No. _____

In The
Supreme Court of the United States

RONALD DUHE and MARK HOLICK,

Petitioners,

v.

LITTLE ROCK, ARKANSAS, CITY OF; SIDNEY ALLEN, in an individual capacity; and PULASKI COUNTY, AN ARKANSAS POLITICAL SUBDIVISION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On summary judgment:

1. Whether precedent by this Court together with the Eighth Circuit, other circuits and state courts of last resort had clearly established the vagueness and overbreadth of language in the Arkansas disorderly conduct statute that, here, punished leafletting and amplified speech.

2. Whether police testimony is the only evidence that matters in a probable cause determination, such that police have no duty to consider controverting witness prior to an arrest.

3. Whether a statute's unconstitutional conduct prohibitions are cured by an unconstitutional *scienter* element.

4. Whether an automatic 48-hour detention policy is constitutional under *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

5. Whether standing to challenge a vague permit ordinance arises from a chill on the First Amendment by police threats to enforce the ordinance and police intent to make such threats in the future.

PARTIES TO THE PROCEEDINGS

Petitioners are two individuals, Ronald Duhe and Pastor Mark Holick. Please note that this Petition does not include another party in the lower courts, Spirit One Ministries, which was represented in the lower courts by counsel for Petitioners.

Respondents are the City of Little Rock, the County of Pulaski and the individual arresting officer, Sidney Allen.

CORPORATE DISCLOSURE STATEMENT

Not applicable.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ronald Duhe and Mark Holick respectfully file this *Petition for a Writ of Certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion, No. 17-2012 (not yet published) is provided at App. 1. The final Opinion and Order by Honorable Kristine G. Baker, United States District Court Judge for the Eastern District of Arkansas, is App. 20, Judgment, App. 83, and earlier Order, App. 85.

JURISDICTION AND RULE 29.4(c) NOTIFICATION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eighth Circuit's ruling was entered September 5, 2018. Under this Court's Rule 29.4(c), Petitioners state:

The constitutionality of an Arkansas statute is drawn into question. 28 U.S.C. § 2403(b) may apply. This *Petition* will be served upon the Arkansas Attorney General. The Clerk for the Eighth Circuit Court of Appeals had certified to the Arkansas Attorney General that the constitutionality of an Arkansas state

statute was drawn into question. The Attorney General's response is provided at App. 88.

Jurisdiction existed in the district court based on federal questions. 28 U.S.C. §1331. Petitioners had sued under 42 U.S.C. §1983. Appellate jurisdiction existed in the Eighth Circuit under 28 U.S.C. §1291 from a final judgment by the district court entered March 31, 2017, corrected April 27, 2017. Notice of Appeal was timely filed April 26, 2017, amended April 28, 2017.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech. . . . or the right of the people peaceably to assemble.

The Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

FEDERAL STATUTE

The federal statute involved, 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ARKANSAS STATE STATUTES

A.C.A. § 5-71-207 (the "DCS")

The primary Arkansas state statute involved is the disorderly conduct statute, A.C.A. § 5-71-207. It provides in pertinent part:

> (a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she . . .
>
> (2) makes unreasonable or excessive noise; . . .
>
> (5) obstructs vehicular or pedestrian traffic.

A.C.A. § 5-2-202

Sections of a separate Arkansas statute, A.C.A. § 5-2-202, were cited by the lower courts:

> (1) Purposely. A person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result.
>
> (3) Recklessly. (A) A person acts recklessly with respect to attendant circumstances or a result of his or her conduct when the person consciously disregards a substantial and unjustifiable risk that the attendant circumstances exist or the result will occur.
>
> (B) The risk must be of a nature and degree that the disregard of the risk constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

LITTLE ROCK CITY ORDINANCES

LRCO § 18-52(c)(3)

LRCO § 18-52(c)(3) specifically authorizes "reasonable use of amplifiers or loud speakers in the course of public addresses which are non-commercial in nature."

LRCO §18-2

LRCO §18-2 states: "All offenses under state law that are not felonies that municipal officers and employees may enforce are adopted by reference."

LRCO §32-551

Note: LRCO §32-551, the public assembly permit ordinance gives the City discretion to define the terms "safe and orderly," (1)(a), "unduly," (1)(b), "proper," (1)(b), "expeditiously," (1)(c), "adequate," (1)(d), "sufficient," (1)(e), and "adverse effects," (1)(g).

Sec. 32-551. Standards for issuance of permit.

(1) The city manager shall issue a permit pursuant to this division as requested by the applicant if after consideration of the information contained in the permit, and such other information as otherwise be obtained, it is determined that:

(a) The conduct of the parade or public assembly will not substantially interrupt the safe and orderly movement of other pedestrian or vehicular traffic contiguous to its route or location;

(b) The concentration of persons, animals, and vehicles at public assembly points of the parade or public assembly will not unduly interfere with proper fire and police protection of, or ambulance service to, areas contiguous to such public assembly areas;

(c) The parade or public assembly is scheduled to move from its point of origin to its point of termination

expeditiously and without unreasonable delays en route;

(d) Adequate sanitation and other required health facilities are or will be made available in or adjacent to any public assembly area;

(e) There is sufficient parking available near the site of the parade or public assembly to accommodate the number of vehicles reasonably expected at the time of the event;

(f) No parade or public assembly permit application for the same time and location has already been granted or, was previously received and will be granted;

(g) No parade or public assembly permit application for the same date, or within a time frame within twenty-four (24) hours of the same date, has been previously received and will be granted, which will require the use and deployment of public resources in such a manner that when combined with the subsequent application, it is reasonably determined that there would be an adverse effect upon the city's ability to provide such resources and to protect the welfare and safety of persons and property, provided that the mere expenditure of public funds for overtime payments for public employees shall not be deemed an adverse effect upon the city's ability to provide public services;

(h) No event is scheduled elsewhere in the city where the public resources required for that event are so great that the deployment of public services would

have an immediate and adverse effect upon the welfare and safety of persons and property.

(2) No permit shall be granted that allows for the erection or placement of any structure, whether permanent or temporary, on a city street, sidewalk, or right-of-way unless advance approval for the erection or placement of the structure is obtained from the city manager.

(3) The city manager shall not deny any application for a permit upon the basis of race, creed, color, national origin, political viewpoint, disability, or gender.

STATEMENT

A. Factual Background

The Eighth Circuit upheld the entry of summary judgment against Petitioners, despite the following facts:

1. Ron Duhe, a Navy veteran, App. 91 ¶1, went to a clinic in Little Rock at 7:30 a.m, App. 94, to pray and minister to women. *Id.* When he arrived, there were five other people present. *Id.*

2. Pastor Holick was there and was at all times peaceful. App. 98 ¶2. He was not blocking or impeding traffic. *Id*. He did not utter fighting words, incite a riot or engage in non-verbal or gratuitous noisemaking. App. 98 ¶5.

3. Emily Sichley, an occupational therapist, was there. App. 101 ¶2. She attested that, "The purpose of the outreach was to offer help and resources to women seeking abortion, to provide educational materials on their unborn baby and on their own health, and to witness to the love of Jesus Christ." App. 102 ¶4. Sichley attested: "At no time did Ron Duhe or Mark Holick purposefully impede traffic or block the driveway or prevent entry into the clinic parking lot. It never happened." App. 102 ¶5. She attested further that "no reasonable person could have thought that our purpose was simply to engage in annoying, alarming or inconvenient activity." *Id*. ¶4.

4. Bill Darr was there. He had spent 40 years with Sun Oil Company in management, had been an active national guardsman and was honorably discharged in 1969 from the Army. App. 104 ¶1. He stood near the Teague Vision Center, App. 106 ¶5, listening to Duhe read the Psalms. App. 105 ¶4. Darr also attested that neither Duhe nor Holick impeded traffic, App. 105 ¶4, and there was no police warning to turn down the amplifier. *Id.* He attested, "The clinic has a wide driveway. We never impede driveways. We hand out literature if someone stops voluntarily." App. 106 ¶4.

5. Ruth Darr is a seamstress, daughter of a pastor who had rescued some five hundred abandoned children during her life, and is the grandmother to 13 grandchildren. App. 107 ¶1. She and husband, Bill, went to the clinic around 8:00 a.m., App. 108 ¶2. Police cars were already present. *Id.* She and just Pastor Holick

stood beside the driveway to hand out pro-life information. App. 108 ¶3. She also stood at the driveway while Duhe was reading Scripture on the amplifier. App. 110 ¶16. She attested, "Police were everywhere. But at no time did the police warn me or my husband or any of us that we were too loud or impeding or blocking traffic. The police never told Pastor Holick or Ron Duhe to turn down the amplifier and police never told Pastor Holick that he was impeding or blocking cars into the driveway." App. 110-11 ¶17. She further attested:

> Whenever cars stopped to take pamphlets from us, the stop was purely voluntary on the driver's part. Traffic was never backed up, slowed or delayed. All cars drove into the lot unimpeded unless the driver made a voluntary stop to take material or talk to us. Neither Pastor Holick nor myself ever once stepped in front of a moving vehicle to slow or impede its path. If a driver voluntarily stopped or slowed down to receive pamphlets, we simply stepped closer to the side of the car (not in front of the car) to provide the pamphlets through the open window. App. 111 ¶17.

6. The Little Rock noise ordinance, LRCO § 18-52(c)(3), specifically authorizes "reasonable use of amplifiers or loud speakers in the course of public addresses which are non-commercial in nature." The City adopted the DCS in LRCO §18-2 by adopting nonfelony state laws "that municipal officers and employees may enforce."

7. The City admitted in Rule 30(b)6) deposition testimony[1] that both the *mens rea* and *actus reus* elements of DCS(a) are undefined, i.e., "inconvenience, annoyance, alarm," "unreasonable or excessive noise" and "obstructs" traffic[2] The City also admitted[3] that the word "noise" in the statute can mean many things (such as horns, mufflers, crowds shouting at War Memorial Stadium and just human noises of people speaking in public), that different people might have different opinions about what is "reasonable" noise[4] and that each officer decides for himself the meaning of the words in the DCS.[5] The record shows that it would not be illegal to annoy someone living close to a stadium with noise from a Friday night football game,[6] that excessively loud, disruptive bands have not been ticketed at the local Riverfest,[7] and that local firefighters would not be ticketed for collecting money for MDA, even if they blocked traffic.[8]

8. Allen himself admitted that one officer may differ with another officer as to what is "reasonable."[9]

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[1] The following footnotes are to the record, but the documents are not included in the Appendix here.

[2] *Amd. Cmpl.* & *City's Ansr. and County's Ansr.* ¶ A65-28 & 29; City 30(b)(6) Bewley 88/5-20.

[3] City 30(b)(6) Bewley 88/5-20.

[4] City 30(b)(6) Bewley 70/4-17.

[5] City 30(b)(6) Bewley 70/16-17; 89 /6-21.

[6] Ferg. 83/2-11; 85/17-23.

[7] Hurd depo 120/10-25; 121/1.

[8] Ferg depo 144/14-25; 145/1.

[9] Allen 208/25 thru 209/1-3; 210/12.

The City and Allen admitted that the City does not provide instructions to officers to define the meaning of the words and the final decision on what is "reasonable" rests with each officer.[10]

9. Likewise, the word "obstructs" can mean various things, including collecting money in a fire officer's boot at Labor Day, or handing out leaflets to cars that voluntarily stop on the side of the road, or having a melon stand that causes cars to pull over, and can mean "slow down" or "prevent passage altogether," or "interfere with the normal flow of traffic."[11] The word "obstructs" is not defined in DCS(a)(5), and "depends on what the officer determines it means."[12]

10. Allen admitted that Duhe's use of an amplifier was for speech of a religious nature and was not for commercial purposes under the City's noise ordinance.[13] To Allen, if more than one person complains, or if he believes a noise volume causes someone discomfort, the noise would be unreasonable.[14] Allen makes his determinations about noise based on his own observations and complaints he has received,[15]

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[10] City 30(b)(6) Bewley 70/4-17; 87/14-23; City 30(b)(6) Tyrell 30/24-25 thru 31/1-5; Allen 208/13-25-209/1-3.

[11] City 30(b)(6) Bewley 90/1-23.

[12] City 30(b)(6) Bewley 89/22-25-90/1-2.

[13] Allen 299/19-25 thru 300/1-3.

[14] Allen 207/8-25.

[15] Allen 210/20; 212/12-24.

especially if more people than the median would think the sound is loud.[16] The City admits that if businesses complain that they can hear noise inside, the conclusion is that it is beyond reasonable, but no written rule exists to that effect.[17] Here, of course, "noise" was Duhe's speech.

11. Duhe was arrested without warning as a result of preaching on public property while using an amplifier. App. 91 ¶1. He was arrested along with Pastor Mark Holick, App. 92, who was not using an amplifier at the time, App 98 ¶5, nor blocking or impeding traffic. *Id.* The record establishes that the City authorized and ratified Allen's acts[18] and both have acted at all relevant times under color of state law.[19]

12. Sichley attested that she had been videotaping Duhe's preaching for at least 20 minutes prior to the arrests, App. 102 ¶3, and that police never warned them to turn down the amplifier or to not block the driveway. *Id.* The police had no contact, no verbal warnings before the arrest of Pastor Holick and Ron Duhe. They just came up and hauled them off. *Id.* Duhe attested that his purpose was to share the news that God loves everyone and that there are alternatives to abortion. App. 92 ¶2. He believes his purpose was very obvious to the police by what he was saying and where

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[16] Allen 209/5-9; 210/14-22; 211/19-24.

[17] City 30(b)(6) Bewley 68/20-25 thru 69/1-5.

[18] *Defendants City and Allen's Response to Plaintiff's Statement of Undisputed Facts* (Doc 27, p. 12, ¶ 26).

[19] *Id.*, ¶ 25.

he was saying it. *Id.* He was out in the open air, on public property, along a public street, in a commercial area, with businesses all around. App. 93 ¶5. "There were no signs posted to indicate that the public was not allowed to use the sidewalk or that sound was restricted to a particular volume level or that amplifiers were prohibited." *Id.* He did not utter fighting words, use obscenity or incite a riot. App. 91 ¶1. He was not preaching with any purpose to cause public inconvenience, annoyance or alarm, or recklessly create a risk of those things. App. 92 ¶2.

13. Ruth Darr further attested:

> Neither Pastor Holick nor Ron Duhe nor any of us at the outreach on September 13, 2012 had a purpose of causing a risk of or of actually causing public inconvenience, annoyance or alarm. . . . All of our activity was to convey a message with the purpose of saving babies' lives, providing information about resources for pregnant couples, and sharing the Gospel of Jesus Christ. This message was self-evident to anyone watching, and no reasonable person could have mistaken the purpose of our outreach that day. App. 111 ¶19.

14. Ruth Darr further attested that she had been in the ultrasound room inside a pregnancy center directly across the street from the clinic driveway. App. 112 ¶20. In that room, she was as close or closer to the amplifier than either the abortion clinic or the Teague Vision Center building, and could not hear the amplifier whatsoever, nor was the pregnancy center's

business interrupted or disturbed, nor did police check with the pregnancy center to ask whether the sound was disrupting business there. *Id.*

15. Of the two complaining businesses, the Teague Vision Center did their business as usual, just complaining that the noise was "an annoyance."[20] The abortion clinic, the other complainant, was also able to conduct business despite the noise.[21] The police department has no devices to measure the volume of sound.[22] Allen himself had no decibel meter, did not check any decibel readings and had no way to verify the decibel level.[23] Allen did not actually go into any of the businesses to check out the level of sound to make sure it was in fact keeping any businesses from being able to operate.[24] Neither did any other Little Rock police officers enter into the two complaining businesses.[25] Yet, despite police failure to verify the complaints of "disrupting business," Plaintiffs were arrested for allegedly being disturbing to the business practices of the people around in the area,[26] one of which was the object of the outreach. Allen told them they were arrested for causing an "annoyance" to businesses.[27] The City has

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[20] Teague 61/18-20; 62/12-22.

[21] Williams 66/1-16.

[22] City 30(b)(6) Bewley 69/25 thru 70/1-7; Allen 208/1-12.

[23] Tr. 12/16-23; Tr 21/2-12; *Amd. Cmpl. and City/Allen Ansr* 33.

[24] Tr 12/3-9; *Amd. Cmpl. and City/Allen Ansr* ¶ 36.

[25] Williams 60/2-12; Teague 65-66.

[26] Allen 66/10-25 thru 67/1-8.

[27] Allen 249/1-3.

no written rule that hearing noise inside a business is "beyond reasonable."[28]

16. Duhe attested that if police had asked him to turn down the amplifier he would have complied. App. 91-2 ¶1. But Duhe had no warning, App. 91 ¶1, and never saw or heard Holick receive any warning at any time. App. 92 ¶1. In fact, Duhe asked Allen, the arresting officer, "[S]houldn't I have been given a warning before being arrested?" App. 95. Allen responded that a warning was given on the previous day, *id.*, a day when Duhe was not in the city at all. App. 92 ¶4.

17. Duhe and Holick were locked up around 10:30 a.m. App. 95. Booking took an hour, according to Allen.[29] Petitioners' friends tried to bail them out around noon, as did their attorney, but they were unsuccessful. App. 95. Others in the jail were able to get released by bail or other means, but Petitioners were not released until around 10:00 p.m. when it was announced that the jail was overcrowded. App. 95. Charges against both men were dismissed at trial. App. 98 ¶5.

18. Jail staff had automatic authority to cite and release Petitioners but did not do so.[30] The County admitted on 30(b)(6) that it has no explanation for the length of Petitioners' custody.[31] When to release

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[28] City 30(b)(6) Bewley 294/20-25 thru 295/1-5.

[29] City/Allen *Ansr* ¶39.

[30] Bennett 84/21-24.

[31] County 30(b)(6) Briggs 103/2-12.

prisoners by issuing them a citation is focused on the "convenience" of the facility and the staff.[32] The County admitted it detains prisoners in the facility for up to 48 hours simply to decide whether to issue a citation and release the prisoner.[33] Thus, there is no rule to release promptly after administrative booking. Deciding when to cite and release a prisoner is at the discretion of the sergeant on the shift, and there is no policy to direct him.[34] No specific policy requires that arrestees be processed quicker than 24 hours.[35] Arrestees are subject to what is going on in terms of staffing,[36] but on the day of Petitioners' arrests, the intake area was adequately staffed.[37] If the jail is overcrowded, any staff member could advise that a prisoner be cited and released.[38] But, if the jail headcount is low, there is no reason to cite a prisoner and release him.[39] There is no requirement that each prisoner's "booking time" and "release time" be entered into the system for regular record-keeping of the duration of each prisoner's custody.[40] The County's official policy is that it had no concern for

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[32] County 30(b)(6) Briggs 104/18-25 thru 105/1-6.

[33] *Amd. Cmpl. and County's Ansrs* ¶¶ A65-13-1.

[34] Bennett 122/4-17.

[35] Paxson 18/15-25; Long 80/4-25-81/1-6; 60; Bennett 44/12-16

[36] Bennett 34/18-25 thru 35/1-8; 42/21-25.

[37] Bennett 43/4-15.

[38] County 30(b)(6) Briggs 79/9-13.

[39] Bennett 84/4-13.

[40] County 30(b)(6) Briggs 85/17-24 thru 86/1-9.

the duration of Petitioners' custody, only that they are not left in the intake area for more than 23 hours.[41]

19. The jail is owned and operated by Pulaski County.[42] The City contracts with the County "whereby City funds are made available to the County to assist in the operation of a new regional jail."[43] The City had closed its own jail facility due to its agreement to cooperate in use of the County facility.[44] The City's municipal police chief "shall be appointed [to an advisory committee] by the County Judge to oversee the implementation and operation" of the Detention Agreements.[45]

20. At the criminal misdemeanor trial, Allen wrongly testified that Petitioners' outreach was required to have a permit. App. 98 ¶6. Allen also testified that he told Petitioner Holick "that he needed to stop using the amplified speaking device because he did not have a permit and it was causing annoyance."[46] He said he told them they were being arrested for disorderly conduct because they were causing an annoyance to the occupants of those businesses because of the loudness of the device.[47] Moreover, Allen said he had told protesters the day before he arrested Petitioners that

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[41] County 30(b)(6) Briggs 103/16-25.

[42] County 30(b)(6) Briggs 14/5-7; *Ansrs* ¶¶ A65-13.

[43] *Amd. Cmpl. and Ansrs* ¶¶ A65-1.

[44] *Ansr by City/Allen* ¶ A65-2.

[45] *Amd. Cmpl. and Ansrs* ¶ A65-5.

[46] Tr 6/6-9.

[47] Allen 285/1-8; 287/15-22.

those protesters were operating without a permit and they would not be charged, so long as they were orderly and polite and complying with his lawful instructions.[48] Allen testified that he retained the right to enforce the permit ordinance against the protesters.[49] Allen admitted he mentioned the permit and the lack of permit to the pro-life individuals numerous times in September 2012 and that it was important to him that they know they had been violating the permit ordinance.[50] Allen's goal was to bring up the permit ordinance to use it as a tool to get the protesters to comply with his orders, and he would do so again today.[51] According to Allen, even if a group has a public assembly permit, it is no protection against arrest for violating the DCS prohibition against unreasonable noise.[52]

21. Based on Allen's testimony, Holick attested that the Respondents had threatened and can still threaten to punish event participants for violating the permit ordinance as a way to discourage himself and other members of the public from exercising their First Amendment freedoms on public property within the City. App. 99 ¶9. Holick further attested: "The ordinance leaves it entirely in the City's discretion to say whether an application satisfies the subjective terms of the ordinance." App. 99 ¶9. LRCO §32-551 leaves to the discretion of the city manager to define the terms

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[48] Allen 194/15-25; 199/17-25 thru 200/1-16.

[49] Allen 201/1-8.

[50] Allen 301/21-24 thru 302/1-2.

[51] Allen 284/1-22.

[52] Allen 212.

"safe and orderly," ¶ (1)(a), "unduly," ¶ (1)(b), "proper," ¶ 1(b), "expeditious," ¶ (1)(c), "adequate," ¶ (1)(d), "sufficient," ¶ (1)(e), and "adverse effects," ¶ (1)(g). The City has not included any standards in the *Ordinance* by which these conditions can be known by the public, nor specifically, by Petitioner Holick. App. 98 ¶¶6-7, 9-10. He attested: "I do not know from these standards how to plan a future event in a way that will meet the ordinance's requirements because the standards are left entirely to the City's discretion." App. 99 ¶7. Likewise, Duhe attested: "The arrest has put a chill on my returning to Little Rock to take part in future outreaches because the City's rules for avoiding arrest are not clear. I have been to the City to go to the VA, but I have not wanted to take part in any pro-life events there and I will refrain from using an amplifier until the rules for using one are straightforward and in writing." App. 92 ¶3.

B. Procedural Background

1. Petitioners filed suit against Allen and the City. The County was made a defendant following initial discovery. Petitioners claimed that Allen and the City, by the arrests under the DCS and by making threats to enforce the permit ordinance, had deprived Petitioners of their First, Fourth and Fourteenth Amendment rights, and that the City/County's blanket 48-hour detention policy was simply delay-for-delay's-sake that had caused their wrongful detention beyond the time needed for the one-hour booking process. Petitioners sought declaratory relief on the grounds of

vagueness and overbreadth. They also sought a judgment for attorney fees.

2. All parties filed motions for summary judgment. The district court denied standing for declaratory relief under LRCO § 32-551. Actual arrest, not just chill, was required. App. 51-52.

3. The district court ruled that any vagueness in the DCS language was cured by what the court itself called the "subjective" words, "inconvenience, annoyance or alarm," App. 51-52. In turn, it ruled that the words "unreasonable or excessive noise" and "obstructs vehicular or pedestrian traffic" curtailed the *mens rea's* subjectivity. *Id*.

4. The district court failed to analyze the disorderly conduct statute under the stricter vagueness standard required for First Amendment cases. *See*, *e.g.*, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2319-20 (2012). Instead, it used an analysis for content-based regulations, which was not the basis for Petitioners' claims.

5. The district court disregarded both the Eighth Circuit's precedent in *Buffkins v. City of Omaha*, 922 F.2d 465 (8th Cir. 1990) (striking down as void language nearly identical to the Arkansas DCS and rejecting qualified immunity) and the controverting facts in the affidavits and the record.

6. Petitioners appealed.[53] Disputed facts aside, the Eighth Circuit, like the district court, disregarded its own precedent in *Buffkins*, *supra*. It disregarded all controverting facts in the affidavits attached here, saying police had no duty to investigate these arrests. It disregarded the City's 30(b)(6) testimony that each officer decides for himself the meaning of the words in the DCS. It held that the words "inconvenience, annoyance or alarm" were an "objective prohibition that does not turn on the subjective opinion of the speaker's audience," App. 13, despite *Buffkins* and despite that the district court had described the same phrase as "subjective." Moreover, despite ruling that the *mens rea* element cured the DCS's vagueness, the court curiously held that Allen had no duty to investigate whether Petitioners actually had the *mens rea.* Other witness testimony did not matter. Petitioners' affidavits of a chill on their First Amendment rights from the threats, App. 16, and a facial chill as to others also did not matter. The City/County's policy of automatic 48-hour detentions was upheld. Delays in gaining liberty are merely 'unfortunate.' App. 19.

REASONS FOR GRANTING THE PETITION

A. Introduction

Although third parties may not sue protesters for emotional distress, *Snyder v. Phelps*, 562 U.S. 443

[53] Two rulings by the district court were not appealed to the Eighth Circuit, one rejected a claim based on publication of Petitioners' mug shots, and the other was a mootness ruling.

(2011), nor for certain conspiracy claims, *Bray v. Alexandria Women's Clinic*, 506 U.S. 263 (1993), and may not sue for the broadcast of what were knowingly ill-gotten communications, *Bartniki v. Vopper*, 532 U.S. 514 (2001), the Eighth Circuit has empowered politicians and third-party tipsters (especially companies being protested) with a much more immediate and simple way to terminate free speech in a public forum: make a phone call and complain about noise and literature handouts. The last officer to be told of a tip/complaint may arrest speakers and leafletters on-the-spot, need not give a warning and need not investigate for a crime. He need not follow precedent in his federal circuit. He may rely on "collective hearsay." He need not prove his suspicion was reasonable even if eyewitnesses controvert his and other police testimony. Police testimony cannot be refuted and will be taken as true.

Here, the DCS requires no warning and police did not give any warning. In addition, the DCS does not define its *scienter* and conduct elements. It, thus, does not define when expressive activity will be deemed "disorderly conduct." The DCS is not tailored to reach only certain places or specific conduct. It gives no guidance to police or the public. The City and Allen admit that police have unbridled discretion to decide when, where and how speech will be deemed to be "unreasonable noise" and when, where and how a leafletter can be deemed to "obstruct traffic." According to the City's Rule 30(b)(6) testimony, these words mean whatever each officer decides they mean. *See supra.*

The stark result of the holding below is that legislatures need not define the *scienter* and conduct elements of crimes that penalize expressive conduct. Municipalities need not narrow a crime's impact on speech. Police need not investigate whether a crime exists if they act on a complaint from the public or a fellow officer. The sufficiency of evidence may not be challenged.

Perhaps the most egregious part of the Eighth Circuit opinion is that police who arrest preachers and leafletters without warning can automatically silence them for the next two days. A policy authorizes unconditional 48-hour detentions, even if booking takes one hour. The policy was the reason why Petitioners were left to sit and stew in jail for 12 hours despite adequate staff with discretion to release them at any time.

This Court's standard of review here is supposed to be an 'independent examination of the whole record' in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984) *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964). *See also NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 915 (1982); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

B. The Eighth Circuit Conflicts with its Own Precedent, This Court, Other Circuit Courts and State Courts of Last Resort on Important Federal Questions about the First, Fourth and Fourteenth Amendments.

1. When Statutes Restrict the First Amendment, the Fourteenth Amendment Requires Greater Specificity.

The lower courts here confused the test for vagueness with the test for content-based[54] First Amendment claims. Petitioners did not make content-based claims. They made vagueness and overbreadth claims. The general parameters of the Due Process vagueness doctrine bear repeating: A statute's vagueness is both a trap for the unwary, and a chill that stifles the airing of expressions that may be unpopular with government authorities. For these reasons, a "heightened vagueness standard is applicable to restrictions upon speech entitled to First Amendment protection." *Brown v. Enterm't Merchants Assoc*., 131 S. Ct. 2729, 2735 (2011), *citing Winters v. New York*, 333 U.S. 507, 510 (1948). The Due Process doctrine:

> [R]equires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement. Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching

[54] App. 8, n. 2 stating court found no evidence Petitioners were arrested based on content of their speech.

> expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

Smith v. Goguen, 415 U.S. 566, 572 (1974).

The DCS's literal scope, unaided by a narrowing state court interpretation, reached Petitioners' expression sheltered by the First Amendment. For this reason, the vagueness doctrine demands a greater degree of specificity than in other contexts. *See id.*

Arkansas state court opinions had not narrowed the DCS's broad sweep at the time of Petitioners' arrest. Vague statutes "can thus . . . be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities." *Hague v. CIO*, 307 U.S. 496, 516 (1939). The City's record admissions establish that the DCS is in fact enforced in a way that favors certain groups over others, such as football announcers and firefighters, when it comes to "noise" and "obstructing traffic."

2. The Eighth Circuit Disregarded Its Own Precedent in *Buffkins*.

The Eighth Circuit opinion is puzzling by failing to mention its own holding in *Buffkins*, *supra*, and to explain why *Buffkins* does not apply here. The Arkansas DCS is stunningly devoid of definitions for its criminal conduct and mental (or *scienter* or *mens rea*) elements. In *Buffkins*, the Eighth Circuit quoted from an earlier case:

> the **word 'unreasonable'** to define what noise is prohibited . . . being void of indication as to whose sensitivity shall measure a violation, **lacks that definiteness**, both in notice of what conduct is proscribed and in establishment of guidelines for enforcement, which precedent has firmly declared to be essential.

Id. at 471 (emphasis added).

A penal statute, such as the DCS, for which "men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). Allen himself decides whether to make an arrest under the DCS based on third-party complaints, and did so in arresting Petitioners. Factually speaking, under a "totality of the circumstances" test as used in *Buffkins*, reliance on third-party complaints here did not establish, under Rule 56, that Allen had reasonable suspicion to arrest Petitioners. Vagueness aside, the record is empty of any evidence of a *mens rea*. The attached affidavits disputed the necessary *mens rea* and *actus reus*. The Eighth Circuit merely accepted evidence that one officer had told Allen of "complaints." But Allen was required to have reasonable suspicion of all elements of the offense. Thus, summary judgment was simply wrong under Rule 56. The affiants refute the Eighth Circuit's characterization of the police version. *See* App. 6. The affiants dispute that Allen or any police saw Petitioners obstruct traffic and make unreasonable noise, and dispute any unlawful purpose. On

summary judgment, the affiants' testimony for Petitioners was required to be taken as true insofar as it directly controverted the movants' testimony. More importantly, under *Buffkins*, Allen could not have made lawful arrests even if he had conducted any semblance of an investigation.

In *Buffkins*, language in Omaha's city ordinance was virtually identical to the Arkansas DCS's language challenge here. The Eighth Circuit denied qualified immunity to police who had arrested a woman inside the Omaha airport for speech that the police had deemed to be "unreasonable noise." The court specifically held that the arrest was based, in part, on the prohibition against "unreasonable noise":

> We hold the officers did not have a reasonable and articulable suspicion to effect a seizure of Buffkins as a matter of law. We find that Buffkins' **arrest was made under both** the "fighting language" **and "unreasonable noise"** subsections of the city ordinance. The City had **notice of the unconstitutionality** of the "unreasonable noise" subsection and therefore the **City was improperly dismissed**.

Id. at 473 (emphasis added).

In this case, the City of Little Rock had more than 22 years' notice that the DCS's language was unconstitutional under *Buffkins*, which was "clearly established law." *Buffkins* expressly rejected qualified immunity for the Omaha police officers, despite the

fact that they had **acted on a third-party's report**, as Allen did here:

> No evidentiary facts exist to allow a reasonable officer to believe the seizure and subsequent arrest of Buffkins was legal. We **hold as a matter of law** the officers possessed **no evidentiary basis** on which to assert **a qualified immunity defense**.

Id. at 473 (final footnote).

Buffkins held that the officers' reliance on the third-party tip, together with the accused's matching race, her loud protests and other evidence, did not rise to the level of "reasonable suspicion" to arrest her where also, the "unreasonable noise" ordinance had already been held facially void by the Nebraska federal district court in *Langford v. City of Omaha*, 755 F. Supp. 1460 (D. Neb. 1989).

Buffkins should have been binding precedent as clearly established law. Despite Petitioners' extensive citation to *Buffkins*, both of the lower courts in the case at bar frustratingly failed to mention, distinguish or follow the case. The Omaha ordinance, nearly identical to the Arkansas DCS, provided: "It shall be unlawful for any person **purposely or knowingly** to cause **inconvenience, annoyance or alarm or create the risk** thereof to any person by: (c) making unreasonable noise." *Buffkins*, 922 F. 2d at 470-71 (emphasis added). *Buffkins* cited a prior Nebraska federal district court opinion in *Langford*, *supra*, and federal cases cited therein: *Pritikin v. Thurman*, 311 F. Supp. 1400, 1402

(S.D. Fla. 1970); *Original Fayette County Civic & Welfare League, Inc. v. Ellington*, 309 F. Supp. 89, 92 (W.D. Tenn. 1970).

By relying on *Langford*, the Eighth Circuit in *Buffkins* upheld *Langford's* rejection of the city's contention that the ordinance's "mental element" cured the vagueness in the phrase "unreasonable *noise*." *Langford* had held:

> [A]s was stated in *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983), "**Specifying an intent** element does not save [the state] from vagueness because the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague. . . ." Because **the term "unreasonable" is not a well-defined term**, the enforcement of the ordinance in this instance may result in the violation of the speaker's fundamental first amendment right of freedom of speech. A person disagreeing with the **content of the speech is likely to conclude that the speech constitutes "unreasonable" noise**. . . . The ordinance provides no standards for determining what noise is considered "unreasonable." The term "unreasonable," is not a well-defined term, and is capable of many different interpretations as to its meaning. The fact that the term is **likely to be interpreted differently among the various officials** enforcing the ordinance is especially troublesome.

Langford, 755 F. Supp. 1462-63 (emphasis added).

3. This Court's Precedent.

In *Terminiello v. Chicago*, 337 U.S. 1 (1949), this court disapproved nearly the identical concepts promulgated by the DCS:

> That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious **substantive evil that rises far above public inconvenience, annoyance, or unrest**. . . .

Id. at 4-5 (emphasis added)

To state the obvious, the Eighth Circuit has violated *Terminiello's* clear disapproval of using "inconvenience" or "annoyance" to punish free speech. "[A] function of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id*. at 2. The DCS, because in Little Rock noise is speech and speech is noise, punishes precisely the speech *Terminiello* holds as the reason for the First Amendment.

The Eighth Circuit's opinion immediately signaled that it would reject Petitioners' vagueness claims by invoking generic language from *Hill v. Colorado*, 530

U.S. 703 (2000). On the contrary, the particularity found in Colorado's statute does not compare to the DCS's sweeping language. The Colorado statute prohibited certain described conduct (i.e., knowing approaches) at specific places (within 100 feet of an entrance). This Court explained that the Colorado statute passed the test for time, place and manner restrictions because it regulated places (i.e., health care facilities' entrances), did not regulate content, and gave clear guidelines to police (a speaker can remain in one place without violating the 8-foot prohibition against knowing approaches). *Id*. at 719-20, 727.

In contrast, the Arkansas DCS is more akin to the vagueness of the "floating bubble zone" in *Schenk v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1996), by fostering "complete uncertainty" on how to remain in compliance with the law. *See also Buffkins* and *Langford*, *supra.* This Court noted in *Schenk*: "Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum." 519 U.S. at 377 (cites omitted). *Schenk* held that the 15-foot floating buffer zone would restrict the speech of those who simply line the sidewalk or curb in an effort to chant, shout, or hold signs peacefully. *Id.* at 380.[55]

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[55] In *Schenk*, a provision enjoining "excessive noise" had not been challenged. 519 U.S. at 377, n. 8.

The Arkansas DCS facially and as applied, has been used to punish Petitioners in the innocent exercise of their First Amendment rights. Its undefined terms cannot plausibly be considered to be a "rigorous adherence to those requirements [as are necessary] to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

In the DCS, the additional word "excessive" does not save subparagraph (a)(2) from vagueness, nor did the lower courts examine the meaning of "excessive," nor have the state appellate courts narrowed the word. The City admits that "excessive" is undefined. Therefore, the words "excessive noise" in the DCS are unconstitutional because their meaning relies on purely discretionary police decisions.

Notably, Petitioners were arrested on a public sidewalk adjacent to a public street. Such space occupies a "special position in terms of First Amendment protection." *Snyder v. Phelps*, 562 U.S. 443, 456 (2011), *citing United States v. Grace*, 461 U.S. 171, 180 (1983). In the context of a racial demonstration case involving public sidewalks, *Cox v. Louisiana*, 379 U.S. 536 (1965), the petitioner had been convicted for "obstructing public passages." The Louisiana statute contained a *scienter* element:

> No person shall **wilfully** obstruct . . . any public side walk . . . or the entrance . . . of any public building, structure, watercraft or ferry, by **impeding, hindering, stifling,**

> **retarding or restraining** traffic or passage thereon or therein.

Id. at 553 (emphasis added).

However, despite the *scienter* element in *Cox*, this Court reversed because "the statute itself provides no standards for the determinations of local officials as to which assemblies to permit or which to prohibit." *Id.* at 556. Moreover, authorities' actual practices under the statute were "not any less effective than a statute expressly permitting such selective enforcement." *Id.* at 557. Likewise, here, the Arkansas DCS contains no standards. Its lack of definitions enables public officials to "determine which expressions of view will be permitted and which will not." *Id.*

4. Fifth Circuit Precedent.

In the case at bar, the Eighth Circuit, has *sub silencio* reversed itself and split with the Fifth Circuit's precedent upon which it previously relied, *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983), *vacated* 723 F.2d 1164 (5th Cir. 1984) (*per curiam*) (following repeal and replacement of the disputed statute). *Kramer* upholds the obvious logic that merely injecting an intent element does not save a statute from vagueness where "the conduct which must be motivated by intent, as well as **the standard** by which that conduct is to be assessed, **remain vague**. Whatever [a plaintiff's] intent may have been, if she was unable to determine the underlying conduct proscribed by the statute, then the statute fails on vagueness grounds." 712 F.2d at 178

(emphasis added). Here, the Eighth Circuit held exactly the opposite of *Kramer*, stating that the DCS's *scienter* element cures the vagueness in the conduct elements. App. 12-13.

Petitioners provided another Fifth Circuit case on the DCS's failure to define "obstructs traffic," which actually means many different things. For leafletters, specificity matters. In *Davidson v. City of Stafford, Texas*, 848 F.3d 384 (5th Cir. 2017), the statute did define the word "obstructs," describing it as: "to render impassable or to render passage unreasonably inconvenient or hazardous." Noticeably, a simple slowing or even the stopping of a single car might not meet that definition. The Fifth Circuit denied qualified immunity where the arresting officers **failed to further require** that vehicular passage **be severely restricted or completely blocked** in order to give "ample breathing room for the exercise of First Amendment rights." *Id*. at 393.

Here, however, an individual officer's personal opinion is all that matters. The DCS need not have breathing room for leafletters like Pastor Holick and others. The City's 30(b)(6) representative openly admitted that the word "obstructs" simply "depends on what the officer determines it means." It can mean "slow down" or "prevent passage altogether" or "interfere with the normal flow of traffic." Also, here, the complaining businesses both testified that their businesses continued as usual. The affidavits, attached, completely refute any basis to have believed that Petitioners had "completely blocked" or in any lesser way

obstructed traffic by handing out leaflets to cars that voluntarily stopped in a driveway.

5. Seventh Circuit Precedent.

In rejecting Petitioners' claim that the phrase "inconvenience, annoyance and alarm" is also vague, the Eighth Circuit disregarded the Seventh Circuit's precedent striking down the exact phrase in *Bell v. Keating*, 697 F.3d 334 (7th Cir. 2012). Since Little Rock treats speech and human voices as noise, the DCS "regulates speech." A "higher specificity" test was required. Instead, the courts below erroneously used a "content neutral" test. Petitioners had not made "content" claims in this case, so the wrong test was used. Their claims are based on vagueness that punishes and chills the First Amendment.

In *Bell*, the Seventh Circuit used a vagueness analysis for the *mens rea* phrase. It held that the words "inconvenience" and "alarm" lacked "warning about the behavior that prompts a lawful dispersal order," 697 F.3d at 462. It held that the word "annoyance" was conduct with "no standard at all." *Id. citing Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). *Bell* further held that the "nature of annoyance renders individuals vulnerable to arbitrary or discriminatory arrest . . . , failing to fulfill due process' second command." *Bell* struck down the language in the Chicago ordinance as void for vagueness. 697 F.3d at 463, *citing Skilling v. U.S.*, 561 U.S. 358, 401 (2010). Notably, the Arkansas DCS sweeps up a shockingly broader range

of speech by punishing speech that "recklessly" creates a "**risk** of inconvenience, annoyance or alarm." The Eighth Circuit disregarded the Seventh Circuit's ruling in *Bell*.

6. State Court(s) of Last Resort.

In *Tanner v. City of Va. Beach*, 674 S.E. 2d 848 (Va. 2009), *cert. denied* 2010 WL 154940 (2010), the court struck down for vagueness a noise ordinance prohibiting "unreasonably loud, disturbing and unnecessary noise," or noise that "disturb[s] or annoy[s] the quiet, comfort or repose of reasonable persons."[56] In addition, other state courts of last resort have struck down language nearly identical to the DCS's "inconvenience, annoyance or alarm," or saved the language by an interpretive, narrowing gloss only for future cases. But importantly, in *Marks v. City of Anchorage*, 500 P.2d 644 (Alaska 1972), language nearly identical to the DCS's was held "unconstitutional in its entirety," *id.* at 645, "because the prefatory language setting out the *mens rea* for the entire ordinance is impermissibly vague and thereby infects its otherwise valid portions." *Id*. at 646, *citing Terminiello*, *supra.*

In *State v. Ausmus*, 85 P. 3d 864 (Or. 2003), the court determined that, because the same *mens rea* as here was applicable to persons who intend to engage in

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[56] *Compare People v. Cullinan*, 188 Misc. 2d 699, 729 N.Y.S.2d 385 (N.Y. City Crim. Ct. 2001) (upholding a scientific definition in the ordinance for "excessive noise," which meant "emission of any sound in excess of 85 dBA on the A weighted scale).

expressive conduct, the statute was facially overbroad, not subject to narrowing. *See also State v. Indrisano*, 640 A. 2d 986 (Conn. 1994) (narrowing for future cases to require a "predominant intent" for "intent to cause inconvenience, annoyance or alarm").

C. Little Rock's Permit Ordinance Is an Objective Chill Upon the First Amendment Freedom of Assembly for which Petitioners Have Standing.

Holick attested that the City and Allen had threatened and can still threaten to punish event participants for violating the permit ordinance as a way to discourage himself and other members of the public from exercising their First Amendment freedoms. App. 99 ¶9. Duke attested similarly. App. 92 ¶3.

The Eighth Circuit rejected Petitioners' affidavits of an inability to plan future events and trivialized Allen's own admissions that he generally threatens with the permit requirement so as to make demonstrators cooperate. App. 15-16. Allen testified that he told Plaintiff Holick that he needed to stop using that amplified speaking device because he did not have a permit.

The Constitution does not require Petitioners to have applied for a permit or be arrested before challenging a facially void ordinance. *Lovell v. Griffin*, 303 U.S. 444, 452-53 (1938) ("As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it."). "The Constitution can hardly be thought to

deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969) (striking down advance permission requirement for all assemblies). This Court more recently found, in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), that plaintiffs seeking pre-enforcement review of a criminal statute, under Article III, faced "a credible threat of prosecution" and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id*. at 12, *citing Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979). A "license to assemble" is unconstitutional without narrow, objective and definite standards to restrict government discretion. *Shuttlesworth*, *supra*. A city's broad discretion to decide what is "necessary and reasonable" is unconstitutional. *City of Lakewood v. Plaint Dealer Co*., 486 U.S. 750 (1988). Likewise a city cannot reject a permit due to an "unsatisfactory" indemnity bond. *Burk v. Augusta-Richmond County*, 365 F. 3d 1247, 1256 (11th Cir. 2004).

The Eighth Circuit incorrectly held that Petitioners were required to show that the permit threats caused their arrest: Threats and a facial chill upon the First Amendment were not enough for standing, despite that Allen intends to continue making threats to enforce the permit ordinance. He does so as a tool to get protesters to comply with his orders, **and he said he would do so again today**. Petitioners attested to their objectively reasonable self-censorship to steer widely away from possible arrest in Little Rock. Holick

attested: "I do not know from these standards how to plan a future event in a way that will meet the ordinance's requirements because the standards are left entirely to the City's discretion." App. 99 ¶7. Duhe attested: "[I] have not wanted to take part in any pro-life events there and I will refrain from using an amplifier until the rules for using one are straightforward and in writing." App. 92 ¶3.

D. The County's Automatic 48-Hour Detention Policy Violates *Gerstein* and *McLaughlin*.

The City and County had no right to haul Petitioners to jail with no warning in the morning of their event and keep them until late that night when the event would be over. Booking took an hour. A trial judge dismissed all charges, but that was long after the damage to the First Amendment had been done. Petitioners challenged the 48-hour policy because it was the moving cause of their 12-hour detention. The Eighth Circuit missed this policy challenge, chiding Petitioners that their 12-hour detention was just unfortunate.

In deciding *McLaughlin*, *supra*, this Court did not clearly order that government must, if given 48 hours to hold hearings on probable cause, conduct an immediate booking and immediate release for people who, at booking, are not given hearing times. Such a requirement is needed all the more where police could have issued a citation instead of having physically arrested an accused. Otherwise, as the Framers knew,

government will act for its own convenience, not for the people's rights. If government's limits are clear, it can be held accountable. The County testified that Petitioners' 12-hour detention had no explanation other than the automatic 48-hour detention policy. The government's startling logic is that an accused has no "right to release" before 48 hours has passed.

The facts here cry out for this Court's revisit of both *McLaughlin* and *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The shockingly harsh result of the rule in *Atwater* that allows "arrest and pretrial detention for minor offenses" means an automatic two full days of jail time in the Eighth Circuit. App. 17, *citing Atwater*. This cannot be what ordinary people expect from their Fourth Amendment. The City/County policy gives jail staff unbridled discretion to hold detainees if staff dislike their hair, their skin color, their politics or their attitude. Moreover, management and staff can overdetain arrestees just to increase the County's reimbursements from various cities. By the same token, favored detainees can be promptly let go. The Eighth Circuit cites *McLaughlin* for this policy of unfettered discretion. Combined with this Court's ruling in *Atwater*, people falsely accused of a seatbelt infraction, preaching and leafletting can be automatically jailed for as long as 48 hours. This result calls to mind a portion of St. Thomas More's *Utopia* on the death penalty for stealing sheep.

The City/County should have had the burden to show, at least, a good faith reason to jail Petitioners in the first place (and to hold them for a probable cause

hearing) rather than issue a citation. Government should be required to have a system that records the time when a person is jailed, when booking begins and ends, the reason an accused was not released immediately after booking, and the date, time and court for a probable cause hearing, all as part of the booking process. Instead, the Eighth Circuit upheld the 48-hour detention policy as part of "normal jail operations" and called Petitioner's 12-hour detention after booking, simply "flexibility." App. 18.

E. The City's Policy was the Moving Force Behind Petitioners' Deprivations Because the City Admits That Allen's Acts were Authorized, Ratified, and in Accord with City Policy, and that City Ordinances had Formally Adopted the DCS, the Permit Requirements and the County as the City's Jail Operator.

A municipality is liable for its policies that are the moving force behind unconstitutional deprivations. *Monell v. Dept. of Social Service*s, 436 U.S. 658, 698 (1978). Yet the Eighth Circuit commented that Little Rock's liability for enforcing a state criminal statute is a "thorny issue."[57] App. 7, n. 2, *citing Slaven v. Engstrom*, 710 F. 3d 772, 781 n. 4 (8th Cir. 2013) (county lacked policymaking authority under Minnesota

[57] The Eighth Circuit here stated it did not address the substantive issue of the City's liability because it found probable cause for Petitioners' arrest. App. 7, fn 2.

statutory scheme). But *Slaven* is not proper here because it did not involve a statute formally adopted by that city, nor language held to be so clearly unconstitutional that qualified immunity was denied, as in *Buffkins*, *supra*.

Other circuits did not find liability thorny where a city's own ordinance had adopted state law, as Little Rock had adopted[58] the DCS. *See Cooper v. Dillon*, 403 F. 3d 1208 (11th Cir. 2005) (city that adopted the state law as its own and police chief, as policymaker, were liable for enforcing unconstitutional statute); *Vives v. City of New York*, 524 F.3d 346, 351 (2d Cir. 2008) (collecting authorities which, to varying degrees, found "that a municipality engages in policy making when it determines to enforce a state law that authorizes it to perform certain actions but does not mandate that it do so."). *See also Monell*, 436 U.S. at 690-91 (local governing bodies are directly liable where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers").

Second, each Little Rock officer is a "decision maker" on how and when the DCS is enforced. *See Cooper*, 403 F. 3d 1222, *citing Board of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 405 (1997) ("[P]roof that a municipality's . . . authorized decisionmaker has intentionally deprived a plaintiff of a

[58] LRCO §18-2 provides: "All offenses under state law that are not felonies that municipal officers and employees may enforce are adopted by reference."

federally protected right necessarily establishes that the municipality acted culpably."). In addition, the City freely admitted that Allen's actions were authorized and ratified by the City.[59] This is not a case where the City of Little Rock had no choice but to enforce the Arkansas DCS. *See Garner v. Memphis Police Dept.*, 8 F. 3d 358 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994) (municipal liability upheld where city made a deliberate choice to adopt unconstitutional policy over various alternatives).

As to City liability for declaratory relief and attorney fees for its unlawful permit ordinance, the permit policy was promulgated by LRCO §32-551. Under *Monell*, the ordinance was the moving force behind Allen's threats to enforce it and the resulting chill upon Petitioners' rights to free assembly.

As to City liability for the County's operations of the jail, the Eighth Circuit's own precedent held Little Rock liable for the County's operations. *Young v. City of Little Rock*, 249 F. 3d 730, 736 (8th Cir. 2001) ("It is far from unfair" to attribute to the City [of Little Rock] policies routinely used by the County in housing and processing City prisoners."). The City's relationship with the County is a formal policy dating back decades. The City is also liable under existing Eighth Circuit precedent.

[59] *Defendants City and Allen's Response to Plaintiff's Statement of Undisputed Facts.* Doc 27, p. 12, ¶ 26.

CONCLUSION

Petitioners ask this Court to grant their *Petition*, reverse the Eighth Circuit and award attorney's fees as allowed by law.

Respectfully submitted,

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