor St. Michael's prayer rally, as a work-around the Preliminary Injunction.

SMG engaged in clever-but-transparent tactics of claiming that the rally could only go forward if St. Michael's complied with unreasonable new terms, despite having agreed to different terms – twice. An injunction would have bound SMG to its word, or at least would have closed the loophole that the City exploited to further its desire to censor the event. If that loophole remains open, SMG is likely to continue its conduct of acting as the puppet, with Baltimore's hand controlling it.

The City already lost the main appeal, but then used SMG to try to evade the injunction's terms anyway. It is a near certainty that the City of Baltimore is not finished with its efforts to censor the rally – it will do so by donning the "glove" of SMG, so that it can later claim that it has clean hands. Meanwhile, this Court should see that the glove is porous.

SMG must be compelled to abide by the terms of the contract it entered into with St. Michael's in, pick one, July 2021, September 2021, or at the very least the one it just signed. Because to SMG, a deal is only a deal until Baltimore says, or even hints, that the deal must be broken. Absent relief, there is a high likelihood of irreparable injury.

2.0 ARGUMENT

2.1 The City is Not a Proper Party to Respond to the Specific Performance Aspect of This Appeal

The Answering Brief is filed only on behalf of the Governmental Appellees. SMG has filed nothing.[1] The relief St. Michael's seeks – declaring the original contract enforceable, and revising the injunction to allow St. Michael's to proceed with lower insurance – has nothing to do with the the City. The City is not a party to the existing contract nor any prior contract. Yet SMG is nowhere to be found. Unless the City is

[1] In a footnote, the City states that SMG joins in its Answering Brief and all other documents in this appeal "[t]o whatever extent SMG is deemed to be an appellee in this appeal." (Answering Brief at ECF p. 14, n.1.) But the City's Answering Brief is not filed on behalf of SMG. This is merely one party's representation as to the actions and intent of another party.

admitting that it and SMG are one and the same,[3] the City has no standing to respond to the specific performance issue.

2.2 There was a Likelihood of Success on the Specific Performance Claim

Appellant's Opening Brief discusses the facts and the state of contract negotiations between SMG and St. Michael's, particularly that all terms were agreed upon before August 5, 2021, and SMG sent St. Michael's a new finalized version of the contract on September 16, 2021. St. Michael's signed and returned it immediately. A contract was formed.

Under Maryland law, formation of a contract requires only 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

[3] This is a position that St. Michael's has come to, and intends to plead in an amended complaint, but is not yet established as the law of the case.

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").

There is no requirement that the ceremony of a signature is necessary. *See NeighborCare Pharmacy Servs., Inc. v. Sunrise Healthcare Ctr., Inc.*, 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 true that parties can enter into contractual negotiations *with the caveat* that there is no deal at all until signatures are affixed, making the signature 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. Signatures are not normally condition precedents. *Id.*

Daniel dealt with unambiguous language specifying that signatures were required for a contract to exist; the contract there stated "[t]his agreement is effective and binding to you and your heirs, successors and assigns and us **when** both parties sign it." *Id.* (emphasis added). It emphasized that signatures being a condition precedent may be found where there is contingent language regarding them, such as "if," "provided that," "when," "after," "as soon as," or "subject to." *Id.* at 182 (quoting *Aronson & Co. Fetridge*, 181 Md. App. 650, 682 (2008)). Here, there is no comparable language and nothing in the record suggesting that such a term is in the contract, or was even hinted at during the creation of the contract. There is no language in the July or September contracts that amount to "there is no agreement between SMG and St. Michael's until both parties affix their signatures to this document."

Such a term that would be expected to contain such a provision, Paragraph 19(c), only requires that amendments be executed.[4]

The District Court relied on *Cochran v. Norkunas*, 398 Md. 1 (2007) in finding that a contract does not exist until signatures from all parties are affixed. But the District Court seems to have misapplied *Norkunas*. The case addresses contracts that must be reduced to writing "before it would become binding." *Id.* at 19. The record here shows that SMG bound St. Michael's to the terms of the agreement without the a signing ceremony. SMG and St. Michael's manifested assent to all material terms by July 14, 2021, such as the date of the rally, its purpose, and the amount of insurance required. At the very latest by September 16, 2021, SMG made it clear that it approved of all terms as drafted. St. Michael's then signed the contract without modification, manifesting its acceptance, and notified the City of this acceptance before SMG repudiated the contract. By that time, all terms had been agreed upon

[4] The City claims it would be ridiculous for an agreement to have this provision but not also consider signatures to the original agreement to be a condition precedent to the existence of the contract. It provides no authority for this position, and ignores that requiring amendments to be in writing is a common practice in contract drafting. That does not mean that the vast majority of written contracts have signatures from all parties as a condition precedent.

and the written agreement was a "mere memorial of the agreement already reached." *Falls Garden Condo. Ass'n v. Falls Homeowners Ass'n*, 441 Md. 290, 305 (2015) (quoting 1 Joseph M. Perillo, Corbin on Contracts §2.8, p.138 (Rev. ed 1993)).

Importantly, in setting out Maryland contract law, the *Norkunas* court quoted *Peoples Drug Stores, Inc. v. Fenton Realty Corp.*, 191 Md. 489, 493-94 (1948), which found that:

> "If … it appears that the parties, although they agreed upon all the terms of the contract, intended to have them reduced to writing and signed before the bargain should be considered as complete, neither party will be bound until that is done, **as long as the contract remains without any acts done under it on either side**."

Norkunas, 398 Md. at 20 (italics removed, bold added). A crucial distinction between the facts here and the authorities cited by both the District Court and the City is the fact that St. Michael's was *already performing* on the contract by obtaining the required insurance policy and changing how it ticketed the event. The parties were not free to step away from the negotiating table at any time before all signatures were affixed because St. Michael's had already acted to its detriment, including by providing a deposit. (A.A. 10, ¶14.) Despite acknowledging that St. Michael's had obtained this insurance policy, the District Court

did not consider these acts of performance in analyzing the state of the parties' contractual obligations. (A.A. 187.)

The District Court and the City also seem to have missed a substantial portion of the *Norkunas* court's contract analysis. That case dealt with two sets of documents that allegedly formed a contract for the purchase of property. The first was a letter of intent, and the second was a formal contract. *Id.* at 5. The letter of intent contained language indicating that the parties did not intend to be bound until a subsequent realtor contract was signed, which the court found made it "the type of preliminary 'agreement to agree' that has generally been held unenforceable in Maryland." *Id.* at 21.

In moving on to the formal realtor contract, the court discussed the sequence and timing of offer and acceptance under Maryland law, and that Maryland uses the "mailbox rule," by which acceptance of an offer is effective upon placing it in the mailbox. *Id.* at 24. It affirmed that "'the acceptance of the offer is complete and the contract becomes binding upon both parties when the offeree deposits the acceptance in the post box.'" *Id.* (quoting *Reserve Ins. Co. v. Duckett*, 249 Md. 108, 117 (1968)). The July contract SMG sent to St. Michael's was not merely a letter of intent,

but rather a formal agreement that contained all material terms. (S.A. Vol. 1 at 403.) It was such a strong indicator of the parties' intent that St. Michael's even began to perform on it to its detriment. (S.A. Vol. 1 at 496.) The July contract is enforceable.

As for the September 16 contract, there is another crucial factual distinction between this case and *Norkunas*. The *Norkunas* court found there was no acceptance of the realtor contract because the buyers of the property were not even aware that the seller had signed the contract (after making alterations to some terms) until after litigation was filed. *Id*. at 25. The lack of transmission of the signed contract precluded a finding that a contract existed. But that is not what happened here. Appellant's immediate acceptance of the September 16 contract without alteration, coupled with the *immediate transmission* of the signed contract to SMG, constituted an offer and acceptance of a binding contract. St. Michael's does not assert there was any acceptance of the contract through silence. Rather, SMG very clearly made an offer by sending the contract, with all terms finalized, to St. Michael's. St. Michael's then assented to these terms by signing it and sending it to SMG. The factual scenario is the exact opposite of what occurred in

Norkunas. It was erroneous for the District Court to rely on that case in its contractual analysis, and the City's reliance on it is misplaced.

The City argues that the parties understood the necessity of the ceremony of ink signatures before a contract could exist or anyone was expected to perform on the contract. But, it has no support for this proposition. Its alleged evidence for this is §19(c) of the contract, which provided that "alterations, amendments, or modifications" to the contract must be "executed by an instrument in writing," having signature lines on the contract mentioning signatures were "duly executed," and email correspondence between the parties' representatives mentioned anticipated counter-signatures. The language of the contract is already addressed above. As for emails between SMG and St. Michael's representatives asking for signatures and counter-signatures, there is nothing in these exchanges to indicate that anyone thought a signature was strictly necessary for a contract to exist. It is commonplace to *want* a signature on a contract, as it is the clearest possible manifestation of intent and helps to avoid situations like this. But that hardly means that *anyone* believed no contract existed prior to the inking ceremony. The clearest evidence is Mr. Voris's preliminary injunction testimony, where

he stated that he understood a contract to have existed and that signatures were a mere formality. (S.A. Vol. 2 at 954, 1005) No contrary evidence is in the record.

The City argues that the individuals negotiating the terms of the contract between SMG and St. Michael's, Teresa Waters and Carmen Allard, did not have any authority to bind their respective parties. (Answering Brief at ECF p. 19.) But there is no support for this in the record,[5] and the District Court noted that Ms. Allard and Ms. Waters were, indeed, representatives of their respective organizations. (A.A. 179.) Teresa Waters is the Human Resources Manager and Executive Assistant to SMG's General Manager, Frank Remesch. (S.A. Vol. 1 at 293.) Further, she had been the point person for all negotiations. (*Id*; S.A. Vol. 2 at 858-860, 962, 976.)

It is a mystery where the City gets the idea that Ms. Allard lacked authority. Appellant's CEO, Michael Voris, explicitly instructed Ms. Allard to negotiate the terms of the contract on behalf of St. Michael's.

[5] Just because the contract that St. Michael's signed under duress was signed by other individuals means nothing. An organization can have multiple individuals with authority to agree to contractual terms.

(S.A. Vol. 2 at 860-861.) Further, Voris testified that Allard had the authority to bind St. Michael's. (S.A. Vol. 2 at 864-865).

The email exchanges between SMG and St. Michael's leading up to August 5, 2021 show that multiple other individuals from each party were involved in these contract negotiations and hammering out final details. The Director of Event Services at Royal Farms Arena, Jason Smith, sent and received several emails helping the parties perform, as did SMG's Director of Finance, John Wolpert. (S.A. Vol. 1 at 293.) Several other email addresses associated with St. Michael's were copied on these exchanges, including Appellant's "Technology," "Production Chief," and "Special Events" addresses. (*Id.*) Appellant's Head of Technology, Michael Sherry, also participated in these exchanges. (*Id.*) This was not a case of two individuals in each organization privately discussing the details of a potential contract; everyone acted with the full knowledge and consent of their respective organizations.

There was a contract in July 2021, and again in September 2021. SMG repudiated both agreements after agreeing to their terms and after St. Michael's had already begun to perform. SMG did not have the right

to back out under these circumstances, and it was clear error for the District Court to find otherwise.

2.3 The Preliminary Injunction Factors Favor St. Michael's

2.3.1 Irreparable Harm

The City argues that there is no likelihood of irreparable harm here because SMG finally signed a contract. However, SMG's word is of no value. SMG already agreed, twice. Then, SMG worked in conjunction with and as an instrument of the City to avoid the injunction. To believe that Appellees have no more tricks up their sleeves requires a degree of faith in them that St. Michael's reserves for divinity.

Appellant's first Amendment rights are still at risk when SMG has the ability to repudiate its contract once again at any time before the prayer rally, which its past behavior suggests it will do.

2.3.2 Balance of Equities and Public Interest

The First Amendment is itself, a sacred public interest. The public interest is served by courts refusing to let enjoined government entities simply "don the glove" of a proxy to do that which they could not do on their own. That is what is happening here, and if SMG is permitted to continue to be a "shadow state actor," then municipalities across this

Circuit will see their way to using this tactic as well – to the detriment of all of our Constitutional rights.

SMG is a state actor under three doctrines: Delegation, Compulsion, and Joint Actor, and thus must be enjoined.

Delegation: The City delegated its relevant acts to SMG. "[I]f the state delegates its obligations to a private actor, the acts conducted in pursuit of those delegated obligations are under color of law." *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 342 (4th Cir.2000); *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 n.1 (2019) ("[A] private entity may, under certain circumstances, be deemed a state actor when the government has outsourced one of its constitutional obligations to a private entity").

Baltimore delegated management of the forum to SMG. (Declaration of Frank Remesch, A.A. 46, ¶4) (stating that "[t]he Mayor and City Council of Baltimore and SMG have a contractual relationship whereby SMG operates and manages Pier VI and whereby SMG contracts with outside parties for use of the venue"). It then delegated its censorship to SMG, whereby SMG did the City's bidding to violate the Preliminary Injunction. (*See* Doc. Nos. 28-2 & 28-3.) This "delegation"

made SMG the glove over the hand of the government. It must be governed and bound by the same principles as the government.

Compulsion: A private entity is a state actor when the government compels the private entity to take a particular action. *See, e.g., Blum v. Yaretsky*, 457 U. S. 991, 1004-1005 (1982). Here, the record shows that the City compelled SMG to refute the contract. (S.A. Vol. 1 at 332; A.A. 49, ¶6.) SMG abided. Once SMG did the government's bidding, it became a state actor. The City, moreover, compelled SMG to act as its proxy censor. It is still the glove over the hand of the City.

Joint Action: This applies when the government acts jointly with a private entity. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U. S. 922, 941-942 (1982). It cannot be said that these parties are not "acting jointly" where the City is controlling SMG in this case, and enjoying joint representation of SMG by the City Solicitor. The City spent considerable tax dollars to try to get SMG out of the contract. The City spent tax dollars to argue that SMG can repudiate the portion of the contract which the District Court already found was agreed to – the $2 million insurance requirement. SMG has worked jointly with the City to deprive St. Michael's of its constitutional rights.

It would be overly optimistic to assume that the District Court's preliminary injunction will ensure the prayer rally goes forward when one of the actors in the City's scheme of censorship is not bound by an injunction. At the very least, an order requiring specific performance of the original contract would merge the responsibilities of SMG and the City such that neither could interfere with the rally without being held in contempt.

2.4 The District Court Erred in Requiring the $250,000 Bond

While the District Court rejected the City's hecklers' veto, it then embraced it by requiring an excessive bond. Continuing the bond requirement is harming St. Michael's. As the amicus brief of the First Amendment Lawyers' Association discusses, requiring a large bond in anticipation of a hypothetical violent reaction to protected speech is itself First Amendment violation. (*See* Doc. No. 17 at ECF pgs. 29-32.) Even if this issue were moot, it is capable of repetition yet evading review. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

2.4.1 The District Court Misapplied the Law

The District Court held that there was a strict requirement for a bond, but bonds can be waived. *See Hoechst Diafoil Co. v. Nan ya Plastics*

Corp., 174 F.3d 411, 421 n.3 (4th Cir. 1999). The Court then seemingly considered only potential damage to the City if the preliminary injunction were unlawful.[6]

The District Court cited *Hoechst*, but ignored the fact that "In some circumstances a nominal bond may suffice." 174 F.3d at 424 n.3; *see Candle Factory, Inc. v. Trade Assocs. Grp., Ltd.*, 23 F. App'x 134, 139 (4th Cir. 2001). In this discussion, the *Hoechst* court cited with approval *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir. 1974) (bond of $0 proper when there is an absence of evidence of likelihood of harm).

There was no evidence that the City was likely to suffer *any* harm if the November 16 rally went forward. There were no findings that any violence would result from the rally. The Court noted that any alleged counter-protesters or other violent agitators were purely hypothetical. (A.A. 167.) Yet now, after having already lost this issue on appeal, the City continues to argue that there is a significant likelihood of danger posed by the rally and its speakers. There is not, and the City has failed

[6] This Court has already upheld the injunction, therefore the bond should be discharged anyway.

to provide even the faintest hint of evidence of this. It is merely repeating its admissions of viewpoint discrimination.

2.4.2 The City's Arguments are Unavailing

The City claims that the District Court was required to impose a bond "large enough to cover all *potential* harm *in the event that the court was wrong about issuing the injunction*, not just harm that the court deems to be likely if the court's injunction was justified." (Answering Brief at ECF p. 45) (emphasis in original). Well, the Court was not wrong on the injunction, as this Court held already.

Further, if this erroneous statement of the law were accepted, it would allow the government to impose a heckler's veto in every case by inventing wild theories about potential harms caused by proposed speech – a prior restraint. This Court in *Hoechst* stated that even a non-existent bond may be appropriate where the risk of harm is remote. *Hoechst*, 174 F.3d at 421 n.3. The City does not get to speculate as to tens of millions of dollars in potential damages without supporting evidence and then insist that a huge bond is required to insure against these non-existent dangers.

2.4.3 The City's "Evidence" is Dishonest and Unhelpful

The City's argument that the bond was too low is merely a rephrasing of its already-rejected argument that it was not engaging in viewpoint-based discrimination. The Court should pay attention to how the City presents St. Michael's words to try to manufacture outrage and fear. The key "evidence" the City cites to raise the alarm is the following block quote:

> **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**.

The ellipsis is highlighted here because it is working so hard that the City must see it as the James Brown of ellipses.[7] However, this ellipsis is no James Brown, but rather Milli Vanilli[8] – it is faking it.

If the Court watches the entire broadcast from which this excerpt comes (something the City must have calculated the Court would not do),

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[7] *See Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746, 749 (S.C. 2013) (South Carolina Supreme Court recognizing James Brown's status as the "hardest working man in show business.")

[8] *See* Stacey A. Hyman, *Comment: The James Frey Scandal: A Million Frivolous Lawsuits*, 17 SETON HALL J. SPORTS & ENT. L. 211, 234 (2007) ("Milli Vanilli's career was ruined because its members were not the actual singers. They actually committed a fraud.")

it will find that the first sentence in the quote is at the 4:00 mark. *The ellipsis then stands in for the next 23 minutes and 57 seconds*. The second sentence is at the 27:57 mark.

That ellipsis represents 23 minutes and 57 seconds of news, footage, and analysis. Eighty percent of the news broadcast hides between these three little dots. Meanwhile, at 9:53 in that broadcast, buried deep inside the wild ellipsis, St. Michael's contrasts the violence engaged in by some on January 6th with how a Catholic group "protested." The Catholics peacefully recited the "Our Father" prayer. Why is this slid in between the dots in the ellipsis? Presumably because this shows what St. Michael's already proved – that it is a purveyor of and proponent of peaceful protest. (S.A. Vol. 2 at 527-610, 840-841, 955-956.) Not just rhetorically so – but provably so.

Meanwhile, the City is trying to slide one past the Court by making it seem like it has merely taken out some brief surplusage with that Milli Vanilli ellipsis. The Court should consider that when evaluating the City's credibility on all other factual claims.

The City also seizes on a brief mention by the District Court that there was a *possibility* that the insurance company could choose not to

pay a claim. But the Court made no such finding, nor could it on the record. This speculation cannot support a hecklers-veto-bond. (A.A. 86.)

2.5 This Appeal is Not Moot

The City argues that this appeal is moot because St. Michael's has signed a contract, on less favorable terms than the deal to which SMG already agreed and then repudiated, and St. Michael's posted the excessive bond – as it had little choice if it wanted an injunction.

On remand, after this Court reverses those aspects of the injunction St. Michael's challenges, it will be entitled to seek relief based on Appellees' unconstitutional torpedoing of the original contract – to name just one, the difference in insurance premiums it was forced to pay under the *signed* contract. Because St. Michael's will benefit from relief in this Court, the appeal is not moot. *Lopez v. Gonzales*, 549 U.S. 47, 52 n. 2 (2006) (petitioner's deportation did not moot his appeal of immigration judge's ruling because he could benefit from relief in Supreme Court).

A look at the procedural posture of this matter confirms this. Baltimore opposes Appellant's prayer rally. Therefore, it came up with pretext after pretext to censor it. First, Baltimore claimed that St. Michael's had "ties to" the events of January 6, 2021. (A.A. 11, ¶21; S.A.

Vol. 2 at 947-948.) When that was shown to be ludicrous, Baltimore changed rationales – then claiming that some of the speakers would cause Baltimoreans to be so unable to control themselves in a civilized society that they would attack the prayer rally attendees. (S.A. Vol. 1 at 444-447; A.A. 48-50.) Then, after the Court rejected that argument, they circled back (in this Court) to their previously-abandoned argument that St. Michael's *itself* would foment violence. (*See* Reply Brief in 2158 appeal at ECF p. 10.)

When none of this worked, and Baltimore's hand was stayed from any further unconstitutional interference, Baltimore slipped on a glove in the form of SMG – and all of a sudden, SMG "changed its mind." Baltimore swears that this is an independent decision and that not a single person associated with Baltimore had anything to do with. (S.A.

Vol. 1 at 687-690.) This strains credulity to the breaking point[10] – more than the ellipsis – but let us take them at their word.

If we take them at their word, then SMG made a deal with St. Michael's. It is still Appellant's position that SMG agreed to the prior agreement, and should be required to abide by the conditions in that prior agreement, particularly the lower amount of required insurance (*e.g.*, $2 million v. $7 million). Then, SMG broke that deal, because Baltimore told it to. (A.A. 11, ¶19; A.A. 51, ¶3; S.A. Vol. 1 at 413.) Once Baltimore was enjoined from interfering, SMG "all on its own" decided to repudiate the agreement. (S.A. Vol. 1 at 428, 476, 703-706, 710, 714, 718-721.) Then, SMG actively got in the way. (*See* Doc. No. 28-2.) Then, SMG

[10] It is suspect that SMG claimed to be so "safety conscious" that $25 million in insurance was imperative based on rank speculation about a prayer rally, when just last week, it permitted Travis Scott to hold a festival at one of its venues – meanwhile Scott himself was charged *twice* with inciting crowds to engage in dangerous behavior. *See Victoria Albert,* "Travis Scott, Drake, Live Nation, others sued by concertgoers over crowd surge at Astroworld music festival," CBS (Nov. 8, 2021), available at: https://www.cbsnews.com/news/travis-scott-astroworld-drake-live-nation-scoremore-sued-deaths-crowd-surge/; *see also* "Travis Scott, History of Hyping Chaos PRAISED FANS WHO GOT HURT AT SHOWS," TMZ (November 10, 2021), available at: https://www.tmz.com/2021/11/10/travis-scott-has-clear-history-of-promoting-violence-injury-at-his-shows/. SMG is not a good faith actor here.

claimed that *something* in the District Court's injunction order convinced it that the risk of this event was so great, that $25 million in insurance (or at least $10 million) was imperative.[12] (*See* Doc. No. 28-3). Then, finally, SMG signed a new contract – one that St. Michael's would never have agreed to but for the duress caused by the District Court's erroneous interpretation of contract law.[13]

Had the District Court correctly decided this issue, St. Michael's would not have *needed* to sign the new contract with less favorable terms and not suffered the delay occasioned by SMG's refusal to move forward until St. Michael's procured what the District Judge herself described as a "ridiculous" amount of insurance.

Certainly, we now have a contract, just like we had on July 14, 2021 and then again on September 16, 2021. However, SMG's habit of repudiating its contracts when the City tells it to is why this cross appeal

[12] SMG has never explained what this "something" is, but what could it be aside from the excessive bond?

[13] The central disagreement with the District Court is this: The District Court held that absent a signature, there is no contract. St. Michael's takes the position that the ceremonial act of signing an agreement is not necessary for an agreement to exist. The District Court seemed to partially agree with this, but still declined to enforce any portion of the contract at all.

exists. Now, we should take the *City's* word that SMG is not going to try to pull the rug out from under St. Michael's? There is no reason to believe the City's representations as to what this allegedly independent third party will do – nor to believe its representations as to *anything* given its extreme efforts to violate the First Amendment to date. SMG dutifully repudiates its contracts whenever the City so much as hints that this is what it wants. (A.A. 11, ¶19; A.A. 51, ¶3; S.A. Vol. 1 at 413, 476, 703-706, 710, 714, 718-721.)

Time is of the essence, with Appellant's prayer rally scheduled to occur on November 16, 2021 and the pall of uncertainty that remains hanging over it. SMG must be compelled to honor the contract that it has already repudiated twice, and then tried to use the uncertainty of the District Court's error to extract new onerous and unnecessary terms, which have themselves become an undue burden.

The existence of a requirement for $7 million in insurance is presently causing injury to St. Michael's. It had to shop in the higher insurance market, which has hurt St. Michael's in the insurance market in general. Insurance works like credit: the more you apply for, the lower your credit rating. St. Michael's is now, by the simple virtue of having to

seek and sign for such insurance, finding its insurance needs in jeopardy. *See* Mark A. Geistfeld, *Legal Ambiguity, Liability Insurance, and Tort Reform*, 60 DEPAUL L. REV. 539, 549-51 (2011) (discussing inherent uncertainty in setting premiums for liability insurance policies and how insurer's perception of insured party's risk increases premiums). All of these harms were precipitated by aspects of the District Court's ruling that St. Michael's challenges in this appeal. The City's assertion of mootness is incorrect.

The City's assertion of mootness may be baseless, but it is not unprecedented. In a different context, this Court recently rejected another attempt by the City to escape appellate review of its unconstitutional actions. *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 333 (4th Cir. 2021) (en banc) (City's decision not to renew unconstitutional aerial surveillance program while appeal was pending, and deletion of most but not all of data it collected, did not moot plaintiffs' appeal of the denial of injunctive relief). The Court should again reject the City's attempt to evade accountability and appellate review. The continuous "moving the goalposts" in contract negotiations, even after the injunction entered, further supports a finding that the

appeal is not moot. *Tandon v. Newsom*, __ U.S. __, 141 S. Ct. 1294, 1297, 209 L. Ed. 2d 355 (2021) (application for emergency injunctive relief was not mooted by state officials' changing policy after its filing, where officials had "a track record of moving the goalposts") (citation omitted).

St. Michael's has a palpable fear that Appellees will not allow the prayer rally to go forward. It is concerned that before November 16, 2021, the City and/or SMG will try, yet again, to obstruct the rally on a pretext. St. Michael's requires finality on this issue, on an expedited basis, because the District Court's split decision has given Baltimore *just enough cover* that it has been able to use SMG as a proxy to try to stop the event. This Court can remove that imprimatur from the City's unconstitutional actions.

The City argues that this appeal is moot because its scope is limited to whether St. Michael's is allowed to use the MECU Pavilion for its November 16 prayer rally, which the current contract accomplishes. (Answering Brief at ECF p. 16.) The city misapprehends the purpose of the appeal. St. Michael's seeks to require SMG to abide by all the terms of the prior contract to which it already agreed. And, as explained above, St. Michael's has no reason to believe SMG will act in good faith and

actually allow the rally to go forward unless this Court issues a decision that SMG must abide by the terms of its contract with St. Michael's. While the District Court's erroneous ruling remains in place, SMG is left with sufficient headroom to cancel the event at the last minute or to require completely unreasonable additional requirements that will effectively censor the rally. Appellees *will* attempt to cancel the rally again if this Court does not issue effective relief.

The City claims that SMG's inevitable bad-faith cancellation of the rally is not a basis for this appeal to proceed because it amounts only to a potential future controversy. But this is false, as the controversy between the parties is still ongoing. Appellees have done everything possible to censor the rally over the course of months, and merely taking a brief breather from their obstruction does not moot the appeal. The City's citation to *Fleet Feet, Inc. v. Nike, Inc.*, 986 F.3d 458 (4th Cir. 2021) is inapposite. That case dealt with Nike's use of a confusingly similar tagline, which the district court enjoined, and which injunction Nike appealed. Nike then ended the infringing advertising campaign "and disavowed any intent to continue using the tagline." *Id.* at 461. Nike argued that the preliminary injunction went beyond the scope of the

tagline and enjoined future speech, but failed to identify what speech was actually being enjoined. *Id*. at 463-64. Here, however, the potential harm caused by SMG again repudiating a contract it agreed to is very real, and St. Michael's has good reason to believe this will happen. A court order will prevent this, as SMG will be much more hesitant to violate an injunction than it will to once again breach a contract.

The mere existence of an over-sized bond is causing St. Michael's additional continuing harm. SMG took the position that "something in the [preliminary injunction] order" gave it the opinion that the insurance should be raised from $2 million to $25 million. The only thing in the order that could possibly be construed as justification for this is the $250,000 bond requirement. Presumably, SMG took the bond amount and simply added a couple of zeroes.[14] Removing this requirement will provide further clarity that there is no potential danger caused by

[14] St. Michael's must presume this, since SMG has never once justified its actions. Therefore, being charitable, we must presume that SMG was being truthful when it claimed that "something" in the District Court order made it feel that $25 million in insurance was reasonable. What could that be other than a bond, higher than anyone could ever imagine would be imposed?

Appellant's rally, and will permit St. Michael's to seek recovery for its damages on remand.

The City argues that the appeal as to the bond is moot because it has already posted the bond and thus recovery of it is a purely monetary issue that is not within the scope of an appeal regarding a preliminary injunction. But the only authority the City cites is *Fleet Feet*, which found that when the sole issue in an appeal that has not been mooted is the requirement or amount of a bond, that issue merges into a final decision on the merits. 986 F.3d at 464-65. This principle has no application where, as here, other issues on appeal are still live.

3.0 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, but the District Court would not rule that SMG is subject to the injunction, therefore SMG had a free hand (guided

by the City) to throw obstacle after obstacle before St. Michael's. 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,

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Dated: November 12, 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 6,404 words.

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