IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Country Mill Farms, **LLC** and **Stephen Tennes**, Plaintiffs, v. **City of East Lansing**, Defendant.	**Case No. 1:17-cv-00487-PLM-RSK** Honorable Paul L. Maloney Plaintiffs' Opposition to Defendant's Motion to Dismiss Oral Argument: September 13, 2017

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INTRODUCTION

The City of East Lansing expelled Charlotte farmer Steve Tennes[1] from the East Lansing Farmer's Market because he posted a statement about his Catholic beliefs on Facebook. Unable to dispute this fact on a motion to dismiss, the City seeks dismissal based on its alleged need to stop purported sexual orientation discrimination wherever it occurs. The Court should deny the City's motion for numerous reasons. First, the City targeted Tennes' speech, not his conduct. Second, the City has no legitimate need to expel Tennes from the Market for legal and constitutionally-protected activities taken *outside the City* altogether. Third, Tennes has not discriminated; he serves everyone regardless of sexual orientation, and follows East Lansing's laws at the Market. It is not Tennes but the City which is engaged in discrimination, based on the City's disfavor for expression of Catholic beliefs and those who profess them.

Punishing Tennes does not achieve any valid City goal. The City can stop discrimination in East Lansing without punishing someone for legal speech outside East Lansing. The City's actions do not stop illegal behavior or ensure access to services in the City in any way. They serve only one purpose: to pressure Tennes to abandon his faith, censor his beliefs, or stay away from the Market. Because the Constitution prohibits precisely this kind of governmental, anti-religious bullying, the Court should deny the City's motion to dismiss.

ARGUMENT

On a motion to dismiss, the Court must accept all pleaded facts as true and draw all reasonable inferences in plaintiff's favor. *Jasinski v. Tyler*, 729 F.3d 531, 538 (6th Cir. 2013). Under that standard, Tennes needs only to plead enough facts sufficient to state a claim "plausible" on its face. *Id.* He easily satisfies this low bar.

[1] In this Response, "Tennes" refers to both Plaintiffs unless context indicates otherwise.

I. The Policy Plausibly Restricts Protected Speech Based on Content and Viewpoint. [2]

Under the First Amendment, a law triggers strict scrutiny if it restricts speech based on content or viewpoint. *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) (en banc). A law is content-based if it "draws distinctions based on the message a speaker conveys," or if it was adopted "because of disagreement with the message [the speech] conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015) (citations omitted). And a law is viewpoint-based if it "favor[s] one speaker over another" or bans speech based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995). The City's actions fail these requirements because (1) the City applied its Policy to restrict Tennes' speech out of disagreement with Tennes' message; (2) this Policy facially restricts speech based on content and viewpoint; and (3) this Policy regulates non-commercial speech based on content and viewpoint.

A. The Policy regulates Tennes' speech as-applied based on content and viewpoint.

Turning to disagreement first, the Policy requires all Market vendors to "[c]omply[]" with the City's "Civil Rights Ordinances" and the City's "public policy against discrimination … while at the [Market] and as a general business practice." V. Am. Compl. ¶ 149, PageID.81 ("Am. Compl."). Although this language does not facially single out the content of Tennes' speech, the facts prove the City adopted and applied its Policy *because of* disagreement with Tennes' message.

The City started its Market in 2009 and ran it with no Policy and no problems until 2016. *Id.* at ¶¶ 88-89, PageID.75. Tennes began participating in the Market in 2010 and was a valued

[2] While the City conflates Tennes' free speech and free press claims, the former focuses on his right to use a means of technology (Facebook) to publish and disseminate his beliefs. *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 505-521 (2012). Nevertheless, for the same reasons the City violates the Free Speech Clause, it also violates the Free Press Clause.

vendor from 2010 to 2016 as the City repeatedly praised him and invited him back each year. *Id.* at ¶¶ 88-89, 102-107, PageID.75-77. That changed in 2016 when Tennes received a question on Country Mill's Facebook page regarding his personal views on marriage. *Id.* at ¶¶ 119-120, PageID.78. He gave an honest answer based on his Catholic faith. *Id.* Only two days later, a City official contacted Country Mill to voice the City's disapproval of Tennes' post and ask him not to participate in the Market that Sunday "because of Tennes' statement of his religious beliefs…." *Id.* at ¶¶ 124-125, PageID.78. Then, with repeated phone calls and emails, the City pressured Tennes not to return to the Market "because of Tennes' post regarding his religious beliefs." Am. Compl. ¶ 126, PageID.78. Due to the City's pressure, Tennes temporarily stopped booking weddings at Country Mill, but the City asked him to leave the Market anyway. *Id.* at ¶¶ 127-130, PageID.78. Recognizing that he had broken no law, Tennes continued to participate in the 2016 Market. *Id.* at ¶¶ 133, 137, PageID.79. And in December, he began booking weddings again at Country Mill. *Id.* at ¶¶ 139-140, PageID.79.

The City had no basis to expel Tennes from the Market; his Facebook post broke no laws or existing policies and his farm lies 22 miles outside the City. *Id.* at ¶¶ 144-147, PageID.80. So when the City opened applications for the 2017 Market, the City added the new Policy to target Tennes' Facebook message. *Id.* at ¶¶ 148-157, 209-210, PageID.81, 88. The City singled Tennes out for differential treatment in the market application process, first by blocking the Market Planning Committee from sending him an invitation, then by removing his application from the Market Planning Committee's review process and reviewing it directly. Am. Compl. ¶¶ 193-196, PageID.86.

As this timeline shows, Tennes engaged in protected speech on a Facebook post, the City disagreed with that post's religious content, and the City took swift action to punish Tennes

because it disagreed with Tennes' speech and beliefs. *Id.* at ¶¶ 121-157, 193-213, Ex. 1, PageID.78-81, 86-88, 111-112.

Ignoring these facts, the City says that its Policy addresses conduct, not speech. Def.'s Br. in Supp. of Mot. to Dismiss 32, ECF No. 14, PageID.216 ("MTD Br."). But that is untrue factually and legally. Factually, the City pointed to no bad conduct in which Tennes allegedly engaged as the reason for barring him from the Market. Am. Compl. ¶¶ 107, 211, PageID.77, 88. Quite the opposite, City officials referenced Tennes' Facebook post every time they asked him to leave the Market from August through March. *Id.* at ¶¶ 121-157, 193-213, Ex. 1, PageID.78-81, 86-88, 111-112. And when they finally expelled him from the Market altogether, officials cited Tennes' Facebook post as the only basis for doing so. *Id.* at 210-211, Ex. 1, PageID.88, 111-112.

Legally, the City fails to appreciate that a law can regulate speech as-applied even if it regulates conduct facially. The test is whether "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). And here, Tennes' statement on Facebook triggered the Policy's application against him. This Facebook post is protected speech. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (explaining that those who use social media like Facebook "employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" (citation omitted)). In sum, the City used the Policy to punish Tennes for his speech, based on the City's disagreement with the religious message that speech contained. That is a paradigm violation of the First Amendment.

B. The Policy facially regulates speech based on content and viewpoint.

Moving from operation to text, the City's Policy facially regulates speech based on content and viewpoint in several ways. First, it forces vendors to comply with the City's "public policy against discrimination … as a general business practice." Am. Compl. Ex. 1, PageID.115. This

"general business practice" language is so broad, it covers not only what a business does, but also what a business says, i.e., what a business does and does not post on its Facebook page. So when the Policy actually requires businesses to comply with the City's public policy on discrimination, the Policy requires businesses to align the content and viewpoint of their Facebook posts with the City's view of discrimination and harassment. *See* East Lansing Code § 22-31 (public policy).

Second, the City's Policy regulates speech on its face based on content and viewpoint by requiring vendors to "[c]omply[] with … East Lansing's Civil Rights ordinances", Am. Compl. Ex. 1, PageID. 115, which ban:

- "harassment" defined as "physical conduct *or communication* which refers to an individual protected under this article, when such conduct *or communication* demeans or dehumanizes and has the purpose or effect of substantially interfering with an individual's…public accommodations or…creating an intimidating, hostile, or offensive…public accommodations …." East Lansing Code § 22-32 (emphasis added).

- "print[ing]...post[ing]...or otherwise caus[ing] to be published *a statement* which indicates that...an individual's patronage of, or presence at a place of public accommodation, is objectionable, unwelcome, unacceptable, or undesirable" because of an enumerated protected status. East Lansing Code § 22-35(b)(2) (emphasis added).

The italicized language expressly prohibits speech—*communications* and *statements.* Indeed, the Sixth Circuit has already determined that a similar but narrower law forbidding publication of statements "is clearly a content-based speech regulation…." *Campbell v. Robb*, 162 F. App'x 460, 468 (6th Cir. 2006) (entertaining First Amendment challenge to Fair Housing Act provision forbidding particular communications). For the City to say otherwise about its law, "[t]o classify some communications as 'speech' and others as 'conduct,' is to engage in nothing more than a 'labeling game'" that "is unprincipled and susceptible to manipulation." *King v. Governor of New Jersey*, 767 F.3d 216, 228 (3d Cir. 2014) (citation omitted).

The City tries to play this game nonetheless, claiming it can ban Tennes' Facebook post under cases like *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), which correctly held

that the government can ban a "White Applicants Only" sign. MTD Br. 34, PageID.218. But the City's argument misperceives the speech-incidental–to-illegal-conduct doctrine. This doctrine allows the government to restrict "speech (commercial or not) that is intended to induce or commence illegal activities" such as statements used to commit conspiracy, solicitation or employment discrimination based on race (i.e., a "White Applicants Only" sign). *United States v. Williams*, 553 U.S. 285, 298 (2008). *See also* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1011 (2016) (explaining this doctrine).

That doctrine has no application to Tennes' Facebook post which does not even describe illegal activity, much less commence or induce it. The post merely conveyed religious views on marriage. Am. Compl. Ex. 1, PageID.112. That speech is not incidental to any conduct. The post also conveyed Tennes' intent to not participate in events that violate his religious views on marriage. *Id.* That speech is incidental to *legal* conduct.

To be sure, the City assumes it can ban speech about conduct legal in Charlotte if the City believes the conduct is outlawed in East Lansing. That argument wrongly assumes that it is a violation of the City's Human Relations Ordinance to serve all customers regardless of orientation but to respectfully decline to participate in a sacramental ceremony that violates one's religious beliefs. But, moreover, the Supreme Court disagrees with the City's argument. A state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Bigelow v. Virginia*, 421 U.S. 809, 824–25 (1975) (invalidating law restricting abortion advertisement in Virginia when that advertisement discussed activities in New York where advertisement was legal). If the City cannot punish Tennes for advertising inside the City about legal activities done outside the City—as *Bigelow* holds—the City surely cannot punish Tennes from discussing his religious beliefs or legal

activities while *outside* the City. *See also Katt v. Dykhouse*, 983 F.2d 690, 695-97 (6th Cir. 1992) (applying *Bigelow* to protect right to advertise in Michigan about conduct in Florida because that conduct, though illegal in Michigan, was legal in Florida).

Moreover, Tennes' Facebook post not only describes beliefs and legal activities, it describes activities protected under the First Amendment. Once again, the contrast between Tennes' post and a "White Applicants Only" sign illustrates the point. A "Whites Applicants Only" sign in the segregationist south communicated that an entire class of people was not welcome in an establishment for any reason. That is discriminatory conduct *because of a protected status* that violates both state and federal law.

In contrast, Tennes serves everyone and always has. Am. Compl. ¶¶ 22, 107, 192, 211-212, PageID.69, 77, 86, 88. He has business associates, employees, and customers of different ethnicities, religions, and sexual orientations. Reflecting that, Tennes' Facebook post did no more than express his religious views on marriage and his intent to live by them when choosing which ceremonies he participates in on his farm. *Id.* at Ex. 1, PageID.112. There is a world of difference between a citizen not serving an entire class of people based on race and a citizen declining to promote and participate in a particular event that violates his religious beliefs about marriage, a belief that is "based on decent and honorable religious or philosophical premises." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). And this view is based on beliefs about an event, not opinions about a person or his/her status. Discussion of this view and declaring an intent to follow it are both constitutionally protected and legal, breaking no law in Charlotte or East Lansing[3]. The City cannot hide behind "illegality" as a basis to restrict Tennes' speech.

[3] To be clear, Tennes does not discriminate on the basis of status and so his speech and business practices would not violate the City's Ordinance even if his farm were located in East Lansing. Moreover, his speech and business practices are constitutionally protected everywhere. However,

C. The Policy regulates non-commercial speech based on content and viewpoint.

The City also invokes the commercial speech doctrine to justify restricting Tennes' speech. MTD Br. 42-43, PageID.226-227. But courts define commercial speech narrowly as speech that does no more than propose a commercial transaction. *Harris v. Quinn*, 134 S. Ct. 2618 (2014). Tennes' Facebook posts do not propose a commercial transaction. They responded to customer questions about his views on marriage and discussed his religious views. Am. Comp. ¶¶ 108-129, Ex. 1, PageID.77-78, 112. This is not commercial speech.

Just as important, even content and viewpoint based regulations on commercial speech trigger strict scrutiny. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011) (holding that "[t]he First Amendment requires heightened scrutiny" for content-based laws and "[c]ommercial speech is no exception" to that rule); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388-89 (1992) (holding that the government "may not prohibit only that commercial advertising that depicts men in a demeaning fashion"); *Matal v. Tam*, 137 S. Ct. 1744, 1767-69 (2017) (five justices concluding in two concurrences agreed that the commercial speech doctrine does not apply to viewpoint-based restrictions on speech, which always receive strict scrutiny); *see also* Order at 6-7, *Nat'l Inst. of Family & Life Advocates v. Rauner*, No. 3:16-cv-50310 (N.D. Ill. July 19, 2017) (adopting same interpretation of *Tam*).

This point neuters any commercial speech defense because the Policy is viewpoint-based. The Policy (as-applied) does not ban all statements or all statements discussing marriage, only those statements declining to promote and participate in same-sex weddings. Under the Policy, a person can promote and endorse same-sex marriage. A farmer could even refuse to host an event sponsored by a Catholic Church and promoting opposite-sex marriage. But if a person declines to

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Tennes understands that the City has taken the position that if he were in East Lansing his Facebook post and business policies would violate the Ordinance.

promote same-sex marriage, the City ostracizes that person from the Market. As the Supreme Court has held, a law like that—that bans objectionable (i.e., negative) speech but allows welcoming (i.e., affirming) speech—is viewpoint-based even though it "evenhandedly prohibits disparagement of all groups." *Tam*, 137 S. Ct. at 1763. That is exactly what the City's Policy does, so the commercial speech doctrine does not save this Policy from strict scrutiny.

II. The Policy was Plausibly Adopted and Enforced to Retaliate Against Speech.

The City also triggered strict scrutiny because it excluded Tennes from the 2017 Market in retaliation for expressing his beliefs on Facebook. Am. Compl. ¶¶ 121-157, 193-213, Ex. 1, PageID.78-81, 86-88, 111-112. In so doing, the City denied a benefit in retaliation for exercising the right to free speech. *Thaddeus-X v. Blatter*, 175 F.3d 378, 388 (6th Cir. 1999).

A speech retaliation claim must allege that (1) a person "engaged in protected conduct," (2) the defendant took "an adverse action … that would deter a person of ordinary firmness from continuing to engage in that conduct," and (3) "there is a causal connection," meaning "the adverse action was motivated at least in part by the plaintiff's protected conduct." *Id.* at 394; MTD Br. 45, PageID.229 (agreeing with standard). Once a prima facie case is made, the burden shifts to the government to show "that it would have taken the same action even in the absence of the protected [speech]." *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002).

The City does not dispute the last two elements and does not show that it would have taken the same action absent Tennes' Facebook post. MTD Br. 45, PageID.229. The City instead disputes the protected nature of Tennes' Facebook post, equating it to "violence" and "other types of potentially expressive activities that produce special harms distinct from their communicative impact." MTD Br. 45, PageID.229 (citation omitted). Not so. *See supra* § I.B. The City cannot transform a Facebook post about marriage into violence or conduct by declaring it so. And this

point holds with particular force since Tennes' post discussed an issue (marriage) of great political and cultural import on which people of good will reasonably disagree.

This point holds even if Tennes' Facebook post offended others. As the Sixth Circuit recently noted, "we reaffirm the comprehensive boundaries of the First Amendment's free speech protection, which envelopes all manner of speech, even when that speech is loathsome in its intolerance, designed to cause offense, and, as a result of such offense, arouses violent retaliation." *Bible Believers*, 805 F.3d at 234. That protection certainly extends to a Facebook post that politely discusses the topic of marriage. The City's retaliation against Tennes for making the post violates the First Amendment.

III. The Policy Plausibly Restricts Speech in an Overbroad Way.

Just as the City's Policy unconstitutionally regulates and retaliates against speech, it also overbroadly restricts speech. A law is unconstitutionally overbroad "if a 'substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010). Many parts of the City's Policy fail this test.

The Objectionable Clause. As noted above, the Policy incorporates the City's Human Rights Ordinances which ban "print[ing]...post[ing]...or otherwise caus[ing] to be published a statement which indicates that...an individual's patronage of, or presence at a place of public accommodation, is objectionable, unwelcome, unacceptable, or undesirable" because of enumerated classifications. East Lansing Code § 22-35(b)(2). The problem is that any criticism of protected class members—whether of their beliefs, actions, or affiliations—could indicate they are objectionable, unwelcome, unacceptable, or undesirable. These terms are so broad they bar religious objections to same-sex marriage because someone could infer that homosexual customers are unwelcome. Similarly, these terms would prohibit criticism of the Pope because that could cause someone to infer that Catholics are objectionable. *R.A.V.*, 505 U.S. at 391-92.

Courts routinely hold similar language overbroad. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (invalidating harassment policy as overbroad because it banned "any unwelcome verbal … conduct which offends … because of" protected characteristics); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 77-80 (D.D.C. 2001) (invalidating policy on "objectionable" appearance as overbroad). *Cf. Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 577-78 (6th Cir. 2013) (declining to interpret the Fair Housing Act's ban on statements as "discourag[ing] an ordinary reader of a particular protected class … [because] using 'discourage' could create First Amendment concerns by creating an overly broad restriction on speech"). This Court should do the same.

The Public Policy/Harassment Clause. The Policy also requires vendors to comply with the City's "public policy against discrimination contained in Chapter 22 of the East Lansing City Code" which forbids "any person … to harass any person because of" certain enumerated classes. Am. Compl. ¶ 159, Ex. 1 (Vendor Guidelines p. 3), PageID.81-82, 115. Harassment is then defined as "communication" that "demeans or dehumanizes and has the purpose or effect of substantially interfering with an individual's … public accommodations … or creating an intimidating, hostile, or offensive … public accommodations … environment." *Id.* at ¶162, PageID.82-83. This broad language likewise restricts criticism of protected class members' beliefs, actions, or affiliations, for such criticism could be considered demeaning or dehumanizing. Based on this language, public accommodations could never critique anything about or associated in any way with protected class members. The breadth is extraordinary. For good reason, the Sixth Circuit has invalidated a policy with nearly identical language. *See Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-84 (6th Cir. 1995) (invalidating harassment policy against "verbal" behavior "that subjects an individual to an

intimidating, hostile or offensive educational … environment" by "demeaning" individuals "because of their racial or ethnic affiliation").

Worse yet, the Policy language is not tied to any particular effect. Rather, the Harassment Clause targets communication with a prohibited *purpose*. *See* Am. Compl. ¶ 162, PageID.82-83 (prohibiting communication with "purpose or effect"). As then Judge Alito wrote for the Third Circuit, a harassment policy that "extends to speech that merely has the 'purpose' of harassing another" is unconstitutionally overbroad. *Saxe*, 240 F.3d at 210. That logic squarely condemns the City's Policy as overbroad as well.

The General Business Practice Clause. The Policy also requires vendors to comply with the City's "public policy against discrimination ... while at the [Market] *and* as a general business practice." Am. Compl. Ex. 1 (Vendor Guidelines p. 3), PageID.115. But as noted above, general business practices include what a business says, including interactions with any client or employee, whether in private or public, whether on the internet or in any internal business document. In effect, the City has required vendors to align the content of *all* communications with the City's views on discrimination and harassment. Thus, a vendor could not post a statement on its website criticizing the City's anti-discrimination law or advocating against inclusion of protected classes, such as weight, because that would directly contradict the City's public policy. The law's breadth gives the City a blank check to restrict almost anything critical that a vendor says about protected classes, in any venue, in any medium, in any context. Such a restriction is overbroad by definition.

Rather than engage its Policy's actual language, the City recycles its assertion that the Policy regulates illegal conduct. MTD Br. 37, PageID.221. But the language described above goes far beyond conduct or statements involving illegal behavior to reach any speech critical of protected class members. Nor can the City bolster its Policy by citing cases that upheld anti-

discrimination laws with completely different language. MTD Br. 37-42, PageID.221-226. Unlike those cases, the City's Policy goes beyond conduct to forbid communications, statements, and general business practices. This is anything but typical public accommodations law.

Left with little else, the City argues Tennes cannot bring an overbreadth claim based on "how it might affect others" when the law clearly proscribes his own activities. MTD Br. 42, PageID.226. But the City has confused overbreadth and vagueness, quoting from cases that discuss vagueness. *Id.* Unlike a vagueness claim, the whole point of the overbreadth doctrine is to allow litigants to challenge overbroad laws even when their own conduct is proscribed by the law. *Entm't Prods., Inc. v. Shelby Cty.*, 588 F.3d 372, 379 (6th Cir. 2009) (explaining this point).

Finally, the City resurrects the commercial speech doctrine, claiming that Tennes' overbreadth claim cannot succeed against its Policy that regulates commercial speech, i.e., speech "in the context of public accommodations." MTD Br. 41-42, PageID.225-226. But the test for commercial speech turns on the substance of the speech, not who is speaking. Businesses frequently engage in non-commercial speech and bring overbreadth claims. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11 (1981) (rejecting argument that businesses could not bring overbreadth challenge). In this case, the Policy's language does not limit itself to speech proposing commercial transactions but applies to *any* communication or statement. That means "the alleged overbreadth ... consists of its application to non-commercial speech, and that is what counts." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989).

IV. The Policy Plausibly Violates Plaintiffs' Right to the Free Exercise of Religion.

The City plausibly violated the Free Exercise Clause because it excluded Tennes from the Market because of his religious beliefs, expression, and religiously motivated actions. As pled, the City contacted Tennes in August 2016 *because of* the Catholic beliefs in his Facebook statement. And in March 2017, the City banished Tennes from the Market *because of* his expression of

religious beliefs on Facebook. *See supra* § IA. Based on the facts pled in the Complaint, the City adopted and applied the Policy because of the City's opposition to the Catholic Church's teachings on marriage and Tennes' willingness to follow those teachings. The Policy thus arose and was applied because of Tennes' religious beliefs and expression.

While the City tries to discount these actions by referencing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990), and other cases upholding neutral and generally applicable laws, MTD Br. 9-15, PageID.193-199, these cases do not help the City. *Smith* acknowledged that the government can never "regulat[e] religious *beliefs* as such," and cannot "punish the expression of religious doctrines it beliefs to be false," or "impose special disabilities on the basis of religious views." 494 U.S. at 877 (quotation omitted). Additionally, under *Smith* and its progeny, a law is not neutral and generally applicable if it does not operate in a neutral and generally applicable way or if it was adopted to target religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (invalidating facially neutral law regulating animal sacrifice because it was motivated by distaste for a particular religious ritual and it created a "religious gerrymander" with the goal of suppressing the ritual). As this progeny shows, a law must be neutral and generally applicable both on its face and in operation.

The City's Policy fails this latter requirement. It was adopted, enforced, and gerrymandered to target Tennes' Catholic beliefs. Am. Compl. ¶¶ 141-157, 193-213, PageID.80-81, 86-88. The City adopted its Policy only after learning of Tennes' religious beliefs and trying to exclude Tennes unsuccessfully from the Market for expressing those beliefs. *Id.* ¶¶ 141-157, PageID.80-81. Even then, the City had to rig its Policy to apply only to Tennes and to apply beyond the Market—beyond the City limits—to reach Tennes' farm outside East Lansing. That the City would purport

to regulate speech and beliefs outside its jurisdiction constitutes the most blatant kind of religious gerrymander—an attempt to restrict religious beliefs, expression, and exercise that the City could not otherwise reach. These are not "legal conclusions" as the City claims, MTD Br. 11, PageID.195; these are facts that indicate the City's true purpose and goals.

In light of these facts, the question is not whether Tennes has a Free Exercise right to violate applicable anti-discrimination laws against status-based discriminatory conduct. While the City pushes this view, offensively comparing Tennes to racists, the KKK, and radical Islamic imams, *id.* at 18, PageID.202, Tennes has never violated any anti-discrimination law, whether in Charlotte or while operating in East Lansing. The cases the City cites are legally irrelevant, and the fact that the City would even make these comparisons exposes the City's anti-religious antipathy. The question is whether the City can constitutionally apply a law against Tennes who does not discriminate and does not violate any applicable anti-discrimination law, when the City singles out and targets Tennes because of his religious beliefs and expression. The answer is no.

That answer is still no even if Tennes' speech and conduct do not rise to the level of participating in a "religious ceremony." MTD Br. 11, PageID.195. Although the City limits free exercise to the latter, *id.*, the Supreme Court correctly rejected that argument in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2022 (2017) (finding access restriction to playground surfacing violated Free Exercise even though state did not "criminalize[] the way Trinity Lutheran worships or [tell] the Church that it cannot subscribe to a certain view of the Gospel"). Under the City's narrow view, it can only violate the Free Exercise Clause if it passes a law barring a particular religious practice or ceremony. That is not and has never been the law.

Nor can the law bestow the neutral and generally applicable label on the City Policy when it contains vague terms that "take[] on the appearance and reality of a system of individualized

exemptions, the antithesis of a neutral and generally applicable policy…." *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). Because of these vague terms—specified in § VIII below—the City can apply its Policy to restrict religious activities while exempting non-religious activities. So far the City has acted to call, email, investigate, and then exclude only Tennes for engaging in purely legal, religiously-motivated activity outside the City. Am. Compl. ¶¶ 121-157, 193-213, Ex. 1, PageID.78-81, 86-88, 111-112. Meanwhile, other vendors engage in secularly motivated acts outside the City and access the Market freely. Am. Compl. ¶¶ 217-229, PageID.88-90. This rigged system lacks neutrality.

Finally, Tennes can allege a hybrid rights claim. While the Sixth Circuit has rejected this theory, MTD Br. 12, PageID.196, that rejection contradicts *Smith* which endorsed hybrid rights. 494 U.S. at 881-82. While conceding that Sixth Circuit law binds this Court, Tennes preserves the hybrid-rights argument for appellate proceedings.

V. The Policy Plausibly Places Unconstitutional Conditions on Receiving Government Benefits.

Under the unconstitutional conditions doctrine, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests…." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Yet that is exactly what the City seeks to do here: condition a government benefit—participation in the Farmer's Market—on Tennes' giving up his First Amendment rights to express and exercise his religious beliefs. *See supra* § I-IV.

Having unequivocally excluded Tennes from stating his Catholic beliefs, the City now tries to relabel the Market a "commercial transaction" and "commercial relationship" rather than a government benefit. MTD Br. 46-48, PageID.230-232. But the facts do not allow this. The Market is a government benefit program where the City licenses vendors—vendors sign a licensing agreement, Am. Compl. ¶ 100, PageID.76—to access and sell their goods (the benefit) in exchange

for a nominal fee ($275 or $265) that presumably covers things like electricity at the Market. *Id.* at Ex. 1, PageID.115. Cities frequently charge fees for licenses, which constitute a classic benefit under the unconstitutional conditions doctrine. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) (noting that state cannot "condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights…").

Nor do the cases the City cites justify its religious discrimination. MTD Br. 47-48, PageID.231-232. Some of those cases involved contracts between the government and a private party for goods or services. The other cited cases did not involve any constitutionally protected interest. The law schools in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, for example, could not legally exclude military recruiters because the schools had no free speech or free exercise right to exclude recruiters from the school's empty rooms. 547 U.S. 47 (2006). And the other cited cases, like *Bob Jones University v. United States*, 461 U.S. 574 (1983), involved government funding situations where the government provided "cash subsidies or their equivalent" to someone. *Tam*, 137 S. Ct. at 1761 (distinguishing cases City cites). And even then, the conditions in those funding cases defined "the limits of the government spending program" and did not "leverage funding to regulate speech outside the contours of the program itself." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013).

In contrast, Tennes has not entered into a contract to provide goods *to the City*. He provides fresh produce *to customers* at the Market. The City provides Tennes and other vendors a license to do so. Am. Compl. ¶¶ 99-100, PageID.76. The City seeks to condition this license and access on Tennes' willingness to give up his free speech and free exercise rights to speak and to operate his farm according to his beliefs. *See supra* §§ I, IV (establishing these rights). Finally, the City is

not funding or subsidizing Tennes. Tennes pays the City for the public benefit of selling goods at the Market. Am. Compl. Ex. 1 (Vendor Fees, p. 3), PageID.116. And just as important, the City expelled Tennes from the Market for reasons unrelated to the Market. While Tennes has always followed the City's Ordinance while at the Market, the Policy reaches beyond the Market to condition access based on speech and actions unrelated to the Market and taken outside the Market, even outside City limits altogether. By definition, this condition "reach[es] outside" the relevant program, creating an unconstitutional condition. *Agency for Int'l Dev.*, 133 S. Ct. at 2330.

As this conclusion suggests, the City says it has not "pressured" the plaintiffs to do anything. MTD Br. 46, PageID.230. "Pressure" apparently does not include emails and calls ordering Tennes to stay away from the Market because of his religious beliefs nor does it include outright exclusion for those beliefs. Am. Compl. ¶¶ 121-126, PageID.78. Without access, Tennes cannot sell his apples or earn profit for his labor at the Market. The City has made the choice plain: forgo your livelihood or forgo your beliefs. The City has "exclude[d]" Tennes "from full participation in the economic life of" the City. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014). This exclusionary act condemns Tennes' beliefs as unworthy and relegates him to a metaphorical and literal outsider, which is precisely what the City wanted.

The City's actions also set a dangerous precedent. If the City can condition access to the Market based on constitutionally protected actions and beliefs outside the City, it can do the same for any other benefit—from conditioning business licenses on companies removing website statements about immigration to conditioning zoning permits on companies not lobbying the government about net neutrality. The City's logic gives it free reign to condition any benefit any way it sees fit. That is exactly what the unconstitutional conditions doctrine seeks to stop.

VI. The Policy Plausibly Violates the Establishment Clause.

The City has also violated the Establishment Clause which "affirmatively mandates accommodation" of religion and "forbids hostility toward [it]." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (citations omitted).

In the Sixth Circuit, government action must have a predominant secular purpose and the purpose or effect of that action cannot send a message of religious disapproval. *See ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 430-35 (6th Cir. 2011) (reviewing Establishment Clause jurisprudence); *Satawa v. Macomb Cty. Rd. Comm'n*, 689 F.3d 506, 527 (6th Cir. 2012) (entertaining religious hostility claim). While the City rejects the predominant purpose part of this test as *dicta*, MTD Br. 24, PageID.209, the Sixth Circuit has repeatedly embraced it. *See Satawa*, 689 F.3d at 526 n.20. Courts examine both the purpose and effect of government action through the eyes of the reasonable observer familiar with an action's context and history. *DeWeese*, 633 F.3d at 430-35.The objective observer will not "turn a blind eye to the context in which [a] policy arose." *ACLU v. McCreary Cty.*, 607 F.3d 439, 446 (6th Cir. 2010).

The City Policy fails this standard because the origin, application, and text of the Policy convey a message of religious hostility. As discussed above, *see supra* § IA, the City created its Policy only after learning about Tennes' religious beliefs and then singled out and excluded him from the Market based on him expressing those beliefs.

Rather than confront its own religious animus, the City focuses on the Policy's text which does not mention religion. MTD Br. 27, PageID.211. But the Policy's text does not settle the matter. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 (2000) ("The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy."). But the events before the Policy's enactment, officials' interactions and statements to Tennes, the timeline of events, and the Policy's application to exclude Tennes also demonstrate

religious disapproval, especially since all facts and inferences must be taken in Tennes' favor. The City relies on cases like *Satawa* that involved summary judgment motions. 689 F.3d at 527. The motion to dismiss standard favors Tennes.

Likewise, it does not matter that Tennes' Facebook post referenced his business practices. MTD Br. 29, PageID.213. That is one of the problems since business practices can include what a business says and believes. *See supra* § I, III. And Tennes has the First Amendment right to operate his business according to his Catholic beliefs. For the City to single out Tennes' religious expression and religiously motivated conduct does not negate but highlights its religious hostility. Moreover, the Facebook post the City referenced also discussed Tennes' beliefs. The post itself constitutes Tennes' religious expression. Taking that in Tennes' favor suggests the City applied its Policy against Tennes because of the religious beliefs and expression in that post.

Even the City's current litigation position reveals religious disapproval. Although the City claims now to exclude Tennes for discriminatory practices, Tennes does not discriminate and does not break any law. MTD Br. 29, PageID.213. Excluding Tennes does not achieve any legitimate City objective. The only objectives left are improper ones—religious disapproval.

VII. The Policy Plausibly Violates Equal Protection

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Distinctions among similarly-situated groups that affect fundamental rights "are given the most exacting scrutiny," *Clark v. Jeter*, 486 U.S. 456, 461 (1988), and in such circumstances discriminatory intent is presumed. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) ("[W]e have treated as presumptively invidious those classifications that … impinge upon the exercise of a 'fundamental right'.").

The City has disparately treated Tennes in contrast with the similarly-situated vendors who attend the Farmer's Market. The City allows other vendors to express messages and host events

promoting LGBT issues, such as same-sex marriage, but refuses to let Tennes express his message about his view of marriage. Am. Compl. ¶¶ 216-226, Ex. 1, PageID.88-89, 211-212. This directly burdens Tennes' fundamental right to free speech and free exercise. While the City claims it never prohibited Tennes from expressing his beliefs, MTD Br. 14, PageID.198, that is irrelevant and untrue. The City conditioned a benefit on the forfeit of his First Amendment rights. Nor can the City hide behind its litigation position of seeking to restrict illegal conduct. MTD Br. 11, PageID.195. Tennes has already refuted that trope. *See supra* § I. Likewise, the City cannot distinguish Tennes from other vendors on the theory that only Tennes discriminates. He does not. Tennes serves and employs all types of persons, including members of the LGBT community. In this respect, Tennes is very similar to a vendor like Good Bites. Both want access to the Market; both have complied with all relevant laws; and both have expressed their views on same-sex marriage. Am. Compl. ¶ 219-220, PageID.89. Yet only Tennes has been excluded as a result. That violates equal protection.

VIII. The Policy Plausibly Violates Due Process and Allows Unbridled Discretion.

The Due Process Clause forbids vague statutes that prevent people from understanding what is prohibited and that allow arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Likewise, the First Amendment forbids laws giving officials "unbridled discretion" to restrict speech without "objective criteria." *United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998).

The City's Policy fails these requirements because it does not define a host of terms—"general business practices," "discriminate," "unwelcome," "objectionable," and "undesirable"—and defines one term so strangely—"harassment"—that the City can restrict speech and conduct for any reason whatsoever. As noted above, these terms are so broad, they allow the City to restrict any criticism about the beliefs, associations, or actions of protected class members anytime a

business communicates. *See supra* § III. This overbreadth also leads to vagueness problems; the terms are so elastic that they create confusion about how these terms apply in numerous situations. City officials in turn have great leeway to apply the terms to any viewpoint or any activity they dislike, as happened here.

In response, the City objects that Tennes cannot raise a substantive due process claim similar to his other claims. MTD Br. 50, PageID.234. But vagueness sounds in procedural, not substantive due process. *See Winters v. New York*, 333 U.S. 507, 510 (1948) (noting that vague law violates "an accused's rights under procedural due process…"). Equally as incorrect, the City claims that Tennes cannot challenge a law that clearly restricts him for being vague. MTD Br. 50, PageID.234. The law does not clearly apply to Tennes: The City simply interprets the law that way. *See supra* footnote 3. Moreover this argument ignores that the vagueness doctrine bars standardless enforcement discretion, not just insufficient notice. *See Act Now to Stop War and End Racism Coal. v. Dist. of Columbia*, 846 F.3d 391, 409-410 (D.C. Cir. 2017) (entertaining vagueness challenge on this basis even though law clearly applied to challenger's conduct).

Finally, the City objects that its Policy's terms have a commonly understood meaning and merely prohibit speech saying someone "will not be served" because of protected class status. MTD Br. 44-45, PageID.228-229. But courts disagree, as they have already found one of these terms vague. *See Armstrong*, 154 F. Supp. 2d at 79-80 (finding regulation on "objectionable" appearance vague). Nor does the City's interpretation fit its Policy, because a separate clause in this Policy already prohibits communications denying service. East Lansing Code § 22-35(b)(2). The Policy then goes on to bar communications that indicate someone is unwelcome, objectionable, and undesirable. *Id*. The City simply reads this latter clause out of its Policy to save the Policy. Courts are not so lenient. *See People v. Borchard–Ruhland*, 597 N.W.2d 1 (1999)

("[T]he court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory.").

Again, the City's Policy is not the typical anti-harassment or anti-discrimination law that clearly bans specified conduct. Rather, the Policy bans "discriminat[ion] against any other person in the exercise of his/her civil rights," "harassment" defined to include communications, and statements indicating persons are "unwelcome," "objectionable," "unacceptable," and "undesirable" and does so in all "general business practices," no matter how expressive those practices are. Neither "common sense" nor differently worded laws can justify the unusual terms in the City's unusual Policy, and the City's use of those vague terms to punish someone simply for expressing their religious beliefs demonstrates just how dangerous vagueness can be.

IX. The Policy Cannot Survive Strict Scrutiny.

Because the City's Policy violates Tennes' fundamental constitutional rights, that Policy must satisfy strict scrutiny, i.e., be narrowly tailored to serve a compelling state interest. *Bible Believers*, 805 F.3d at 248. But excluding Tennes does not achieve even a legitimate interest. While the City invokes stopping sexual orientation discrimination, MTD Br. 4-9, PageID.188-193, that interest does not justify regulating Tennes' speech. The government can stop discriminatory conduct without silencing speech. Moreover, the City only has an interest to stop illegal, status-based discrimination *in the City*. Excluding Tennes does not further that interest because he does not discriminate in East Lansing (or anywhere else). He sells his produce to everyone at the Market (and everywhere else). As a result, excluding Tennes does not stop any discrimination in East Lansing. It merely harms Tennes, coerces him to change his beliefs and expression, and deprives East Lansing residents of the produce Tennes sells at the Market.

This logic also suggests an obvious least restrictive alternative: the City can stop status discrimination in the City by forbidding status discrimination in the City. As of now though, the

City has accepted the duty to review all its vendors "general business practice[s]," including their speech, everywhere in the country and the world. Am. Compl Ex. 1, PageID.115. But this obligation does not further the City's legitimate goals. A better alternative is for the City to stop illegal actions in the City, not to roam the countryside and internet, punishing people for expressing and exercising beliefs where doing so is legal.

X. The Policy Plausibly Violates the Michigan State Home Rule City Act.

With its Policy, the City seeks to extend its ordinances to regulate Tennes' speech, belief, and "business practices" on his own farm, 22 miles outside of East Lansing. Am. Compl. ¶¶ 145-46, 365, PageID.80, 103. That violates the Michigan Home Rule City Act.

While the City claims it stayed within its "geographic boundaries," MTD Br. 51, PageID.235, that assertion ignores that Tennes' speech occurred outside East Lansing. Since Tennes verified that he complied with all laws in his Market vendor application, the City must have at least investigated outside the City to see if Tennes complied with its Policy. In addition, the City misconstrues Tennes' argument to stop any act based on what happens outside the City. *Id*. But Tennes does not go so far; he merely condemns the attempt to restrict universally available benefits in the City for what legally occurs outside the City. In other words, the City cannot indirectly exercise its authority outside the City to achieve what it may not do directly. Otherwise, the City could withdraw any benefit in the City—fire or police protection, park permits, business licenses—based on conduct occurring outside the City. That type of leverage would enable the City to coerce anyone who visited or did business in the City to align their behavior outside the City to the City's dictates. The Home Rule City Act forbids this. *See City of Riverview v. Sibley Limestone*, 716 N.W.2d 615, 618-20 (Mich. Ct. App. 2006) (forbidding city from ticketing company for noise coming from construction outside the city).

XI. The Policy Plausibly Violates the Michigan Conscience Clause.

Tennes' Michigan Conscience Clause claim does not overlap his Federal Free Exercise claim. *Contra* MTD Br. 52, PageID.236. To evaluate the former, Michigan courts consider whether the state has burdened sincere and religious belief or conduct, and whether a compelling state interest justifies that burden and a less obtrusive regulation is available. *Champion v. Sec'y of State*, 761 N.W.2d 747, 753 (Mich. Ct. App. 2008); *Reid v. Kenowa Hills Pub. Schs.*, 680 N.W.2d 62, 69 (Mich. Ct. App. 2004).

The City does not dispute the sincerity or religious nature of Tennes' beliefs. MTD Br. 13-14, PageID.197-198. And Tennes has already shown the lack of a narrowly tailored compelling interest. *See supra* § IX. Thus, the only remaining factor is whether the City has burdened Tennes' belief or conduct. It has. A substantial burden occurs when government action would coerce a person into violating his beliefs or would penalize his religious activity by denying him "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Reid*, 680 N.W.2d at 69 (citation omitted). The burden need not be "overwhelming"; "subtle pressure" suffices. *Id.*

The City has applied much more than subtle pressure; it excluded Tennes from the Market altogether for speaking and exercising his religious beliefs. Am. Compl. Ex. 1, PageID.111-112. This exclusion puts Tennes on unequal footing from other vendors who have expressed views on marriage. This exclusion burdens Tennes' beliefs and violates the Michigan Conscience Clause.

CONCLUSION

If the City can threaten a farmer's livelihood and deny him access to public benefits because City officials disfavor his Catholic views and religious exercise on his own farm 22 miles outside the City, then the City can use that same power to relegate anyone to the edges of society. Tennes seeks to serve everyone at the Farmer's Market while peacefully exercising his rights on his farm. The Constitution guarantees him as much. The Motion to Dismiss should be denied.

Respectfully submitted August 11, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record who are registered users of the ECF system:

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