No. 17-6290

In The United States Court of Appeals for the Sixth Circuit

Kashiya Nwanguma, Molly Shah, and Henry Brousseau,

Plaintiffs-Appellees,

v.

Donald J. Trump and Donald J. Trump for President, Inc.,

Defendants-Appellants.

On Appeal From
U.S. District Court for the Western District of Kentucky
No. 3:16-247 (Hon. David J. Hale)

BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"),[1] a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The mission of the Lawyers' Committee is to secure equal justice under law, through the rule of law, targeting in particular the inequities confronting African-Americans and other racial and ethnic minorities. The Lawyers' Committee has worked for decades to combat hate-inspired violence faced by African-American and other minority communities and worked to protect the rights of those engaged in demonstrations and protests. These efforts date back to 1963 when the Lawyers' Committee worked to represent marchers and demonstrators who were denied permits or subject to arrest in Jackson, Mississippi. Today, the Lawyers' Committee's Stop Hate Project develops resources for communities to address hate, works with local and national organizations to monitor hate crimes and improve effective response to hate group activity, and responds directly to bias-motivated crimes and incidents.

[1] Pursuant to Fed. R. App. Proc. 29(a), Amicus certifies that all parties have consented to this filing; this brief was not authored in whole or part by either party; and no person other than Amicus contributed money to fund preparing or submitting this brief.

STATEMENT OF THE CASE

This case involves violence against peaceful demonstrators and protesters, and speech that may incite such violence. In 2015 and 2016, Defendant President Donald J. Trump ("Defendant") held numerous rallies, and at many of these events, he allegedly used language that created a volatile atmosphere and this language allegedly encouraged certain rally attendees to attack demonstrators and protesters. Compl. ¶¶ 29-35, 84-95, R.1-1, PageID#10, 16-18. For example, on November 21, 2015, Defendant held a rally at which an African-American protester was attacked. Defendant said the protester "should have been, maybe he should have been roughed up." *Id.* ¶ 85, PageID#16. On February 1, 2016, Defendant instructed rally attendees to "knock the crap out of" protesters; he said if they attacked protesters on his behalf, "I promise you, I will pay for the legal fees." *Id*. ¶ 86, PageID#16-17. On February 22, 2016, Defendant responded to a rally protester by saying, "I love the old days. You know what they used to do to guys like that when they were in a place like this? They'd be carried out on a stretcher, folks." Defendant said he would like "to punch [the protester] in the face." *Id.* ¶¶ 87-88, PageID#16-17.

On March 1, 2016, after these incidents, Appellants held a rally in Louisville at the Kentucky International Convention Center, a state-owned public building.

Id. ¶¶ 17, 29-31, PageID#8, 10. This event was open to the public without limitation. *Id*.

Appellees attended this rally to exercise their First Amendment right to peacefully protest. *Id*. ¶¶ 37, 51, 61, PageID#11-13. Kashiya Nwanguma was a 21-year-old African-American college student, Molly Shah was a 36-year-old White mother, and Henry Brousseau was a 17-year-old White transgender high school student. *Id*. ¶¶ 21-28, PageID#9; *see also* Appellees' Br. at 18.

Also at the rally was Matthew Heimbach, a white supremacist and leader of the Traditionalist Worker Party (TWP), a prominent hate group. *Id*. ¶¶ 3-10, R.1-1, PageID#7-8. Heimbach supported Defendant's candidacy in part because in his view, "This is the first time since Buchanan in the '90s and George Wallace in '68 where you have a guy outside the mainstream speaking to white interests." *Id*. ¶ 7, PageID#7. Heimbach and other TWP members went to the Louisville rally to support Defendant and recruit new members for the TWP. *Id*. ¶¶ 8, 66-67, PageID#7-8, 13-14. "Donald Trump is a gateway drug ... we can move them from civic nationalism and populism to nationalism for us—and these people are ready for our message," he said. *Id*. ¶ 8, PageID#7-8. The TWP members were conspicuously recognizable by the quasi-uniforms they wore. *Id*. ¶¶ 54, 66, PageID#12-13.

When Appellees began protesting, Defendant repeatedly instructed attendees—not event security or law enforcement—to attack them. *Id*. ¶¶ 30-35, 80-82, PageID#10, 15-16. Defendant repeatedly instructed attendees through the loudspeakers to "Get 'em out of here," and commented, "In the old days, which isn't so long ago, when we were less politically correct, that kinda stuff wouldn't have happened. Today we have to be so nice, so nice. We always have to be so nice." *Id*. Defendant made these statements so that attendees would physically attack the protesters in a similar fashion to his previous rallies, and rally attendees dutifully obliged. *Id*. ¶¶ 68-82, 84-88, PageID#14-17.

Supporters of Defendant called Nwanguma a "nig*er" and a "c*nt" and used other racial and ethnic slurs against her. *Id.* ¶¶ 37-43, PageID#11. Defendant's supporters, including Alvin Bamberger and Heimbach, assaulted, struck, and shoved Nwanguma through the crowd, physically forcing her out of the rally. *Id*. ¶¶ 46-50, PageID#11-12. Supporters of Defendant also attacked Brousseau and Shah. One of the TWP members punched Brousseau in the stomach; Heimbach and others shoved and pushed Shah. *Id*. ¶¶ 56-65, PageID#12-13.

After the Louisville rally, Defendant allegedly continued to support and incite violence against protesters at other events by using language similar to that used at the Louisville rally. *Id*. ¶¶ 89-95, PageID#17-18.

STANDARD OF REVIEW

On appeal from a denial of a motion to dismiss, the Court's review is *de novo*. *See Cooey v. Strickland*, 479 F.3d 412, 415 (6th Cir. 2007). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2004)). "*Twombly* insists that pleadings be plausible, not probable.... Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) (citations omitted). "In this analysis, we must construe the complaint in the light most favorable to the plaintiff, accept all of his factual allegations, and determine whether he undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Cooey*, 479 F.3d at 415.

SUMMARY OF ARGUMENT

The issue before this Court is relatively narrow: When examining the Complaint in the light most favorable to Appellees, taking all allegations as true, did Appellees plead sufficient facts to support their claim that Appellants incited violent or lawless conduct in violation of Kentucky law? The District Court properly found that Appellees satisfied their pleading burden. The Lawyers'

Committee urges the Court to focus on the narrow task at hand, apply the *Iqbal/Twombly* standard with due deference, and affirm.

When evaluating inciting speech, the Court must both (a) assess the language's layers of meaning and the speaker's message to the audience, and (b) examine how the speaker's audience understood that language. Here, this context includes the history of the use of racially-tinged—but superficially neutral—language, called "dog whistles," to prime audiences for hostility toward outsiders; Defendant's use of dog whistles throughout his campaign and this rally; a pattern of violence at Defendant's rallies that resulted from his language; the presence of identifiable white supremacists; an angry and agitated crowd; and Defendant's repeated command to "get 'em out of here."

Appellants make numerous assertions about the purportedly "objective" meaning of Defendant's words. The factfinder will weigh whether Appellants' or Appellees' version of the facts is accurate. As the District Court held, "Simply put, the plausibility of the [Appellants'] explanation for Trump's statement 'does not render all other [explanations] implausible.'" Order at 4, R.27, PageID#271. We urge the Court not to prematurely accept Appellants' interpretation or interpret on its own what the language "must" mean, but instead to assess the Complaint with due deference and conclude that Appellees have adequately pled sufficient facts to substantiate their claims.

Additionally, the Court should conclude that the First Amendment in no way bars Appellees' incitement claim. Incitement does not enjoy constitutional protection. And here, where there are sufficient allegations that Appellants explicitly or implicitly encouraged lawless action with violent results, Supreme Court and Sixth Circuit precedent make clear that the First Amendment is no shield.

ARGUMENT

I. There is a long history of the use of coded, racially-tinged language—or "dog whistles"—to implicitly encourage white supremacy and lawless violence, and this history informs an assessment of whether speech constitutes incitement.

When evaluating whether particular speech constitutes incitement, it is essential to both (a) understand the layers of meaning behind the language and the message being conveyed to the audience, and (b) look at how the speaker's audience, not the general public, would have subjectively understood that language. *Compare Saylor v. Bd. of Educ. of Harlan Cty, Ky.*, 118 F.3d 507, 509 (6th Cir. 1997) ("[I]f [my son] gives you any more problems, call me and I'll take care of him" with corporal punishment.), *with United States v. Franklin*, 415 F.3d 537, 550 (6th Cir. 2005) (Defendant promised to "take care of [him]" which Witness understood meant sharing robbery spoils). Words that appear innocuous to a layperson can also encourage lawlessness by some audience members who understand the underlying message.

Accounting for context is vital in cases, like this one, that involve violence by white supremacists. Modern hate groups have developed subtle communication strategies to encourage broader audiences to commit violence. Prominent white supremacists have said that part of their goal is to shift the range of viewpoints and actions that are socially acceptable to increase the acceptance of racial hatred. They can then motivate their followers to perpetrate hate crimes while maintaining plausible deniability. *See, e.g.*, Andrew Anglin, *A Normie's Guide to the Alt-Right*, Daily Stormer (Aug. 31, 2016) (discussing, *inter alia*, how to normalize white supremacy using alt-right branding, "counter-culture," and memes to spread racist and violent messages).[2] The incitement doctrine allows redress for actual violence while protecting free speech. But if a speaker's language incites violence from white supremacists while hiding behind the plausible deniability of a purportedly "objective"—but inaccurate—understanding of the speech, the doctrine becomes meaningless.

There is a long history in America of using racially-tinged—yet superficially neutral—language to court target constituencies with appeals to racism and white supremacy. These are called "dog whistles," because while many people will not interpret (or can plausibly deny interpreting) the racial jab, the target audience will

[2] https://dailystormer.red/a-normies-guide-to-the-alt-right/. The Daily Stormer is a popular white supremacist website. It is frequently knocked offline. If this link stops working, this article is on file with Amicus.

understand the coded message, "He is on *our* side against *them*." *See Lloyd v. Holder*, 2013 WL 667531, *9 (S.D.N.Y. Dec. 17, 2013) ("'dog-whistle racism' [is] the use of code words and themes which activate conscious or subconscious racist concepts and frames."); *see also Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) ("[T]he disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."). Dog whistles may prime audiences for confrontation with someone perceived to be an outsider and, when paired with a call to act, can incite violence.

Lee Atwater, an adviser to Presidents Ronald Reagan and George H.W. Bush, explained dog whistles while discussing the "Southern Strategy" for winning southern white voters: "By 1968, you can't say 'nig*er'—that hurts you. Backfires. So you say stuff like forced busing, states' rights and all that stuff." Andrew Rosenthal, *Lee Atwater's 'Southern Strategy' Interview*, N.Y. Times (Nov. 14, 2012).[3] President Richard Nixon concurred, "[Y]ou have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to." *Haldeman Diary Shows Nixon Was Wary of Blacks*

[3] https://takingnote.blogs.nytimes.com/2012/11/14/lee-atwaters-southern-strategy-interview/.

and Jews, N.Y. Times (May 18, 1994).[4] Segregationists George Wallace and Strom Thurmond often appealed to "states' rights" to sanction racist policies and actions. *See, e.g.*, *George Wallace Discusses States Rights 1967*, YouTube (last visited Jan. 9, 2018);[5] *Platform of the States Rights Democratic Party*, The American Presidency Project (Aug. 14, 1948).[6] Announcing his candidacy, Reagan said, "I believe in states' rights," in Mississippi in 1980, only a few miles from where three Freedom Riders were murdered in 1964. *Transcript of Ronald Reagan's 1980 Neshoba County Fair speech*, The Neshoba Democrat (Nov. 15, 2007).[7] Dehumanizing African-American youth criminals in 1996, then-First Lady Hillary Clinton said, "They are often the kinds of kids that are called superpredators—no conscience, no empathy. We can talk about why they ended up that way, but first, we have to bring them to heel." *1996: Hillary Clinton on "superpredators" (C-SPAN)*, YouTube (last visited Jan. 9, 2018).[8] Her speech bolstered President Bill Clinton's "law and order" credentials—a category of dog whistle evoking the need to control African-Americans before "helping" *them*.

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[4] http://www.nytimes.com/1994/05/18/us/haldeman-diary-shows-nixon-was-wary-of-blacks-and-jews.html.

[5] https://www.youtube.com/watch?v=QW6ikSCDaRQ.

[6] http://www.presidency.ucsb.edu/ws/index.php?pid=25851.

[7] http://neshobademocrat.com/Content/NEWS/News/Article/Transcript-of-Ronald-Reagan-s-1980-Neshoba-County-Fair-speech/2/297/15599.

[8] https://www.youtube.com/watch?v=j0uCrA7ePno.

Dog whistles stereotype and dehumanize groups perceived as different from the majority of audience members and consequently prime the audience to "bar the gates" against outsiders who do not align with the majority. In Louisville, Appellees have alleged Defendant's language went one step further and encouraged attendees to *act* lawlessly against the outsiders in their midst. That is how speech crosses the line from First Amendment protection to unlawful incitement.

"The Rally … [was] not the first or last incident of its kind." Compl. ¶ 84, R.1-1, PageID#16. Using dog whistle language, Defendant described majority minority cities as lacking "law and order"[9] on multiple occasions. In August 2015, commenting on protests following the death of Freddie Gray, an African-American man who died in police custody, Defendant said residents of Baltimore, "allowed that city to be destroyed….We need law and order!" James Hohmann, *Trump, in Tennessee, downplays police brutality, promises to get rid of gangs*, Wash. Post (Aug. 29, 2015);[10] *see also* Nick Gass, *Trump seizes on Chattanooga shooting,* Politico (July 17, 2015) ("We're losing law and order…. [L]ook at what's

[9] *See supra* at 10.

[10] https://www.washingtonpost.com/news/post-politics/wp/2015/08/29/trump-in-tennessee-downplays-police-brutality-promises-to-get-rid-of-gangs/?utm_term=.86b5dc173d2d.

happening in Detroit,… Baltimore or Chicago, it's getting worse all the time.");[11] David Lightman, *Trump, in St. Louis, fends off hecklers, says Clinton and Obama 'destroying' country*, Miami Herald (Mar. 13, 2016) ("There has to be some decorum…. There has to be some law and order in our country.").[12] When an African-American protester was attacked at a rally, Defendant said, "Maybe he should have been roughed up." Compl. ¶ 85, R.1-1, PageID#16; Jenna Johnson and Mary Jordan, *Trump on rally protester: 'Maybe he should have been roughed up'*, Wash. Post (Nov. 22, 2015).[13] In January 2016, he retweeted a white supremacist Twitter account called @WhiteGenocideTM ("white genocide" is a racist meme connoting that a violent race war is necessary to prevent non-white people from exterminating white people). Donald J. Trump (@realDonaldTrump), Twitter (Jan. 22, 2016, 7:51 am).[14] Former KKK leader David Duke, describing his endorsement of Defendant, said, "He's talking about it [protecting the white race] in a visceral way…. Trump is talking implicitly. I'm talking explicitly." Lisa Mascaro, *David*

[11] https://www.politico.com/story/2015/07/donald-trump-chattanooga-shooting-gun-free-zones-120281#ixzz3gePYxZfW

[12] http://www.miamiherald.com/news/politics-government/article65517272.html

[13] https://www.washingtonpost.com/news/post-politics/wp/2015/11/22/black-activist-punched-at-donald-trump-rally-in-birmingham/.

[14] https://twitter.com/realDonaldTrump/status/690562515500032000.

Duke and other white supremacists see Trump's rise as way to increase role in mainstream politics, L.A. Times (Sept. 26, 2016).[15]

The layers of meaning in Defendant's speech informed the perception of the Louisville white supremacists. Defendant stated at the rally, "In the old days, which isn't so long ago, when we were less politically correct, that kinda stuff wouldn't have happened. Today we have to be so nice, so nice. We always have to be so nice." Compl. ¶ 35, R.1-1, PageID#10. In the context of his other statements and the sordid history of race relations, one can see how the white supremacists interpreted the dog whistles: "the old days, which isn't so long ago" (before civil rights protections), "when we were less politically correct" (when we allowed racial discrimination), "that kinda stuff wouldn't have happened" (minorities knew their place), and "today we have to be so nice" (we say sarcastically, because we would rather beat up *those people*, and you can act on this desire).

As the complaint alleges, white supremacists—including those wearing recognizable quasi-uniforms at the Louisville rally—interpreted Defendant's use of racial dog whistles as an implicit sign of support and encouragement to act. *Id*. ¶¶ 4, 70-72, PageID#7, 14. Co-Defendant Heimbach, "the face of a new generation of white nationalists," discussed the Louisville rally in a blog post, "White Americans

[15] http://www.latimes.com/politics/la-na-pol-trump-david-duke-20160928-snap-story.html.

are getting fed up and they're learning that they must either push back or be pushed down." *Id*. ¶¶ 4, 70, PageID#7, 14. He told *Radio Aryan*, "I want Donald Trump to … make the Jews around the world quake in their boots[.]" *Id*. ¶ 72, PageID#14. In September 2015, the leader of the American Nazi Party wrote that Defendant's statements "if nothing else, have SHOWN that 'our views' are NOT so 'unpopular[.]'" Rocky J. Suhayda, *ANP Report for September 20, 2015*, American Nazi Party (Sept. 20, 2015).[16] In October 2015, Don Black, former KKK grand dragon and founder of the white supremacist website Stormfront, said, "[Defendant] resonates with many of our people, of course, and with white, middle America, which has been seething for many years now about the immigration issue.... It inspires a lot of people, including a lot of our own people." Rachel Monroe, *How Does a White Supremacist See America Today?*, New York Magazine (Oct. 12, 2015).[17] Heimbach also told *Radio Aryan*, "The fires of nationalism, the fires of identity, the fires of anger against the corrupt establishment are arising all around Europe, all around America.... Hail, Emperor Trump! And hail, victory!" Sarah Posner & David Neiwert, *Meet the Horde of*

[16] http://www.americannaziparty.com/news/archives.php?report_date=2015-09-20.
[17] http://nymag.com/daily/intelligencer/2015/10/how-does-a-white-supremacist-see-america-today.html.

Neo-Nazis, Klansmen, and Other Extremist Leaders Endorsing Donald Trump, Mother Jones (Sept. 21, 2016).[18]

Appellees pled sufficient facts to support their allegation that Defendant's meaning—to incite violence or lawlessness—was understood by and encouraged Appellees' assailants. Heimbach and Bamberger said they attacked Appellees because Defendant told them to. *See* Heimbach Answer and Cross-Claim ¶¶ 107-23, 146-49, R.32-1, PageID#345-46, 350-51; Bamberger Answer ¶ 2, R.30, PageID#313. "Bamberger would not have acted as he did without [Appellants'] specific urging and inspiration." Bamberger Cross-Claim ¶ 5, R.30, PageID#316.

II. Appellees alleged sufficient facts to substantiate a violation of Kentucky's incitement to riot statute.

A. The statute was enacted to criminalize actions that provoke or urge a riot, regardless of whether a riot actually occurs.

Kentucky criminalizes the act of inciting a riot, separate from the actual riot itself, to recognize the seriousness of inciting a crowd to lawlessness. The Legislature carefully crafted the language "to protect freedom of speech on the one hand," and to ensure "the public's right to peace and tranquility on the other." *See* K.R.S. § 525.040, Commentary. By penalizing incitement as an independent crime,

[18] http://www.motherjones.com/politics/2016/09/trump-supporters-neo-nazis-white-nationalists-kkk-militias-racism-hate/.

the statute aims to prevent a situation from escalating "to the point where there is a clear and present danger of riot." *Id.*

The Legislature designed the statute to be a "less stringent test" as compared to the original incitement statute. Under prior law, guilt could only be established with "***proof*** that the actor urged the imminent commission of such conduct and proof that there was a clear and present danger of its occurrence." *Id.* (Emphasis added). Recognizing that "police should be granted authority to move in at an earlier point in time" to prevent a riot from occurring in the first place, the incitement statute now only requires that "the urging create[] a grave danger of property damage, personal injury, or substantial obstruction of governmental function." Given that encouraging assault is precisely the type of behavior that would create "a grave danger of property damage, personal injury, or substantial obstruction of governmental function," *id.*; *see* K.R.S. § 525.010(5) (defining "riot"), the incitement statute was intended to (and does) cover the type of behavior implicated here.

B. Appellees alleged sufficient facts at the pleading stage to satisfy the requisite elements of the incitement statute.

The incitement to riot statute has just three requisite elements: a defendant is guilty of the offense by (1) inciting[19] (2) five or more persons (3) to engage in a

[19] Incitement is commonly defined as "provoking, urging on, or stirring up." INCITEMENT, Black's Law Dictionary (10th ed. 2014).

riot. The District Court correctly concluded that the Complaint is replete with allegations sufficient to "state a claim to relief that is plausible on its face." *See Watson Carpet*, 648 F.3d at 456-57 (internal quotation marks omitted). Defendant stopped his 30-minute speech during the Louisville rally at five different times to "point out protesters" and "to tell his crowd of supporters to 'get 'em out of here.'" Compl. ¶ 32, R.1-1, PageID#10. Defendant's "repeated order to 'get them out' was directed to his supporters," rather than toward any security personnel or law enforcement. *See id.* ¶ 81, PageID#15. The Complaint alleges Defendant "intended for his supporters to use unwanted, harmful physical force to remove protesters," and he "knew or reasonabl[y] should have known that his supporters would act upon his orders." *Id.* ¶ 82, PageID#15-16.

In fact, Defendant's conduct at the Kentucky rally was not isolated. At many events during the same time period, as detailed in the Complaint, Defendant made similar inflammatory statements at other rallies to attendees who interpreted him as condoning violence against protesters. Relevant examples include:

- On November 21, 2015, an African-American protester was attacked, and Defendant stated that "he should have been, maybe he should have been roughed up." *Id.* ¶ 85, PageID#16.

- On February 1, 2016, Defendant stated that the crowd should "knock the crap out of" any protesters "getting ready to throw a tomato." Defendant repeated the comment: "Seriously. Okay? Just knock the hell…" and promised that he would pay his supporters' legal fees, presumably arising out of their violent conduct. *Id.* ¶ 86, PageID#16.

- On February 22, 2016, Defendant explained that he "love[s] the old days" and that protesters used to "be carried out on a stretcher." Defendant also stated in reference to a protester being escorted out: "I'd like to punch [him] in the face." *Id.* ¶¶ 87-88, PageID#16-17.

- On March 4, 2016, Defendant explained to attendees that "[i]f you do [hurt the protester], I'll defend you in court. Don't worry about it." *Id.* ¶ 89, PageID#17.

These detailed allegations provide critical context to Defendant's statements at the Kentucky rally where Appellees were attacked and forcibly removed. Viewed in totality and in Appellees' favor, the allegations support the District Court's determination that Defendant provoked or urged the crowd to act unlawfully by forcibly and violently removing Appellees from the event.

The allegations also demonstrate that Defendant knew from previous rallies that crowds would heed the "get 'em out of here" directions, that a number of those attendees would act violently towards protesters, and that his instructions would produce unlawful action with violent and harmful results. Compl. ¶¶ 81-82, 102-106, R.1-1, PageID#11,19. Heimbach admitted that he assaulted Appellees because he knew that is what Defendant wanted him to do. *See* Heimbach Answer and Cross-Claim ¶¶ 107-23, 146-49, R.32-1, PageID#345-46, 350-51. Defendant's well-documented comments at other events—in which he promised to pay supporters' legal fees and defend them in court if they harmed or attacked protesters—undermine any suggestion that Defendant's statements were designed to be neutral or harmless. Compl. ¶ 86, R.1-1, PageID#16. To the contrary,

Defendant had a clear purpose in mind, and the statements fell squarely within the definition of incitement. *Id.* ¶¶ 80-82, PageID#15-16.

The Complaint further details that Defendant incited five or more people to engage in unlawful conduct and that the crowds' actions at the Kentucky rally constituted a riot. Appellees were assaulted "by numerous protesters," including defendants Heimbach and Bamberger, in addition to a nearby group of four to six TWP white supremacists. Compl. ¶¶ 46-50, 54-59, 63-64, R.1-1, PageID#11-13. The crowd surrounded Appellees in a disturbing fashion, yelled racial and sexual slurs, and shoved and pushed them (including at least one punch in the stomach). *Id*. Indeed, Bamberger offered a public apology and expressed his regrets for participating in the assault after the event, conceding that Defendant "kept saying 'get them out, get them out' and people in the crowd began pushing and shoving the protesters." *Id.* ¶ 76, PageID#15. These allegations, if true, would demonstrate that the crowd's conduct constituted a riot, by creating grave danger of personal injury to Appellees and others at the event.

C. Appellants' alternative narratives do not warrant dismissal at this stage of proceedings.

A motion to dismiss only assesses the sufficiency of the allegations under Fed. R. Civ. P. 12(b)(6). Indeed, many of the cases cited in Appellants' brief were decided on a fuller factual record (unlike the one here) with the benefit of

factfinders' credibility determinations.[20] *See, e.g.*, *Smith v. Novato Unified School Dist.*, 150 Cal. App. 4th 1439 (Ct. App. 5th Dist. 2007) (decided after bench trial); *People v. Shafou*, 416 Mich. 113 (1982) (decided after jury trial). In the instant case, Appellees should at a minimum be afforded the right to discovery.

Appellants present alternative narratives and explanations[21] in an effort to present an equally plausible recounting of the incident. But that effort does nothing to advance their arguments.[22] As the District Court properly recognized in its decision, none of Appellants' alternative explanations require dismissal at this juncture in the proceedings. "Often, defendants' conduct has several plausible explanations," and "[f]erreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Watson Carpet*, 648 F.3d at 458;

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[20] Even in the Florida Supreme Court decision relied upon by Appellants, the court permitted the state to file amended information as the circumstances may have justified the charge with additional factual allegations in the record. *See State v. Beasley*, 317 So. 2d 750, 753-54 (Fla. 1975).

[21] Appellants' alternative explanations appear to employ facts not presented in the Complaint, which must not be considered on a motion to dismiss. *See Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009) ("When reviewing a motion to dismiss, the District Court may not consider matters beyond the complaint.").

[22] Defendant did state "[d]on't hurt 'em" to attendees in Kentucky. Compl. ¶ 34, R.1-1, PageID#6. But even on that issue, Defendant made a nearly identical statement at a rally on March 4, 2016, in Warren, Michigan, only to then explain that if attendees did hurt the protesters, he would defend them in court, apparently under the belief that such conduct is lawful. *Id.* ¶ 89, PageID#17. Accordingly, Appellants' argument—that Defendant's "[d]on't hurt 'em" comment alone is enough to absolve him of liability—lacks key context included in the Complaint.

see also Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011) ("If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6).").

In sum, these competing narratives are appropriately decided by a factfinder, not by a court deciding a motion to dismiss without the benefit of any discovery or credibility determinations.

III. The First Amendment does not bar Appellees' incitement claim.

The First Amendment "offers sweeping protection that allows all manner of speech to enter the marketplace of ideas." *Bible Believers v. Wayne County, Michigan*, 805 F.3d 228, 243 (6th Cir. 2015) (en banc). This constitutional provision is particularly important for ***minority*** viewpoints, "including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people." *Id.* The First Amendment protects against the majority silencing "dissidents simply as a matter of personal predilections." *Id.*

But the First Amendment's protections for freedom of speech are not without limit.[23] *Id.* (explaining that "not all speech is entitled to its sanctuary").

[23] Appellants' argument that the First Amendment conveys heightened protection against any legal process is meritless. *See* Appellants' Br. at 29-30. None of their cases hold this and none dismiss a meritorious case. *Helstoski v. Meanor* is not even a First Amendment case; it addresses the Speech and Debate Clause. 442 U.S. 500, 508 (1979). Their other quotes are dicta that may be pertinent to chilling

Speech can be proscribed "when such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see also Bible Believers*, 805 F.3d at 244. Put simply, "when a speaker incites a crowd to violence, his incitement does not receive constitutional protection." *Bible Believers*, 805 F.3d at 245.

A speaker loses the benefit of the First Amendment when "(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech." *Id.* at 246. The instant case squarely falls within this framework.

A. Appellees alleged sufficient facts to support their contention that Defendant's speech explicitly or implicitly encouraged the use of violence or lawless action.

As the Complaint details, the context of Defendant's alleged statements at the Kentucky rally, if true, would support the conclusion that he explicitly or implicitly encouraged violence, or at a minimum lawless action. As alleged, Defendant knew that crowds at previous rallies had acted *on his direction* to

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effects in defamation cases—especially at summary judgment, like *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966)—but are irrelevant in incitement actions. *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.").

remove protesters, Compl. ¶¶ 86-87, R.1-1, PageID#16, that his supporters violently attacked protesters, causing injuries, *id.* ¶¶ 85-87, PageID#16, and that some attendees at the Kentucky rally identified with white supremacist organizations, *see id.* ¶¶ 7-8, 66-70, PageID#7-8, 13-14. Defendant offered to reimburse legal fees for audience members facing legal ramifications because of their violent behavior. *See id.* ¶¶ 86, 89, PageID#16-17. As alleged, Defendant's comments explicitly instructed attendees to forcibly remove protesters, and implicitly encouraged audience members to engage in the "good old days" conduct—shoving, punching, and assaulting protesters to chase them away. *Id.* ¶ 35, PageID#10.

Using coded language to encourage violent acts is not protected when, as alleged here, the speaker intends that the targeted (and primed) audience use violence and such unlawful action is the likely result. This Court does not require purely explicit language to sustain an incitement charge, instead warning that implicit encouragement of violence ***enjoys no protection*** under the First Amendment. *See Bible Believers*, 805 F.3d at 246 (analyzing "subjective intent to spur [] audience to violence").

This case is distinguishable from prior incitement cases where the First Amendment protected speakers engaging in mere advocacy. The speakers in those cases never encouraged anyone in the crowd to commit lawless or violent acts nor

to take any imminent action. In *Bible Believers*, where the speakers spewed anti-Muslim sentiments at a predominantly Muslim festival resulting in violent reactions, *see* 805 F.3d at 239-40, at no point did the speakers explicitly or implicitly call for violence or lawless actions. In *Hess v. Indiana*, 414 U.S. 105 (1973), a man at an antiwar demonstration stated, "We'll take the fuc*ing street later," or "We'll take the fuc*ing street again," both of which could have been viewed as troublesome by nearby law enforcement.[24] 414 U.S. at 107. But two witnesses later testified at trial that the speaker was not instructing anyone to do anything, that his statement "did not appear to be addressed to any particular person or group," and that his voice "was no louder" than anyone else in the area. *Id.* By contrast, Appellants allege that Defendant spoke at a podium with a microphone in a large venue in front of thousands of individuals and directly commanded those primed for violence to take immediate unlawful action against the protesters. Compl. ¶¶ 80-82, R.1-1, PageID#15-16. And two of the people who violently attacked Plaintiffs stated that they were acting at his behest. *See* Heimbach Answer and Cross-Claim ¶¶ 107-23, 146-49, R.32.1, PageID#345-46, 350-51; Bamberger Answer ¶ 2, R.30, PageID#313; Bamberger Cross-Claim ¶¶ 2-7, R.30, PageID#316.

[24] *Hess*, along with many other incitement cases relied upon by Appellants, *supra* at 18, were decided after a fully developed factual record. Appellees should receive the same benefit.

Equally distinguishable are cases where there was no temporal proximity between the speech and the resulting violent conduct. In *Brandenburg*, at a KKK event, the speaker conditioned his threats on hypothetical future events, and at no point was anyone instructed to engage in imminent lawless or violent behavior. 395 U.S. at 446 ("We're not a revengent organization, but if 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***." (emphasis added)). The same issue arose in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 902 (1982), where a speaker stated that anyone who failed to comply with a pre-arranged boycott would face discipline, including threatening to "break [their] damn neck." Critically, the Supreme Court explained that the speech was protected by the First Amendment because there was no call for ***immediate*** violent or lawless actions. *Id.* at 928. The Court even cautioned that if the at-issue language had been immediately followed by acts of violence, "a substantial question would be presented whether the speaker could be held liable." *Id.* Conversely, in the instant case, as alleged, Defendant gave a direct order to "get 'em out of here" and emphasized the immediacy of that imperative by repeating this statement until the protesters were violently removed. Compl. ¶¶ 80-82, R.1-1, PageID#15-16. Appellees allege that Defendant's conduct resulted in violence moments later with

numerous audience members assaulting the Appellees. *See id.* ¶¶ 46-50, 54-59, 63-64, PageID#11-13.

B. The Complaint contains sufficient allegations to support the contention that Defendant intended his speech to result in the use of violence or lawless action.

Appellants hardly address the intent requirement under the *Brandenburg* framework, conceding that this issue is inappropriate for resolution at such an early stage of the case. "An appellant abandons all issues not raised and argued in its initial brief on appeal." *United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (citation and quotation omitted). Regardless, even a cursory review of the Complaint makes it clear that Appellees adequately alleged Defendant's intention that his speech would result in violence or lawless action. Compl. ¶¶ 80-82, R.1-1, PageID#15-16. Defendant witnessed the violent ramifications of his inflammatory language at other nearly identical events and affirmatively chose to use similar speech again, demonstrating his intent to achieve a similar result. *Id.* ¶¶ 84-88, PageID#16-17.

If there is a factual dispute concerning Defendant's intent, that dispute should be left to a factfinder. *See Morissette v. United States*, 342 U.S. 246, 274 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."). The District Court correctly noted this, explaining that "[w]hether [Defendant] actually

intended for violence to occur is beyond the scope of the [] inquiry at the motion-to-dismiss stage." Order at 9, R.27, PageID#276.

C. Appellees alleged sufficient facts to support their contention that the imminent use of violence or lawless action was the likely result of Defendant's speech.

Appellants likewise do not address the imminence prong, and therefore concede it. *See Johnson*, 440 F.3d at 845-46. Regardless, the Court should conclude that the District Court did not err in finding that Defendant's use of dog whistles and inflammatory speech was likely to result in imminent violence or lawless action. *See* Order at 9, R.27, PageID#276.

As the Complaint alleges, Defendant told attendees to "[G]et 'em out of here!" and alluded to how things were done differently in "the old days." Compl. ¶¶ 32-35, R.1-1, PageID#10. Heimbach admitted that Defendant's language was likely to result in a physical assault on Appellees. Heimbach Answer and Cross-Claim ¶¶ 107-23, 146-49, R.32-1, PageID#345-46, 350-51. Bamberger agreed and said that he "would not have acted as he did without [Appellants'] specific urging and inspiration." Bamberger Cross-Claim ¶ 5, R.30, PageID#316. Based on prior rallies, where violence erupted after similar statements by Defendant, *see* Compl. ¶¶ 84-88, R.1-1, PageID#16-17, it was no surprise "that violence actually occurred as a result of the statement." Order at 9, R.27, PageID#276; *see also* Compl. ¶¶ 40-82, R.1-1, PageID#11-16.

IV. The allegations of the Complaint do not establish the defense that Appellants had a right to invoke violence to eject Appellees.

In an apparent effort to focus on the level of force employed by the crowd in removing Appellees, Appellants mistakenly argue on appeal that they were merely exercising their common-law right to expel unwanted attendees from the rally, and that so long as Defendant did not call for *excessive* force,[25] they could not be held liable for incitement to riot. Because this argument relies on factual allegations outside of the Complaint, it should not be considered grounds for dismissal.

Appellants' arguments are premised on Appellees' refusal to leave the property, but none of the factual allegations in the Complaint support such a conclusion. To the contrary, Appellees allege that Defendant instructed the crowd to "get 'em out of here," that numerous crowd members then immediately assaulted them, and that they were physically forced out of the rally before they could react. Compl. ¶¶ 30-33, 45-47, 56-59, 63-64, 81-82, R.1-1, PageID#10-13, 15-16. Additionally, the Complaint alleges that the rally was held on public property and all members of the public, without restriction, were allowed to attend. *Id*. ¶¶ 17, 31, PageID#8, 10. At no point in the Complaint do Appellees state that

[25] Excessive force is not the appropriate standard for assessing whether there was in fact a riot. Because Appellees allege sufficient facts to establish a grave danger of personal injury, they satisfy the legal definition of "riot." K.R.S. § 525.010(5). Even if it were the standard, Appellees alleged in the Complaint that, understood in the context of his history of dog whistle language and calls to violence, Defendant did call for the use of excessive force.

they resisted anyone's efforts to remove them from the rally, nor do they allege that anybody asked them to leave before employing force.

CONCLUSION

The Lawyers' Committee for Civil Rights Under Law urges the Court to affirm.

Dated: January 19, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,447 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2018, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and that service to the participants in this appeal, all of whom are registered CM/ECF users, will be accomplished by the appellate CM/ECF system.

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