No. 21 -2158

In the

United States Court of Appeals

for the

Fourth Circuit

SAINT MICHAEL'S MEDIA, INC.,

Plaintiff-Appellee / Cross- Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,

Defendants-Appellants / Cross-Appellees.

On Appeal from the United States District Court for the District of Maryland at Baltimore
No. 1:21-cv-02337-ELH

Brief of Amicus Curiae First Amendment Lawyers Association in Support of Appellee/Cross Appellant Saint Michael's Media for Affirmance in Part and Reversal in Part

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21 -2158 Caption: Saint Michael's Media v. Mayor and City of Baltimore, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

First Amendment Lawyers Association (FALA)
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

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

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

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

Signature: _____ Date: November 1, 2021

Counsel for: First Amendment Lawyers Assoc.

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INTEREST OF AMICUS CURIAE

Amicus Curiae First Amendment Lawyers Association ("FALA") is an Illinois nonprofit corporation with some 180 members throughout the United States, Canada, and Europe. Its membership consists of attorneys whose practice emphasizes the defense of First Amendment rights and related civil liberties. For more than half a century, FALA members have litigated cases concerning a wide spectrum of such rights, including free expression, free association, and related privacy issues. FALA has frequently appeared as *amicus curiae* before numerous federal courts to provide its unique perspective on some of the most important First Amendment issues of the day.

No Party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person – other than *Amicus Curiae* First Amendment Lawyers Association or its counsel – contributed money that was intended to fund preparing or submitting the brief.

The First Amendment Lawyer's Association has authorized the undersigned to file this memorandum on its behalf.

Counsel for Defendants-Appellants / Cross-Appellees consented to the filing of this memorandum.

SUMMARY OF ARGUMENT

Although the trial court obviously ruled correctly on the merits, as the Appellee demonstrates in its briefing, the First Amendment Lawyer's Association nonetheless finds it important to address the Court in this matter. The District Court made a procedural error, which if allowed to stand, could negatively impact Fourth Circuit litigants seeking to protect important First Amendment rights.

Baltimore City's procedure for determining who it will exclude from using a venue it has designated for public expressive activity lacks the safeguards required for a prior restraint, and thus, is facially unconstitutional. Beyond that, Baltimore's actual implementation here specifically imposed a heckler's veto of exactly the sort identified and invalidated in *Nationalist Movement* and thus, the City's procedures are unconstitutional as applied. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992). Accordingly, this Court must affirm on the merits.

This brief concentrates on the trial court's error when it required Saint Michael's Media to post a $250,000 bond in order to protect its First Amendment rights and receive the benefit of the preliminary injunction issued by the court.

Circuit courts uniformly hold that the Rule 65(c) bond requirement allows district courts discretion to waive the bond requirement or order a nominal bond. The circuits have identified four factors to consider when deciding if a nominal bond or bond waiver is advisable: 1) the possible

harm to the enjoined party if the order is unlawful, 2) the likelihood of applicant's success on the merits, 3) applicant's ability to post a substantial bond or surety, and 4) the possible adverse impact that requiring substantial security might have on the enforcement of rights created by remedial legislation. Here the District Court only considered the risk of harm, and its analysis in that regard was flawed. All four factors suggest that the court should not have issued an excessive bond as it did.

Moreover, the District Court recognized that governments cannot place restrictions or impose special fees on speech if such restrictions are based on actual or anticipated audience reaction to the speech. However, the court then turns around and makes that very mistake with its own government action in contradiction to the First Amendment. The court's imposition of an excessive $250,000 bond is in effect a judicial heckler's veto and cannot stand.

Court judgments are subject to First Amendment constraints, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)(state courts "applied a state rule of law which the petitioners claim to impose invalid restrictions on their freedom of speech and press"); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 923-24 n. 67 (1982)(vacating permanent injunction "[f]or the same reasons" that damage award exceeded First Amendment limits). Thus, even in an action between private parties (let alone one, as here, involving government), the First Amendment

constrains the elements of an injunction. Just as the *Claiborne Hardware* injunction warranted reversal, so too does the bond requirement here.

ARGUMENT

I. The District Court Correctly Enjoined Baltimore.

In its opening brief, Baltimore laments the District Court's labeling of the City-owned, MECU Pavilion (the "Pavilion") as an "*either* nonpublic forum *or* a limited public forum." FALA agrees that the District Court's discussion concerning the nature of the forum is muddled. However, Baltimore's assertion that the Pavilion is a non-public forum is wrong. The court should have labeled the Pavilion a designated public forum. "Created public forums are forums, such as university meeting facilities, school board meetings and *municipal theatres*, which the government 'has opened for use by the public as a place for expressive activity.' The government need not open such forums to the public. But once opened, speech in these forums is subject to the same protections as speech in traditional public forums." *Shopco Distribution Co. v. Commanding Gen. of Marine Corps Base, Camp Lejeune*, 885 F.2d 167, 171 (4th Cir. 1989) *citing*, *Perry Educ. Ass'n v. Perry Local Educators' Assn*, 460 U.S. 37, 45-46 (1983) (emphasis added; footnote and internal citations omitted).

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the Supreme Court found that by operating a municipal auditorium, Chattanooga had designated the theater a public forum and therefore, its refusal to permit a production of *Hair* was an unconstitutional prior

restraint. Baltimore has advanced no cogent argument to distinguish the matter before this Court from *Southeastern Promotions*.

While FALA might quibble about the type of forum the court assigned to the Pavilion, we find the distinction is of little import here, because no matter the category of forum, there is no escaping the fact that Baltimore has no objective standards for determining who it will preclude from the venue, which it has designated for expressive activity. At the hearing on the preliminary injunction, Baltimore explicitly admitted that it has no standards for determining under what circumstances it will deny a license to use the Pavilion.

Baltimore incorrectly believes it is constitutionally permissible to operate without objective criteria so long as it acts reasonably. Baltimore's attorney made the following statements at the preliminary injunction hearing.

> "There is nothing in the papers that have been submitted that says that the City or any decision making venture could not be arbitrary…[…]...the plaintiff cited no case that requires the City to have a specific policy. And under these circumstances, how could it?"

S.A._1126.

> "[I]t is our belief, and based on the case law that we've cited to, of course the standard is reasonableness. The City must be given the latitude under, within the bounds of reasonableness to change with the changing circumstances as they are presented to the City."

S.A._1128.

This represents an unconstitutional grant of unbridled discretion to the governmental body serving as a gatekeeper to the venue. The fear in such an arrangement is that without specific and objective standards, it is impossible to determine whether the gatekeeper's refusal of access to a venue through the denial of a permit, license, or contract is motivated by the government's disfavoring of the content of the speech. "[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints." *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006); *see also*, *Southworth v. Board of Regents of the University of Wisconsin System*, 307 F.3d 566, 579 (7th Cir. 2002) ("[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement").

But here we do not even need to speculate on the motivation of the gatekeeper—Baltimore unabashedly admits that it denied Saint Michael's the right to use the Pavilion because of its slate of speakers, the message those speakers represent, and the potential reaction to those speakers and their messages. Citing again from the preliminary injunction hearing:

> THE COURT: Let me go to the topic of the protesters, though, because I would like you to tell me what case you rely on. It seems that the concern of the City really is the response of potential protesters to the speakers, who would then cause disruption.

MS. COLLINS: Yes, Your Honor.

S.A._1135.

THE COURT: But the problem with that is that that isn't the reason that you said no. What you said no to is the fact that they're calling people that you don't think will -- or let me put it in the affirmative. They designated speakers who, according to the information presented from the City's perspective, will generate the kind of response that will create a public safety concern.

MS. COLLINS: Correct.

S.A._1136.

THE COURT: But in other words, what I'm saying is this is the City's explanation.

MS. COLLINS: Correct.

THE COURT: The City is stuck with this. There's nothing about traffic. There's nothing about the wrong time of day, too busy a time.

MS. COLLINS: Yes.

S.A._1140-41.

THE COURT: The point that I was trying to inquire about with respect to this affidavit is that in fact the reason the City pulled the plug was not because of matters such as traffic, imposition on the workplace. The offered explanation in this document, ECF 25-3, is a concern that the speakers will generate the appearance and presence of counter-protesters, which could lead to violence.

MS. COLLINS: Yes, Your Honor.

S.A._1144.

See also, Appellants' Opening Brief at p. 2-3, ("These two speakers have a well-documented history of advocating political violence and engendering, if not outright inciting, civil unrest.")

Given the obvious First Amendment violation, FALA has confidence the Court will uphold the injunction. However, the District Court's ruling raises a separate important question concerning the impact an excessive bond could have on Saint Michael's ability to realize its First Amendment rights.

II. Rule 65(C) Grants Discretion to Set Nominal Bonds or to Waive the Bond Requirement Altogether.

Federal Rule of Civil Procedure 65(c) states that:

> The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

Fed. R. Civ. Pro. 65(c)

Although the federal courts interpreted Rule 65(c) as a mandatory provision for the first forty years of its history, by 1985 about half of the circuits considered it a discretionary provision, reasoning that the phrase "such sum as the court deems proper" literally allows the trial judge to dispense with the bond. Reina Caldron, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. Envtl. Aff. L. Rev. 125 (1985).

Currently, every federal circuit, with the possible exception of the DC Circuit,[1] has explicitly held that Rule 65 (c) grants judges discretion to order nominal bonds or to waive the bond requirement altogether. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999); *see also*, *Crowley v. Local No. 83, Furniture & Piano Moving, Furniture Store Drivers, etc.*, 679 F.2d 978, 999 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984); *Int'l Controls Corp. v. Vesco,* 490 F.2d 1334, 1356 (2d Cir. 1974); *Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3d Cir. 1996); *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 302-303 (5th Cir. 1978); *Moltan Co. v. Eagle-Picher Industries, Inc.,* 55 F.3d 1171, 1176 (6th Cir. 1995); *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 391 (7th Cir. 1983); *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Eng'rs* , 826 F.3d 1030, 1043 (8th Cir. 2016); *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003); *Cont'l Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964) (*per curiam*); *Transcon. Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130, 1172 (11th Cir. 2018); *LEGO A/S v. ZURU Inc.*, 799 F. App'x 823, 837-38 (Fed. Cir. 2020)

[1] Although the DC Circuit has not directly ruled on the issue, "[c]ourts in [the DC] Circuit have found the Rule 'vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond,' including the discretion to require no bond at all." *Huisha-Huisha v. Mayorkas*, No. 21-100(EGS), 2021 U.S. Dist. LEXIS 175980, at *59 (D.D.C. Sep. 16, 2021) *citing*, *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012).

III. Under Federal Jurisprudence, Courts Should Waive or Reduce the Bond Requirement in Four Different Situations.

Federal jurisprudence has identified a set of conditions where it is appropriate for judges to exercise their discretion and order only a nominal bond or waive the Rule 65(c) bond requirement altogether. In *Crowley v. Local 82, Furniture & Piano Moving, Furniture Store Drivers*, 521 F. Supp. 614, 635 (D. Mass. 1981), *aff'd* 679 F.2d 978 (1st Cir. 1982), *rev'd on other grounds* 467 U.S. 526 (1984), the court exercised its discretion to waive the Rule 65(c) bond requirement after its evaluation of four factors: 1) "the possible harm to the enjoined party if the order is unlawful," 2) "the likelihood of applicant's success on the merits," 3) applicant's ability to post a substantial bond or surety," and 4) "the possible adverse impact that requiring substantial security might have on the enforcement of rights created by remedial legislation." The First Circuit affirmed the issuance of a preliminary injunction, specifically ratifying the lower court's bond analysis. *Crowley,* 679 F.2d at 999.

Other courts have identified one additional situation where it is appropriate to waive a bond—where the enjoined party failed to request a bond. *Clarkson Co. v. Shaheen*, 544 F.2d 624, 632 (2d Cir. 1976)("Because no request for a bond was ever made in the district court, and because, under Fed. R. Civ. P. 65, the amount of any bond to be given upon the issuance of a preliminary injunction rests within the sound discretion of the trial court, the district court may dispense with the filing

of a bond.")(*citations omitted*). However, those cases may be considered a subset of cases where trial courts waive the bond requirement due to a failure to demonstrate a likelihood of substantial harm since the failure to request a bond would necessarily mean the enjoined party failed to prove likely harm. *Youth Justice Coal. v. City of L.A.*, No. LA CV 16–7932-VBF, 2017 U.S. Dist. LEXIS 221738, at *11 (C.D. Cal. Jan. 27,2017)(waiving the bond requirement, "where the party adverse to the PI applicant fails to request a bond and fails to present evidence regarding the damages it would likely suffer if the applicant ultimately did not 'win the case'") *citing, Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882-83 (9th Cir. 2003).

Finally, some courts, most notably the Third Circuit, have combined the consideration of a number of the factors, referring to the analysis as a balancing of the equities. *Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3d Cir. 1996) ("Thus, the [bond requirement] exception involves a balance of the equities of the potential hardships that each party would suffer as a result of a preliminary injunction. Where the balance of these equities weighs overwhelmingly in favor of the party seeking the injunction, a district court has the discretion to waive the Rule 65(c) bond requirement."); *see also*, *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1086 (N.D. Cal. 1997) *citing, Elliot*.

Here, the District Court only considered one of the four factors, and on that factor the Court's analysis was flawed.

IV. The District Court Incorrectly Evaluated the Risk of Harm to Baltimore.

The District Court cited the seminal Fourth Circuit case addressing Rule 65(c) bond setting discretion for the proposition that bonding "is mandatory and unambiguous." [A.A._185] *citing*, *Hoechst* 174 F.3d at 421. However, that is not the only, or even the most important, takeaway from *Hoechst*. In *Hoechst* the district court failed to set any bond and the Fourth Circuit remanded the case so the trial court could explain its reasoning for waiving the bond. In its opinion, the *Hoechst* Court reminded the lower court that, "[i]n fixing the amount of an injunction bond, the district court should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order. The amount of the bond, then, ordinarily depends on the gravity of the potential harm to the enjoined party." *Id*. at 424, n. 3. "Where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may suffice." *Ibid*.

Thus, *Hoechst* is widely cited for holding that judges have wide discretion in setting the bond and that when there is no showing of harm, it is proper to order a nominal bond. District courts have followed the Court's lead by requiring only nominal bonds where the risk of harm is

remote. In *Candle Factory, Inc. v. Trade Assocs. Grp., Ltd.*, the district court ordered a $500 bond in a copyright infringement case finding that because the defendant had no right to sell candles that infringed the plaintiff's copyrights in the first place, the defendant was not likely to suffer harm if enjoined from further selling the infringing candles. *Candle Factory, Inc. v. Trade Assocs. Grp., Ltd.*, 23 F. App'x. 134, 139 (4th Cir. 2001). The Court wrote, "[w]here the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant, the court may fix the amount of bond accordingly. In some circumstances, a nominal bond may suffice." *Id.* Similarly, the court can set a minimal bond of $5,000 when "defendants failed to produce sufficient evidence to support their request for a one-million-dollar bond [and there was] lack of evidence supporting any specific lower amount." *Storage Concepts, Inc. v. Incontro Holdings, L.L.C.*, No. 8:20-CV-447, 2021 U.S. Dist. LEXIS 86284, at *36 (D. Neb. May 5, 2021); *see also*, *Int'l Controls Corp.*, 490 F.2d at 1356 (2d Cir.); *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 816 (6th Cir. 1954); *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964) ("if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary"); *Bukaka, Inc. v. Cty. of Benton*, 852 F. Supp. 807, 813 (D. Minn. 1993)(no bond when defendant "has not pointed to any costs or monetary damages it might incur if it were enjoined").

"The party against whom a preliminary injunction is sought has the burden of establishing the amount of a bond necessary to secure against the wrongful issuance of the injunction." *Elite Licensing, Inc. v. Thomas Plastics, Inc.*, 250 F. Supp. 2d 372, 391 (S.D.N.Y. 2003); *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996); *Philips Elecs. N. Am. Corp. v. Hope*, 631 F. Supp. 2d 705, 724 (M.D.N.C. 2009); *GM L.L.C. v. Santa Monica Grp., Inc.*, No. CV 10-04787 DMG (RCx), 2010 U.S. Dist. LEXIS 78711, at *10 (C.D. Cal. July 9, 2010). Baltimore failed to meet that burden.

Here the District Court found that Baltimore failed to provide any "precise supporting calculation." [A.A._127] Nonetheless, the Court set a bond of $250,000, despite the fact that the License Agreement already requires Saint Michael's to pay a security deposit [S.A._278], to obtain insurance [S.A._279] and to pay for Security Services, EMT Services, Fire Protection Services, and Baltimore City Police Services. S.A._288. These contract requirements are strong evidence of the Defendants' own quantification of risk associated with hosting large events at the Pavilion. Indeed, the only explanation that can support requiring Saint Michael's to provide security beyond what is generally required of Pavilion licensees is the City's stated fear of negative audience reaction. As discussed at § VI, *infra*, such an additional fee is an unconstitutional prior restraint under *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992).

The only evidence the Court cites in support of the excessive bond is, "the Baltimore Police Department's officer shortage and ongoing federal litigation against the City by business owners in the aftermath of the death of Freddie Gray." [A.A._186] Regardless of whether the court issues an injunction or if that injunction is later found to be improvidently issued, Saint Michael's did not cause Baltimore's police officer shortage, the ongoing federal litigation, or problems relating to Freddie Gray's death. Those problems belong to Baltimore. The District Court may fear that Baltimore's shortcomings could exacerbate potential problems stemming from reaction to Saint Michael's speakers, but that is not something for which Saint Michael's can be held responsible, unless it engages in speech that is "directed to inciting or producing imminent lawless action," and is "likely to incite or produce such action." *Brandenburg v. State of Ohio*, 395 U.S. 444 (1969). More importantly, there is no evidence the event is likely to cause any harm at all.

Finally, it is wholly inappropriate for the District Court to set an extraordinary bond amount based on an assumption that a regulated and presumably solvent insurance company will simply default on its contractual obligations. A.A._86. It is just as likely that the surety company will decline to honor its bond. The Court cannot engage in this sort of wild speculation where the enjoined party is required to demonstrate more than a remote risk of harm to support a large bond requirement.

The District Court should have waived the bond requirement because Baltimore failed to demonstrate a likelihood of significant damages will be caused by an improperly issued preliminary injunction.

V. The Other Three Factors, Ignored by the District Court, Weigh in Favor of Waiving the Bond Requirement.

Although the District Court's likelihood-of-damage analysis was flawed, the Court recognized that some conditions can support requiring only a nominal bond. However, the Court failed to consider three other factors that typically support a nominal bond.

A. Saint Michael's seeks to advance important constitutional rights.

The District Court's most significant error relating to the bond was its failure to consider that Saint Michael's is advancing important constitutional rights. In fact, in some cases where the plaintiff is seeking to enforce Free Speech rights a bond requirement is in direct conflict with First Amendment principles if the bond serves as a heckler's veto by charging an extra fee to protect against risk of damage caused by people reacting to the speaker's message. See § VI, *infra*.

The First, Third, Sixth, Seventh, Eighth, Ninth, and DC circuits have all held that courts should consider waiving the Rule 65(c) bond requirement when the party seeking the injunction is advancing important constitutional or other federal rights. *Crowley*, 679 F.2d at 999 (1st Cir.); *Temple Univ.*, 941 F.2d at 219-20 (3d Cir.); *Moltan Co.*, 55 F.3d

at 1176 (6th Cir.); *BankDirect Capital Finance, LLC v. Capital Premium Financing, Inc.*, 912 F.3d 1054, 1058 (7th Cir. 2019); *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engrs.*, 826 F.3d 1030, 1043 (8th Cir. 2016); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999); *DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999).

District Courts in the Second, Fourth, Fifth, Tenth, and Eleventh Circuits have followed suit. *Burritt v. N.Y. State DOT*, No. 08-CV-605, 2008 U.S. Dist. LEXIS 102434, at *26 (N.D.N.Y. Dec. 18, 2008); *Red Wolf Coal. v. United States Fish & Wildlife Serv.*, No. 2:20-CV-75-BO, 2021 U.S. Dist. LEXIS 12061, at *18 (E.D N.C. Jan. 21, 2021); *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 (D. Utah 2017); *Curling v. Raffensperger*, 491 F. Supp. 3d 1289, 1326 n.25 (N.D. Ga. 2020) ("Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.").

Courts have set nominal or no bond requirement in a variety of First Amendment situations, including challenges to zoning laws regulating expressive nude dancing, *Bukaka, Inc. v. Cty. of Benton* , 852 F. Supp. 807, 813 (D. Minn. 1993); high school students seeking to preserve their rights to free expression, *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 129 (D. Mass. 2003)]; a challenge to state law prohibiting road side signs *Burritt v. N.Y. State DOT*, No. 08-CV-605, 2008 U.S. Dist. LEXIS 102434, at *26 (N.D.N.Y. Dec. 18, 2008);

and election violations, *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 (D. Utah 2017).

The reason for this exception to the Rule 65 (c) bond requirement should be clear. As a matter of public policy, the federal government encourages individuals to seek redress from violations of their constitutional rights. This is most clearly demonstrated in the fee-shifting provisions of federal civil rights law. See, 42 USC §1988 (providing for attorney's fees and expert witness fees in civil rights litigation).

Here, plaintiff seeks to vindicate important First Amendment rights. The District Court should have taken that into consideration and either waived the bond requirement or set a nominal bond amount.

B. Saint Michael's has a high probability of success.

A district court has discretion to impose a nominal bond requirement where the plaintiff demonstrates a high or strong likelihood of success on the merits. *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972)(finding "district court did not abuse its discretion in failing to require the plaintiffs to post a security" … "[c]onsidering … the strong likelihood of success on the merits which the plaintiffs have demonstrated); *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985) ("the likelihood of success on the merits, as found by the district court, tips in favor of a minimal bond or no bond at all") *citing*, *Friends of the Earth v. Brinegar,* 518 F.2d 322,

323 (9th Cir. 1975); *Storage Concepts, Inc., v. Incontro Holdings L.L.C.*, 8:20-CV-447, 2021 U.S. Dist. LEXIS 86284, at *36 (Oct. 26, 2020)(finding a business that spent a career building its name had demonstrated a high likelihood of success and therefore "should not be burdened with what could be a prohibitively high bond of one million dollars" to defend that name).

Adopting law from sister circuits, courts of this circuit have also ordered nominal bonds when the plaintiff has shown a high likelihood of success on the merits. *George Sink PA Injury Lawyers v. George Sink II Law Firm LLC*, No. 2:19-cv-01206-DCN, 2019 U.S. Dist. LEXIS 204840, at *17-18 (D.S.C. Nov. 26, 2019)(court found a nominal bond of $500 appropriate where plaintiff showed a "strong likelihood of success on the merits" in a trademark infringement case); *Ark. Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 518 (W.D.N.C. 1999)(in an unfair competition case, the court wrote that "[c]ircumstances in the instant case warrant the posting of only a nominal bond in that Plaintiffs have shown a strong likelihood of success on the merits," and set the bond at $100).

Here, the District Court "conclude[d] that plaintiff is likely to succeed on the merits with regard to the claim that the City violated its rights to free speech under the First Amendment," but did not specifically refer to the strength of Saint Michael's claims in the portion of the order discussing the appropriate bond amount. However, the very fact that the

claims were solid enough to justify the extraordinary relief of a preliminary injunction in the first place, demonstrates that a high probability of success on the merits exists. *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 499 (4th Cir. 1981)("[A] preliminary injunction is an extraordinary remedy, to be granted only if the moving party clearly establishes entitlement to the relief sought."); *Direx Israel Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1992)) ("[a] preliminary injunction … is to be applied only in the limited circumstances which clearly demand it.").

Moreover, on the record here, this Court can independently reach the conclusion that Saint Michael's has a high level of success on the merits of its First Amendment claim. See, § I, *supra*.

C. There is no evidence that Saint Michael's can afford to post a bond.

Multiple Circuits have held that a district court should consider a plaintiff's ability to pay a bond or "hardship that a bond requirement would impose on the applicant." *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991) *citing, Crowley*, 679 F.2d at 999 (1st Cir.); *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 391 (7th Cir. 1983)("the district court can require a bond of nominal amount in appropriate cases, for example if the plaintiff is indigent"); *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) ("[t]he court has discretion to dispense with the security requirement, or to request

mere nominal security, where requiring security would effectively deny access to judicial review").

At least one Fourth Circuit district court has considered a plaintiff's ability to pay as a factor in setting the required bond amount. *Draego v. City of Charlottesville*, No. 3:16-CV-00057, 2016 U.S. Dist. LEXIS 159910, at *66 (W.D. Va. Nov. 18, 2016)(in an order enjoining a city's group defamation rule on First Amendment grounds, the court waived the bond requirement where "an ordinary citizen [was] unable to post anything more than a nominal bond, and a bond requirement would effectively deny access to judicial review") (internal citations and quotation marks omitted).

District courts in sister circuits have similarly ruled. *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1180, 1194 (W.D.N.Y. 1995)("[a] party's ability to pay a bond has also been held relevant with respect to whether to require security"); *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012) ("plaintiff has extremely limited financial resources, and is unable to post security in any significant amount").

In its First Amended Complaint, Saint Michael's states it is a registered 501(c)(3) nonprofit organization. [A.A._8] By their very nature, non-profits tend to have limited resources. See, *Red Wolf Coal. v. United States Fish & Wildlife Serv.*, No. 2:20-CV-75-BO, 2021 U.S. Dist. LEXIS 12061, at *18 (E.D.N.C. Jan. 21, 2021) (court set bond at $100 "where

plaintiffs [were] public interest groups who might otherwise be barred from obtaining meaningful judicial review were the bond required more than nominal"); *See generally*, *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 61 (2d Cir. 2020) (finding standing based on nonprofit organizations' "diverted resources that would otherwise have been available for other programming").

In setting the bond, the Court gave no consideration as to whether Saint Michael's is financially capable of obtaining a $250,000 bond. The Court's failure to make an inquiry into Saint Michaels' ability to post the bond, especially where Saint Michael's is seeking to enforce its Free Speech rights, is an abuse of discretion and reversable error with regard to the size of the bond. See, *Swanson v. Univ. of Hawaii Prof. Assembly*, 269 F. Supp. 2d 1252, 1261 (D. Haw. 2003)(bond requirement for public employees waived based on ability to pay, and also because injunction sought enforcement of constitutional rights); see also, Charles A. Wright, Arthur R. Miller, Mary K. Kane, Richard L. Marcus, Federal Practice and Procedure § 2954 (2d ed.) (same).

While Baltimore requested a bond, thereby satisfying one element courts should consider when setting a Rule 65(c) bond, each of the other factors supports a waiver of the bond requirement in this action. The Court erred when it found that Baltimore has established sufficient proof of potential harm to warrant a $250,000 bond. Further the District Court did not at all consider that Saint Michael's is advancing important

constitutional rights, that it has a high likelihood of success on its First Amendment claim, and that Saint Michael's is a non-profit public interest corporation that may not be able to afford a $250,000 bond. The failure to consider these factors below is an abuse of discretion, and this Court should reverse the District Court's order that Saint Michael's post a $250,000 bond.

VI. Ordering a Bond Based on Anticipated Reaction to Speech Based on Content Is a Prior Restraint and Is Presumptively Unconstitutional.

The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. 1 cl. 3-5. The principal force of this restriction prevents the government from interfering with expression between one or more willing speakers (or writers or performers), *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976)("[f]reedom of speech presupposes a willing speaker") and one or more willing listeners (or readers or audience members), *Rowan v. United States Post Office Department*, 397 U.S. 728, 738 (1970)(upholding statue permitting individual to block mailings from specified mailer). These free expression clauses, of course, nowhere protect speech, writing, and performance more stringently than against interference by prior restraints. *E.g.*

Southeastern Promotions, 420 U.S. at 559 (invalidating denial of permission to use public theater to present rock musical where determination was unconstrained by safeguards necessary to address "the risks of freewheeling censorship").

Virtually every day, throughout the United States, students, faculty, activists, politicians, and social commentators—whether by posting on social media, teaching or participating in classrooms, inviting speakers, tabling and leafleting, or myriad other means—express themselves in ways someone finds objectionable. In response to provocative but protected expression, government officials should model our national ethos of "more speech, not enforced silence." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 305-306 (4th Cir. 2008) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). To allow a governmental body to prohibit, restrict, or burden speech based on the anticipated reaction of the audience would strike to the heart of the First Amendment.

Where the government either entirely proscribes or places extra burdens on speakers due to an anticipated negative reaction from the audience it is a subtype of prior restraint often referred to as a heckler's veto. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992). Like other forms of prior restraints, a heckler's veto is presumed to be unconstitutional, and the government can only overcome that presumption if it can prove that the challenged law is narrowly tailored

to achieve a compelling governmental interest. *Saltz v. City of Frederick*, Civil Action No. ELH-20-0831, 2021 U.S. Dist. LEXIS 88283, at *53 (D. Md. May 10, 2021) *citing*, *Nationalist Movement*.

Accordingly, the government cannot charge additional insurance, fees, or bonds to cover, "the cost of necessary and reasonable protection of persons participating in or observing said . . . activity." *Nationalist Movement*, at 134. In *Nationalist Movement*, the Supreme Court examined whether an ordinance that allowed county administrators to vary the administrative fees charged to groups seeking permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads to reflect the estimated cost of maintaining public order violated the First Amendment. The Court found that, "[l]isteners' reaction to speech is not a content-neutral basis for regulation" and thus the ordnance was invalid. *Ibid*. Thus, while a government entity can vary fees based on the anticipated size of the event, which facilities will be used, or other objective factors, it cannot vary the fees due to the anticipated reaction the speaker's words. *See, Thomas v. Chi. Park Dist.*, 227 F.3d 921, 925 (7th Cir. 2000) *aff'd*, 534 U.S. 316 (2002) (insurance requirement was not a heckler's veto where the amount of insurance required was not dependent on the nature of the event).

The District Court discussed and properly applied the precepts of *Nationalist Movement* on the merits. A.A._162. However, the court then

applied its own judicial heckler's veto by ordering Saint Michael's to pay an additional fee in the form of a bond to protect against potential damage caused by the anticipated audience reaction.

It is well settled that, even in civil litigation exclusively between private parties, the courts cannot enter judgments which violate basic constitutional limits. *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 923-24 n. 67 (1982)(vacating permanent injunction "[f]or the same reasons" that damage award exceeded First Amendment limits); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)(state courts "applied a state rule of law which the petitioners claim to impose invalid restrictions on their freedom of speech and press"); *see also, Shelley v. Kraemer*, 334 U.S. 1, 14 (1948)(action of court and judicial officers is action of government for constitutional purposes). The same principle applies, *a fortiorari*, where a government litigant has managed to condition relief against it on a requirement matter which, as a practical matter, prevents relief from the government party's own conduct.

And so, Baltimore cannot turn to the courts to extract additional security from a speaker (or group of speakers) when the additional security demand is based on the potential audience reaction to the speaker unless it can demonstrate that the bond is narrowly tailored to achieve a compelling governmental interest.

Accordingly, the Court should remand this matter to the District Court with instructions to waive the bond requirement because in this matter any bond would be an unconstitutional prior restraint.

CONCLUSION

The Court should rule that the issuance of a $250,000 bond was an abuse of discretion and should direct the District Court to waive the bond requirement. In the alternative, the Court should remand to the District Court to consider the points raised herein and to reconsider and reset the amount of the required bond.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 21 - .2158 **Caption:** Saint Michael's Media v. Mayor and City of Baltimore, et

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