

20-6434

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JEREMIAH WALDROP, et. al.,

Plaintiffs/Appellants,

v.

CITY OF JOHNSON CITY, TN,

Defendant/Appellee.

On appeal from the United States District Court
for the Eastern District of Tennessee
Case No. 2:19-cv-00103

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STATEMENT REGARDING ORAL ARGUMENT

The appellee, Johnson City, Tennessee (“Johnson City”) believes that it would aid in this Court’s decision-making process to have the parties appear for oral argument because the issue presented involves an important question of federal constitutional law.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court properly granted summary judgment on behalf of Johnson City as to the federal constitutional claims and the state law claim based on a finding that there was no basis for municipal liability?

II. Whether the District Court properly denied summary judgment on behalf of Waldrop and Self as to the federal constitutional claims and the state law claim based on a finding of: (a) no underlying constitutional violation or (b) no basis for municipal liability?

III. Whether the District Court properly denied the motion for preliminary injunction of Waldrop and Self?

STATEMENT OF THE CASE

Johnson City does not need to restate the procedural history.

The following is a concise statement of the relevant facts:

The appellants are Jerimiah Waldrop (“Waldrop”) and Phillip Self (“Self”).

The appellee is Johnson City, Tennessee (“Johnson City”).

Relevant facts leading up to the September 15, 2018 TriPride Parade and Festival

1. TriPrideTN, Inc. (“TriPride”) is a non-profit organization celebrating LGBTQ+ citizens, which was created for the purpose of building a more inclusive community by presenting a free community festival and parade. *See* <https://www.tripridetn.org/about> (last visited October 14, 2020).

2. TriPride applied to Johnson City for permission to hold a parade and festival on September 15, 2018. TriPride’s application stated the purpose of the event: “LGBT Pride Parade – Celebration of Diversity, Inclusion.” The application described the event as: “This is the first annual family friendly, inclusive parade and festival celebrating the diversity of the local LGBT community in the Tri-Cities.” [Decl. Keenan, RE 18-7, PageID #: 159]

3. TriPride’s Application sought to hold the Festival in Founders Park, a City park, from 11:00 a.m. to 6:00 p.m. [*Id.*, at PageID #: 155; *Id.*, PageID #: 139, at ¶ 9; Keenan depo. (6-25-20), RE 87-6, PageID #: 1166]

4. The City's Special Events Committee ("the Committee") coordinated the City's planning for this event. [Keenan depo., (6-25-20), RE 87-6, PageID #: 1163-1165]

5. The Committee is made up of City employees. *However*, only those City employees who are needed at a *particular* meeting attend *that* meeting. Therefore, any reference to a decision of the Committee means a decision made by those City employees *at that particular meeting*. [Keenan depo., (6-26-20), RE 87-7, PageID #: 1176-1178, 1182-1184; Rice depo., (6-26-20), RE 87-11, PageID #: 1021; RE Tallmadge depo., 87-15, PageID #: 1238-1239; Tallmadge Decl., RE 87-2, PageID #: 1129-1130, ¶ 4]

6. Initially, the City's planning for the TriPride Parade and Festival proceeded like any other event. [Keenan depo., (6-26-20), RE 87-7, PageID #: 1175-1177, 1180-1181]

7. Prior to the September 15, 2018 TriPride Festival, protesters and counter-protesters had always been allowed within an event in a City Park and police officers would try to keep both sides safe. [Rice depo., (9-14-20), RE 87-2, PageID #: 1227-1228] In fact, Waldrop testified that City officers have protected him when he was preaching at just about every annual Blue Plum Festival since 2011. [Waldrop depo., RE 87-16, PageID #: 1242-1244]

8. Originally, the plan was that the TriPride Festival would occur in the

same manner. For example, Kenn Lyon (“Lyon”), the president of TriPride, has testified that the now-retired City staff attorney, Jim Epps, advised him that TriPride and persons opposed to TriPride had First Amendment rights – and those persons would be allowed within the Festival and could exercise their First Amendment rights so long as they were not being disruptive or harassing or threatening TriPride’s attendees. [Lyon depo., RE 58-1, PageID #: 698]

9. However, during this litigation, Lyon gave a declaration stating that Attorney Epps provided this information at some point in June 2018 – at a time when the plan was to have only five (5) officers at the Festival. [Decl. of Kenn Lyon, RE 59-1, PageID #: 799]

10. In that declaration Lyon further explained that: (a) during August 2018 there were escalating threats of violence towards the upcoming Parade and Festival; (b) during a meeting with City representatives on August 31, 2018 TriPride representatives were informed that the FBI was involved, and there would also be officers from other jurisdictions providing security; and (c) during that same meeting, TriPride representatives were informed that TriPride would have control of who could attend its Festival. Exhibit A to Lyon’s declaration is a copy of TriPride’s minutes that were prepared reflecting what occurred during that meeting with the City. [Decl. of Kenn Lyon., RE 59-1, PageID #: 800 at ¶¶ 6-8, and Exhibit A, meeting notes, PageID #: 801]

11. In August 2018, Johnson City Police Chief Karl Turner received information from the FBI that some groups that had been present during the violence in Charlottesville, Virginia were planning to attend the September 15, 2018 TriPride Parade and Festival. [Decl. of Karl Turner, RE 87-3, PageID #: 1132-1133 at ¶ 4]

12. Because of this, the number of officers scheduled to work security ultimately changed from less than ten (10) to more than two hundred (200). [Decl. Turner, RE, 87-3, PageID #: 1113 at ¶ 5]

13. On August 29, 2018, Chief Turner and other officers met with Knoxville Police Department (“KPD”) officers because Knoxville had already been through a similar experience. During that meeting, KPD officers mentioned one thing that had worked well – which was the decision to give the Knoxville gay pride group control over the location where the parade ended. [Decl. Turner, RE 87-3, PageID #: 1133 at ¶¶ 6-8]

14. On August 31, 2018, there was a meeting of the Special Events Committee with representatives of TriPride. [McDavid, depo., RE 87-8, PageID #: 1192-1193, 1194-1195; Decl. Lyon, RE 59-1, PageID #: 801, meeting notes; Rice depo., (6-26-20), RE 87-11, PageID #: 1222; Rice depo., (6-25-20), RE 87-10, PageID #: 1212-1213]

15. The City’s position is that on August 31, 2018 the consensus of the

Committee was that TriPride could control access to the Festival. [Rice depo., (6-25-20), 87-10, PageID #: 1124-1125; City's Answer to Request for Admission No. 28, RE 87-17, PageID #: 1255; Rice depo., (6-26-20), RE 87-11, PageID #:1221-1222]

16. Importantly, there is a factual dispute over the level of control given to TriPride in this meeting. Johnson City's position is that the control given was broad enough to give TriPride control over the forum for First Amendment purposes. However, the street preachers' position is that on August 31, 2018, the Special Events Committee only gave TriPride control over security threats. In support of the street preachers' position is the Rule 30(b)(6) testimony of Captain Rice who testified that no one should have been removed from the Festival unless they were a security threat. [Rice 30(b)(6) depo., RE 90-9, PageID #: 1338] Therefore, for purposes of assessing Johnson City's Motion for Summary Judgment, this Court must assume that that testimony is true. After his Rule 30(b)(6) deposition, Johnson City introduced a later declaration from Captain Rice stating that this Rule 30(b)(6) testimony was in error (and was not consistent with his own actions at the Festival as shown on the street preachers' videos). But the District Court granted the street preachers' motion to exclude that declaration. [Memorandum Opinion, RE 113, PageID #: 1809] Turning now to the street preachers' Motion for Summary Judgment, this Court will initially have to

determine whether there is sufficient evidence from which a jury could find that TriPride's control was sufficient to protect its own expressive message (notwithstanding Captain Rice's Rule 30(b)(6) testimony) because this Court's legal analysis will be guided by that determination.

17. The two TriPride representatives who attended the August 31, 2018 meeting, Lyon and Mark McDavid, confirm that TriPride was given control by the City. [Decl. Lyon, RE 59-1, PageID #: 800; McDavid depo., RE 87-8, PageID # 1196; Lyon depo., (7-1-20), RE 87-5 PageID #: 1159] In addition, TriPride's minutes of the August 31, 2018 meeting confirm this fact as well. [Decl. Lyon, RE 59-1, PageID #: 801]

18. On or after August 31, 2018, either Captain Rice¹ or Captain Howell -- *who were both in attendance at the August 31, 2018 meeting of the Special Events Committee with TriPride* – informed Chief Turner that the Committee had decided to give TriPride control over access to Founders Park. [Decl. Turner, RE 87-3, PageID #: 1133 at ¶ 19]

19. Captain Howell prepared a bullet point handout for the officers working the TriPride Parade and Festival. Captain Billy Church put the information into a PowerPoint presentation. [Church, depo., RE 87-4, PageID ##: 1137-1141;

¹ At the time of the events in question, Brian Rice held the rank of Captain. Later, he was promoted to Major, but Johnson City refers to him by the rank he held at the time.

PowerPoint Presentation, RE 87-1, PageID #: 1111-1128]

20. On the morning of the TriPride Festival, there were two briefings for law enforcement officers. The first briefing was primarily for officers of the Johnson City Police Department (“JCPD”) and local law enforcement agencies. The second briefing was primarily for Tennessee Highway Patrol (“THP”) troopers and FBI agents. [Church depo., RE 87-4, PageID #: 1141-1142]

21. Both briefings were the same. Captain Church gave a PowerPoint presentation, and an FBI representative gave a PowerPoint presentation. The officers were also given Captain Howell’s two-page handout. [Church depo., RE 87-4, PageID #: 1143-1146; Peters depo., RE 87-9, PageID #: 1200-1201]

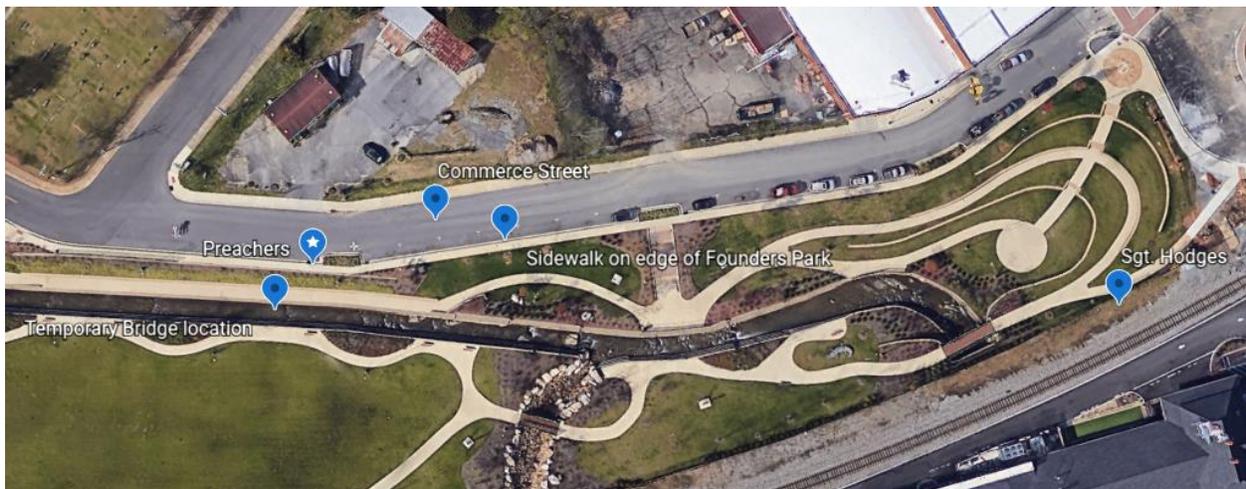
22. The focus of the JCPD presentations was on the rights of protesters and counter-protesters and how to properly interact with them. [*Id.*] In addition to addressing those rights, the two-page handout stated: “TriPride committee members have rented Founder’s Park and can restrict who enters the festival area.” [Two-page handout, RE 59-2, PageID #: 802-803]

Relevant facts at the September 15, 2018 TriPride Festival

1. The following is an aerial photo of Founders Park:



2. The following close up shows relevant locations:



3. The location marked “Sgt. Hodges” is no longer relevant. At the District Court level, the street preachers asserted that his conduct – in moving them and another group out of a right-of-way owned by the railroad – somehow violated their constitutional rights. But the street preachers have not advanced that argument on appeal. Instead, the street preachers are only focused on other officers at and around the sidewalk location on the edge of Founders Park, but still within the footprint of the Festival. On the map, that location is marked “Sidewalk on

edge of Founders Park”. The location where the street preachers’ group ended up and preached for several hours on that sidewalk is marked “Preachers.” [Waldrop depo., 87-16, PageID ##: 1245, 1252; Self depo., RE 87-13, PageID #: 1232; Church depo., RE 87-4, PageID #: 1152] The location marked “Commerce Street” is a street that was closed for the Festival, and therefore within the footprint of the Festival. [Waldrop depo., RE 87-16, PageID ##: 1248-1249; Self depo., RE 87-13, PageID #: 1231; Rice depo., (6-25-20), RE 87-10, PageID ##: 1209-1210; Church depo., RE 87-4, PageID #: 1150] The location marked “temporary bridge” can be seen frequently in the DVDs referenced in this Brief.

4. TriPride’s purpose in having the Festival was to convey inclusiveness to the community that persons who are lesbian, gay, bisexual, or transexual are accepted in the East Tennessee community and to otherwise celebrate diversity and support equal rights for all people. [Lyon depo., (7-1-20), RE 87-5, PageID ##: 1156-1160] As part of conveying this message, TriPride wanted the event open to the public. TriPride had no objection to persons who disagreed with TriPride’s message engaging TriPride’s attendees in civil, respectful conversations that did not involve name calling, belittling or harassment. [Lyon Depo., RE 58-2, PageID #: 704] However, TriPride representatives were on the lookout for persons who were not engaging in respectful conversations because those persons were interfering with TriPride’s expressive message. *Id.* at PageID #: 158.

5. With respect to the involvement between the officers and the street preachers, this occurred when the street preachers' group was positioned on a narrow grassy area within Founders Park. [DVD, RE 18-2, PageID #: 120, at time marker 9:02 to 10:50] If one looks at the close-up aerial photo provided, the grassy strip is just in front of the location marked "preachers" and is approximately ten (10) feet in width. [Waldrop depo., RE 87-16, PageID #:1250-1251; Rice depo., (6-25-20), RE 87-10, PageID #: 1207]

6. Prior to Lt. Kevin Peters' arrival, "the street preachers' group" (this group refers to Waldrop, Self, former plaintiff Fisher, and at least one other street preacher who was never a party to this lawsuit) had been moved a distance of 6-8 feet from the grassy area to the sidewalk on the edge of Founders Park. [Rice depo., (6-25-20), RE 87-10, PageID #: 1209-1210; Church depo., RE 87-4, PageID #: 1150; Keenan depo., (6-25-20), RE 87-6, PageID #:1167-1168]

7. Lt. Peters informed the street preachers' group that they could not re-enter the Festival area because TriPride representatives did not want them in there. Lt. Peters confirmed that they would be arrested if they entered the main Festival area. [Peters depo., RE 87-9, PageID #: 1204] Other officers made similar comments. [DVD, RE 18-1, PageID #: 119 (four (4) copies will be mailed for manual filing on April 5, 2021)]

8. As shown on the aerial photo of Founders Park, the sidewalk where the

street preachers' group was directed to stay (and did stay) was the closest sidewalk on the perimeter of Founders Park. *See*, DVD, RE 18-2, PageID #: 120; Decl. Peters, RE 18-3, PageID #:122 at ¶ 13 and Decl. Rice, RE 18-4, PageID #: 128 at ¶ 14]

9. The street preachers' group preached from that location using amplification for several hours. Their own video shows them loudly interacting with Festival attendees throughout their time at the sidewalk location. *See, e.g.* beginning at time mark 00:00 to 3:25; 6:17 to 13:32; RE 18-2, DVD, PageID #: 120.

10. While they were preaching from that sidewalk, a TriPride representative, George Chamoun, complained that they were continuing to disrupt the Festival from their location on the sidewalk at the edge of Founders Park. [Rice depo. (6-25-20), RE 87-10 PageID ##: 1208-1209; Church depo., RE 87-4, PageID ##: 1147-1152; DVD, RE 18-2, PageID # 120, at time mark 2:08 to 2:24; Waldrop depo., RE 87-16, PageID ##: 1245, 1252; Self depo., RE 87-13, PageID #: 1237]

11. Captain Rice, the Incident Commander, refused to move the street preachers from that sidewalk in the permitted area. [Church depo., RE 87-4 PageID ##: 1147-1150, Lyon depo., (7-14-20), RE 87-18, PageID #:1257]

12. From their location on the sidewalk on the edge of Founders Park, in addition to their religious commentary, the following are just a few examples of

what the street preachers said to TriPride attendees:

- They were perverts and were going to have prolapsed rectums due to anal sex, which was engaged in by 90% of gays who have 110 sex partners and 68 rectal encounters a year; and
- 80% of gays admit to licking or inserting their tongue into the anus of partners.

["Video" titled "Tri-Cities Pride 2018, RE 88, Ex. A, PageID #: 1263 at 1:40, 4:30, 4:37, 4:57, 5:05, 6:45 (copies manually filed by Appellants)]

- Rectal wall tearing is especially common when toys (homosexual lingo for objects) are inserted into the rectum – bottles, pipes and even gerbils.

["Video" titled "Tri-Cities Pride 2018, RE 88, Ex. B, PageID #: 1263 at 24:00, 24:25, 25:01, 25:15, 25:18 (four (4) copies will be mailed for manual filing on April 5, 2021)]

SUMMARY OF ARGUMENT

This Court's task is complicated by the fact that the street preachers seek appellate review of opposing motions for summary judgment – meaning that all reasonable inferences must be drawn in favor of the street preachers as to the City's motion, and in favor of Johnson City as to the street preachers' motion.

A. Johnson City's Motion for Summary Judgment

Because all reasonable inferences must be drawn in favor of the street preachers, on appeal Johnson City limits its argument to the issue of whether there is a basis for municipal liability. The street preachers' theory is that based upon the Rule 30(b)(6) testimony of Captain Rice, the August 31, 2018 decision of the Special Events Committee only gave TriPride control of the forum for purposes of security threats. As a result, during the briefing on the morning of the TriPride Parade and Festival, the officers should have been instructed that TriPride's level of control was limited to security threats. Therefore, according to the street preachers, since the street preachers were not security threats, Johnson City is liable under *City of Canton v. Harris* for failure to train. But Johnson City's position is that the briefing information was prepared by Captain Howell who attended the August 31, 2018 meeting of the Special Events Committee. If Captain Howell misunderstood that the level of control was limited to security threats, his misunderstanding is not a basis for finding that the *municipality* was deliberately

indifferent towards training under *City of Canton v. Harris*. Therefore, the District Court's grant of summary judgment should be affirmed.

B. Street preachers' Motion for Summary Judgment

As described earlier, there is a factual dispute over the level of control given to TriPride. If, after viewing the facts in the light most favorable to Johnson City, this Court concludes that the street preachers are correct that the Special Events Committee only gave TriPride control over security threats, and not control to protect its First Amendment expressive message, then the street preachers' Motion for Summary Judgment should be denied for the same reasons that Johnson City's Motion should be granted – *i.e.*, there is no basis for municipal liability.

In the alternative, if, after viewing the facts in the light most favorable to Johnson City, this Court concludes that the control given to TriPride was broad enough to allow it to protect its expressive message, then the street preachers' Motion for Summary Judgment should be denied because the conduct of the officers in protecting TriPride's expressive message was constitutional.

C. State law claim

Next, the parties agree that the state law claim brought under the Tennessee Religious Freedom Restoration Act rises or falls with the federal constitutional claims.

D. Motion for Preliminary Injunction

Finally, the District Court properly denied the street preachers' motion for preliminary injunction for two reasons. First, the motion sought to enjoin the application of the Special Events Policy regarding the street preachers' constitutional rights; but as the case developed, that Policy had no effect on the street preachers' constitutional rights. Second, the motion should be denied for the same reasons just set forth regarding why Johnson City's motion for summary judgment should be granted and why the street preachers' motion for summary judgment should be denied.

ARGUMENT

I. Standard of review.

A district court's ruling on a motion for summary judgment is subject to *de novo* review by this Court. *Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 416 (6th Cir. 2020). With respect to the denial of a motion for preliminary injunction, the review is also *de novo* because this case involves the First Amendment. *See McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012).

II. Johnson City agrees with the street preachers that a ground relied upon by the District Court should not be relied upon on appeal.

Johnson City agrees with the street preachers that the basis relied upon by the District Court for finding no underlying constitutional violation (*i.e.*, that the street preachers were moved for blocking the entrance) should not be relied upon by this Court on appeal.

III. Factual dispute over control given to TriPride.

It is undisputed that on August 31, 2018 during a meeting between the Special Events Committee and TriPride representatives that TriPride was given some level of control over Founders Park during the limited hours of the TriPride Festival on September 15, 2018. The question is whether that control was broad enough to allow TriPride to control its own expressive message. In their opening Brief, the street preachers argue as follows:

As the City's 30(b)(6) witness, Major Rice testified that the only reason the City gave TriPride control over access to the event area was security. (June 26, 2020, Deposition of the City's Rule 30(b)(6) representative, Major Rice ("June Rice 30(b)(6) Depo."), RE 90-9, PageID# 1336-1337). Major Rice testified that any messages and all expression were allowed throughout the Festival:

- 10 Q. Persons with various expressive messages
11 could walk throughout the event area, correct?
12 A. Yes, sir.
13 Q. Persons with expressive messages could
14 express those messages in Founders Park, correct?
15 A. Yes. I suppose so, yes, sir.
16 Q. Okay. So did the City limit the expressive
17 messages of anyone?
18 A. No. And again, the expressive messages was
19 not really even a thought going into this. It was
20 based on security.

(June Rice 30(b)(6) Depo., RE 90-9, PageID# 1339). Major Rice testified that the Johnson City Police Department would not comply with a request from TriPride to remove someone based on their expressive message. (June Rice 30(b)(6) Depo., RE 90-9, PageID# 1340). Major Rice testified that no one would be removed unless they were a security threat. (June Rice 30(b)(6) Depo., RE 90-9, PageID# 1338).

[Doc. 22, Appellants' Brief, pp. 13-14] Therefore, for purposes of this Court's review of Johnson City's Motion for Summary Judgment, this Court must assume this testimony to be true.

But when analyzing the street preachers' motion for summary judgment, the initial question for this Court, after drawing all reasonable inferences in favor of Johnson City, is whether there is sufficient evidence from which a jury could

conclude that TriPride was given control broad enough to allow TriPride to protect its own expressive message – notwithstanding Captain Rice’s Rule 30(b)(6) testimony. On this issue, Johnson City asserts:

Point 1: The testimony of a Rule 30(b)(6) witness is not a judicial admission. *See e.g. Keepers, Inc. v. City of Milford*, 807 F.3d 24, 34-35 (2nd Cir. 2015). Captain Rice has testified that he has worked many events where the street preachers were present and his job was to attempt to keep the peace. In other words, they were not moved. [Rice depo., RE 18-4, PageID #: 129 at ¶ 16] However, on the day of the TriPride Festival, Captain Rice upheld a decision of other officers to move the street preachers to a sidewalk on the edge of Founders Park, and then later refused a subsequent request from TriPride to move them further away. [Rice depo., RE 18-4, PageID #: 128 at ¶ 14] Such actions are consistent with protecting First Amendment rights, but are not consistent with viewing the street preachers as a security threat. In fact, there is no dispute that the street preachers were not a security threat. Therefore, Captain Rice’s own actions (as shown on the street preachers’ videos) are inconsistent with his Rule 30(b)(6) testimony.

Point 2: The contemporaneous written record contains no such limitation on TriPride’s authority. TriPride prepared minutes of the August 31, 2018 meeting

with the Special Events Committee, and those minutes simply state “we can decide who attends and who doesn’t.” [TriPride Minutes, RE 59-1, PageID #: 801]

Point 3: In the street preachers’ opening Brief, they make the following argument:

. . . the City’s attorney admitted TriPride could not impose a blanket ban on the type of expression engaged in by Waldrop and Self, and no one else was removed from the Festival.

[Doc. 22, Appellants’ Brief, p. 46] This is an example of the street preachers presenting incomplete evidence – even though all reasonable inferences must be drawn in favor of Johnson City as to the street preachers’ appeal of the denial of their motion for summary judgment.

The street preachers’ opening Brief refers to testimony of Kenn Lyon, the TriPride President, who testified that in June, 2018, attorney Jim Epps, a Johnson City staff attorney, told him that TriPride could not exclude anyone from the Festival because both TriPride and other groups had expressive messages protected by the First Amendment. [Pls’ State. Undis. Facts, RE 90, PageID #: 1271 at ¶ 12; and Pls’ Memo, RE 91, PageID #: 1399] However, what the street preachers leave out is that Lyon gave a declaration explaining that this conversation with the City attorney was in June, 2018 at a time when five officers were planned to provide security. Lyon explained that by the August 31, 2018 meeting with the Special Events Committee, he (as a TriPride representative) was informed that TriPride

could control who was in the Festival. [Def. Reply Brief, RE 59-1, PageID #: 799-800 and Exhibit A, meeting notes, PageID #: 801] In other words, the reasonable inference is that there was a change of position. TriPride's understanding of the decision of the Special Events Committee is confirmed by the actions of TriPride representative, Ron Adkins, who on the day of the Festival sought the removal of the street preachers for engaging in hateful speech, not for being a security threat:

6. During the limited period of time TriPride had reserved Founder's Park, TriPride's expressive message was one of acceptance and celebration of diversity. I complained to law enforcement when the preachers came into Founder's Park and began expressing a message of hatred towards homosexuality. This directly conflicted with TriPride's message. Therefore, I asked, on two occasions, for law enforcement officers to remove the preachers from within the Park and this occurred without incident. This first request for removal occurred in the amphitheater area and the second request occurred in the vicinity of the "great lawn" area where the primary festival activities were taking place.

[Decl. of Ron Adkins, RE 18-5, PageID #: 134]²

Point 4: Captain Rice and Captain Howell were both in the August 31, 2018 meeting where the control decision was made, and they did not advise the Police Chief that TriPride's control was limited to barring security threats. [Decl. Turner, RE 87-3, PageID #: 1133 at ¶ 9] Moreover, Captain Howell actually prepared a two-page handout for officers that was distributed the morning of the TriPride

² In the street preachers' Brief, they argue that the District Court should have considered the Adkins Declaration. [Doc. 22, Page 34] Johnson City agrees that Adkins' Declaration can be considered on appeal.

Festival. That memo is inconsistent with TriPride only having been given control limited to security threats. The following are relevant excerpts from that handout, which was entitled “Officers Information for Events and Protests”:

- The officer’s role shall be to preserve the peace and not take sides nor express an opinion regarding the validity of the demonstration.
- Printed materials, including placards and handbills, are generally protected under the Constitution. Such material shall not be seized unless a violation of law has occurred and such materials are of evidentiary value to that case.
- A site designated for protestors and counter-protestors will be offered by the department at the event, but protestors and counter-protestors do not have to remain in their designated areas.
- Officers will actively enforce all local, state, and federal law . . . and all officers shall be strictly prohibited from engaging in biased-based policing.
- **TriPride committee members have rented Founder’s Park and can restrict who enters the festival area.**

[Two-page handout, RE 59-2, PageID ##: 802-803 (bold added)]

Therefore, when this Court is reviewing the street preachers’ Motion for Summary Judgment, Johnson City’s position is that there are sufficient facts from which a jury could conclude that TriPride was given control broad enough to allow it to protect its own expressive message during the limited hours of the Festival because that was the understanding of the officers present at the August 31, 2018

meeting, that was the understanding of the TriPride representatives at that meeting, and that collective understanding is consistent with the actions of Captain Rice and TriPride representatives on the day of the Festival.

IV. Whether Johnson City is entitled to summary judgment?

A. Street preachers' First and Fourteenth Amendment claims

In their First and Second Causes of Action, the street preachers assert *that the Special Events Policy*³ of Johnson City violated their First Amendment rights under the Free Speech Clause and Free Exercise Clause. [RE 72, First Amended Complaint, PageID #: 957 at ¶ 157 to PageID #: 961 at ¶ 186] These claims will be analyzed together. *See Marie v. American Red Cross*, 771 F.3d 344 at fn. 5 (6th Cir. 2014). As to the Fourteenth Amendment, in their opening Brief the street preachers assert that the District Court failed to address their Due Process claim. That claim is a failure to train claim. [Doc. 52, Appellants' Brief, p. 52] Likewise, the theory of municipal liability as to why Johnson City violated the street preachers' First Amendment rights is an alleged failure to train claim. Therefore, the argument in this part of the Brief as to whether Johnson City was deliberately indifferent in regards to training addresses both the First and the Fourteenth Amendment claims.

³ The street preachers' theory of the case – *that the Special Events Policy caused the constitutional violation* -- is no longer the theory sued upon. Instead, their argument now is a failure to train under *City of Canton v. Harris*.

B. Facts drawing reasonable inferences in favor of street preachers

1. Based on Captain Rice's Ruled 30(b)(6) testimony, one could infer that on August 31, 2018, the Special Events Committee only gave TriPride representatives authority to remove someone from the Festival who was a security threat. [Appellants' Brief, Doc. 22, p. 13]

2. On or after August 31, 2018, either Captain Rice or Captain Howell -- *who were both in attendance at the August 31, 2018 meeting between the Special Events Committee and TriPride* -- informed Chief Turner that the Special Events Committee had decided to give TriPride control over access to Founders Park. [Turner Decl., RE 87-3, PageID #: 1133 at ¶ 9]

3. Captain Howell prepared a bullet point handout for the officers working the TriPride Parade and Festival that informed the officers that "TriPride committee members have rented Founder's Park and can restrict who enters the festival area." [Two-page handout, RE 59-2, PageID ##: 802-803]

4. On the morning of the TriPride Festival, the officers were briefed based on the information in Captain Howell's handout. [Church, depo., RE 87-4, PageID ##: 1137-1140; and PowerPoint Presentation, PageID ##: 1111-1128]

5. At no time during the Festival were Waldrop and Self security threats.

6. Waldrop, Self, and former plaintiff Fisher had an expressive message entitled to First Amendment protection.

7. Based on the briefing that came from Captain Howell's information, officers believed that TriPride had control over who was in the Festival, and the officers moved the street preachers' group to the sidewalk at the edge of Founders Park, but still within the footprint of the Festival, at the request of TriPride representatives. [Peters depo. 87-9, PageID #: 1200-1203; Church depo, RE 87-4, PageID #: 1150]

C. Law on municipal liability as to training

For purposes of establishing municipal liability, the street preachers must present sufficient evidence from which a jury could find that (a) their constitutional rights were violated by the officers, and (b) there was a policy or practice of the City that caused the constitutional violation. The street preachers' theory is that there is a policy or practice of inadequate training.

In the specific context of municipal liability regarding training, in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) the United States Supreme Court held that: "[t]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to **deliberate indifference** to the rights of persons with whom the police come into contact." *Id.* at 388 (bold added). In *Cherrington v. Skeeter*, 344 F.3d 631 (6th Cir. 2003), this Court further explained:

We have read *City of Canton* as recognizing at least two situations in which inadequate training could be found to be the result of **deliberate indifference**. 'One is failure to provide adequate training

in light of foreseeable consequences that could result from the lack of instruction,’ as would be the case, for example, if a municipality failed to instruct its officers in the use of deadly force. *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir.1999). ‘A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers.’ *Brown*, 172 F.3d at 931.

Id. at 646 (bold added).

In *Miller v. Calhoun County*, 408 F.3d 803 (6th Cir. 2005), this Court explained the test for determining whether a governmental entity has been deliberately indifferent:

“‘[D]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” This in turn typically requires proof that the municipality was aware of prior unconstitutional actions by its employees and failed to take corrective measures. Additionally, a § 1983 plaintiff must prove that the municipal policies and practices directly caused the constitutional violation.

Id. at 815 (citations omitted).

D. Application of law to facts

Viewing the facts in the light most favorable to the street preachers, a reasonable jury could find that Captain Rice or Captain Howell – who both attended the August 31, 2018 meeting with TriPride – did not accurately pass on the decision of the Special Events Committee that TriPride’s level of control was limited to removal of security threats.

As the cases cited above explain, municipal liability in the context of Section 1983 requires a showing that *the entity* was deliberately indifferent – which is a “stringent standard of fault.” *Miller, supra*, at 815. “A showing of simple or even heightened negligence will not suffice.” *Baynes v. Cleland*, 799 F.3d 600, 620-21 (6th Cir. 2015), And “. . . the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be ‘plainly obvious.’” *Id.*

As addressed in more detail in the next section responding to the street preachers’ arguments, there is no basis for municipal liability because the facts of this case are not a situation where the municipality was deliberately indifferent towards training – as that concept is explained in *City of Canton v. Harris, supra*. Therefore, the District Court’s grant of summary judgment on behalf of Johnson City should be affirmed as a matter of law.

E. Johnson City’s response to the street preachers’ arguments

In the previous section, Johnson City set forth its affirmative case as to why it is entitled to summary judgment. In this section, Johnson City will address the street preachers’ arguments.

i. Street preachers’ argument regarding failure to train

In their opening Brief, the street preachers argue that “the ‘need for more or different training’ was made obvious by the staff attorney’s statement to TriPride’s President in June, 2018 that both sides had First Amendment rights; and based on

Sgt. Tallmadge’s testimony that “the City would never have a policy allowing an event organizer to exclude someone from an event that was free and open to the public.” [Doc. 22, Appellants’ Brief, p. 53]

The testimony of Kenn Lyon relative to Staff Attorney Epps has already been addressed, but an additional fact is that Attorney Epps was in the Special Events Committee on August 31, 2018 when TriPride was given some level of control. [Depo Rice, RE 98-1, PageID #: 1547] With respect to Sgt. Tallmadge, he originally was the Police Department’s liaison with the Special Events Committee for the TriPride Festival, but by the time of the August 31, 2018 Special Events Committee meeting where TriPride was given control, he was not present. Instead, Captains Rice and Howell were present. [Decl. Tallmadge, RE 87-2, PageID #: 1130 at ¶¶ 5-7]

The weakness of the street preachers’ position is demonstrated by their reliance on testimony related to Mr. Epps and Sgt. Tallmadge to support their argument that the need for remedial training was “plainly obvious.” Again, the street preachers’ theory is that the Special Events Committee gave TriPride control only as to security threats, and this decision was not accurately communicated by the officers who attended that meeting to the officers working the event. This is not a case where officers have repeatedly engage in unconstitutional conduct (of which the municipality was aware) and the *municipality* then demonstrated *deliberate*

indifference by ignoring the need for *remedial training*. The facts of this case simply do not support a remedial training claim under *City of Canton v. Harris*.

Therefore, there is no basis for municipal liability.

ii. Street preachers make confusing references to “policy”

In their opening Brief, the street preachers loosely use the word “policy” as if that will somehow lead to municipal liability. As a starting point, the law is as follows:

A plaintiff must show a “direct causal link between the custom and the constitutional deprivation; that is, she must show that the particular injury was incurred *because* of the execution of that policy.” *Doe*, 103 F.3d at 508 (internal quotation marks omitted); *see also Fair v. Franklin Cnty., Ohio*, 215 F.3d 1325 (6th Cir.2000) (table decision) (“*Monell* requires that a plaintiff identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.”)(internal quotation marks omitted).

Baynes, supra, at 621 (italics in original).

As made clear in the street preachers’ First Amended Complaint, any reference to “the Policy” is a reference to the City’s Special Events Policy. [First Amended Complaint, RE 72, PageID #: 931 at ¶ 2] Similarly, in their opening Brief, the street preachers argue:

It is clear that the City was applying its policies by removing Waldrop and Self from Founders Park. The Policy authorizes the approval and issuance of Special Event permits. (Joint Statement, RE 78, PageID# 999). The City admits that the Policy is its Policy. (RFA Answers, RE 90-14, PageID# 1380).

[Doc. 22, Appellants' Brief, p. 55] The fact that the Special Events Policy allows the City to approve requests to hold events has no bearing on the street preachers' current theory of the case – *i.e.*, that the decision of the Special Events Committee to limit TriPride's control to security threats was not appropriately communicated to the officers working the event.

Next, the street preachers argue:

The City admitted that “the consensus of the special event committee was that TriPride could control who entered Founders Park, and that decision was communicated to all law enforcement personnel working the TriPride event.” (RFA Answers, RE 90-14, PageID# 1389-1391). The City admitted that the Special Events Committee is a policymaker. (City's Memo, RE 87, PageID# 1102).

[Doc. 22, Appellants' Brief, p. 56] The street preachers cannot have it both ways. Their current theory of the case is that based upon Captain Rice's Rule 30(b)(6) testimony, this Court must assume that the Special Events Committee's decision was limited to giving TriPride control to address security threats; and that decision was incorrectly communicated to the City's officers, which according to the street preachers constitutes deliberate indifference in regards to training. The paragraph quoted above is not consistent with that position. The paragraph quoted above would only be relevant if Captain Rice's Rule 30(b)(6) testimony is ignored. If the street preachers are arguing that the decision of the Special Events Committee was that TriPride could control who was in the Festival – not just security threats – then

Johnson City adopts verbatim its argument later in this Brief as to why the actions of the officers were constitutional. That argument requires an acknowledgement that TriPride was given control of the forum by the Committee for First Amendment purposes.

The third reference to policy that the street preachers are making in their opening Brief *is their current theory of the case*:

the City failed to properly train and/or instruct its officers, prior to the beginning of the Festival, that TriPride had the authority to exclude people from the event area only if the person was a security threat. (Peters Depo., RE 90-12, PageID# 1352-1353; Church Depo., RE 90-8, PageID# 1327-1328). The City failed to properly train and/or instruct officers, prior to the beginning of the Festival, that TriPride did not have the authority to exclude people from the event area for the reason a person was expressing a message contrary to TriPride's message. (Peters Depo., RE 90-12, PageID# 1352-1353; Church Depo., RE 90-8, PageID# 1327- 1328). Instead, the City erroneously instructed officers that TriPride could exclude anyone from the event area for any reason.

[Doc. 22, Appellants' Brief, pp. 16-17] Johnson City has already addressed this argument.

Based on the foregoing, the District Court's grant of summary judgment to Johnson City should be affirmed.

V. Whether the street preachers are entitled to summary judgment?

A. Overview

The street preachers' opening Brief sets forth the facts in the light most favorable to themselves. Therefore, this Court should find that they have waived their right to challenge the District Court's dismissal of their motion for summary judgment because they cannot now use their reply brief to make arguments that they were required to make in their opening Brief. *See Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir.1986) ("An argument raised for the first time in a reply brief will not be considered by this Court.").

B. If TriPride's level of control was only to remove security threats

If this Court finds that the evidence shows (after drawing all reasonable inferences in favor of Johnson City) that no reasonable jury could find that the Special Events Committee gave TriPride control for any purpose other than dealing with security threats, then the street preachers' motion for summary judgment fails for the identical reasons that Johnson City is entitled to summary judgment – *i.e.*, there is no basis for municipal liability. In that event, the remainder of the City's argument as to the street preachers' Motion for Summary Judgment would become moot.

C. If TriPride’s level of control entitled it to protect its own expressive message

In the alternative, if the evidence is sufficient for a reasonable jury to find that TriPride’s level of control entitled it to protect its own expressive message, then the street preachers’ motion for summary judgment should be denied because their constitutional rights were not violated. As to that factual question, Johnson City relies on the earlier discussion in “Section III.” as to why there is sufficient evidence to find that TriPride could protect its own expressive message – notwithstanding Captain Rice’s Rule 30(b)(6) testimony. *See* pages 17-22 of this Brief.

D. Overview of parties’ legal positions

i. Johnson City’s position

In *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), the United States Supreme Court specifically held that the government may regulate competing uses of a public forum in the form of issuing permits for those wishing to hold a march, parade or rally. *Id.* at 130.

ii. Street preachers’ position

In the street preachers’ opening Brief, they take the position that it is never constitutional to give one speaker control over a public forum. [Doc. 22, Appellants’ Brief, pp. 42-43]

E. Relevant cases

In *Forsyth County, Ga., supra*, a branch of the Ku Klux Klan (“*Nationalist Movement*”) sought to hold a rally on the courthouse steps. Pursuant to its permit ordinance, Forsyth County sought to charge the Nationalist Movement \$100 for the permit. The Nationalist Movement refused to pay and filed a lawsuit. The Supreme Court set forth the constitutional law:

The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in “the archetype of a traditional public forum,” . . . , is a prior restraint on speech, Although there is a “heavy presumption” against the validity of a prior restraint, . . . **the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally,** Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, **any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.**

Id. at 130 (emphasis supplied and citations omitted).

The Supreme Court found the ordinance to be unconstitutional because the ordinance gave the County Administrator “uncontrolled discretion” in setting the fee amount based on the expected cost of security, and this required the official to consider the content of the speech of the permit applicant (and the expected reaction to that speech). *Id.* at 133-34. In other words, the ordinance delegated

overly broad discretion to a government official regarding issuance of a permit. *Id.* at 130. That is not a concern in the case at bar. Also, there is no dispute that Johnson City’s permitting scheme is content neutral.

Forsyth County, supra, is important because it recognizes a principle that the street preachers have refused to recognize – *i.e.*, that a local government may regulate competing uses of a public forum through a permitting scheme.

A case applying this principle is *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) wherein a Veterans Council had obtained a permit to hold a Parade. *Id.* at 560-61. The question presented was whether the Council was required to allow a gay rights organization (“GLIB”) to march with them in the Parade. The Supreme Court held that the Council was protected by the First Amendment from having GLIB march in the parade. In reaching this holding, the Supreme Court explained that the parade was protected speech:

we use the word “parade” to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, “if a parade or demonstration receives no media coverage, it may as well not have happened.” *Id.*, at 171. Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.

Id. at 568. Because the parade was protected speech, the Supreme Court relied on

the following principle as to why the Council did not have to allow GLIB to march:

“Since *all* speech inherently involves choices of what to say and what to leave unsaid,” one important manifestation of the principle of free speech is that one who chooses to speak may also decide “what not to say,” . . .

Id. at 573 (italics in original and citations omitted).

A Sixth Circuit case decided after *Hurley, supra*, is *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996) wherein the Bush-Quayle '92 Committee (“the Bush Committee”) was given a permit to hold a political rally in a traditional public forum. Even though the permit indicated that the use of the facilities and grounds was for use by the organization and their invitees, the Committee decided to make the event open to the public. Any member of the public could obtain a free ticket and attend the rally. *Sistrunk*, 99 F.3d at 196. Admission tickets were available at city hall free of charge on a first come, first serve basis. The Strongsville public schools encouraged students to attend. *Id.* at 197. *Sistrunk*, a high school student, obtained a ticket. She wore a jacket that had several buttons – including a political button endorsing Bill Clinton for President that she was required to relinquish before she was allowed into the rally. *Id.* at 196.

The Sixth Circuit held that *Hurley, supra*, did not control because the group (“GLIB”) wishing to march in the Boston parade did not assert a First Amendment

claim. Instead, GLIB asserted a denial of public accommodations claim – and it was the parade organizers (the Veterans Council) that asserted a First Amendment right. *However, this Court also stated:*

. . . the similarity between the facts in *Hurley* and the facts in the present case strongly suggests that the city could not have required the committee to include in the rally persons imparting a message that the committee did not wish to convey.

Id. at 198. Based on that similarity, this Court relied on *Hurley, supra*, as follows:

The City of Strongsville appropriately granted permission to the committee to engage in expressive activity in the Commons just as Boston appropriately granted permission to the veterans council to engage in expressive activity on the public streets. A public rally is speech to the same extent that a parade is speech. The committee here did not seek merely to assemble and “stand around,” any more than the parade organizers sought merely to reach a particular destination. As the *Hurley* Court recognized, the collective point conveyed to the audience is so essential to the parade that “ ‘if a parade or demonstration receives no media coverage, it may as well not have happened.’ ” *Id.* at --, 115 S.Ct. at 2345 (citation omitted). Similarly, the organizers of the Bush-Quayle rally sought to assemble in order to convey a pro-Bush message to the media by use of pro-Bush speakers and largely pro-Bush attendees. The committee expressly sought to attract attendance in order to “send the media a message” that Bush would win; to convey the message that “Strongsville Trusts George Bush.”

.....

The plaintiff could have held a pro-Clinton rally on another day just as GLIB could have held its own parade at another time. *The plaintiff could have stood with her button on the sidewalk leading up to the rally to express her support for Clinton, just as GLIB could have lined the streets with other non-participating members of the public to watch the parade and convey from the sidewalks their distinct message.* It was suggested at oral argument that the parallel to

expressing disapproval of the parade from the sidewalks would be attending the rally as a member of the rally's audience in the Commons. However, participating in the rally as a member of the audience is more akin to marching in the parade itself as one of the less visible marchers. As the parade organizers had received permission to use the streets of Boston, but not the sidewalks, to convey their message, so the rally organizers had received permission to use the Commons, but not the adjacent public sidewalks. Those seeking admission to the area that was covered by the permit -- which area was reasonably necessary to the organizers' expressive activity and was restricted to the use of the organizers and their invitees -- were in effect seeking inclusion in the expressive activity itself. For the city to require the committee to admit all ticket-holding members of the public seeking to express a message would amount to a rule of law stating that

any contingent of protected individuals with a message would have the right to participate in [the Committee's] speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

Hurley, 515 U.S. at -- , 115 S.Ct. at 2347.

Therefore, we conclude that even if plaintiff has alleged sufficient facts to establish that the city authorized the committee to exclude members of the public who sought to express a discordant message, plaintiff has not alleged that the city violated plaintiff's free speech rights; *rather, plaintiff has only established that the city permitted the committee to exercise its free speech rights and autonomy over the content of its own message.* There has been no constitutional violation and therefore there can be no liability on the part of the city or the committee. The district court properly dismissed this action.

Id. at 199-200 (emphasis supplied).

In summary, *Hurley, supra*, and *Sistrunk, supra*, are consistent with the principle quoted above from *Forsyth County, supra*, that a governmental entity may issue a permit to a group to control a public forum for a limited period of time. This is consistent with a rally for a presidential candidate in a public forum. And this is consistent with TriPride's permitted use of Founders Park on September 15, 2018.

F. Intermediate scrutiny applies

As quoted above, the United States Supreme Court in *Forsyth County, supra*, held that intermediate scrutiny applies in the context of a permitted event. *Id.* at 130.

G. Facts

1. Johnson City does not require a person or entity to obtain a permit before engaging in free speech or free exercise of religion in a traditional public forum. However, if an entity desires to reserve a traditional public forum for a limited period of time, then it must submit an application and obtain approval from the City. [Special Events Policy and Procedure Overview (and Application), RE 16-1, PageID ## 81-93]

2. TriPride applied for a permit to hold a Parade and Festival on September 15, 2018. That application made clear that the purpose of the Parade and Festival

was to convey an expressive message that is entitled to protection under the First Amendment [Application, RE 18-7, PageID #: 159]

3. In an August 31, 2018 meeting between TriPride representatives and the Special Events Committee, TriPride was informed that it could control who entered the Festival. [TriPride Minutes, RE 59-1, PageID #: 801; Rice depo., RE 90-9, PageID ##: 1335-1337] The detailed evidence supporting this fact is set forth earlier in this Brief at pages 17-22.

4. On the morning of the TriPride Parade and Festival, officers were briefed on the rights of protesters and counter-protesters – and they were specifically instructed that “TriPride committee members have rented Founder’s Park and can restrict who enters the festival area.” [RE 59-2, *Two-page handout*, PageID ##: 802-803]

5. TriPride chose to make the Festival open to any person who wished to attend. Persons who wished to enter the Festival had to go through a security perimeter set up by Johnson City and obtain a colored wristband. [Church depo., RE 97-1, PageID ##: 1496-1498]

6. During the Festival, officers received a request from TriPride representatives to remove the street preachers from the Festival. [Waldrop depo., RE 87-16, PageID #: 1248; Peters depo., RE 87-9, PageID #: 1204]

7. A video made by the street preachers shows them being moved from a

grassy area just inside Founders Park to a sidewalk just a few feet back that is located on the edge of Founders Park, but still within the permitted footprint of the Festival. [Video, RE 18-2, PageID #: 120 at timemark 9:02 to 10:50; Waldrop depo., RE 87-16, PageID #: 1249; Church depo., RE 87-4, PageID #: 1150] Also, Johnson City agrees that officers told the street preachers that they could not go back down into the Festival area because TriPride did not want them in there. [Peters depo., RE 87-9, PageID #: 1203]

8. The street preachers began preaching at this sidewalk location with amplification. [Video, RE 88, PageID #: 1263, Ex. "A", timemark 00:00 to 14:44 (manually filed by Appellants)]

9. A TriPride representative then asked the commanding officer on the scene, Captain Rice, to move the street preachers further away. Captain Rice declined to do so because he believed the street preachers had the right to remain where they were and preach. [Rice Depo., RE 87-10, PageID ##: 1208-1210]

10. The street preachers remained at this sidewalk location for several hours and preached with amplification their message condemning homosexuality. The street preachers' own video recordings show them interacting with Festival attendees. [Self depo., RE 87-13, PageID #: 1232; Church depo., RE 87-4, PageID #: 1152]

H. Application of law to the facts

Based on *Forsyth, supra*, it was constitutional to give one speaker control of a public forum for a limited period of time. The Special Events Committee gave TriPride control of the forum during the limited period of time of the Festival. TriPride had an expressive message entitled to First Amendment protection. TriPride representatives requested that the street preachers be removed because their speech of hatred of homosexuality conflicted with the expressive message of TriPride. [Adkins Decl., RE 18-5 at ¶ 6, PageID #: 134] Officers moved the “street preachers group” to a sidewalk on the edge of Founders Park, but still within the footprint of the Festival. Captain Rice refused another request from a TriPride representative to move them further away. From the vantage point of the sidewalk, the street preachers continued to preach their message (with amplification) to Festival attendees as proven by their own videos. The street preachers remained at this location for several hours. Therefore, based on the teachings of *Forsyth County, supra*, *Hurley, supra*, and *Sistrunk, supra*, there was no violation of the constitutional rights of the street preachers. Therefore, the street preachers’ Motion for Summary Judgment should be denied.

I. Responses to street preachers' arguments

i. Overview

Because the District Court ruled in favor of the street preachers regarding the applicability of *Forsyth County, Hurley*, and *Sistrunk*, the street preachers' opening Brief does not address Johnson City's position. However, certain arguments in their Brief directly impact Johnson City's position. Therefore, Johnson City responds to those arguments.

ii. Strict scrutiny does not apply

The street preachers' position is that the strict scrutiny standard applies because the actions of the officers were based on the content of their message. Specifically, within the context of viewpoint discrimination, the street preachers rely on cases *not involving permitting schemes* for the proposition that strict scrutiny always applies where the government favors certain viewpoints. [Doc. 22, Appellants' Brief, pp. 40-41]

However, they go on to demonstrate that the *government* did not have animus towards their viewpoint by arguing: "Waldrop and Self were removed based on the content, more specifically the viewpoint, of their message. As noted by the District Court, the Adkins Declaration provides evidence of that fact." [*Id.*]

Moreover, their legal position is incorrect because, as quoted earlier, the Supreme Court held in *Forsyth County, supra*, that intermediate scrutiny applies *in the context of a permitting scheme. Id.* at 130.

During the TriPride Festival, the officers were doing nothing more than protecting the First Amendment rights of the permit holder. The street preachers have made no logical argument as to why the intermediate scrutiny standard (as set forth in *Forsyth County, supra*) should not apply.

iii. McGlone v. Metropolitan Government of Nashville

In the street preachers' opening Brief, they cite to *McGlone v. Metropolitan Government of Nashville*, 749 Fed.Appx. 402 (6th Cir. 2018), which is a case involving street preachers at a gay pride festival in Nashville. In that case, this Court declined to apply *Hurley* and *Sistrunk* under the facts of that case.

On appeal, Waldrop and Self submit that *McGlone, supra*, is factually the same as this case; but that is not correct. The street preachers argue as follows:

This case involves a similar situation addressed by this Court in *McGlone* . . . In that case, the dissent argued that the removal of the plaintiffs from the permitted area was justified, at least in part, because they were using bullhorns, which caused a disturbance. (*See, e.g.*, at 24, 28, 32, 35, 37-38, 39). However, the decision to preclude the plaintiffs from the permitted area had been made *before* the event even commenced. One of the plaintiffs contacted the officer in charge of the event, who told him, *before the event had started*, that they could not be in the permitted area. (*Id.* at 2, 13, 15-16).

[Doc. 22, Appellants' Brief, p. 38 (italics in original)]

In *McGlone*, a gay pride festival was held in Public Square Park, a public forum. It was a ticketed event and there was a fence around the festival. There was a sidewalk just outside that fence that was in the permitted area. In other words, a sidewalk just like the sidewalk at the edge of Founders Park. But here is what is different. In *McGlone*, the street preachers never sought to enter the festival. They only wanted to stand on the sidewalk that was immediately outside the festival. About a week before the festival, the street preachers contacted a Metro Nashville police Lieutenant and were told that they would not be allowed to stand on the sidewalk just outside the festival because that sidewalk was part of the permitted area. *McGlone, supra*, at *403. On the day of the festival, the street preachers stood on that sidewalk in defiance of the Lieutenant's directive and preached with bullhorns and amplification. They were moved to a sidewalk across the street that was not within the permitted area. The question was whether Metro Nashville violated their constitutional rights by deciding ahead of time that they could not stand there and by moving them to a sidewalk further away on the day of the festival.

The majority in *McGlone* found a constitutional violation and factually distinguished *Hurley* and *Sistrunk*. *McGlone, supra*, at *406-07. The majority based its decision on the fact that since the Nashville street preachers' intention was not to enter the gay rights festival, they were not attempting to *participate* in

the speech of the permit holder. For example, an analogous situation in *Hurley* would have been if the gay rights group had not asked to enter the Boston parade, but had only asked to stand on the sidewalk at the edge of the parade (with other members of the public) and had been told to stand further away. An analogous situation in *Sistrunk* would have been if the high school student with the Clinton for President button did not attempt to enter the rally, but only wished to stand on the sidewalk outside the rally, but was told that she had to stand further away.

As the majority in *McGlone* emphasized:

McGlone and Peters did not insist on *entering* the Pride Festival, let alone *participate* in the Pride Festival's speech. They stood outside and expressed a contrary message. In doing so they were not attempting to participate in the Pride Festival's speech.

Id. at 407 (emphasis in original).

In contrast, the street preachers now before this Court argue their rights were violated because: “[i]nside the park, Waldrop and Self would have been able to move around and speak to a much larger audience.” [Doc. 22, Appellants’ Brief, p. 24] “Obviously, inside the park, Waldrop and Self would have been able to move around and interact with festival-goers at any location within the festival.” [*Id.*, p. 50]

The next issue involves Circuit Judge Moore’s dissent in *McGlone*. She argued that if someone is standing just outside the permitted space -- but is causing

disruption through amplification -- that would justify moving that person further away in order to protect the First Amendment rights of the permittee. While that logically makes sense, Waldrop and Self in their opening Brief latch on to the “disruption” language as if the constitutional standard for removing someone from a permitted space is whether they were causing disruption. While that would be the standard for moving someone further away than normal, Waldrop and Self were only moved to the sidewalk at the edge of Founders Park *and Captain Rice refused a request from TriPride to move them further away*. So Waldrop and Self’s argument that they were not causing a disruption is irrelevant. The actual standard is whether the inclusion of their speech would “alter the message” of the Festival. For example, in *Hurley*, the inclusion of the GLIB in the parade would not have caused disruption, but it would have altered the expressive message of the Veterans’ Council. Likewise, in *Sistrunk*, a high school student wearing a Clinton button in a Bush rally would not have caused a disruption, but it would have altered the expressive message of the Bush Committee. In summary, the legal standard is not disruption.

In *McGlone*, the majority also factually distinguishes *Sistrunk* because in *Sistrunk* the Bush rally was limited to invitees and in *McGlone*, any member of the public could stand on the sidewalk immediately outside the festival (even though it was technically within the permitted area). With respect to *Sistrunk*, the Bush

Committee actually welcomed any citizen who would pick up a free ticket. In fact, local high schools offered to bus students to the rally. The case at bar differs from *McGlone* because no member of the public could walk into Founders Park unless they went through the security perimeter and obtained a colored wristband. Just like *Sistrunk* (where the condition of entry was a free ticket available to all), everyone was invited to TriPride's Festival (so long as they would comply with going through security).

At the District Court level, the street preachers cited *McMahon v. City of Panama City Beach*, 180 F.Supp.3d 1076 (N.D.Fla. 2016); but that case supports Johnson City's position on this issue. That case involved a permit holder that was holding a motorcycle rally in a public park with no expressive message. The rally was free and open to the public with no barriers limiting or restricting ingress and egress. A Christian evangelist sued after he was not allowed to pass out religious tracts within the Rally. *McMahon, supra*, at 1081. The following discussion from *McMahon* is supportive of Johnson City's position:

Even if (the permit holder) did not charge admission, and merely roped or otherwise demarcated the event as a purely private event (even to which all members of the public were invited), the event might be a limited forum.

...

In order to transform a traditional forum into a more limited one, there must be some sort of visible, meaningful distinction setting

the event apart from the venue on which it is held. There must be a change in the “nature,” “use,” “characteristics,” “purpose,” or “function” of the forum. *Bloedorn*, 631 F.3d at 1233-34; *Forbes*, 523 U.S. at 677 . . .; *Frandsen*, 212 F.3d at 1237. The limited record in this case, however, contains no evidence of any such distinction; members of the public were free to come and go at the Site during Thunder Beach just as they were on a typical Saturday morning.

McMahon, supra, at 1099-1100 (italics omitted).

On the day of the TriPride Festival, any citizen entering Founders Park had to go through a security checkpoint and obtain a colored wristband. [Church depo., RE 97-1, PageID #: 1496-1497] Therefore, to the extent that there is a requirement for purposes of creating a limited public forum that there be some physical characteristic that separates the access to the Festival from a typical Saturday in Founders Park, that requirement has easily been met.

It is understandable that TriPride would want the event to be free and open to any person who went through security. In *Hurley, supra*, the Supreme Court explained: “a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, “if a parade or demonstration receives no media coverage, it may as well not have happened.” *Id.* at 568. Similarly, where TriPride’s expressive message was to hold a Festival for purposes of demonstrating community support for diversity and inclusion, if the Festival were closed to the public, then there would be no reason for the Festival.

There is one final legal point in *McGlone* to be addressed. In Circuit Judge Moore's dissent she argued that the majority incorrectly found the officers' actions were content based (meaning strict scrutiny applied) based on whether the conduct was *associated* with the conduct of the speech as opposed to the correct standard of whether there was *animus* towards the speech. *McGlone, supra*, at 413-14. Judge Moore's position is consistent with *Forsyth County, supra* – which was not cited in *McGlone*. As noted earlier, the Supreme Court in *Forsyth County* held that the intermediate scrutiny standard applies to situations involving permit holders, which makes sense because any effort by a state actor to respond to a request from a permit holder to protect that holder's expressive message is going to be an action *associated* with the content of the speech of the person not holding the permit.

In summary, *McGlone* is factually distinguishable because the Nashville street preachers never intended to enter the festival. They only sought to stand on the sidewalk at the edge of the festival.

iv. Bible Believers v. Wayne Co., Mich., 805 F.3d 228 (6th Cir. 2015)

The street preachers' cite this case in their opening Brief. [Doc. 22, Appellants' Brief, p. 45] It is inapposite because the permit holder was not claiming an expressive message entitled to First Amendment protection. Therefore, the removal of those street preachers was the enforcement of a "heckler's veto."

v. Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 2005)

The street preachers' cite this case in their opening Brief. [Doc. 22, Appellants' Brief, pp. 45-46] It is inapposite because the Arts Council did not claim an expressive message entitled to First Amendment protection. *Id.* at 651-52. In fact, the Arts Festival was held pursuant to a "block party permit," which in the City of Columbus is only issued for the non-exclusive use of the permitted area." *Id.* at 645.

vi. Appellants' allegation that only they were removed and violent protesters were allowed to remain

In their opening Brief they argue: "Waldrop and Self were removed, while violent protesters were allowed to remain." [Doc. 22, Appellants' Brief, pp. 46-47] There is no evidence in the record of violent protesters within the security perimeter of the Festival -- and the officers were only reacting to TriPride's complaints about the street preachers.

J. Conclusion as to whether officers' conduct was constitutional

The United States Supreme Court allows a permitting scheme to regulate competing uses of a public forum. TriPride obtained a permit to hold a festival for a limited period of time in Founders Park on September 15, 2018. TriPride had an expressive message entitled to First Amendment protection. TriPride asked that the street preachers be moved out of the Festival because the street preachers' message

condemning homosexuality as a sin was at odds with the expressive message that TriPride was attempting to convey. Intermediate scrutiny applies. The officers moved the street preachers to a sidewalk at the edge of Founders Park. The street preachers' own video and testimony demonstrates that they interacted with Festival attendees for hours. Moreover, they did so with amplification, and Captain Rice refused a request from TriPride to move the street preachers further away.

Based upon the teachings of *Forsyth County*, *Hurley*, and *Sistrunk*, the conduct of the officers was constitutional. Since the officers' conduct was constitutional, there is no basis for municipal liability as to Johnson City because there was no underlying constitutional violation. Therefore, the District Court's denial of the street preachers' motion for summary judgment should be affirmed as a matter of law.

VI. Tennessee Religious Freedom Restoration Act claim fails as a matter of law

In the street preachers' First Amended Complaint, the only claim they assert regarding Tennessee's Religious Freedom Restoration Act ("RFRA") is found in their Fourth Cause of Action. They allege that the City's Special Events Policy, as applied, violates the RFRA. Specifically, they allege that: "(a)s interpreted and enforced by the City, Plaintiffs' manner of free exercise of religion is prohibited by the Policy. [RE 72, First Amended Complaint, PageID #: 964] And again, the

“Policy” referred to is the Special Events Policy. [Doc. 72, First Amended Complaint, PageID #: 931 at ¶ 2] That Policy makes no mention of the First Amendment or free speech rights or anyone’s free exercise of religion. [Answer, RE 16-1, PageID #: 81-93] The Policy that the street preachers sued upon simply was not the cause of any alleged violation of the RFRA under the street preachers’ current theory of the case. Therefore, Johnson City is entitled to summary judgment on that ground alone.

Alternatively, to the extent this Court finds that there was no constitutional violation, then the RFRA claim fails as well. *See Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, 428 S.W.3d 800, 821 (Tenn. Ct. App. 2013) (treating an analysis under the Free Exercise Clause as co-extensive with an analysis under the Tennessee Religious Freedom Restoration Act).

VII. Did the district court err in denying the street preachers’ motion for preliminary injunction?

A. Law

In *Overstreet v. Lexington-Fayette Urb. Cty. Gov’t*, 305 F.3d 566 (6th Cir. 2002), this Court explained:

In determining whether to issue a preliminary injunction, the Court must examine four factors: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the

injunction. These factors are not prerequisites, but are factors that are to be balanced against each other. A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.

Id. at 573 (citations omitted).

B. Preliminary injunction being sought by street preachers

In their original Complaint and their First Amended Complaint, the street preachers sought a preliminary injunction “restraining and enforcing Defendant . . . from enforcing the City’s Special Event Policy, Procedure and Application in the manner it was enforced against Plaintiffs on September 15, 2018 . . .” [Complaint, RE 1, PageID #: 27; and First Amended Complaint, RE 72, PageID ##: 966-967] Consistent with their Complaints, the street preachers filed a Motion for Preliminary Injunction on March 12, 2020 to enjoin the City “from enforcing the challenged sections of the City’s “Special Event Policy, Procedure and Application” (the “Policy”). [Motion for Preliminary Injunction, RE 38, PageID #: 278]

Based on the foregoing, this Court would reasonably expect to read the street preachers’ opening Brief to see what “challenged sections” should be enjoined. But there is no such language in the opening Brief because the street preachers’ theory of the case has evolved over time. They are not asserting that any portion of the “Policy” is unconstitutional. In fact, they are not asserting that the August 31, 2018

decision of the Special Events Committee was unconstitutional. Their theory at this juncture is that the August 31, 2018 decision of the Special Events Committee was not correctly communicated to the officers working the TriPride Festival – which according to the street preachers is a training issue under *City of Canton v. Harris*. Therefore, the requested preliminary injunction is based on a theory of relief they are no longer asserting.

C. Analysis

In *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 526 (6th Cir. 2017), this Court held: “[a] preliminary injunction is an extraordinary remedy reserved only for cases where it is necessary to preserve the status quo until trial.” What status quo are the street preachers seeking to preserve until trial? Stated another way, what irreparable injury would a preliminary injunction address? If the street preachers prevail at trial on their theory that the City did not properly “train” its officers regarding the scope of control given to TriPride at the 2018 Festival, that is not the type of scenario that would necessitate the issuance of a preliminary injunction.

Moreover, if this Court issued an injunction stating that the street preachers have the right to enter (and remain in) any public forum for First Amendment purposes, then such an injunction would be contrary to *Forsyth County, Hurley*, and *Sistrunk*. In other words, it would be violating the First Amendment rights of a

permit holder who reserved a public forum for a limited period of time to convey an expressive message protected by the First Amendment.

Finally, the street preachers cannot prove a substantial likelihood of success on the merits because under their theory of the case (*i.e.*, that the decision of the Special Events Committee was not accurately conveyed), there is no basis for municipal liability – and the injunction sought is against the City. And as to Johnson City’s theory of the case (*i.e.*, that the Special Events Committee’s decision was broad enough to give TriPride the right to control its expressive message), there is no basis for municipal liability because there was no constitutional violation.

In summary, the street preachers cannot meet the standard that: “[a] preliminary injunction is an *extraordinary remedy* which should be granted *only if* the movant carries his or her burden of proving that the circumstances clearly demand it.” *Overstreet, supra*, at 753 (emphasis added). Therefore, the District Court’s denial of the Motion for Preliminary Injunction should be affirmed.

CONCLUSION

Based on the foregoing, the following rulings of the District Court should be affirmed: (1) the grant of Johnson City's motion for summary judgment, (2) the denial of the street preachers' motion for summary judgment, and (3) the denial of the street preachers' motion for preliminary injunction.

Respectfully submitted this 5th day
of April, 2021.

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April 5, 2021

Date

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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ADDENDUM:
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The Defendant/Appellee, Johnson City, provides a designation of relevant

District Court Documents:

<u>Description of Entry</u>	<u>Date Filed</u>	<u>Record Entry No.</u>	<u>PageID # Range</u>
Complaint	06/19/2019	1	1-36
Answer to Complaint, Ex. A, Special Events Policy and Procedure Overview	09/16/2019	16-1	81-93
Motion for Summary Judgment on Behalf of Lt. Peters, in his individual capacity	09/16/2019	17	94-95
Memorandum Brief in Support of Peters, Ex.1, Video of Peters' interaction with the Plaintiffs uploaded to YouTube	09/16/2019	18-1	119
Ex. 2, Video of Plaintiffs' interaction with Festival attendees after being moved to the sidewalk.	09/16/2019	18-2	120
Ex. 3, Declaration of Kevin Peters	09/16/2019	18-3	121-125
Ex. 4, Declaration of Brian Rice	09/16/2019	18-4	126-132
Ex. 7, Keenan Deposition	09/16/2019	18-7	138-162
Motion for Summary Judgment on Behalf of Sgt. Hodges, in his individual capacity	09/16/2019	20	165-167
Memorandum Brief in Support of Hodges, Ex. 2, Declaration Hodges	09/16/2019	21-2	183-187
Motion for Preliminary Injunction	03/12/2020	38	278-281
Response to Motion for Preliminary Injunction	03/25/2020	41	308-319

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Response in Opposition to Motion for Protective Order, Lyon Deposition (taken 07/14/2020)	07/22/2020	58-1	693-700
Response in Opposition to Motion for Protective Order, Lyon Deposition (taken 07/1/2020)	7/22/2020	58-2	701-707
Reply Brief in Support of Johnson City for Protective Order, Ex. A, Declaration of Kenn Lyon	07/27/2020	59-1	799-801
Reply Brief in Support of Johnson City for Protective Order, Two-Page Handout	07/27/20	59-2	802-803
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First Amended Complaint	09/2/2020	72	931-973
Motion for Summary Judgment on Behalf of the City of Johnson City	10/16/2020	86	1077-1082
Memorandum Brief in Support of Summary Judgment on Behalf of Johnson City, Ex. C, PowerPoint Presentation	10/16/2020	87-1	1111-1128
Ex. D, Tallmadge Declaration	10/16/2020	87-2	1129-1131
Ex. E, Turner Declaration	10/16/2020	87-3	1132-1134
Ex. G, Lyon Deposition (7-1-20)	10/16/2020	87-5	1154-1161
Ex. F, Church Deposition	10/16/2020	87-4	1135-1153
Ex. H, Kennan Deposition (6-25-20)	10/16/2020	87-6	1162-1173
Ex. I, Keenan Deposition (6-26-20)	10/16/2020	87-7	1174-1190
Ex. J, McDavid Deposition	10/16/2020	87-8	1191-1198
Ex. K, Peters Deposition	10/16/2020	87-9	1199-1205

Ex. L, Rice Deposition (6-25-20)	10/16/2020	87-10	1206-1219
Ex. M, Rice Deposition (6-26-20)	10/16/2020	87-11	1220-1225
Ex. N, Rice Deposition	10/16/2020	87-12	1226-1229
Ex. O, Self Deposition	10/16/2020	87-13	1230-1233
Ex. Q, Tallmadge Deposition	10/16/2020	87-15	1237-1240
Ex. R. Waldrop Deposition	10/16/2020	87-16	1241-1253
Ex. S, City's Answer to Request for Admission No. 28	10/16/2020	87-17	1254-1255
Ex. T, Lyon Deposition (7-14-20)	10/16/2020	87-18	1256-1258
Plaintiffs' Motion of Summary Judgment	10/16/2020	89	1265-1268
Statement of Material Facts	10/16/2020	90	1269-1279
Joint Statement	10/16/2020	90-1	1280-1286
Johnson City's Response in Opposition to Plaintiffs' Motion for Summary Judgment	10/30/2020	97	1470-1494
Plaintiffs' Response in Opposition to Motion for Summary Judgment	10/30/2020	99	1582-1611
Memorandum Opinion	11/30/2020	113	1772-1809
Judgment Order Dismissing Case	11/30/2020	114	1810
Notice of Appeal	12/28/2020	119	1861-1863

DESIGNATION OF RELEVANT SIXTH CIRCUIT COURT DOCUMENTS

The Defendant/Appellee, Johnson City, provides a designation of relevant

Sixth Circuit Court Documents:

<u>Description of Entry</u>	<u>Date Filed</u>	<u>Document No.</u>	<u>PageID # Range</u>
Appellants' Brief	03/08/2021	22	1-66