

SIXTH CIRCUIT REVIEW

**Speech and Safety:
Interest Balancing in First Amendment Analysis
As Applied to *Bible Believers v. Wayne County***

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Commenting on *Bible Believers v. Wayne County*, 765 F.3d 578 (6th Cir. 2014).

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I. INTRODUCTION

“Speech is often provocative and challenging.”¹ Nonetheless, “in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”² In *Bible Believers v. Wayne County*, however, a Sixth Circuit majority ignored this principle, finding instead that provocative preaching could be suppressed without violating the preachers’ First Amendment rights simply because their speech incited a riotous response.³ Although this decision identified the correct doctrine for First Amendment analysis, its ultimate determination that the speech suppression was lawful is insensitive to the fundamental interest-balancing at stake.

As it stands, the *Bible Believers* decision has potentially dangerous implications.⁴ In its pending en banc rehearing, however, the Sixth Circuit is

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¹ *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

² *Boos v. Barry*, 485 U.S. 312, 322 (1988) (citations omitted) (internal quotation marks omitted).

³ See *Bible Believers v. Wayne Cnty.*, 765 F.3d 578, 582–85 (6th Cir.), *vacated, reh’g en banc granted* (Oct. 23, 2014).

⁴ See Eugene Volokh, *Thuggery Wins, Free Speech Rights Lose*, WASH. POST (Aug. 27, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/27/thuggery-wins-free-speech-rights-lose/> [http://perma.cc/Y743-YXRP] (arguing that the *Bible Believers* decision incentivizes violence in response to offensive speech).

poised to refine the balance between reciprocal rights to speech and safety, even where the speech is construed as offensive to its listeners. By incorporating an interest-balancing dimension to First Amendment analysis that accounts for the extent to which each right may be impaired, the court is likely to reach a more equitable, and potentially opposite, decision.

II. SUMMARY OF THE CASE

From 1995 to 2012, the City of Dearborn, in Wayne County, Michigan, hosted approximately 250,000 visitors at the Arab International Festival (Festival).⁵ The three-day event was one of the largest gatherings of Arab Americans in the United States.⁶ Over the years, the Festival became a target for Christian missionary groups, including the Bible Believers, seeking to proselytize and debate Muslim Festival attendees.⁷ In 2012, the Bible Believers contacted the Wayne County Sheriff's Office (WCSO) to declare the group's intentions to attend the Festival and preach. In their letter, the group asserted its expectation of police protection "from the reactions of hostile audiences."⁸ The WCSO responded by developing an Operations Plan in anticipation of conflict and by reminding the Bible Believers of the WCSO's duty to protect the public at large, not just the provocative preachers.⁹

On June 15, the Bible Believers entered the Festival wearing t-shirts with statements including "Fear God" on the front and "Trust Jesus, Repent and Believe in Jesus" on the back.¹⁰ They carried banners with messages proclaiming "Only Jesus Christ Can Save You From Sin and Hell" and "Islam Is A Religion of Blood and Murder," while one Bible Believer carried a severed pig's head on a stick.¹¹ Using a megaphone, the Believers declared

⁵ *Bible Believers*, 765 F.3d at 582.

⁶ Niraj Warikoo, *Arab Festival in Dearborn Canceled After Conflicts Drive Up Insurance Costs*, DETROIT FREE PRESS (Apr. 29, 2014, 8:19 PM), <http://archive.freep.com/article/20140429/NEWS02/304290181/arab-festival-dearborn-canceled> [<http://perma.cc/H45C-P4FC>].

⁷ *See, e.g., Bible Believers*, 765 F.3d at 582 (denying First Amendment rights to Christian missionaries preaching provocative messages while parading through the 2012 Festival); *Saieg v. City of Dearborn*, 641 F.3d 727, 730–32 (6th Cir. 2011) (preserving First Amendment speech rights for Christian missionary who sought to distribute religious literature to Muslim attendees at the 2010 Festival). The Festival has been cancelled since 2012 due to mounting insurance costs. Warikoo, *supra* note 6.

⁸ *Bible Believers*, 765 F.3d at 583. The group attended the Festival first in 2011, which resulted in a confrontation and one arrest. *Id.* at 582–83.

⁹ *Id.* at 583 ("[I]t's important to keep in mind that some individuals will attend this event solely to provoke trouble, however; professionalism, and even temperaments will prevail.")

¹⁰ *Id.* at 584. Other slogans included "Prepare to Meet Thy God—Amos 4:12," "Obey God, Repent," and "Turn or Burn." *Id.*

¹¹ *Id.* The leader of the Bible Believers explained that the pig's head was carried for protection because the head was thought to repel observers who feared it. *Id.*

that Festival attendees “would ‘burn in hell’ . . . because they were ‘wicked, filthy, and sick.’”¹²

Unsurprisingly, the Bible Believers’ speech was not well received. Festival attendees responded to the Bible Believers’ display by spitting,¹³ shoving, and yelling statements like “‘get them,’ and ‘beat the s*** out of them[,]’”¹⁴ while others, most of whom were minors, threw rocks and garbage.¹⁵ WCSO police responded by informing the Bible Believers about a municipal ordinance against using megaphones, and later detained the “debris-throwers.”¹⁶ The situation escalated until police requested that the Bible Believers leave the Festival to avoid danger, upon threat of citation for disorderly conduct.¹⁷ Focusing their efforts on the Bible Believers, police ultimately escorted the group out of the Festival without citation or arrest.¹⁸

III. THE SIXTH CIRCUIT’S DECISION

The Bible Believers sued Wayne County, as well as its sheriff and several deputies, for alleged First and Fourteenth Amendment violations under 42 U.S.C. § 1983.¹⁹ The District Court for the Southern District of Michigan granted defendants’ summary judgment motion on May 14, 2013.²⁰ The district court found that the WCSO Operations plan and the actions of the police at the Festival were content-neutral and did not violate the Bible Believers’ First Amendment rights to free speech or free exercise.²¹ The Bible Believers appealed, and on August 27, 2014, the Sixth Circuit affirmed.²²

While the parties agreed that the Bible Believers’ speech satisfied the first two prongs of First Amendment analysis, the third prong, which established and applied the standard of review for the WCSO police’s suppression actions, remained in contention.²³ The court found the operations plan, which

¹² *Id.* at 590.

¹³ Appellant’s Supplemental Brief at 10, *Bible Believers v. Wayne Cnty.*, 765 F.3d 578 (6th Cir. 2014) (No. 13-1635).

¹⁴ *Bible Believers*, 765 F.3d at 584, 590.

¹⁵ *Id.* at 584.

¹⁶ *Id.*

¹⁷ *Id.* at 585.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Bible Believers v. Wayne Cnty.*, No. 2:12-cv-14236, 2013 WL 2048923, at *18 (E.D. Mich. May 14, 2013).

²¹ *Id.* at *9–10.

²² *Bible Believers*, 765 F.3d at 578, 582.

²³ *Id.* at 587.

“The first step is to determine whether the plaintiff’s conduct is protected speech The second step is to identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic. [The third step is] whether the justifications for exclusion from the relevant forum satisfy the requisite standard.”

recognized a source of potential conflict but fell short of explicitly regulating speech content or imposing any prior restraint, was content-neutral and therefore subject only to intermediate scrutiny.²⁴ When the court then considered whether the Bible Believers' speech incited the crowd,²⁵ the court focused on the "extremely aggressive and offensive messages" from the Bible Believers and the violent response of Festival attendees to show dangerous incitement.²⁶ As a result, the Sixth Circuit found that a dangerous level of incitement had been reached, and, therefore, the WCSO police's actions in threatening citation and escorting the Bible Believers out of the Festival were lawful.²⁷

IV. DISCUSSION

Bible Believers captures a classic legal conflict between what has been understood as a fundamental individual right and a social interest.²⁸ On the one hand, protecting freedom of expression comes at the expense of public safety; on the other hand, public safety seems only to be protected to the detriment of fundamental individual speech rights.²⁹ Thus, First Amendment analysis ultimately becomes a precarious interest-balancing exercise made even more challenging in cases that involve perceptibly offensive speech.

Rather than approaching First Amendment analysis as a balance of whether the individual right or social interest weighs heavier given the situation, as the court did in *Bible Believers*, it should be reconceived as a balance between two reciprocal individual rights: speech and safety. From there, interest balancing becomes a matter of the extent to which the exercise of each right impaired the other and whether a less restrictive regulatory alternative existed that would have preserved both rights.³⁰ This latter approach incorporates reciprocal interest balancing into First Amendment analysis that likely would have led to an opposite decision in *Bible Believers*.

The *Bible Believers* court's analytical doctrine accurately captured the case's interplay between speech and safety. "Government regulation of

Id. at 586–87 (citing *Saieg v. City of Dearborn*, 641 F.3d 727, 734–35 (2010) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985))). The parties agreed that the Bible Believers' speech was protected and that the Festival constituted a public forum. *Id.* at 587.

²⁴ *Id.* at 587–88.

²⁵ *Id.* at 589–90.

²⁶ *Id.* at 591.

²⁷ *Id.* at 590. In contrast, a vigorous dissent identified a clear "heckler's veto," arrived at an opposite interpretation of incitement, and would have denied the application of the good faith defense. *Id.* 592–600 (Clay, J., dissenting).

²⁸ See Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. Rev. 1275, 1279–80 (1998). For a discussion of the liberty interests grounding each right, see *id.* at 1313–36.

²⁹ See *id.* at 1313–17 (explaining fundamental rights).

³⁰ See *id.* at 1355–57 (discussing criteria for interest balancing).

expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech,’”³¹ therefore triggering intermediate scrutiny. However, “[l]isteners’ reactions to speech is not a content-neutral basis for regulation[,]”³² therefore the government regulation would become content-based and subject to strict scrutiny. Although police, in acting for the state, “may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions[,]”³³ police may take measures to keep the peace by regulating speech where “the speaker passes the bounds of argument or persuasion and undertakes incitement to riot”³⁴ In these situations, police are not required “to defend the right of a speaker to address a hostile audience,”³⁵ and may “discharge their duty of preserving the peace by intercepting [the speaker’s] message”³⁶ Incitement triggering lawful suppression occurs where “the speech [is] ‘likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.’”³⁷ Thus, the speaker must go “beyond forceful rhetoric and veer[] into incitement [before] the state can step in”³⁸ to suppress the speech.

In its interpretation of incitement, the court read case law as creating a threshold protecting public safety beyond which any speech suppression would be considered lawful. In so doing, it ignored the extent to which the suppression act may have impaired the reciprocal speech right. According to the Majority, the Bible Believers incited Festival attendees, thus crossing the conceptual incitement line that permitted police suppression. As a result, the court inappropriately found that the public safety right reached a tipping point that outweighed the need to protect speech rights, and ultimately found WCSO police’s actions to be lawful.³⁹

Instead, the court should have considered the extent to which the speech suppression went in balance with the extent to which the safety right was impaired. In reconceiving of the scene to also account for the reciprocal impairment of speech by actions to preserve safety, there was not a clear and

³¹ *Bible Believers*, 765 F.3d at 588 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non Violence*, 468 U.S. 288, 293 (1984))).

³² *Id.* (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 124 (1992)) (internal quotation marks omitted).

³³ *Feiner v. New York*, 340 U.S. 315, 320 (1951) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)).

³⁴ *Id.* at 321.

³⁵ *Glasson v. City of Louisville*, 518 F.2d 899, 909 (6th Cir. 1975).

³⁶ *Id.*

³⁷ *Bible Believers v. Wayne Cnty.*, 765 F.3d 578, 594 (6th Cir.) (Clay, J., dissenting) (quoting *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949)), *vacated, reh’g en banc granted* (Oct. 23, 2014).

³⁸ *Id.*

³⁹ *See id.* at 598–99 (arguing that “the majority reaches its conclusion by reading the facts in favor of Defendants”).

present danger reaching a level of incitement that merited the level of police suppression that occurred. Setting aside confrontational speech from both the Bible Believers and Festival attendees, the only dangers at the Festival that could be linked to the Bible Believers' preaching were a few rocks and some garbage thrown by children. Thus, this scene hardly impaired safety rights to an equivalent, reciprocal extent that speech rights were impaired when the Bible Believers were removed from the Festival. Furthermore, past Festival practice indicated that a less restrictive alternative existed such that less police regulation was required. The 2011 Festival included a "free speech zone" that cordoned off potentially provocative preachers from any violent responses of Festival attendees.⁴⁰ This practice seemed to preserve both speech and safety rights successfully, but was not provided at the 2012 Festival.⁴¹ The presence of this viable alternative suggests that it would be unlikely that the police's actions at the 2012 Festival would satisfy intermediate, let alone strict, scrutiny. Ultimately, this alternative analysis, with its sensitivity to reciprocal rights impairment, would lead to a finding that the Bible Believers' speech was impermissibly suppressed.

In its application of relevant First Amendment analysis, the Sixth Circuit majority approached this classic conflict between speech and safety as a weighing of interests to find a tipping point, rather than a more equitable balancing of reciprocal impairments. As a result, its analysis improperly found the Bible Believers incited the crowd to a point that permitted police to suppress the Bible Believers' preaching entirely. By adding another dimension to First Amendment analysis that accounts for reciprocal rights impairment, the extent to which police suppressed the Bible Believers' speech right was not in balance with the extent to which safety was impaired by the impact of their speech. Thus, under this model, the WCSO police's suppression would not meet the appropriate standard of review and would be found unlawful.

V. CONCLUSION

In finding for Wayne County, the *Bible Believers* court improperly weighed rights to public safety as weightier than an otherwise protected speech right. On its pending en banc rehearing, the Sixth Circuit ought to include interest balancing in its analysis by considering the extent to which each right is impaired by the situation and whether a less restrictive alternative existed. In so doing, the court would account for the fundamental rights at stake more equitably to reach a better, and probably opposite, decision.

⁴⁰ *Id.* at 582 (majority opinion).

⁴¹ *See id.* at 585.