UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
FILED ELECTRONICALLY

KASHIYA NWANGUMA, ET AL. **CASE NO. 3:16-CV-247-DJH**
PLAINTIFFS,

v.

DONALD J. TRUMP, ET AL.
DEFENDANTS

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, in response to the Motion to Dismiss filed by Defendants Donald J. Trump and Donald J. Trump for President, Inc. (the "Campaign") (DN #9), state the following.

I. DEFENDANTS' MOTION TO DISMISS IS REALLY A MOTION FOR SUMMARY JUDGMENT AND THEREFORE PREMATURE

Defendants frame their Motion as one arising under Fed. R. Civ. P. 12(b)(6), and expend most of their argument discussing the application of standards arising under Fed. R. Civ. P. 8. The attack on the sufficiency of the Complaint under Rule 8 is explored extensively in the section immediately below. But more fundamentally, a closer examination of Defendants' arguments demonstrates that they refer to matters outside of the pleadings—ones which necessitate, at the very least, the taking of some discovery.

Assessment of the facial sufficiency of the complaint must ordinarily be undertaken without resort to matters outside the pleadings. *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010). If a court considers material outside the pleadings, the motion to dismiss must be treated as a motion for summary judgment under Fed. R. Civ. P. 56, and all parties must be given a reasonable opportunity to present all material pertinent to the motion. *Id.*

However, a court may consider "exhibits attached [to the complaint], public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein," without converting the motion to one for summary judgment. *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008).

Here, Defendants rely not on the matters contained within the Complaint, nor on public records or other exhibits, but on their own interpretation of the well-documented events of the Trump rally in Louisville on March 1, 2016. In particular, Defendants take for granted the following disputed issues:

- that Trump directed his catchphrase "get 'em out of here" to undefined "professional security personnel," and not the crowd at large (Defendants' Memorandum, DN #9-1, p.6, PageID #:55);
- that Trump was sincere, or reasonably believed that his words would have any effect at all, or was even heard by Defendants Heimbach and Bamberger when he said "don't hurt 'em" (Id., pp.6, 18);
- that Defendants Heimbach and Bamberger could not have believed they were acting according to Trump's orders when they attacked Plaintiffs (Id., pp.14-15);
- that Trump and the Trump campaign did not foresee, or could not have foreseen, crowd violence based on Trump's prior actions (Id., pp.11-12); and
- that Trump and the Trump campaign did not know, and could not have known, of the presence of white supremacist groups at the rally, or that if they had known, it would not have made a difference. (Id., pp.15-17).

Defendants offer no competent evidence, testimonial or otherwise, for these conclusions, even in response to Plaintiffs' verified statements.

Importantly, the tacit concession by Defendants in their arguments is that many of the dispositive issues in this case pertain to *state of mind*, i.e., motivation, knowledge, and intent. These are normally issues for the trier of fact, and are rarely appropriate for consideration even in a motion for summary judgment following discovery. *See, e.g.*, *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001) (noting that questions of state of mind and motivation are often ill-suited for resolution by dispositive motion); *Martin H. Bauman Assoc., Inc. v. H & M Int'l. Transp., Inc.,* 171 A.D.2d 479 (N.Y. App. Div. 1991). But there can be no serious contention that these issues can be decided in a motion to *dismiss*; indeed, ample caselaw suggests they cannot. *See, e.g.*, *Grose v. Caruso*, 284 F. App'x 279, 284 (6th Cir. 2008) ("Whether or not Appellants possessed the requisite subjective state of mind needed to trigger a clearly established constitutional violation is, as stated above, a fact-specific inquiry which is ill-suited for appellate judicial review at this time.").

To the contrary, at the pleading stage, the Supreme Court has simply held that allegations of state of mind must be alleged with some factual detail. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).[1] As discussed further in the section below, that is exactly what Plaintiffs have done here. Granting a motion to dismiss at this stage would be tantamount to casting every state-of-mind issue in favor of the Defendants, ignoring the allegations in the Complaint, ignoring the overall context for Plaintiff's allegations, and granting summary judgment. And as this Court no doubt knows, federal case law is unequivocal about two things: First, "the court must analyze [such]

[1] This is so despite the language in Fed. R. Civ. P. 9(b), which specifies that "conditions of a person's mind may be alleged generally."

questions after construing the facts in the light most favorable to the party asserting the injury and drawing all reasonable inferences in that party's favor." *Brown v. Chapman,* 814 F.3d 447, 457 (6th Cir. 2016). Second, a non-moving party generally must receive "a full opportunity to conduct discovery" in order to respond to any motion for summary judgment. *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231-32 (6th Cir.1994) ("[in light of *Anderson* and *Celotex*,] a grant of summary judgment is improper if the non-movant is given an insufficient opportunity for discovery").

Fed. R. Civ. P. 56(d) provides: "[i]f a non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declaration or take discovery; or (3) issue any other appropriate order." As such, counsel has attached his declaration to this Response as **Exhibit 1**.

In sum, Defendants' Motion should be denied outright, or at least held in abeyance, because it assumes facts which Plaintiffs are entitled to prove through discovery. Regardless, under any applicable standard, Plaintiffs have alleged sufficient facts in their Verified Complaint and the materials referenced therein to go forward with this action, as discussed further below.

II. "PLAUSIBILITY" DOES NOT MEAN WHAT DEFENDANTS SAY IT MEANS

A. Defendants misuse the *Iqbal/Twombly* standard.

Much of Defendants' Motion is premised on the argument that Plaintiffs' formulation in their Verified Complaint—that Trump ordered crowd members to attack them, those crowd members did so, and it was captured on video—presents an implausible scenario, and cannot be proved. Defendants go so far as to say that Plaintiffs have not stated "*any* claim to relief" against Trump or his campaign. In support, they rely on the often-cited, often-misunderstood, standards enunciated in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Iqbal, a case involving discriminatory intent and qualified immunity for the U.S. attorney general, ostensibly raised the bar for pleadings in all civil cases. But it did not make that bar altogether impossible to jump just because a defendant can come up with any alternate explanation as to why the defendant should not be liable. In theory, under *Iqbal*, the inquiry into plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." 556 U.S. at 679. In practice, it is often a defendant's invitation to have a court issue a "get out of jail free" card at the pleading stage before any discovery may be conducted.[2] This Court should decline that invitation.

---

[2] Potential abuse of *Iqbal/Twombly* by lower courts was a popular theme for scholars and commentators even at the time *Iqbal* was decided. *See, e.g.*, Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits,* N.Y. TIMES, July 21, 2009, at A10 (quoting Justice Ginsburg's comment that *Iqbal* was dangerous and had "messed up the federal rules" and Professor Stephen Burbank's comment that it "obviously licenses highly subjective judgments" and "is a blank check for federal judges to get rid of cases they disfavor"). Those fears have proved well-founded in the seven years since *Iqbal*. *See, e.g.*, Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 994 n.102 (2011) (noting "at best, mixed empirical support" to suggest that heightened pleading "weeds out the frivolous suits while allowing the weak but potentially meritorious suits to proceed"); Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191 (2014) (collecting sources and noting that "one harm flowing from *Iqbal* and *Twombly* is that the new pleading standard will result in dismissal of meritorious cases without the benefit of a more accurate determination of the meritless case"); Arthur H. Bryant, *'Iqbal' Brings Seven Years of Bad Luck for Plaintiffs,* NAT'L LAW JOURNAL, May 23, 2016 (noting a Virginia Law Review Article finding that "*Iqbal* increased dismissals of most cases by 10 percent, but employment discrimination and civil rights cases much more (16 percent and 19 percent, respectively). Cases filed by individuals were also dismissed far more often (18 percent), but not cases filed by corporations"); Joe S. Cecil, et al., *Motion To Dismiss For Failure To State A Claim After Iqbal*, FED. JUD. CENTER (2011), http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf (reporting a 55% increase in the

Criticisms of the overuse of *Iqbal/Twombly* aside, Plaintiffs' Complaint in the instant case is not deficient under Fed. R. Civ. P. 8 or any other pleading standard. Here, Defendants have taken the "obvious alternative explanation" contemplated by *Iqbal* to mean "if we think our explanation is better, yours is not *plausible.*"[3] That is not how the federal rules, or the *Iqbal* standard, work. As discussed in further detail below, Plaintiffs have set forth facts and theories of liability in their Complaint which are not only plausible, but practically proved, at the pleading stage.

B. It is plausible that Trump ordered the crowd to attack protesters.

Defendants repeatedly argue that Trump directed his catchphrase "get 'em out of here" at security personnel, not the crowd members themselves, and that he did not intend "that anyone should use physical force" to do so. (DN # 9-1, p.5.) Defendants offer no affirmative evidence of this other than to say that their argument is an "obvious alternative explanation." (Id.) At a fundamental level, because Mr. Trump did not identify who he wanted to "get 'em out of here," Defendants' argument is exclusively concerned with Mr. Trump's intent. And all that *Iqbal* requires—at the most[4]—is that a plaintiff "plead facts about the defendant's mental state, which, accepted as true, make the state-of-mind allegation 'plausible on its face.'" *Republic Bank & Trust Co. v. Bear Stearns & Co.,* 683 F.3d 239, 247 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at

---

rate at which defendants filed motions to dismiss between January and June 2010 as compared to January and June 2006). Plaintiffs respectfully assert that the Motion to Dismiss filed by Trump and the Trump Campaign in this case is precisely the sort of thing scholars and pundits have warned of for the last decade.

[3] *See, e.g.*, *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1277 (Ohio 2003) (Pfeifer, J., dissenting) ("You keep using that word. I do not think it means what you think it means.") (quoting THE PRINCE□□ BRIDE (20th Century Fox, 1987).

[4] Plaintiffs note that this standard, like the *Iqbal* case itself, typically arises in the context of statutory discrimination claims or deliberate indifference medical neglect claims under the Eighth Amendment. *See, e.g.*, *Katoula v. Detroit Entm't, LLC,* 557 F. App'x 496 (6th Cir. 2014). *Republic Bank* was a case involving the heightened pleading standards for fraud and negligent misrepresentation under Fed. R. Civ. P. 9(b). It is in these contexts that courts citing *Iqbal* have applied the most rigorous analysis—not in the context of simple negligence or other common-law torts.

678). Plaintiffs have done so. (*See* Complaint, DN #1-1, ¶¶ 35, 81, 82, 104, 106, 111, 112, 115, 120-22, and *passim*.) Defendants' arguments are nothing more than a gainsay of the allegations in the Complaint, and may be discarded on this basis alone.

But as to the "context-specific issue" of plausibility under *Iqbal*, the context for Trump's comments also matters a great deal. Indeed, Defendants may be the only people on Earth who believe the idea that Trump was ordering the crowd to attack protesters is *implausible*. First of all, Plaintiffs' version of events is plausible in the sense that it is exactly what happened; Trump gave an order to "get 'em out of here," and that is what the crowd did. Plaintiffs were present at the event and have provided competent testimony to that effect. (Verified Complaint, DN #1-1.) However, if this is unconvincing, the highly publicized video evidence of the rally itself, which is also referred to in the Complaint (¶ 83), should be enough to at least nudge Plaintiffs' Complaint into "plausible" territory. Plaintiffs have attached an index of relevant video evidence which is readily available online to this Response as **Exhibit 2**. This evidence, too, corroborates Plaintiffs' allegations *in toto* (with the obvious caveat that the video cannot literally show Trump's intent).

Furthermore, if Trump intended to speak to "security personnel," he certainly made no effort to clarify his target audience before, during, or after the fact.[5] Nor did he make it clear how anyone should "get 'em out of here" except by physical force. To the contrary, as set forth in the Complaint, Trump has suggested umpteen times that he would like to attack protesters himself and that he will pay the legal fees of audience members who attack protesters. He has further

[5] It is worth noting that Trump's "security professionals" also attack protesters. See Jose A. DelReal, *Protesters to File Charges Against Donald Trump Following Alleged Assault by Security Detail*, WASH. POST, Sep. 9, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/09/09/protesters-to-file-charges-against-donald-trump-following-alleged-assault-by-security-detail/ and §II(D)(2), *infra*.

made repeated insinuations of how mob violence is a vestige of the "good old days," and has explicitly instructed audience members to "knock the crap out of" protesters. (Complaint, ¶¶ 85-94.)

Of course, not all such comments made their way into Plaintiffs' Complaint because after all, counsel is still obligated to keep the pleading "short and plain." Fed. R. Civ. P. 8. But more such comments certainly exist. *See* Philip Bump, *Could Donald Trump Be Held Legally Responsible for Inciting Violence at His Rallies?*, WASH. POST, Mar. 14, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/03/11/could-donald-trump-be-held-legally-responsible-for-inciting-violence-at-his-rallies/ (collecting incidents) (noting that on Aug. 11, 2015, in reaction to a protester seizing a microphone from another candidate, Trump publicly stated, "That will never happen with me . . . I don't know if I'll do the fighting myself, or if other people will.") (further noting that on November 22, 2015 Trump stated with regard to protesters, "The third group, I'll be a little more violent. And the fourth group, I'll say get the hell out of here!") (further noting a press conference on or about March 11, 2016, in which Trump claimed a protester "was hitting people, and the audience hit back . . . . That's what we need more of."). These comments have not happened in a vacuum and cannot be discounted when drawing inferences as to Trump's intentions.

Plaintiffs' interpretation is so "plausible," in fact, that legal pundits have opined for months now about Trump's criminal and/or civil liability for repeatedly ordering crowds—not security—to attack protesters. *See, e.g.*, Dahlia Lithwick, *Is Donald Trump Inciting Violence?*, SLATE (Mar. 15, 2016, 6:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence

/2016/03/is_donald_trump_inciting_violence_he_might_be.html; Judge Andrew P. Napolitano, *Trump Rally Violence, The First Amendment and 'The Heckler's Veto*,' FOX NEWS (Mar. 17, 2016), http://www.foxnews.com/opinion/2016/03/17/trump-rally-violence-first-amendment-and-hecklers-veto.html ("If Trump publicly demands violence and there is no time or ability for any speech to neutralize his demands and the demanded violence takes place, his speech is unprotected -- and he can be prosecuted for incitement to riot."); Bryan Logan, *Donald Trump's Rivals Rip Him for 'Disturbing, Ugly' Rhetoric amid Chaos in Chicago*, BUSINESS INSIDER (Mar. 11, 2016),http://www.businessinsider.com/ted-cruz-says-trumps-campaign-affirmatively-encourages-violence-2016-3 ("A campaign bears responsibility for creating an environment where the candidate urges supporters to engage in violence") (quoting Senator Ted Cruz). Legal scholars, too, have analyzed Trump's liability under the First Amendment without considering the possibility that Trump was talking to security personnel. That is because no one legitimately thinks that he was. Lithwick, *supra* (citing Garrett Epps, a Supreme Court scholar and professor of law at the University of Baltimore) ("Trump is talking to people who are present and urging them to commit assault on someone who hasn't done anything (holding a tomato isn't a crime). He could have said, "if you see someone holding a tomato, notify security," or "try to talk them out of it," but instead he advocates immediate preemptive violence.") (Complaint, DN #1-1 at ¶ 86).

Defendants' "obvious alternative explanation" that Trump directed his comment to "Secret Service . . . and local law enforcement to enforce the law and remove hecklers[6] who were

[6] Defendants are apparently confused about who the "heckler" is in a typical "heckler's veto" situation. "A heckler's veto is 'the suppression of speech by the government [] because of the possibility of a violent reaction by hecklers.'" Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 179 (citing Ronald B. Standler, *Heckler's Veto*, RB□2.COM, Dec. 4, 1999, http://www.rbs2.com/heckler.htm; *Berger v. Battaglia*,

ruining the event for others" (DN #9-1, p.5) is, respectfully, not-so-obvious, even if cast strictly as a matter of law. In fact, under the First Amendment, there is widely accepted to be "an effective requirement that law enforcement officers protect unpopular speakers from hostile audiences and silence speakers only if controlling the crowd becomes impossible." Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1011 (2011) (citing *Gregory v. City of Chi.*, 394 U.S. 111 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963)). This is the explicit rule in this Circuit, as set forth in the case of *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228 (6th Cir. 2015), cited by Defendants. (DN #9-1, p.8.) In *Bible Believers*, officers threatened to issue citations for disorderly conduct to a group of Christians who were antagonizing Muslims at the Arab International Festival in Dearborn. *En banc*, the Sixth Circuit held that officers were not entitled to qualified immunity for threatening to arrest the protesting Bible Believers. The majority held that officers could have protected the Bible Believers' speech in a number of ways, including cordoning off the speakers to protect them, and even dispersing the entire crowd. *Id*. at 253. Writing for the majority, Judge Clay opined: "If the speaker, at his or her own risk, chooses to continue exercising the constitutional right to freedom of speech [before a hostile audience], he or she may do so without fear of retribution by the state, for the speaker is not the one threatening to breach the peace or break the law." *Id*. In other words, Trump's supposed intention that law enforcement remove peaceful protesters was itself unlawful, and therefore implausible. *See also Startzell v. City of Philadelphia,* 533 F.3d 183, 206 (3d Cir. 2008) (Stapleton, J., concurring) ("Police may not,

779 F.2d 992, 1001 (4th Cir. 1985) (defining the heckler's veto as "the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order"). The "hecklers" in a crowd full of Trump supporters would be those speaking *against* Trump.

consistent with the First Amendment, silence protected speech based solely on their judgment that it is interfering with competing protected speech.").

In sum, Plaintiffs' position is that Trump was directly and unmistakably addressing the crowd. Frankly, it is difficult to see how the situation could be interpreted any other way, but if Defendants wish to offer an alternate explanation, they are free to do so via the discovery process. A good start would be to provide some testimony from Mr. Trump himself on the matter. But simply saying "that's not what he meant," without any evidentiary support whatsoever, cannot suffice.

Defendants also allege pleading deficiencies in several discrete causes of action. These are examined separately below.

C. Plaintiffs plausibly alleged a riot.

Defendants go through the somewhat desperate exercise of arguing that Plaintiffs did not properly plead "that there was a riot at all." (DN #9-1, p.6.) Defendants argue the pleading is deficient because Plaintiffs only named three individual Defendants, and nowhere state the precise number of people involved in the attack (though they acknowledge Plaintiffs allege a "group" with "multiple" perpetrators). Defendants further argue that Plaintiffs' claim fails because they do not specifically state "tumultuous and violent" or "grave danger" in their Complaint. Finally, Defendants claim that Plaintiffs fail to allege that Trump intended to cause a riot. (Id., p.7.)

First, Defendants misread the plain language of the incitement statutes. Ky. Rev. Stat. 525.040 states: "A person is guilty of inciting to riot when he incites or urges five (5) or more persons to create or engage in a riot." Ky. Rev. Stat. 525.010(5) states: "'Riot' means a public

disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons[.]" These statutes are specifically referred to by name in the Complaint. (DN #1-1, ¶ 103.) Ky. Rev. Stat. 525.040 does not require that any person be physically attacked by five people, or that five people participate in any sort of rioting, or even that a riot actually occur. It simply requires someone "incite or urge" five people or more.[7] And a riot itself does not require five people to physically assault another person; it just requires "grave danger" of injury. It should go without saying that Plaintiffs had no obligation, as Defendants suggest, to actually sue five individuals. Furthermore, these statutes are part of the penal code, and as such, require intentional conduct. "[T]he requisite state of mind is implicit in the very nature of the . . . activity." *Hobart Corp. v. Dayton Power & Light Co.,* 997 F. Supp. 2d 835, 852-53 (S.D. Ohio 2014).

Elsewhere, Defendants state: "Finally, Plaintiffs' incitement claim fails to allege that the likely result of Mr. Trump's statement was imminent physical violence."[8] (DN #9-1, p.11.) That is because the result, as Plaintiffs plainly state in the Complaint, was *actual* violence. Put another way, imminent physical violence was so likely to occur as a result of Trump's direction that it *actually did occur.* (Exhibit 2; Complaint, *passim*.)

But finally, and perhaps most importantly, Defendants' argument is factually wrong. Despite a passing reference to it in their Memorandum, Defendants dismiss paragraph 104 of Plaintiffs' Complaint, which states: "In directing his supporters to eject peaceful protesters using

[7] *See also United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010) ("In the case of a criminal solicitation, the speech--asking another to commit a crime--is the punishable act. Solicitation is an inchoate crime; the crime is complete once the words are spoken with the requisite intent, and no further actions from either the solicitor or the solicitee are necessary.").

[8] This is included in Defendants' arguments regarding Trump's First Amendment rights, but is plainly an argument regarding a supposed pleading deficiency, and as such is included in this section of Plaintiffs' Response.

harmful physical force, Trump **intended** to create a public disturbance involving an **assemblage of five or more persons** which by **tumultuous and violent conduct** created **grave danger** of damage or injury." (Emphasis added.) In light of this, it is impossible to discern what Defendants actually intend to argue here. Every single phrase Defendants complain of as lacking is contained —explicitly and in no uncertain terms—in this one paragraph (which itself ties statutory language to the facts of this particular case). No case before or since *Iqbal* requires a plaintiff to write out entire statutes in both the fact section *and* the individual claims of a complaint. *See Lazette v. Kulmatycki*, 949 F. Supp. 2d 748, 751 n.4 (N.D. Ohio 2013) ("The fact that the complaint also — and properly so — recites or paraphrases statutory language does not somehow negate the plausibility of the claim she asserts under the statute, or take her complaint into *Twombly/Iqbal* territory.") Defendants even go so far as to characterize Plaintiffs' incitement claim as "naked assertions devoid of further factual enhancement." (DN #9-1, p.7.) This is only so if one assumes that a court is incapable of reading individual claims in the overall context of a 22-page complaint as a whole.[9] But again, *Iqbal* requires courts to draw on "judicial experience and common sense" and make a "context-specific" determination. It does not require courts to pedantically parse each count of a Complaint and ignore context to invent deficiencies.[10]

[9] Plaintiffs further note that while probably not necessary under Fed. R. Civ. P. 8 or any other pleading standard, they have specifically incorporated the Complaint's factual allegations into the incitement claim by reference. See DN #1-1 ¶ 102.

[10] Casting about for any other examples of Trump's brand of direct incitement, Defendants make a torpid comparison to Obama's 2008 comment, made at a fundraiser, that "If they bring a knife to the fight, we bring a gun," But as Defendants correctly note, "'there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.' *United States v. Williams*, 553 U.S. 285, 298–99 (2008)." This distinction is precisely where Trump crossed the line. Unlike Trump, Obama was not directing anyone to do anything. He was answering a question with a metaphor (and even the metaphor, if taken to its literal extreme, suggests self-defense, not illegality). If candidate Obama had said "pull out your guns, everybody" or "let's go have a knife fight," or had even been talking about actual knives and guns, or had suggested any kind of actual physical violence whatsoever, then Defendants' analogy might be workable.

D. Plaintiffs properly pleaded claims for negligence.

Even if this Court were to take the unprecedented view that a defendant's state of mind must be proved by the initial pleading alone, this would not affect Plaintiffs' claims for negligence. What Trump really *meant* by "get 'em out of here" does not affect whether he *should have known* he was igniting a virtual powder keg with his directive. Still, Defendants ask for these claims to be dismissed at the pleading stage. The Court should deny that request.

When the jurisdictional basis of a lawsuit is predicated upon diversity of citizenship, federal courts must apply "the substantive law of the forum state." *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 358 (6th Cir. 2013); *see also Erie v. Tompkins,* 304 U.S. 64 (1938) (explaining that in diversity cases, state law governs matters of substance while federal law dictates procedure). Courts within the Sixth Circuit have looked to substantive state law to determine if an action was properly pleaded under *Iqbal*. *See, e.g.*, *Kelley v. United States*, No. 5:15-cv-370-JMH, 2016 U.S. Dist. LEXIS 62121 (E.D. Ky. May 11, 2016); *Mourad v. Marathon Petro. Co. LP*, 129 F. Supp. 3d 517, 522 (E.D. Mich. 2015). Thus, it is appropriate to look to Kentucky caselaw to determine whether Plaintiffs properly pleaded a claim for negligence against Trump and his campaign. And the standard for such a pleading is not nearly as stringent as Defendants would have this Court believe, whether before or after *Iqbal*. *See Hart v. Roth*, 186 Ky. 535, 217 S.W. 893 (1920) ("It is . . . well settled, that a plaintiff, in an action because of personal injuries, may allege the negligence of the defendant in general terms, and when having done this, he may show and rely upon any specific element of negligence, which the evidence warrants, and, in such a state of case, it is considered, that the allegations of the petition have

given notice to the defendant of every specific act of negligence, which is susceptible of being proven and that the plaintiff is relying thereon."); *Kelley*, 2016 U.S. Dist. LEXIS 62121, at *8 (denying motion to dismiss negligence claims). These have been the elements of negligence, in Kentucky and the rest of America, for a very long time. *See C.J.S., Negligence* § § 1, 3-6, 8-14, 16-19, 21, 63(103), 90-115; *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850).

Plaintiffs' Complaint easily satisfies the standard for negligence pleading in Kentucky. It alleges a duty (DN # 1-1, ¶ 117), breach of that duty (¶ 118), causation (¶ 123), and damages (Id.). What Defendants really mean to say is "Plaintiffs did not *prove* their entire case for negligence in their Complaint." Defendants go so far as to argue "Plaintiffs allege no facts about what type or what amount of security was present. Nor have they alleged what sort of security should have been provided or what the cost of such security would have been."[11] Then, Defendants paradoxically argue that more security simply could not have helped, even if it had been provided. (DN #9-1, p.15.) Defendants do not cite even a single authority to suggest that any such information—which is uniquely in the possession of the Defendants and has nothing to do with the elements of negligence—is required to appear in a complaint. That is because no such authority exists. Imagine if courts were to accept that, in negligent security cases, complaints should be dismissed because a plaintiff did not specify what the cost of extra security would be? Or that complaints should be dismissed simply upon a defendant's word that extra security would have been futile because "we couldn't have stopped the harm anyway?" It is no exaggeration to say such an approach would effectively end negligent tort claims altogether.

[11] Even if this were a motion for summary judgment made at the end of discovery, it is hard to imagine that the issue of what proper security might *cost* would be somehow dispositive of Plaintiffs' claims, and Defendants do not endeavor to explain how Plaintiffs would shoulder the burden of proving what would, at best, be considered an affirmative defense.

Plaintiffs are (at least) entitled to discovery on these points. *See, e.g.*, *Hobart Corp. v. Dayton Power & Light Co.,* 997 F. Supp. at 852-53 ("At this stage of the litigation, Plaintiffs need not identify exactly which hazardous substances were released by which defendants, in what manner, or on what specific dates.")

Collateral issues pertaining to Plaintiffs' negligence claims are considered separately below.

1. Defendants owed at least a duty of reasonable care.

Assuming that the Court is inclined to make a call on any discrete issue of law, the only remotely resolvable issue is what kind of duty was owed by Trump and/or the Campaign to the Plaintiffs. *See Jenkins v. Best*, 250 S.W.3d 680, 688 (Ky. App. 2007) ("[where] facts are sufficient upon which to base a legal conclusion as to whether a duty exists, we must state that conclusion.") If this Court must decide this issue before discovery, it should be resolved in Plaintiffs' favor. As stated above, the claims against Trump and his campaign are for simple negligence, but if they must be classified further, they are claims for "negligent security," which is generally viewed as a variety of premises liability. *See Bugg v. Am. Legion*, No. 2006-CA-000429-MR, 2007 Ky. App. LEXIS 163 (Ct. App. May 25, 2007). Premises liability law supplies the nature and scope of that duty when dealing with tort injuries on real property. As attendees of Trump's political rally, Plaintiffs would likely be considered invitees, and were owed at least a duty of reasonable care. *Shelton v. Ky. Easter Seals Soc'y, Inc.,* 413 S.W.3d 901 (Ky. 2013); *see also Sidebottom v. Aubrey*, 267 Ky. 45, 101 S.W.2d 212 (1937) (cited by Defendants, DN #9-1, p16) ("A proprietor of any public house of entertainment may be answerable for the act of one of his patrons as well as of his servant. He owes a duty to those that

come to his place to protect them from insult and other annoyances or dangers."). Notably, some caselaw suggests that Defendants may even have been able to lawfully restrict dissenters from entering Trump's rallies in the first place. *Sistrunk v. City of Strongsville,* 99 F.3d 194 (6th Cir. 1996). *But see Bible Believers*, 805 F.3d 228). They made no effort to do so. In fact, some media reports that Trump "often says that he likes protesters because they are the only thing that makes camera operators aim away from him and pan his large crowds[.]" Ben Schreckinger, *Trump Cracks Down on Protesters*, POLITICO (Mar. 7, 2016, 8:31 PM), http://www.politico.com/story/2016/03/donald-trump-rally-protester-crack-down-220407.

But Plaintiffs' status matters little, because at a more fundamental level, "every person owes a duty of care to every other person to exercise ordinary care in his activities to prevent foreseeable injury." *James v. Wilson*, 95 S.W.3d 875, 891 (2002) (citing *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987)). This duty includes the obligation to refrain from inviting an angry mob to attack a dissenting voice, especially when one knows that mob will likely do exactly that.[12]

Even if the common law is not enough, Trump and his campaign had a *contractual* duty to provide adequate security. The contract between Trump's Campaign and the Convention Center states: "The Lessee further agrees to have in place, at all time, sufficient security to maintain order and protect persons and property from any and all injuries. The Lessee shall defend, indemnify and hold harmless the Board, its members officers, employees agents, and servants from all such causes of action, claims, losses and damages except if such cause of action arises from the negligence or intentional act of Lessee or his member, officers, employees

[12] This is so even if the dissenters were trespassing (which Plaintiffs do not concede here). See §III(B), *infra*.

agents, or servants." (page 3 of Short Form Lease, page 22 of document, attached hereto as **Exhibit 3**.) Thus, Defendants' argument that Trump was not the proprietor, which is unsupported by any evidence or authority, is immaterial (DN #9-1, p.16). The argument that "they were not responsible for insuring the the safety of the attendees" is simply wrong, both as a matter of law and of fact.

In support of their argument (DN # 9-1, pp.15-16), Defendants cite to *Murphy v. Second St. Corp.* 48 S.W.3d 571, 573–74 (Ky. App. 2001). But their quoted passage from that case goes on to state: "A plaintiff must show either: (1) that the proprietor had knowledge that one of his patrons was about to injure the plaintiff and he failed to exercise ordinary care to prevent such injury; or, (2) that the conduct of some of the persons present was such as would lead a reasonably prudent person to believe that they *might* injure other guests." *Id.* at 574 (emphasis added). Thus, even if Defendants had not had an explicit contractual duty to ensure the safety of attendees, the question is really one of what was factually *foreseeable*, not whether there was a total lack of duty on Defendants' part by some operation of law. The pleading stage is not the place to determine this issue. Plaintiffs' Complaint plainly states, "Trump and the Trump campaign knew or should have known that by encouraging members of the audience, including Heimbach, Bamberger, and/or unknown defendant, to 'get them out of here,' these individuals would physically attack the Plaintiffs." (DN # 1-1, ¶ 121.) Nothing more is required. Here, Defendants again confuse the *Iqbal* standard with the standard under Fed. R. Civ. P. 56, as their argument is essentially "violence wasn't foreseen or foreseeable." This is addressed in the section below.

2. Assaults on protesters were foreseeable by Defendants.

Defendants launch an inherently factual attack on foreseeability, arguing "it is undisputed that Mr. Trump and the Campaign were unaware that members of a white supremacist group would be present at the speech. Thus, Mr. Trump and the Campaign could not possibly have known more security might be needed." (DN # 9-1, p.17.) Defendants' argument tacitly concedes an important point: if Trump had known white supremacists would be present, then he should have hired more security. In any event, Trump's foreknowledge of his rally's attendees is not at all "undisputed." The connection between the Trump campaign and groups like Heimbach's was well-documented even before the Louisville rally on March 1. *See, e.g.*, Jay Hathaway, *More Than Half of Trump's Retweets Are White Supremacists Praising Him*, NYMAG: SELECTALL (Jan. 27, 2016, 10:58 AM), http://nymag.com/selectall/2016/01/donald-trump-mostly-retweets-white-supremacists.html; Eric Bradner, *Donald Trump Stumbles on David Duke, KKK*, CNN (Feb. 29, 2016, 10:18 AM), http://www.cnn.com/2016/02/28/politics/donald-trump-white-supremacists/ (noting that on the February 24, 2016 edition of his radio program, white nationalist and former Ku Klux Klan grand wizard David Duke urged his listeners to vote for Trump; Trump knew of this endorsement days before the Louisville rally); Peter Holley & Sarah Larimer, *How America's Dying White Supremacist Movement is Seizing on Donald Trump's Appeal*, WASH. POST (Feb. 29), https://www.washingtonpost.com/news/morning-mix/wp/2015/12/21/how-donald-trump-is-breathing-life-into-americas-dying-white-supremacist-movement/; Jonathan Mahler, Donald Trump's Message Resonates with White Supremacists, N.Y. Times (Feb. 29,

2016), http://www.nytimes.com/2016/03/01/us/politics/donald-trump-supremacists.html. In fact, the American National Super PAC, created by prominent white nationalist group the American Freedom Party, issued robocalls for Trump in late February, 2016, urging voters "don't vote for a Cuban" and bemoaning the "gradual genocide of the white race" because white people are "afraid to be called racist." Candace Smith, The White Nationalists Who Support Donald Trump, ABC NEWS (Mar. 10, 2016), http://abcnews.go.com/Politics/white-nationalists-support-donald-trump/story?id=37524610 (audio available at https://soundcloud.com/tpmmedia/american-national-super-pac-trump-robocall). The chairman of the American Freedom Party (and the voice heard on the robocall) was included on a list of Trump's Republican Convention delegates. James Queally & Seema Mehta, *A White Nationalist is Among Donald Trump's Pledged Delegates in California*, L.A. TIMES (May 10, 2016, 9:26 PM), http://www.latimes.com/politics/la-me-ln-donald-trump-white-nationalist-delegate-20160510-story.html. Indeed, it is likely that white supremacists have been present and highly visible[13] at virtually every Trump campaign event, as they were at the Louisville rally. Under these circumstances, it is highly likely that Trump knew (and knows) his audience. If not, Defendants are welcome to prove it.[14]

Defendants continue their attack on foreseeability by arguing that evidence of similar occurrences at other rallies somehow makes Plaintiffs' Complaint deficient. (DN # 9-1,

[13] Defendants acknowledge but wholly dismiss the fact that Defendant Heimbach and his group were wearing matching white-nationalist t-shirts on the day of the rally. (DN #9-1, p.3.) Perhaps Trump did not notice this, or perhaps he did not anticipate that Heimbach and his group were likely to attack one of the only Black people in attendance at the slightest provocation. These are issues for discovery.

[14] For what it's worth, Plaintiffs doubt it. See Michael Finnegan, *Donald Trump's Campaign: It's Less Chaotic and More Calculated than it Looks*, L.A. TIMES (Dec. 23, 2015, 9:32 AM), http://www.latimes.com/politics/la-na-trump-campaign-strategy-20151223-story.html (quoting a former Trump business associate) ("What Trump's opponents and critics have failed to understand,' she said, is that 'everything he does is strategic.'").

pp.11-12.) The fact that this same kind of thing has happened all over the country is undeniable (see Complaint, DN #1-1, ¶¶85-94)[15], but Defendants' argument is that all such information in the Complaint should be disregarded because Plaintiffs "point to only one incident" of *actual*—not just advocated—violence in their Complaint.[16]

First of all, there is no authority at all to suggest that a plaintiff must affirmatively prove that there were *numerous* prior incidents of the same kind in order to state a claim for negligence in a complaint. Not to beat a dead horse, but this is what the discovery process is for. Defendants cite two cases in support of their argument: *Grisham v. Wal-Mart Stores, Inc*., 929 F.Supp. 1054, 1056 (E.D. Ky. 1995), and *Napper v. Kenwood Drive-In Theatre Co.,* 310 S.W.2d 270, 271–72 (Ky. 1958). While *Grisham* does helpfully point out that "Kentucky courts have 'rejected any all-inclusive general rule that . . . criminal acts of third parties . . . relieve the negligent party from liability,'" 929 F.Supp at 1057, both cases are inapposite here because they were decided at the summary judgment stage. In fact, both cases explicitly refer to multiple depositions and other discovery in reaching a fact-specific, detail-driven determination that the acts by third parties were not foreseeable. *Grisham*, 929 F.Supp at 1056 (analyzing two depositions and an expert report); *Napper*, 310 S.W.2d at 271 (referring to "[t]he depositions and affidavits upon which the decision [below] rests").

---

[15] Plaintiffs assume that the repeated attacks on protesters at Trump rallies is well known to this Court (and to the general public) by now, but just in case, collected events may be found at: Ben Mathis-Lilley, *A Continually Growing List of Violent Incidents at Trump Events*, SLATE: THE SLATEST (last visited June 27, 2016), http://www.slate.com/blogs/the_slatest/2016/03/02/a_list_of_violent_incidents_at_donald_trump_rallies_and_events.html.

[16] The Complaint lists three incidents prior to the March 1, 2016 rally. Only one resulted in violence; the other two involve Trump's open and unashamed advocacy of violence against protesters. (Par. 85-88.) Even if Plaintiffs had to prove their entire case in their Complaint, this situation is quite unlike the "single incident" straw man erected by Defendants in their Memorandum. (p.16.) It is hardly unforeseeable that repeated advocacy of violence against protesters would ultimately result in violence against protesters.

Notably, Trump has provided no testimony, no evidence, and even no argument to suggest that there has been no more than "only one incident" of violence at a Trump rally. Put another way, Trump does not argue that he did not actually foresee such violence (after repeatedly asking for it), just that Plaintiffs were somehow obligated to point out more than one prior incident to get to the discovery phase. While this is unquestionably not required of Plaintiffs, they are happy to oblige. In addition to the incident described in the Complaint, the following incidents of violence occurred prior to March 1, 2016:

- September 3, 2015, in New York (Trump security guard punched a protester in the face after the demonstrator approached the guard to retrieve his sign). Jose A. DelReal, *Protesters to File Charges Against Donald Trump Following Alleged Assault by Security Detail*, WASH. POST (Sep. 9, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/09/09/protesters-to-file-charges-against-donald-trump-following-alleged-assault-by-security-detail/. These protesters are currently in litigation against Trump and his campaign. *See Galicia, et al., v. Trump, et al*, No. 24973/15 (S. Ct. N.Y. filed on Sept. 09, 2015) (limited pleadings available at https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=YPFxXIzoSY_PLUS_5Iws/XzzZdg==).
- Oct. 14, 2015, in Richmond, Virginia (Trump supporters shoved and took signs from a group of immigration activists, and spit in a protester's face). *Trump Rally Gives Way to Shoving, Yelling Amid Latino Protests*, YAHOO! NEWS (Oct. 15, 2015), https://www.yahoo.com/news/trump-rally-gives-way-shoving-yelling-amid-latino-024244055.html.

- Oct. 23, 2015, in Miami, Florida (A man at a Trump rally knocked down and kicked a Latino protester). Tessa Berenson, *Protesters at Donald Trump Rallies Face Increasing Violence*, TIME (Oct. 28, 2015), http://time.com/4090437/donald-trump-violence-protests-republican-debate/
- Dec. 3, 2015, in New York City (security guard took a sign from and struck an immigration activist during a protest after a Trump event). Ben Mathis-Lilley, *A Continually Growing List of Violent Incidents at Trump Events*, SLATE: THE SLATEST (Apr. 25, 2016, 11:45 AM), http://www.slate.com/blogs/the_slatest/2016/03/02/a_list_of_violent_incidents_at_donald_trump_rallies_and_events.html.
- Dec. 11, 2015, in New York City (protesters affiliated with various Arab-American and Muslim-American groups were "forcibly ejected" from a fundraiser at which Trump was speaking). Jake Pearson, *Protesters Disrupt Donald Trump Speech at NYC Luncheon*, AP NEWS (Dec. 11, 2015, 10:45 PM), http://bigstory.ap.org/article/f4fbbf3f93aa4628b8fa321ebf7bc553/protestors-disrupt-donald-trump-speech-nyc-luncheon.
- Dec. 14, 2015, in Las Vegas (Trump supporters yelled "Sieg Heil" and "light the motherfucker on fire" toward a black protester who was being physically removed by security staffers). Ben Mathis-Lilley, *Trump Supporters Shout, "Sieg Heil," "Light Him on Fire" at Black Protester*, SLATE: THE SLATEST (Dec. 15, 2015, 9:24 AM), http://www.slate.com/blogs/the_slatest/2015/12/15/supporter_yells_sieg_heil_toward_black_protester_at_trump_rally.html.

Plaintiffs would likely not have filed this case if the Louisville rally had been an isolated incident. It was not. To say that violence was foreseeable by March 1, 2016, would be a gross understatement. It happened before the Louisville rally, it has happened repeatedly since, and it must stop.

3. The chain of causation is not cut just because Trump said "don't hurt 'em."

Defendants also argue, again without authority or evidentiary support, that Trump's admonition of "don't hurt 'em," after the proverbial trigger had been pulled, somehow cuts the chain of causation. (DN # 9-1, p.6) It is as if to say that Trump could create his own intervening/superseding cause of sorts; one that undoes his prior negligent act. Or an inverted "last clear chance" doctrine that applies to defendants. A negligence mulligan.

Negligence claims do not work that way. For something to cut the chain of causation, it must be an "independent force, not naturally arising out of or related to the negligently created condition." *Lexington Country Club v. Stevenson*, 390 S.W.2d 137, 141 (Ky. 1965) (citing *United Fuel Gas Co. v. Thacker,* 372 S.W.2d 784 (Ky. 1963)). *See also* RESTATEMENT (SECOND) OF TORTS §§ 441, 442–53. Even if it were a proper affirmative defense that Defendants could prove, there would still be a substantial question as to Trump's sincerity in saying "don't hurt 'em" after months of saying, in effect, "wouldn't it be great if more of 'em got hurt?" (Complaint, ¶¶85-94; §II(D)(2), *supra*.), not to mention whether the attackers even heard Trump say "don't hurt 'em" in the ensuing melee, or what they might have understood that to mean.[17] Whatever Defendants intended to argue, this issue cannot be decided at the pleading stage.

[17] It is worth noting that such statements likely would not even absolve Trump from facing *criminal* liability. In *United States v. Hale*, for example, the defendant's multiple attempts to distance himself from any illegal actions with statements such as "I'm gonna fight within the law" and "I can't take any steps to further anything illegal" were not enough to overturn his solicitation conviction. The Seventh Circuit held that a rational jury could have inferred his true intention from the evidence, regardless of any coded or disguised language. *Id.* at 984-85.

4. The Assumption of Risk Doctrine is an outdated affirmative defense which does not apply.

Defendants also argue that Plaintiffs' negligence claims should be dismissed because they assumed the risk of an intentional assault by going to a Trump rally, just as if they had been hit with a foul ball at a baseball game. (DN #9-1, p.19, citing *Dean v. Martz*, 329 S.W.2d 371, 374 (Ky. 1959). As a matter of law, this argument is not dispositive of any claim, and is entirely premature. In the seminal case of *Hilen v. Hays,* the Supreme Court of Kentucky abrogated the doctrine of contributory negligence and adopted comparative negligence as the law of the Commonwealth. The *Hilen* court stated: "Comparative negligence . . . eliminates a windfall for either claimant or defendant as presently exists in our all or nothing situation where sometimes claims are barred by contributory negligence[.]" 673 S.W.2d 713, 718 (Ky. 1984). Regardless, comparative fault, assumption of risk and/or contributory negligence[18] are, and always have been, "affirmative defense[s] which must be pleaded by the defendant, and the burden of proof borne by him." *Prater v. Arnett,* 648 S.W.2d 82, 84 (Ky. App. 1983) (citing Ky. R. Civ. P. 8.03). "It is a bar whereby the defendant can escape imposition of negligent liability by showing that the plaintiff himself failed to exercise the requisite standard of care for his own safety. Like the primary negligence of the defendant, it is a question that generally falls within the province of the jury." *Id.; see also Bryant v. Conrad,* 420 S.W.2d 666 (Ky. 1967) ("Contributory negligence and the assumption of risk, usually one and the same thing, are ordinarily questions for the jury. To find contributory negligence or assumption of risk as a matter of law there must be no

[18] "The concept of assumed risk as distinguished from contributory negligence was abolished in *Parker v. Redden*, Ky., 421 S.W.2d 586 (decided June 23, 1967)." *Roberts v. Davis,* 422 S.W.2d 890, 894 (Ky. 1967).

substantial contrariety and the facts must show that the plaintiff was guilty of such negligence that the injuries would not have occurred otherwise. There must be but one conclusion that fair-minded men can draw.") Defendants do not just get to win by saying - or even proving - that Plaintiffs were negligent too.

But Defendants' argument is not just wrong as a matter of law; it is wholly wrong as a matter of fact, and uniquely offensive. Defendants speculate that Plaintiffs "likely hoped that some form of violence would break out as way to publicize their protest of Mr. Trump's message and to publicize their counter-message."[19] (DN # 9-1, p.19.) This unashamedly argues that a peaceful protester should, as a matter of law, *expect* to be met with violence for dissenting speech at a political rally. The undersigned has researched the history of violence at presidential political rallies in the U.S. and can find few examples indeed. The most recent example of anything even comparable occurred nearly fifty years ago, during the campaign of 1968, but even then, protesters were not repeatedly attacked at the events sponsored by one particular candidate. *See, e.g.*, Meghan Keneally, *The History of Violence on Presidential Campaign Trails*, ABC NEWS (Mar. 14, 2016, 6:38 PM), http://abcnews.go.com/Politics/history-violence-presidential-campaign-trails/story?id=37634969. This was not a baseball game. Plaintiffs were not hit with a foul ball. This was a presidential campaign event, and Plaintiffs had every reason to believe that they could peacefully protest without fear of physical violence. If Defendants seek to prove

[19] It is interesting to note that Defendants' argument reflects the majority's approach in the original *Bible Believers* case, i.e., that the protesters "intended to incite the crowd to turn violent," and were therefore not entitled to First Amendment protection. *Bible Believers v. Wayne County*, 765 F.3d 578, 590 (6th Cir. 2014). That opinion was vacated by the Sixth Circuit *en banc*.

otherwise, they can try to do so through brass-tacks litigation. As yet, no competent evidence, testimony, or authority has been introduced to prove this affirmative defense.

III. TRUMP'S DIRECTIVE TO "GET 'EM OUT OF HERE" IS A DIRECT INCITEMENT AND IS NOT PROTECTED BY THE FIRST AMENDMENT

Perhaps the most interesting question to be decided by this Court is the discrete issue of whether the First Amendment protects Trump from liability for incitement under KRS 446.070. Defendants appear to assume that simply because Trump spoke, he is entitled to absolute immunity under the First Amendment. "Although First Amendment speech protections are far-reaching, there are limits." *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010). For example, "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *United States v. Williams,* 553 U.S. 285, 297 (2008). Speech or expressive conduct that is directed to "inciting or producing imminent lawless action and [that] is likely to incite or produce such action" is also subject to regulation. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*). In addition, the Constitution permits the government to proscribe "true threats." *See Virginia v. Black*, 538 U.S. 343, 360 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

At the outset, it should be noted that there is no jurisprudential reason to protect Trump's speech in this instance. Whatever Trump intended by "get 'em out of here," it was certainly not "core speech." *See* Kenneth Pike, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech,* 2008 BYU L. REV.

971, 979 n.33 (citing BLACK's LAW DICTIONARY 1436 (8th ed. 2004). It did not have expressive or artistic value. "The speech [did not] contribute to political or scientific debates, provide innocent entertainment, or even satisfy law-abiding users' intellectual curiosity." Eugene Volokh, *Crime–Facilitating Speech*, 57 STAN. L. REV. 1095, 1142 (2005); *see Roth v. United States*, 354 U.S. 476, 485 (1957) (concluding that obscenity is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (same as to fighting words).

A. No case has ever held the kind of speech at issue here should be protected.

The Supreme Court has never considered a situation in which a speaker directs a crowd to harm specific persons, in part because such speech is uniquely outside of anything that the First Amendment could ever protect. In *Brandenburg*, 395 U.S. 444, the most serious "threat" made by KKK members was, "[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." No one directed anyone to do anything. In holding that this speech was protected, the Court distinguished "terms of mere advocacy . . . from incitement to imminent lawless action." *Id*. at 449. It is hard to imagine what the *Brandenburg* justices meant by "imminent lawless action" if it was not a speaker ordering a crowd to manhandle peaceful protesters. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) ("'Imminent lawless action,' as used in Brandenburg, means violence or physical disorder in the nature of a riot."). "Get 'em out of here" is not "mere advocacy," especially not in this context. *Brandenburg* was a close call; the instant case is not.

Trump's directive is more akin to the unprotected speech contemplated by *Chaplinsky*, in that it is "inherently likely to provoke violent reaction," or the "true threats" contemplated by *Watts*, i.e., "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id*. at 360. These tests are in harmony with the test under Kentucky's incitement statute, as they only require intent by the speaker, coupled with the mere likelihood of resulting fear and/or violence, to remove a statement from the ambit of protected speech.[20]

Contrary to Defendants' suggestions, there is no case that stretches *Brandenburg* (or any other First Amendment limit) so far as to allow someone to urge crowd members to engage in physical violence against people who are present right then and there. The authorities cited by Defendants do not contemplate anything of the sort. The Volokh article (DN #9-1, p.9), which contains a comprehensive (as of 2005) catalog of civil cases involving core speech, illustrates just how unprecedented Trump's actions were. Of the 16 categories of advocacy of unlawful actions examined by Professor Volokh, not a single one contemplates a situation where a speaker orders a crowd to attack one or more individuals. "These are not incitement cases: The speech isn't persuading or inspiring some readers to commit bad acts." Volokh, *supra* at 1097–1102. As the title suggests, the Volokh article deals primarily with published, "crime-facilitating" speech. There is a big difference between telling someone *how* to do something, and just telling them to

[20] *Black* makes it very clear that the speaker's intent matters. 538 U.S. at 365–66. Thus, Defendants' First Amendment argument, like all the others in their motion, is premature. *See* §II, *supra*.

do it right then. Trump did not release a publication entitled "*How to Beat Up Protesters*." Even if he had, the First Amendment still might not protect him. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997).

Volokh does, however, discuss cases of "single-use" speech, in which the First Amendment does not bar criminal (or civil) liability, and which are at least more closely analogous to Trump's "speech" in this case. Volokh, *supra* at 1142 (collecting cases and examples) ("In all these examples, the speech has pretty much a solely crime-facilitating effect . . . and the speaker knows this or is at least reckless about this. In this respect, the speech is like sales of guns or bomb ingredients to people who the seller knows are likely to use the material in committing a crime.") Volokh describes this kind of speech as having "virtually no First Amendment value." *Id*. at 1143.

In *Hess v. Indiana*, it was important to the majority that during an antiwar protest, "Hess did not appear to be exhorting the crowd to go back into the street . . . his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was no louder than that of the other people in the area." 414 U.S. 105, 107 (1973). The contrast between the scenario in *Hess* and the rally in the instant case could not be more stark. Similarly, no one in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982), ever directed anyone to attack anyone else. The speeches in that case, which were characterized as an "impassioned plea" for unity, support, and nonviolent participation in a boycott, did not exceed the bounds of *Brandenburg*-protected advocacy. But importantly, the Supreme Court acknowledged that there would be no constitutional problem with imposing liability for losses caused by violence and

threats of violence, *id*. at 916, and that if there was evidence of such "wrongful conduct" the speeches could be used to corroborate that evidence, *id*. at 929.

On the other hand, apt analogies can be found in lower court decisions, particularly with regard to the offense of solicitation. These almost universally treat the issue of First Amendment protections as a question of fact to be decided by a jury. A scholarly example can be found in *United States v. White*, in which Judges Posner, et al., discuss speech for which the speaker may be found criminally liable. 610 F.3d 956, 960–62 (7th Cir. 2010) (discussing, *inter alia, United States v. Sattar*, 272 F. Supp. 2d 348, 373–74 (S.D.N.Y. 2003) (district court, without requiring any evidence or allegations of further acts, found sufficient an indictment where the alleged solicitation consisted of a generally issued fatwa urging Muslims to "fight the Jews and to kill them wherever they are"); *United States v. Rahman* 189 F.3d 88, 117 (2d Cir. 1999) (defendant convicted of soliciting violence based on his public speeches calling for an attack on military installations and the murder of an Egyptian president); *United States v. Hale*, 448 F.3d 971, 979 (7th Cir. 2006) (sufficient evidence to uphold a solicitation conviction where defendant never explicitly asked his chief enforcer to do anything but locate a judge's home address, and made statements such as, "[T]hat information's been pro-, provided. If you wish to, ah, do anything yourself, you can, you know?")). In finding that White, a member of the "American National Socialist Workers Party," could be tried for posting on a website that unnamed individuals "deserved assassination for a long time," and then subsequently posting the personal information of a juror in a different case, the court held "that a request for criminal action is coded or implicit" does not entitle it to First Amendment protection. *Id. White* further illustrates that the advocacy/incitement dichotomy discussed in *Black* is a question of fact. *Id*. at 962 ("This dispute

turns out not to be an argument about the validity of the indictment in light of the First Amendment, but is instead a dispute over the meaning and inferences that can be drawn from the facts. . . . Based on the full factual record, the court may decide to instruct the jury on the distinction between solicitation and advocacy, and the legal requirements imposed by the First Amendment.")

The Sixth Circuit is in accord with this application of *Black*, though Judge Sutton has expressed some doubt in dicta as to whether a jury even need be instructed as to the subjective intent of the speaker. *United States v. Cope*, 283 F. App'x 384, 389 (6th Cir. 2008); *see also United States v. Hankins,* 195 F. App'x 295, 301 (6th Cir. 2006) ("The jury determines whether a statement is a true threat.") (citing *United States v. Daughenbaugh,* 49 F.3d 171, 173 (5th Cir. 1995) (explaining that the jury must "determine the nature of the subject communication" and whether it falls within protected speech); *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994)). If, as in the solicitation cases, a speaker can be prosecuted for posting on a website that someone should be hurt and later posting their identifying information, there should be no question that someone could be liable for ordering a volatile crowd to turn on protesters after publicly stating that protesters should be hurt for months. A holding to the contrary at the pleading stage would likely compromise the government's ability to successfully indict cases where a defendant's speech is involved.

B. Trump's incitement was to lawless action.

Defendants seek to evade liability because, the argument goes, the crowd was entitled to assault them. This is an affirmative defense (defense of property) within another affirmative defense (First Amendment protection). Like the other affirmative defenses argued by

Defendants, this issue cannot be decided at the pleading stage. *See* CR 8.03; *White,* 610 F.3d 956; *Deberry v. Commonwealth,* No. 2009-CA-000286-MR, 2010 Ky. App. Unpub. LEXIS 331, at *5 (Ky. App. Apr. 16, 2010) ("Deberry bore the burden of proving the elements of his affirmative defense.").

To circumambulate this problem, Defendants assert that it is "indisputable that the protesters were trespassing." (DN #9-1, p.10.) That assertion is disputable, disputed, and wrong. That the Plaintiffs came to a political rally for a candidate for the presidency of the United States with the sole purpose of protesting does not make them "trespassers." Nor does it make them fair game for whatever abuses anyone might like to heap on them. Nor does it matter for purposes of First Amendment analysis.

1. Plaintiffs were not trespassers.

Factually speaking, Plaintiffs were not trespassers. Defendants concede that Plaintiffs were lawfully present at the rally, but argue that "once they began their protests," Plaintiffs instantly became trespassers. (DN # 9-1, p.10.) As discussed above, Trump has publicly *welcomed* protesters to his events. Plaintiffs obtained tickets to the event which did not expressly or impliedly limit their speech in any way. No formal or informal measures were taken to exclude anyone from attending simply because they disagreed with the platform of the would-be President of the United States. *See Sistrunk v. City of Strongsville,*, cited *supra*. Not only did no one stop protesters from entering, but no one asked them to leave once they began protesting. Regardless of whether Trump or anyone else approved of it, the content of Plaintiffs' speech in

itself did not and cannot make them trespassers at a public event, in a building owned by the state, hosted by the would-be leader of the free world.[21]

For these reasons, Defendants attempt to analogize *O'Leary v. Com.*, 441 S.W.2d 150 (Ky. 1969) fails. *O'Leary*, decided exactly one month before *Brandenburg* and the modern era of First-Amendment jurisprudence, is probably no longer good law. But from a purely factual standpoint, the case is easily distinguishable. In that case, the dean had ordered the protesting students to leave twice. As Defendants recognize, "a refusal to leave the property . . . invites the owner to eject the intruder by force." *Id*. at 157. (DN # 9-1, p.10.) In the instant case, there was no refusal, because there was no request. Defendants immediately resorted to mob violence. The students in *O'Leary* were not removed because the dean did not like their speech; they were removed for blocking doors. And the dean in *O'Leary* did not order other students to remove the protesters; he called campus police to do so.

2. *Physical assault of a trespasser is not* per se *lawful.*

Assuming that Plaintiffs were trespassers, even in Defendants' legal universe, a trespasser is not subject to immediate physical attack - at least not lawfully. 13 D. Leibson, *Defense of Property*, KY. PRAC. TORT LAW § 9:7 (2015) (cited in DN # 9-1, p.10) (citing *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971)). The common law would only immunize someone from using physical force to protect property "if he 'reasonably believes' he is in danger, an objective test." *Id*. What Defendants argue is that mere status as a trespasser entitles a possessor of a property to use any means to eject that trespasser, regardless of the circumstances. That has

[21] Similarly, the assertion that Plaintiffs "were committing a crime by breaching the peace" is unsupported by any statute, caselaw, or facts. (DN #9-1, pp.10-11.) Plaintiffs were not arrested, prosecuted, or even asked to leave. In the case of Plaintiff Nwanguma, her alleged "criminal activity" consisted of holding up a sign, and nothing more.

never been the rule in Kentucky. *See Fagg's Admr v. Louisville & N. R. R. Co.*, 63 S.W. 580, 582 (1901) (collecting cases) ("[The] 'right of exclusion can[not] be exercised arbitrarily and inhumanly, or without due care and provision for the safety and well-being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized.'"); *Strader's Adm'rs v. Lexington Hydraulic & Mfg. Co.*, 142 S.W. 1073, 1076 (1912) ("[I]t is established that if the servant uses more force than is necessary in ejecting a trespasser, or if he winds up an ejectment peaceably begun by a wanton or vicious act, the master is liable.").

Here, despite the extensive video evidence showing violent conduct by Trump supporters, there is no video, photo, testimony, credible eyewitness account, or even anecdotal evidence that Plaintiffs engaged in anything other than peaceful protest speech at the rally. No Defendant or any other Trump supporter reasonably believed they were in danger. Directing a crowd that substantially outnumbered Plaintiffs to take "matters into their own hands" (DN # 9-1, p.11) was, to put it mildly, more force than was necessary.

3. The conduct advocated was unlawful regardless of whether Plaintiffs were trespassers.

Incitement to a riot is unlawful, as per KRS 525.040, whether or not a riot even occurs. This is so because, to state the obvious, a riot itself is unlawful. Whatever privilege crowd members might have had to remove peaceful protesters, they were not entitled to riot. As such, Defendants argument that Trump did not "lawlessly" remove "trespassers" is a red herring. Those who are injured or potentially injured in a riot may be trespassers, invitees, or something else - the riot itself is still unlawful.[22]

[22] Defendants describe Trump as simply advocating "the peaceable removal of trespassers from private property." This (frankly unbelievable) assertion is yet another issue of intent not susceptible of resolution at the pleading stage—one which matters quite a bit under *Brandenburg, Black,* and related jurisprudence.

C. Sound First Amendment policy dictates that Trump's speech should not be protected to the detriment of the Plaintiffs' speech.

There is a very disturbing irony in the argument that Trump and his campaign make throughout their Memorandum. They argue that Plaintiffs' peaceful protest served to "chill core political speech by empowering hecklers to provoke violence at a political rally." Elsewhere, Defendants reiterate: "If the First Amendment protects anything, it protects statements by political candidates for the highest office in the land to the voters who wish to hear them in the face of attempts by political opponents to silence that speech." (DN #9-1, p.12.) This assertion—which is unsupported by any case law, dicta, or credible philosophy—demonstrates a fundamental misunderstanding of the line of incitement cases decided by the United States Supreme Court (*Terminiello v. Chicago*, 337 U.S. 1 (1949); *Feiner v. New York*, 340 U.S. 315 (1951); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. La.*, 379 U.S. 536 (1965); *Gregory v. Chicago*, 394 U.S. 111 (1969)), and the very purposes of the First Amendment itself. *All* of these cases, up to and including *Brandenburg* and *NAACP v. Claiborne Hardware*, involved government suppression of dissident, countermajoritarian speech. And the very reason for the Court's reluctance to restrict such speech, according to Professor Bhagwat, is to protect *countermajoritarian* associations. "Such associations ensure that majoritarian institutions, often with close ties to the state - such as the two main political parties - do not gain a monopoly on the formation and dissemination of political values." Bhagwat, *supra* at 1006. Lower courts generally fall into this pattern as well. *See Bible Believers*, 805 F.3d 228.

Defendants seek to turn this equation on its head by saying the majority is entitled to greater First Amendment protections in the face of a dissenting minority. This Court should not let that proposition go unchallenged. Plaintiffs were indisputably engaged in core political

speech at the time of their assaults. Trump's "speech," on the other hand, was intended to suppress dissenting speech aimed at a decidedly *majoritarian* institution. It was for the express and sole purpose of silencing protesters. It should not be protected.

IV. NO AGENCY PRINCIPLES COMPEL DISMISSAL AT THE PLEADING STAGE

Defendants characterize Plaintiffs' agency allegations as "bald." It is not clear, however, what sort of hair Defendants think these allegations should have. This case does not get much simpler than Plantiffs' agency allegations. Trump told people to do something. They did it.

Defendants' primary authority is a footnote from a thirty-year-old district court opinion from New York, which states: "There is no agency relationship where the alleged principal has no right of control over the alleged agent." *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 657 F.Supp. 1475, 1481 n.2 (S.D.N.Y. 1987). Defendants take this to mean that since there was no employment relationship, "preexisting relationship" or express "agreement" between Trump and Heimbach/Bamberger, Trump cannot be liable for their actions. (DN # 9-1, pp.13-14.) That is not the law in Kentucky.

"The right of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times." RESTATEMENT (SECOND) OF AGENCY, § 14 (cited with approval in *Fisk v. Peoples Liberty Bank & Tr. Co.,* 570 S.W.2d 657, 660 (Ky. Ct. App. 1978)). "[I]f the principal requests another to act for him with respect to a matter, and indicates that the other is to act without further communication and the other consents so to act, the relation of principal and agent exists. If, under such

circumstances, the other does the requested act, it is inferred that he acts as agent[.]" RESTATEMENT (SECOND) OF AGENCY, § 15 (cited in *Mais v. Allianz Life Ins. Co. of N. Am.,* 34 F. Supp. 3d 754, 761–62 (W.D. Mich. 2014)). Even without an express order by an agent, an agency relationship may be implied. "Implied authority is actual authority that is circumstantially proven which the principal actually intended the agent to possess and includes such powers as are practically necessary to carry out the duties actually designated." *Mill Street Church of Christ and State Automobile Insurance Co. v. Hogan,* 785 S.W.2d 263, 267 (Ky. App. 1990) (citing 3 Am.Jur.2d Agency § 75) (internal citations omitted). Defendants ridicule the idea that Trump would have "deputized" members of his audience, but in a sense, that is exactly what he did. "Get 'em out of here" was a call to any supporter willing to step into the role of "security" and physically eject protesters. Defendants answered that call.

It is further important to note that an employer/employee relationship, or even a simple master/servant relationship, is not required to hold a defendant accountable for ordering someone to do something unlawful. In *Smith v. Isaacs*, the Kentucky Supreme Court discussed independent liability for the conduct of third parties. 777 S.W.2d 912, 914 (Ky. 1989) (quoted and discussed by Chief Judge Acree in *Edwards v. Gruver,* No. 2008-CA-002348-MR, 2011 Ky. App. LEXIS 198, at *36-37 (Ky. App. Oct. 14, 2011)) ("The third concept recognized in Smith is a corollary to the second — the cause of action for negligent selection does not require the existence of an employment relationship. The rule of liability for negligent selection still 'applies when there is no master and servant relation.'") (citing RESTATEMENT (SECOND) OF TORTS § 877; RESTATEMENT (SECOND) OF AGENCY § 213).

Finally, there is no competent evidence provided to support Defendants' claim that Heimbach was motivated solely by racism, or that Bamberger was motivated solely by emotion, and not the "obvious alternative explanation", i.e., that they were doing exactly what Trump told them to do. Defendants do not get to simply assert a defense involving the state of mind of *other Defendants* and automatically win their case at the pleading stage. The existence of an agency relationship, like so many other claims raised by Defendants, is a question for the jury. *Middletown Eng'g Co. v. Main St. Realty Co.,* 839 S.W.2d 274, 276 (Ky. 1992) (citing *Crump v. Sabath*, 261 Ky. 652, 88 S.W.2d 665 (Ky. 1935)).

V. CONCLUSION

Defendants have presented the Court with a litany of premature, fact-intensive, and at times demonstrably false arguments in an effort to short-circuit this litigation. Plaintiffs, even at this early stage, have presented video evidence, testimony, and circumstantial evidence to suggest that what happened was exactly what it looked like: Trump ordered an angry mob to use physical force against peaceful protesters. For the reasons set forth above, the law provides multiple avenues for relief to Plaintiffs. The Defendants' Motion should be denied and this case should proceed to discovery.

Respectfully submitted,

s/ *Daniel J. Canon*
Daniel J. Canon
David N. Ward
CLAY DANIEL WALTON & ADAMS, PLC
462 S. Fourth St., Ste. 101
Louisville, KY 40202
(502) 561-2005
dan@justiceky.com
david@justiceky.com

Gregory A. Belzley
Camille Bathurst
BELZLEY BATHURST ATTORNEYS
P.O. Box 278
Prospect, KY 40059
gbelzley@aol.com

CERTIFICATE OF SERVICE

I certify that on June 27, 2016, the above was electronically filed with the Clerk of the Court by using the CM/ECF filing system and copied to all registered CM/ECF participants in the above-styled action. A true and correct copy was also mailed to:

Matthew John Heimbach
222 Mable Street, Apt 2
Paoli, IN 47454

s/ *Daniel J. Canon*