No. _____

In the Supreme Court of the United States

CITY OF MEMPHIS,
Petitioner,

v.

LAKENDUS COLE; LEON EDMOND, individually and as representatives of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether there exists a fundamental right to intrastate travel under the Due Process Clause of the Fourteenth Amendment, and, if so, what level of scrutiny applies?

II. If, in a civil trial involving fundamental rights, a district court instructs a jury using strict scrutiny and the court of appeals determines a lower level of scrutiny should have been used, can the erroneous jury instructions be affirmed as harmless error?

PARTIES TO THE PROCEEDINGS

Petitioner is the City of Memphis, Tennessee. Respondents are Lakendus Cole and Leon Edmond, both individually and as representatives of all others similarly situated.

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The order of the District Court of the Western District of Tennessee granting declaratory and injunctive relief is reported at 108 F. Supp. 3d 593 and reproduced at pages 31-69 of the Appendix. The order of the District Court of the Western District of Tennessee granting in part and denying in part Petitioner's motion for summary judgment is reported at 97 F. Supp. 3d 947 and reproduced at pages 70-101 of the Appendix.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on October 17, 2016. Petitioner timely requested rehearing en banc, which the United States Court of Appeals for the Sixth Circuit denied on January 4, 2017. Petitioner then timely filed this Petition on April 4, 2017. This Court has jurisdiction under Title 28, United States Code, Section 1254(1).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

This case was filed under Title 42, United States Code, Section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

This case concerns the Fourteenth Amendment, specifically Section 1, the Due Process Clause, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of the arrest of Respondents in Memphis, Tennessee. Respondents were arrested for refusing to leave Beale Street, a popular entertainment district. (Appendix A,[1] App. 3.) Beale Street runs for approximately two blocks through the heart of downtown Memphis. (*Id*., App. 3.) It is lined with restaurants, bars, nightclubs, and other establishments. (*Ibid.*) Pedestrians move on and off Beale Street while visiting these establishments. By ordinance, pedestrians are allowed to carry and consume alcoholic beverages on the sidewalks and along Beale Street. (*Ibid.*) Vehicle access to Beale Street is generally restricted. At night, barricades are erected, no vehicles are allowed, and the entirety of Beale Street is open to pedestrians. (*Ibid*.)

During times relevant to this matter, in addition to barricades and otherwise restricting access to Beale Street, the City implemented other safety and security practices. For example, in the early hours of weekend mornings (typically between 3:00 a.m. and 5:00 a.m.), the Memphis Police Department ("MPD"), based on "a real-time determination," would direct pedestrians off of Beale Street. (*Id*., App. 28.) MPD vehicles stationed around Beale Street would turn on their lights, and pedestrians were instructed to either leave the area or go into a still-open establishment. (*Id*., App. 12.) Throughout this case, this practice has been referred to as the "Beale Street Sweep." (*Id.*, App. 2.)

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[1] Appendix A is the Opinion of the United States Court of Appeals for the Sixth Circuit.

Around 3:30 a.m. on August 26, 2012, Respondent Lakendus Cole ("Cole")—an off-duty MPD officer—was on Beale Street. (*Id.*, App. 3.) MPD instructed all pedestrians, including Cole, to leave the area or go into an establishment. Cole refused to do either and was arrested. (Appendix B,[2] App. 35.) Several months earlier, on May 5, 2012, MPD arrested Respondent Leon Edmond under similar circumstances. (Appendix A, App. 4, n.1.)

On February 25, 2013, Respondents, individually and as representatives of all others similarly situated, filed a Section 1983 lawsuit against the City and individual MPD officers.[3] (Appendix B, App. 37.) Relevant to this Petition, the lawsuit claimed the Beale Street Sweep violated the Due Process Clause of the Fourteenth Amendment; specifically, it was "an unconstitutional restriction on an individual's fundamental right to intrastate travel."[4] (Appendix C,[5] App. 89.)

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[2] Appendix B is the Order Granting Declaratory and Injunctive Relief in the United States District Court for the Western District of Tennessee, Western Division.

[3] The MPD officers were later voluntary dismissed. Also, issues related to the class and certification thereof are not relevant to this Petition.

[4] There were numerous other claims, theories, and arguments in this case. Petitioner has limited the statement of the case to those facts material to consideration of the questions presented. *See* S. Ct. R. 14(g).

[5] Appendix C is the Order Granting in part and Denying in part Defendant City of Memphis' Motion for Summary Judgment in the United States District Court of the Western District of Tennessee, Western Division.

In January of 2015, Respondents' Fourteenth Amendment claim was tried before a jury.[6] (Appendix B, App. 35.) The district court instructed the jury on what the City must prove with respect to the Beale Street Sweep and why the practice existed. (Appendix A, App. 14.) In doing so, the district court utilized "strict scrutiny." The jury found the City's justifications for the Sweep did not meet this burden and returned a verdict in favor of Respondents. (*Id*., App 3.) Thereafter, the City timely noticed its appeal to the United States Court of Appeals for the Sixth Circuit. (*Id*., App. 6.)

On October 17, 2016, a divided panel of the Sixth Circuit affirmed the jury's verdict. (Appendix A, App. 24.) The majority made clear that the Sixth Circuit was—and would continue to be—"one of a few circuits to recognize the right to intrastate travel as 'fundamental.'" (*Id.*, App. 7-10.) The dissent concurred with majority's affirmation of the fundamental right to intrastate travel. (*Id.*, App. 24.) Perhaps anticipating this Petition, the dissent also noted that the right is "an important and largely unexplained area of constitutional jurisprudence." (*Id.*, App. 24.)

The majority further recognized that the district court "revised the definition of the Beale Street Sweep in order to be more consistent with the strict scrutiny standard that is applied to cases regarding violations of an individual's fundamental rights, such as the fundamental right to intrastate travel." (*Id.*, App. 5.) Notwithstanding, the majority concluded that

[6] All claims then-existing were tried in January of 2015. The focus of this Petition, however, is Respondents' Fourteenth Amendment claim.

"[i]ntermediate scrutiny is appropriate in this case." (*Id.*, App. 13.) The majority then stood in place of the jury, assessed the Beale Street Sweep under intermediate scrutiny, and found that the Sweep was not "narrowly tailored to meet significant city objectives." (*Id.*, App. 15.) In short, the majority believed the jury would have reached the same result under strict or intermediate scrutiny. The majority, therefore, considered the district court's erroneous use of strict scrutiny to be harmless error. (*Id.*, App. 17.)

The dissent likewise recognized that "the district court judge and district court jury applied the more onerous legal standard of strict scrutiny." (Appendix A, App. 24.) The dissent further agreed "that intermediate scrutiny is the appropriate legal standard for constitutional review of the City of Memphis's practice of sweeping Beale Street." (*Id.*, App. 24.) But the district court's erroneous use of strict scrutiny could not be harmless error because the jury's findings were inextricably intertwined with "the more onerous legal standard." (*Id.*, App. 24.) The dissent, thus, would have reversed and remanded for further proceedings applying the correct law of intermediate scrutiny. (*Id.*, App. 30.)

REASONS FOR GRANTING THE PETITION

With the first question presented, this Petition presents a compelling opportunity for the Court to resolve a well-developed Circuit split on an issue of absolute importance—fundamental rights. The split concerns the existence of the fundamental right to intrastate travel. This Court has never identified the right. While the Court has discussed it, the discussions have been incomplete and, respectfully, conflicting. Against this backdrop, the Circuits have split. Four Circuits, including the Sixth Circuit, recognize the right. Four Circuits reject the right, with still others openly doubting the right's existence.

With the second question presented, Petitioners ask this Court to preserve the sanctity of trial by jury. In this case, the Sixth Circuit—for what appears to be the first time ever—affirmed as "harmless" jury instructions erroneously using the strict scrutiny standard in a case involving fundamental rights. The Sixth Circuit's decision conflicts with decisions from other Circuits, including the First, Second, and Tenth. Fundamental rights are an issue of absolute importance. The conflict created by the Sixth Circuit's decision can and should be resolved by this Court.

For the foregoing reasons and those explained below, the Court should grant this Petition as to both questions presented.

I. The Circuits are split on whether there exists a fundamental right to intrastate travel under the Due Process Clause of the Fourteenth Amendment.

This Court has never recognized a fundamental right to intrastate travel. In fact, several of the active Justices of the Court appear split on whether the right exists. This apparent split is representative of—and arguably the cause of—the well-developed split among the Circuits.

The Court's limited discussions of the right to intrastate travel have flowed out of seminal decisions on interstate travel, like *Shapiro*[7] and *Dunn*.[8] In 1974, for example, the Court considered an Arizona statute requiring a year's residence in a county as a condition to receiving nonemergency hospitalization or medical care at the county's expense. *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974). Relying on *Shapiro* and *Dunn*, the Court reasoned that the durational residency requirement treated one class of persons (those who lived there for less than one year) differently from another class (those who lived there for more than one year). The Court, therefore, struck down the durational residency requirement as violating the Equal Protection Clause. *Id*. at 259-61.

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[7] *Shapiro v. Thompson*, 394 U.S. 618 (1969) (relying on Equal Protection Clause of the Fourteenth Amendment to strike down one-year residence requirement before receiving welfare benefits).

[8] *Dunn v. Blumstein*, 405 U.S. 330 (1972) (relying on Equal Protection Clause of the Fourteenth Amendment to strike down one-year residence requirement before receiving in-state voting rights).

Importantly, the Court's reasoning appeared to reject the notion that the right to travel applied to all free movement, stating: "Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement." *Id.* at 255.[9] More importantly, the Court refused to declare a separate right to intrastate travel. The appellees attempted to distinguish the county-residence requirement on the basis that it penalized only intrastate travel, not interstate travel. *Id.* at 255. The Court rejected this argument. "Even were we to draw a constitutional distinction between interstate and intrastate travel," a question the Court made clear it was not considering, "such a distinction would not support the judgment of the Arizona court before us." *Id.* at 255-56. Thus, faced with the opportunity to recognize a right to intrastate travel, this Court chose not to do so.

Two decades after *Memorial Hospital*, the Court revisited the right to intrastate travel in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). There, a group of abortion clinics moved to enjoin an antiabortion organization from blocking access to abortion facilities in specified counties, as well as other locations. *Bray*, 506 U.S. at 266-67. The district court ruled that the defendants conspired to deprive women seeking abortions of their right to

[9] The D.C. Circuit later relied on this statement and concluded that *Memorial Hospital* "cast strong doubt on the idea that there [is] a fundamental right to free movement." *See Hutchins v. D.C.*, 188 F.3d 531, 537 (D.C. Cir. 1999) (en banc).

interstate travel, in violation of Section 1985.[10] *Id.* This Court vacated the ruling and related award of attorneys' fees because the plaintiffs' claim failed to allege a conspiracy to violate a federal right. *Id.* at 276-77. Justice Scalia, writing for the Court, explained that:

> the only "actual barriers to . . . movement" that would have resulted from petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another. Such a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied discriminatorily against them.

Id. at 277. Notably, of the Court's current Justices, Justice Kennedy and Justice Thomas joined the *Bray* majority.

Prior to *Bray*, whether the right to interstate travel encompassed the right to intrastate travel appeared to be an open question. In *Bray*, however, the Court foreclosed this possibility and seemed to make clear that purely intrastate activity, unless discriminatory, does not trigger a federal right.

Most recently, in 1999, the Court decided *City of Chicago v. Morales*, 527 U.S. 41 (1999). In that case,

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[10] Section 1985 prohibits conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *Bray*, 506 U.S. at 274 (internal citations omitted).

Chicago's Gang Congregation Ordinance prohibited criminal street gang members from loitering in public places. *Id*. at 45-46. The Court ultimately struck down the loitering ordinance as vague. *See, e.g.*, *id*. at 51 ("[W]e conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague."). Within the decision, however, the Justices took conflicting positions on the existence of the right to intrastate travel.

Justice Stevens, joined by Justice Souter and Justice Ginsburg, asserted that as "the United States recognizes . . . the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 53 (internal citations omitted). The plurality further observed:

> Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement frontiers that is "a part of our heritage" . . . or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.

Id. at 54 (internal citations omitted).

In their dissent, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, argued that a right to free movement—intrastate or otherwise—is not protected by the Due Process Clause of the Fourteenth Amendment. *Id*. at 105. The dissent remarked that the plurality "cites only three cases in support of the asserted right to 'loiter for innocent purposes.'" *Ibid.* While dicta from those cases arguably supports "the

fundamental right that the plurality asserts," the cases do not (1) say anything about a constitutional right nor (2) undertake "the now-accepted analysis applied in substantive due process cases . . . ." *Ibid.* Moreover, emphasized the dissent, the cases concerned "the entirely distinct" rights to interstate travel and international travel. *Id.* at 105, n.5 (internal citations omitted).

While the *Bray* Court seemed to make clear that purely intrastate activity, unless discriminatory, does not trigger a federal right, the Justices in *City of Chicago* appeared to reignite this debate. In the nearly twenty years since *City of Chicago*, the Court has not provided any further guidance on the right to intrastate travel. Without clear guidance, the Circuits have split on whether the right exists.

A. Four Circuits recognize a fundamental right to intrastate travel.

The four Circuits recognizing the right are the First, Second, Third, and Sixth.

In 1970—prior to the Court's decision in *Memorial Hospital*—the First Circuit decided *Cole v. Housing Authority of City of Newport*, 435 F.2d 807 (1st Cir. 1970). The municipality in that case imposed a two-year residency requirement on applicants to federally-funded public housing projects. *Id.* at 808. Each of the two plaintiffs was a single mother with two children. *Id.* at 809. One mother moved to the municipality from another state; the other moved from a community within the state. *Ibid.* The First Circuit found that the city's durational residency requirement violated the fundamental right to travel as applied to **both**

plaintiffs because they were **both** exercising their right to "migrate and resettle." *Id.* at 809-10 (citing *Shapiro*, 394 U.S. at 629). Although the First Circuit did not specifically speak to a separate right of intrastate travel, the court applied principles of the fundamental right to interstate travel to purely intrastate travel.[11]

A year later, in 1971, the Second Circuit, relying on the First Circuit's *Cole* decision, specifically recognized a constitutionally protected right to intrastate travel. *See King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 113 (1971). The Second Circuit was persuaded that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *Id*. at 648. Later decisions have affirmed the Second Circuit's recognition of a stand-alone, fundamental right to intrastate travel. *See, e.g.*, *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 100 (2d Cir. 2009) ("Even if we had not recognized a right of intra-state travel . . . ."); *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) ("The right to intrastate travel, or what we sometimes will refer to as the right to free movement, has been recognized in this Circuit.").

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[11] *See, e.g.*, *Fayerweather v. Town of Narragansett Hous. Auth.*, 848 F. Supp. 19, 21, n.2 (D.R.I. 1994) ("The First Circuit has applied the principles of the fundamental right to interstate travel to intrastate travel as well.") (citing *Cole*, 435 F.2d 807). Likewise, in this case, the Sixth Circuit's majority opinion identified the First Circuit as recognizing the fundamental right to intrastate travel. (Appendix A, App. 7, n.3.)

In 1990, the Third Circuit joined the First and Second Circuits. In *Lutz*, the Third Circuit decided a challenge to an ordinance outlawing "cruising," or "unnecessary repetitive driving" for pleasure. *Lutz v. City of York, Pa.*, 899 F.2d 255, 257 (3d Cir. 1990). The Third Circuit criticized the Second Circuit's analysis in *King*, finding it "underarticulated." *Id*. at 261. The Third Circuit thought the Second Circuit relied too heavily on *Shapiro* and the right to interstate travel. The court, therefore, undertook its own analysis of the "various constitutional provisions that might give right to a right of localized intrastate movement." *Id.* at 261-62 (internal quotation marks omitted).

The Third Circuit ultimately settled on the Due Process Clause of the Fourteenth Amendment. *Id*. at 266-68. The court found that the "right to travel locally through public spaces and roadways" was both "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history." *Id.* at 268. It conceded that its decision was "unquestionably ad hoc," but the court believed it was required to rule this way unless this Court decides "the question left open in [*Memorial Hospital*], or limits substantive due process analysis to more specific fact patterns." *Ibid.* Since 1990, the Third Circuit has recognized a stand-alone, fundamental right to intrastate travel.

The Third Circuit decided *Lutz* before this Court decided *Bray*. In 2002, however, after the Court's decision in *Bray*, the Sixth Circuit was tasked with whether to recognize a fundamental right to intrastate travel. *See Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2276 (2003). The *Johnson* court neither mentioned nor discussed

Bray.[12] Instead, the Sixth Circuit wholly adopted *Lutz*. In justifying its adoption of *Lutz*, the Sixth Circuit opined that "[t]he right to travel locally through public spaces and roadways—perhaps more than any other right secured by substantive due process—is an everyday right, a right we depend on to carry out our daily life activities." *Id*. at 498. Fourteen years later, in 2016, the Sixth Circuit decided this case. In its opinion, the Sixth Circuit acknowledged the Circuit split, distinguishing itself as "one of a few circuits to recognize the right to intrastate travel as 'fundamental.'" (Appendix A, App. 7.) The Sixth Circuit then affirmed its *Johnson* decision and made clear that within the Sixth Circuit, there exists a stand-alone, fundamental right to intrastate travel.

B. Four Circuits reject a fundamental right to intrastate travel, and others openly doubt the right's existence.

The four Circuits rejecting the right are the Fifth, D.C., Tenth, and Eleventh Circuits. Similarly, the Fourth, Seventh, and Ninth Circuits have openly doubted the right's existence.

In 1975, the Fifth Circuit became the first Circuit to reject a fundamental right to intrastate travel. In *Wright*, the Fifth Circuit upheld a bona fide residency requirement, which the plaintiffs challenged under the Fourteenth Amendment. *Wright v. City of Jackson, Mississippi*, 506 F.2d 900, 901 (5th Cir. 1975). The

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[12] *Johnson* was a split decision. The dissent quoted *Bray* and concluded that its "language strongly suggests that no fundamental right to intrastate travel exists." *Johnson*, 310 F.3d at 508 (Gilman, J., dissenting).

court explained that any "doubt that the 'right to travel' rationale of *Shapiro* and *Dunn* was meant to apply to intrastate travel and municipal employment residency requirements was put to rest by the Supreme Court's treatment of litigation challenging a Detroit ordinance . . . ." *Id*. at 902.[13] The Fifth Circuit, therefore, affirmed that there is no constitutionally protected right to intrastate travel. *Id.* at 901-02. To this day, *Wright* remains controlling precedent in both the Fifth and Eleventh Circuits.[14]

In 1999, the D.C. Circuit deepened the Circuit split in *Hutchins v. D.C.*, 188 F.3d 531 (D.C. Cir. 1999) (en banc). There, the court dealt with a juvenile curfew restriction. The court noted that *Memorial Hospital* "cast strong doubt on the idea that there [is] a fundamental right to free movement." *Id*. at 537. The court also disfavored the primary reasoning of *Lutz*:

> Appellees argue that restrictions of that kind, even ordinary traffic lights, impinge on this substantive free movement right. We are rather

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[13] The litigation referenced by the Fifth Circuit involved a similar Detroit ordinance. The Detroit ordinance was sustained by the Michigan Supreme Court. An appeal was taken to this Court. This Court ordered that the case be "dismissed for want of a substantial federal question." *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950, 950 (1972). The Fifth Circuit considered this an adjudication on the merits and, therefore, controlling precedent as to the non-existence of a constitutionally protected right to intrastate travel. *Wright*, 506 F.2d at 902-03.

[14] *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981). The Eleventh Circuit has not since revisited *Wright* nor otherwise disturbed its holding.

> doubtful that substantive due process, those constitutional rights that stem from basic notions of ordered liberty "deeply rooted in [our] history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, ——, 117 S. Ct. 2258, 2268, 138 L.Ed.2d 772 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L.Ed.2d 531 (1977)), can be so lightly extended.

Id. at 538. While the court recognized that "a hypothetical municipal restriction on the movement of its citizens, for example, a draconian curfew, might bring into play the concept of substantive due process," the court rejected a fundamental right to intrastate travel, albeit only with respect to juveniles. *Id*. at 539.

The split grew even deeper in 2010 with the Tenth Circuit's decision in *D.L. v. Unified School District No. 497*, 596 F.3d 768 (10th Cir. 2010). In that case, the plaintiffs challenged educational benefits—and the lack thereof—being provided to their children. *Id*. at 771. The case centered, in relevant part, on the defendant's non-resident admissions policies. *Id*. at 776. The plaintiffs challenged the policies as violating their rights to travel and right to establish a residence. *Ibid*. The Tenth Circuit affirmed dismissal of the challenge because it involved only intrastate travel: "a purely intrastate restriction does not implicate the right of interstate travel." *Id*. (quoting *Bray*, 506 U.S. at 277). Accordingly, the Tenth Circuit rejects a fundamental right to intrastate travel.

As for the remaining Circuits, the existence of the right has been openly doubted by the Fourth,[15] Seventh,[16] and Ninth Circuits.[17] The Eighth Circuit has identified the split, but it has not taken a position on the issue.[18] Regardless, any further decision from the open Circuits would do nothing more than deepen what is already a well-developed split.

C. The Court should grant this Petition and resolve the Circuit split.

The foregoing Circuit split warrants the Court's attention. It is difficult to imagine a more important role for this Court than ensuring the uniformity of the rights of citizens. As Justice Story explained 200 years ago, "[t]he constitution of the United States was designed for the common and equal benefit of all the

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[15] *See, e.g.*, *Eldridge v. Bouchard*, 645 F. Supp. 749, 753 (W.D. Va. 1986) ("[T]he plaintiffs do not have a federally recognized fundamental right to intrastate travel. Having a fundamental right of interstate travel does not necessitate recognizing a fundamental right to intrastate travel."), *aff'd*, 1987 WL 37944 (4th Cir. 1987) (affirmed without opinion); *Willis v. Town Of Marshall, N.C.*, 426 F.3d 251, 268 (4th Cir. 2005) (Williams, J., concurring) ("The Supreme Court has held only that the Constitution creates a right to international and interstate travel.").

[16] *Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 770 (7th Cir. 2004) (en banc) (describing right to intrastate travel as "certainly . . . not unimportant" but existing authority does not establish it as "fundamental").

[17] *Lauran v. U.S. Forest Serv.*, 141 F. App'x 515, 520 (9th Cir. 2005) ("[N]either the Supreme Court nor the Ninth Circuit has recognized a protected right to intrastate travel.").

[18] *See Doe v. Miller*, 405 F.3d 700, 712 (8th Cir. 2005) ("Some of our sister circuits have recognized a fundamental right to intrastate.").

people of the United States." *Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816). Justice Story lamented the possibility that "the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." *Ibid*. This possibility has become reality—the Constitution of the United States provides differing rights to those in different states. In some states, the Constitution provides a fundamental right to intrastate travel; a right purporting to cover everything from free movement to physically remaining wherever one pleases (like in this case). In others, the Constitution provides no such right. In still others, it is not yet known if (or to what extent) the Constitution will provide the right. In granting this Petition, the Court can resolve these inconsistencies and restore uniformity not only to the Circuits, but also to the Constitution's "common and equal benefit of all the people of the United States."

Moreover, Justice Story explained that the "public mischiefs that would attend such a state of things," e.g., the Constitution being different in different states, "would be truly deplorable." *Martin*, 14 U.S. at 348. Here, too, Justice Story's prediction has become reality. There presently is no way of knowing what government activities infringe upon the fundamental right to intrastate travel because there is no uniformity as to what the right is, or if it even exists at all. For example, if the City barricades off a parade route, can it then be sued by every pedestrian wishing to cross a street down which the parade proceeds? Should construction be needed at an intersection, have the fundamental rights of every driver routed around the

intersection been infringed? What level of scrutiny applies to a police officer's decision to clear pedestrians from the scene of an accident? Is that level of scrutiny different for a fire fighter needing to block traffic to fight a fire? There are no clear answers to these questions, not throughout the country nor within any given Circuit. This Court has the sole power to remedy this. The Court should grant this Petition and finally address whether there exists a fundamental right to intrastate travel and, if so, what level of scrutiny applies.

II. The Sixth Circuit's "harmless error" ruling impermissibly conflicts with decisions from other Circuits.

As set out above, during the trial of this matter, the district court "revised the definition of the Beale Street Sweep in order to be more consistent with the strict scrutiny standard that is applied to cases regarding violations of an individual's fundamental rights, such as the fundamental right to intrastate travel." (Appendix A, App. 5.[19]) Notwithstanding, the Sixth Circuit majority concluded that "[i]ntermediate scrutiny is appropriate in this case." (*Id.*, App. 13.) Having concluded that the jury applied the wrong level of scrutiny, the majority—putting itself in place of the jury—re-weighed the facts and evidence under intermediate scrutiny. The majority decided that the Beale Street Sweep was not "narrowly tailored to meet significant city objectives." (*Id*., App. 15.) The majority then went further and decided that, had the jury

[19] The dissent likewise recognized that "the district court judge and district court jury applied the more onerous legal standard of strict scrutiny." (*Id*., App. 24.)

received proper instructions on intermediate scrutiny, it nevertheless would have reached the same verdict. Accordingly, the majority considered the district court's erroneous use of strict scrutiny to be harmless error. (*Id.*, App. 17.)

The Sixth Circuit's decision affirmed as harmless erroneous jury instructions requiring the City to prove more than legally required. To so hold conflicts with decisions from other Circuits. The First Circuit, for example, overturns a jury instruction if it misstates or unduly complicates the correct legal standard. *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F.3d 26, 49 (1st Cir. 2003). In *John G. Danielson, Inc.*, the jury instructions "erroneously stated an extremely high standard to show that an element of profit was not attributable to [a copyright] infringement." *Id*. at 48-49. The court found that the jury instructions contained "an overstatement of what [the defendants] have to show in the case." Thus, the court vacated the damages award based on that erroneous instruction. *Id.* at 51.

Similarly, in the Second Circuit, jury instructions that improperly direct the jury on whether a litigant has satisfied a burden of proof will not be affirmed as harmless error. By way of example, in *Gordon*, the district court charged the jury that to establish a prima facie case of retaliation under Title VII, the plaintiff must show the employer's agents actually knew of the employee's protected activity. *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000). Actual knowledge by the employer's agents, however, is not required under the law. *Ibid*. The district court's charge was erroneous, and, therefore, the Second

Circuit reversed. *Ibid.* "We find that the district court committed reversible error," explained the Second Circuit, "by giving instructions to the jury that failed to convey the correct legal standards." *Id.* at 119.

In the Tenth Circuit, as in the First and Second Circuits, jury instructions constitute reversible error if they require a litigant "to prove more than what was legally necessary." *E.E.O.C. v. Beverage Dist. Co., LLC*, 780 F.3d 1018, 1022 (10th Cir. 2015). In *Beverage Distributors*, the jury instructions involved whether the plaintiff posed a direct threat to the safety of himself or others under the Americans with Disabilities Act. *Ibid*. To establish a direct threat, an employer need only show that it reasonably believed an employee posed a direct threat. *Id*. at 1021-22. Yet the district court instructed the jury that to establish a direct threat, the defendant-employer had to prove the plaintiff-employee was, in fact, a direct threat. *Id*. at 1021. Because the instruction required the defendant to prove more than was legally necessary, the Tenth Circuit reversed. *See also Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151,1159 (10th Cir. 2012) (reversing because "the jury might have based its verdict on the erroneously given standard of proof").

As shown, the Sixth Circuit's decision conflicts with decisions from other Circuits. The importance of this conflict is underscored by the fact that the Sixth Circuit supplanted a jury's deliberations with its own beliefs, and it did so in a case deciding fundamental rights. A jury's role and existence are the cornerstones of American democracy. As Blackstone commented, the civil jury "preserves in the hands of the people that share which they ought to have in the administration

of public justice." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 380 (1807). From the beginning, the jury trial was "the glory of the English Law." *Ibid*. James Madison, who drafted the Seventh Amendment, echoed Blackstone in saying that a "[t]rial by jury in civil cases is as essential to secure the liberty of the people as any of the pre-existent rights of nature." Mark W. Bennett, et al., *Judges' Views on Vanishing Civil Trials*, *in* 88 JUDICATURE, THE JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, 306, 307 (David Richert ed., 2005). The Sixth Circuit's decision erodes the sanctity of trial by jury by substituting a spilt panel's findings for that of the actual jury, and the decision impermissibly conflicts with decisions from other Circuits. The Court, therefore, should grant this Petition and resolve the conflict of importance.

CONCLUSION

Petitioner respectfully requests that the Court grant this Petition and undertake certiorari review of the questions presented herein. Petitioner respectfully requests any additional relief the Court deems warranted under the circumstances.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 16a0258p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 15-5725/5999

[Filed October 17, 2016]

LAKENDUS COLE; LEON EDMOND, individually and as representatives of all others similarly situated,
Plaintiffs-Appellees,

v.

CITY OF MEMPHIS,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 2:13-cv-02117—Jon Phipps McCalla,
District Judge.

Argued: June 14, 2016

Decided and Filed: October 17, 2016

Before: GIBBONS, GRIFFIN, and DONALD,
Circuit Judges.

COUNSEL

ARGUED: J. Michael Fletcher, CITY OF MEMPHIS, Memphis, Tennessee, for Appellant. Robert L. J. Spence, Jr., THE SPENCE LAW FIRM, Memphis, Tennessee, for Appellees. **ON BRIEF:** J. Michael Fletcher, Zayid A. Saleem, Barbaralette G. Davis, CITY OF MEMPHIS, Memphis, Tennessee, for Appellant. Robert L. J. Spence, Jr., Bryan M. Meredith, E. Lee Whitwell, THE SPENCE LAW FIRM, Memphis, Tennessee, for Appellees.

GIBBONS, J., delivered the opinion of the court in which DONALD, J., joined, and GRIFFIN, J., joined in part. GRIFFIN, J. (pp. 16–19), delivered a separate opinion concurring in part and dissenting in part.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Lakendus Cole, a Memphis police officer, was arrested in the early morning hours of August 26, 2012, shortly after leaving a night club on Beale Street in downtown Memphis, Tennessee. After his arrest, he brought claims individually and on behalf of those similarly situated, alleging that the City's routine practice of sweeping Beale Street at 3 a.m. on weekend nights violated his constitutional right to *intra*state travel. Cole and the class won at trial. The jury found that the City implemented its street-sweeping policy without consideration of whether conditions throughout the Beale Street area posed an existing, imminent, or

immediate threat to public safety. Based on the jury's findings, the district court found the policy unconstitutional under strict scrutiny, entered an injunction, and ordered other equitable relief on behalf of the class. The City appeals, arguing that it was error to subject the Beale Street Sweep to strict scrutiny and error to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(2) when the precise members of the class were not ascertainable. The City also argues that there was insufficient evidence to support the jury's findings that the Sweep was the cause of Cole's arrest. For the reasons set forth below, we affirm the district court.

I.

Beale Street is a popular entertainment district in Memphis, consisting of two blocks of restaurants, bars, clubs, and other entertainment venues. The street is typically barricaded on each end, so most traffic is by foot. By Memphis ordinance, vendors may sell, and patrons may carry, alcoholic beverages on the sidewalks and streets when the street is closed to motor traffic. Tenn. Code Ann. § 57-4-102(27)(A)(iv); Memphis Ordinance §§ 7-4-15(C), 7-8-23.

Around 3:30 a.m. on August 26, 2012, Memphis Police Department ("MPD") officers arrested fellow MPD officer Lakendus Cole on Beale Street shortly after he exited a dance club. During the course of arrest, officers pressed Cole against a squad car with enough force to make two dents. Cole was charged with disorderly conduct, resisting stop/arrest, and vandalism over $500 (a felony). Although the charges were ultimately dropped, the arrest and pending charges resulted in damages to Cole, including loss of secondary

employment and reassignment from the MPD's organized crime unit to traffic patrol. He also sought medical treatment from a neurologist for physical injuries.

Cole and another named plaintiff, Leon Edmond,[1] brought a class-action lawsuit. They alleged that the City's routine practice of sweeping Beale Street in the early morning hours was unconstitutional. Plaintiffs defined the "Beale Street Sweep" as:

> [T]he policy, procedure, custom, or practice by which police officers of the [MPD] order all persons to immediately leave the sidewalks and street on Beale Street *when there are no circumstances present which threaten the safety of the public or MPD police officers.*

(DE 88, ID 769 (emphasis added).) They alleged that the Beale Street Sweep "incite[d] violence and create[d] an environment where Memphis police officers involved in this unlawful conduct bec[a]me highly aggressive, agitated, frenetic, and confrontational towards individuals lawfully standing and walking on Beale Street." (DE 1, ID 8–9.) Plaintiffs also brought individual claims for unlawful arrest and excessive force pursuant to 42 U.S.C. § 1983.[2]

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[1] The MPD arrested Edmond on Beale Street on May 5, 2012. At trial, witnesses testified that Edmond appeared to be highly intoxicated and had behaved erratically, which caused the manager of Club 152 to call the police. Ultimately, the jury did not find that the municipal practice caused Edmond's arrest. Edmond does not appeal.

[2] Plaintiffs voluntarily dismissed their claims against the individual officers.

The district court certified the following class definition under Federal Rule of Civil Procedure 23(b)(2): "All persons who have been unlawfully removed from Beale Street and/or adjacent sidewalks by City of Memphis police officers pursuant to the custom, policy and practice known as the Beale Street Sweep." (DE 88, ID 780, 805–08.) However, upon the City's motion to decertify or modify the class and before final judgment, the district court revised the definition of the Beale Street Sweep "in order to be more consistent with the strict scrutiny standard that is applied to cases regarding violations of an individual's fundamental rights, such as the fundamental right to intrastate travel." (DE 160, ID 2062.) The court revised the definition of the Beale Street Sweep (embedded in the class definition) as follows:

> [T]he policy, procedure, custom, or practice by which police officers of the Memphis Police Department order all persons to immediately leave the sidewalks and street on Beale Street *without consideration of whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety*.

(*Id.* at 2063 (emphasis added).)

In support of its pretrial motions, the City admitted that it had a practice of regularly sweeping Beale Street but argued that it discontinued the practice on or about June 14, 2012. The City also defended the practice as being related to public safety. After a five-day trial, a jury found otherwise. It concluded that the City "carried out a custom and/or well-established practice mainly on weekends at or about 3:00 a.m. of

preventing persons from standing and/or walking on the sidewalk or street of Beale Street" prior to *and* on or after June 14, 2012, (DE 141, ID 1899–1900), that the custom was "the cause of persons being prevented from standing and/or walking on the sidewalk or street of Beale Street" (*id.* at 1900), and that the practice occurred "without consideration to whether conditions throughout the [area] pose[d] an existing, imminent or immediate threat to public safety." (*Id.*) Further, the jury found that, since 2007, thousands of persons were cleared pursuant to the practice.

As for Cole, the jury found that the practice was the cause of his arrest, and that on the night of Cole's arrest, conditions on Beale Street did not pose an existing, imminent, or immediate threat to public safety. Cole was awarded $35,000 in compensatory damages for his arrest pursuant to the policy.

After trial, the district court granted plaintiffs' motion for class-wide declaratory and injunctive relief, permanently enjoining the City and its employees from "engaging in 'the Beale Street Sweep' [as previously defined]," but the court specifically noted that the injunction did not "prevent the MPD from conducting normal police work or clearing Beale Street under appropriate circumstances where an imminent threat exists to public safety throughout the Beale Street area." (DE 161, ID 2092–93.) In addition, the court ordered other equitable relief, including officer training and the distribution of bulletins to officers explaining that the practice is unconstitutional. The City timely appeals.

II.

A.

The City first argues that the district court erred in finding that the Beale Street Sweep infringed the fundamental right to intrastate travel and in subjecting the policy to strict scrutiny. In the City's view, the policy does not implicate the right to intrastate travel, and even if it does, the infringement is slight and, therefore, it should be reviewed for a rational basis.

In 2002, we became one of a few circuits to recognize the right to intrastate travel as "fundamental."[3] In *Johnson v. City of Cincinnati*, our court held that the Due Process Clause of the Fourteenth Amendment protects the "right to travel locally through public spaces and roadways." 310 F.3d 484, 495 (6th Cir. 2002). At issue in *Johnson* was a city ordinance that banned individuals arrested for certain drug offenses from entering designated "drug-exclusion zones" (such as Cincinnati's Over the Rhine neighborhood) for up to ninety days. *Id.* at 487–88. The ordinance's exclusion extended for up to one year upon conviction. *Id.* at 488.

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[3] The First, Second, and Third Circuits have also recognized a fundamental right to intrastate travel. *See Cole v. Hous. Auth. of Newport*, 435 F.2d 807 (1st Cir. 1970); *Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2003); *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990). Additionally, the Eighth Circuit has affirmed a district court's decision that assumed, without deciding, that a right to intrastate travel existed and laws burdening such rights were subject to intermediate scrutiny. *See Townes v. City of St. Louis*, 112 F.3d 514 (8th Cir. 1997) (per curiam) (unpublished table decision) ("[W]e conclude that the district court's judgment was correct and that an extended discussion is not warranted.").

Two plaintiffs, one of whom was prohibited from entering the neighborhood where her daughter and five minor grandchildren lived, challenged the ordinance as an unconstitutional infringement on their right to "freedom of movement in the form of their right to intrastate travel." *Id.* at 489.

We began by asking whether the right to intrastate travel was "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty," *id.* at 495 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)), and concluded that "the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage." *Johnson*, 310 F.3d at 495–98. We noted:

> Although the Supreme Court has not expressly recognized a fundamental right to intrastate travel, as early as the Articles of Confederation, state citizens "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom."

Id. at 496–97 (quoting *United States v. Wheeler*, 254 U.S. 281, 293 (1920)).

After concluding that "the right to travel locally through public spaces and roadways" was a "fundamental liberty interest," we considered the appropriate degree of scrutiny. *Id.* at 502. For guidance, we turned to the Third Circuit's decision in *Lutz*, which concerned a challenge to the City's anti-cruising ordinance that prohibited repetitive

driving through a few-block portion of downtown York. *Id.* (citing 899 F.2d at 256) The court in *Lutz*, drawing heavily from First Amendment time, place, and manner doctrine, observed that "[n]ot every governmental burden on fundamental rights must survive strict scrutiny" and concluded that "reviewing all infringements on the right to travel under strict scrutiny is just as inappropriate as applying no heightened scrutiny." *Id.* at 269. Just as in the speech context, the "right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases—even on roads specifically designed for public travel" because "[u]nlimited access to public . . . roadways would result not in maximizing individuals' opportunity to engage in protected activity, but chaos." *Id.* To avoid such disorder, state and local governments should be afforded "some degree of flexibility to regulate access to, and use of, the publicly held instrumentalities of . . . travel." *Id.* The court ultimately reviewed the ordinance under intermediate scrutiny, a test the ordinance passed because its scope was limited to a specific location—"a distance of no more than several blocks" that was "undisputedly affected by the current cruising problem"—and left ample alternative routes to travel through town. *Id.* at 270.

The *Johnson* court then compared the ordinance at issue in *Lutz* to Cincinnati's drug-exclusion zone ordinance and concluded that strict scrutiny was the more appropriate standard. 310 F.3d at 502. We noted that, unlike York's anti-cruising rule, the drug-exclusion ordinance did not regulate the time or the manner in which people accessed the Over the Rhine neighborhood. Rather, it broadly prohibited

access to the entire neighborhood for an extended period of time—ninety days after a drug arrest and one year after a drug conviction. *Id.* at 494, 502. Our decision to apply strict scrutiny in *Johnson* was based entirely on this cogent difference in the scope of the ordinances, and we were quick to "acknowledge the strength of the Third Circuit's reasoning" in *Lutz* and noted the possibility that intermediate scrutiny could be applied to a "less severe regulation of localized travel." *Id.* at 502. In a footnote, we cautioned that First Amendment jurisprudence concerning "place" regulations would be difficult to translocate to the travel context because "regulating the place of speech does not foreclose speech or association in the same way as regulating the place of travel might." *Id.* at 502 n.7. Nonetheless, we emphasized the "possibility that a narrow 'place' restriction might be more appropriately analyzed under intermediate scrutiny." *Id.*

In support of its argument that we should review the policy for a rational basis, the City draws a parallel between this case and our decision in *LULAC v. Bredesen*, 500 F.3d 523 (6th Cir. 2007). We fail to see any similarity. *LULAC* involved a Tennessee law that prohibited non-citizens and unlawful permanent residents from receiving or renewing their driver's licenses, but which did allow for the issuance of non-photographic driving certificates to non-resident aliens. *Id.* at 535. There, we held that "[a] state law implicates the right to travel when it actually deters travel, when impeding travel is its primary objective, or when it uses a classification that serves to penalize the exercise of the right." *Id.* We reasoned that the driver's license law did not implicate the right to travel because

it resulted merely in inconvenience, namely the need for non-resident aliens to carry multiple identification papers while driving. *Id.* "To the extent this inconvenience burden[ed] exercise of the right to travel at all, the burden [was] incidental and negligible, insufficient to implicate denial of the right to travel." *Id.* Because the infringement was at most minor, we affirmed the district court's analysis under the rational-basis standard. *Id.* at 235–36. By contrast, the primary purpose of the Beale Street Sweep was to impede travel, and it resulted in the broad denial of access to a popular, two-block area of a public roadway and sidewalk. This is much more than an incidental or negligible inconvenience; it clearly implicates the right to travel and should be subject to heightened scrutiny.

B.

As noted above, in *Johnson* we applied strict scrutiny because the drug-exclusion zone ordinance "impose[d] a more severe restriction" than "regulating the manner in which affected individuals access Over the Rhine (i.e., an anti-cruising ordinance), or the time of access (i.e., a curfew)" by "broadly prohibiting individuals to access the entire neighborhood, which [Cincinnati] advertises as the largest national historic district in the nation, the City's fastest growing entertainment district and home to nearly 10,000 City residents." 310 F.3d at 502. The Beale Street Sweep, on the other hand, implicated a mere two-block stretch for limited periods of time between 3 and 5 a.m., typically on weekend mornings and sometimes after special events. Although the jury did not make a specific factual finding, it heard undisputed evidence that the

MPD normally reopened Beale Street after the Sweep.[4] The evidence at trial established that around thirty minutes before the Sweep, MPD officers used flashing blue lights and a PA announcement to warn visitors that the street would be swept. Officers instructed visitors to either enter a business along Beale Street or leave the barricaded street area. Posted signs also indicated that the street would be cleared at 3 a.m. Visitors were not prohibited from patronizing businesses altogether, but they were temporarily cleared from the street and adjacent sidewalks. Accordingly, the Beale Street Sweep was considerably more limited in time and place than the broad drug-exclusion zone ordinance in *Johnson*.

[4] None of the officers testified to the exact length of time that Beale Street was closed. However, several witnesses testified that the Sweep occurred at approximately 3:00 a.m. and the street was reopened most nights. Merchants were allowed to stay open until 5 a.m., suggesting that the Sweep typically lasted no more than two hours.

Intermediate scrutiny is appropriate in this case.[5] The Beale Street Sweep has much more in common with the anti-cruising ordinance at issue in *Lutz* than the broad drug-exclusion zone ordinance in *Johnson.* It was limited in scope to a specific, two-block radius, and it was limited in time to specific two hours periods on weekend mornings and following special events. The policy appears to be exactly the type of "narrow 'place' restriction" the *Johnson* court contemplated would be appropriately reviewed under intermediate scrutiny. 310 F.3d at 502 n.7.

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[5] At least one other court has applied strict scrutiny to intrastate travel restrictions, but that case is readily distinguishable. In *Embry v. City of Cloverport*, a district court applied strict scrutiny to a broad curfew ordinance making it "unlawful for any person to be on a street, alleyway, highway, roadway, sidewalk or any other public place in the city" from 12:00 midnight to 5:00 a.m. Sunday through Thursday and 1:00 a.m. to 5:00 a.m. on Friday and Saturday. No. 3:02CV-560-H, 2004 WL 191613, at *1 (W.D. Ky. Jan. 22, 2004). The regulation at issue in *Embry* is much broader in scope (all public places in the city) and in time (between four to five hours every night) than the Beale Street Sweep.

The Second Circuit has intimated that it would apply strict scrutiny to a similar curfew. In *Ramos v. Town of Vernon*, the court analyzed a juvenile curfew under intermediate scrutiny but observed in dicta that it would have reviewed the curfew for strict scrutiny had it applied to adults. 353 F.3d 171, 176 (2d Cir. 2003). As in *Embry*, the curfew was considerably broader in time and place than the Beale Street Sweep. *See id.* at 172 (making it unlawful for "any person under 18 years of age" "to remain idle, wander, stroll or play in *any public place or establishment in the Town*" from 11 p.m. to 5 a.m. on Sunday through Thursday and 12:01 a.m. to 5 a.m. on Friday and Saturday nights (emphasis added)).

C.

Before assessing the Sweep under intermediate scrutiny, we first recognize two errors identified by the dissent. The dissent believes that the district court erred in subjecting the Beale Street Sweep to strict scrutiny and that the court compounded this error by asking the jury whether the City carried out its policy "without consideration to whether conditions throughout the Beale Street area pose[d] an existing, imminent, or immediate threat to public safety." (Slip Op. at 17–18.) (DE 141, Page ID 1899–1900.) In the dissent's view, the language of Jury Question 4, and therefore the jury's factual findings, are inextricably intertwined with strict scrutiny and can support a judgment under only that standard. (Slip Op. at 18–19.)

We generally "review[] a district court's jury instructions for an abuse of discretion." *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1074 (6th Cir. 2015). We assess "whether, taken as a whole, the instructions adequately inform the jury of the relevant considerations and provide the jury with a sound basis in law with which to reach a conclusion." *Id.* (quoting *Pivnick v. White, Getgey & Meyer Co.*, 552 F.3d 479, 488 (6th Cir. 2009)). "Erroneous jury instructions require reversal only if they are confusing, misleading, and prejudicial," not "where the error is harmless." *Id.* at 1074–75.

While the district court was incorrect to apply strict scrutiny in analyzing the Beale Street Sweep, that error was ultimately harmless. Jury Question 4's language did not require the City to meet a strict scrutiny standard, and even if so, the evidence adduced

at trial and the jury's other factual findings support our conclusion that the Beale Street Sweep does not pass muster under either strict or intermediate scrutiny.

To survive intermediate scrutiny, the Beale Street Sweep must be "narrowly tailored to meet significant city objectives." *Lutz*, 899 F.2d at 270; *see Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 594 (6th Cir. 2003). Unlike strict scrutiny, however, intermediate review does not require that the practice be the "least restrictive or least intrusive means" of serving the government's objectives. *Neinast*, 346 F.3d at 594 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). Rather, "all that is required is 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'" *Id.* (quoting *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

Under intermediate scrutiny, the City bears the burden of identifying a "significant" government interest that was furthered by the Beale Street Sweep.[6] *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014) (citing *Fox*, 492 U.S. at 480 (1989)); *see also Lutz*, 899 F.2d at 270. The City has identified public safety, which we have recognized as a "compelling" interest. *See, e.g.*,

[6] Because we conclude that intermediate scrutiny is appropriate and because the City bears the burden under that standard, we find no merit in the City's argument that the district court improperly shifted the burden of proof to the City in Jury Question 4. Under either strict or intermediate scrutiny, the City would have had to show that the Sweep furthered its stated goal of increased public safety. We also point out that the City likely waived this argument on appeal because it, in fact, agreed to the language used in Jury Question 4.

Johnson, 310 F.3d at 502. Therefore, the outcome-determinative question is whether the Beale Street Sweep bears a reasonably close relationship to the City's stated goal of public safety.

The jury found that MPD officers "carried out a custom and/or well-established practice mainly on weekends at or about 3:00 a.m. of preventing persons from standing and/or walking on the sidewalk or street of Beale Street" both prior to and after June 14, 2012. (*See* DE 141, Page ID 1899–1900.) This finding alone strongly supports the conclusion that the Sweep was not tied to public safety concerns but rather to a specific, arbitrary time on certain nights. Importantly, the City points to no evidence in the record showing that the decision to sweep Beale Street at or around 3 a.m. was in any way related to conditions or potential conditions on the ground, and the testimony of Arley Knight, a deputy chief with the MPD, precludes a presumption that the timing and execution of the sweeps was related to public safety. Knight observed that the City's policy was to sweep Beale Street at 3 a.m. "irrespective of emergencies." (DE 210, Page ID 2861.) Other officers also testified that the Sweep was a routine practice that occurred at 3 a.m. on weekend nights, regardless of conditions on the street. There were also signs posted around the area, noting that the street was cleared on weekend nights at 3 a.m.

The jury further found that the sweep occurred "without consideration to whether conditions throughout the Beale Street area pose[d] an existing, imminent or immediate threat to public safety." (DE 141, ID 1900.) Unlike the dissent, we do not believe that the language of Jury Question 4 improperly forced

the City to prove that the Sweep was the least restrictive means of ensuring public safety on Beale Street. While there is no doubt that, prior to trial, the district court concluded that strict scrutiny applied, Jury Question 4 simply asked the jury to determine, as a factual matter, whether the City took public safety into consideration in carrying out the Beale Street Sweep, not whether the practice was narrowly tailored to serve a compelling government interest. While the jury's finding that the policy occurred notwithstanding "existing, imminent or immediate threat[s] to public safety" supports the conclusion that the policy fails strict scrutiny, it likewise supports a finding that the Sweep lacks the connection to public safety necessary to survive intermediate scrutiny.

Although we discern no error in the wording of Jury Question 4, even assuming the question imposed too high a burden on the City, any mistake was ultimately harmless. Under both strict and intermediate scrutiny, the City bore the burden of justifying the Sweep to its stated goal of public safety. There is no indication in the trial transcript that the City lost at trial because it could not prove that the Sweep was the least restrictive means possible. Rather, the evidence adduced at trial and the jury's factual findings show that the timing and execution of the Sweep policy was tied to an arbitrary time, not to existing conditions on the ground. And without the requisite connection to public safety, the policy fails under intermediate scrutiny. Moreover, the error in the district court's analysis affected only its own legal analysis, not the reliability of the jury's factual finding.

III.

Before the district court, Cole sought class certification based on either Rule 23(b)(2) or (b)(3) of a class comprised of "[a]ll persons who have been unlawfully removed from Beale Street and/or adjacent sidewalks by City of Memphis police officers pursuant to the custom, policy and practice known as the Beale Street Sweep." (DE 88, ID 780.) The district court analyzed whether the proposed class satisfied Rule 23(a), and concluded that the class was sufficiently numerous, that there were common questions of law or fact, that Cole's claims typified the class's claims, and that Cole and his counsel would fairly and adequately represent the interests of the class. The court went on to determine that although the proposed class did not satisfy Rule 23(b)(3), it did satisfy 23(b)(2). It observed that the "nature of the primary relief sought in 23(b)(2) class actions, injunctive or declaratory relief, does not require that the class be as narrowly confined as under either (b)(1) or (b)(3)." (*Id.* at 802 (quoting *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974)) (brackets omitted).) In its order denying the City's motion to modify the class, the district court further noted that "the relief sought—an injunction against the further execution of the Beale Street Sweep—provide[d] a single remedy to protect all class members from future harm." (DE 160, Page ID 2060.) The district court adopted the approach of the First Circuit in *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972), where the court found that because 23(b)(2) classes do not require notice, class membership need not be precisely ascertained. Accordingly, the district court held that ascertainability of class membership was not a requirement for Rule 23(b)(2) certification.

The City argues on appeal that ascertainability is an implicit requirement for class certification, even classes certified pursuant to Rule 23(b)(2). It argues further that the inclusion of the word "unlawfully" in the class definition means that the probable membership of the class cannot be ascertained without case-by-case determinations. Cole responds that, pursuant to Rule 23(b)(2), the class sought and won a single remedy that will protect all class members from future harm, and that thus, ascertainability was not necessary for certification.

We review class-certification decisions for an abuse of discretion. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013). "We will reverse the class certification decision . . . only if [the party opposing certification] makes a strong showing that the district court's decision amounted to a clear abuse of discretion." *Id.* "An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Id.* (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012)). "We will not find an abuse of discretion unless we reach a definite and firm conviction that the district court committed a clear error of judgment." *Id.* (citation and internal quotation marks omitted).

Although Rule 23(a) has no express ascertainability requirement, many courts, including our own, have held that it is an implicit requirement of class certification. *See Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Young*, 693 F.3d 532 (6th Cir. 2012). In

Young, we adopted the ascertainability requirement noting that certification necessitated "a class description [that is] sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." 693 F.3d at 538; *see also Rikos v. Proctor & Gamble Co.*, 799 F.3d 497, 524–26 (6th Cir. 2015). However, *Young* involved a Rule 23(b)(3) class, 693 F.3d at 536, as have the other cases in which we analyzed this requirement. *See, e.g.*, *Rikos*, 799 F.3d at 524–26; *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014). Thus, whether ascertainability is a requirement for (b)(2) actions is a question of first impression in our court.

At least three of our sister circuits have held that "ascertainability" is inapplicable to Rule 23(b)(2). *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015), *Shook v. El Paso Cnty.*, 386 F.3d 963 (10th Cir. 2004); *Yaffe*, 454 F.2d 1362. The Third Circuit, in *Shelton*, began its discussion of the requirement by noting that Rule 23(b)(2) and 23(b)(3) "create two remarkably different litigation devices." 775 F.3d at 560. Rule 23(b)(3) "allows class certification in a much wider set of circumstances" than (b)(2). *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011)). It is such an "adventuresome innovation" that Congress included additional "procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted). For instance, Rule 23(b)(3) requires certifying courts to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior

to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). And unlike (b)(1) and (b)(2) classes, (b)(3) class members are entitled to notice and are able to opt-out of the class. *Id.* (c)(2)(B).

In the Rule 23(b)(3) context, ascertainability aids the inherent efficiencies of the class device by ensuring administrative feasibility, and as we read our own precedent and the precedent of other courts, ascertainability is a requirement tied almost exclusively to the practical need to notify absent class members and to allow those members a chance to opt-out and avoid the potential collateral estoppel effects of a final judgment. *See, e.g.*, *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012) (noting that ascertainability "protects absent class members by facilitating the best notice practicable" and "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable"). But "the requirement that the class be defined in a manner that allows ready identification of class members serves several important objectives that either do not exist or are not compelling in (b)(2) classes." *Shelton*, 775 F.3d at 561. Since notice is not required for a (b)(2) class, the practical efficiencies that come with knowing the precise membership of the class are nonexistent. Likewise, without notice and an opportunity to opt-out, absent (b)(2) class members would not be estopped by a final judgment for the defense.

As discussed above, administering a (b)(3) class is a more procedurally complicated task than overseeing a (b)(2) class. *See Wal-Mart*, 564 U.S. at 362–63 ("When

a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether [a] class action is a superior method of adjudicating the dispute.") The main the purpose of a (b)(2) class is to provide relief through a *single* injunction or declaratory judgment. *Id.* at 360. "Because the focus in a (b)(2) class is more heavily placed on the nature of the remedy sought, and because a remedy obtained by one member will naturally affect the others, the identities of individual class members are less critical in a (b)(2) action than in a (b)(3) action." *Shelton*, 775 F.3d at 561.

The advisory committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context. *See* Fed. R. Civ. P. 23 advisory committee's note to amendment 1966. The committee's guidance states that (b)(2) is an appropriate device to use "even if [the action directed towards the class] has taken effect or is threatened only as to one or a few members of the class." *Id*. And the note further provides that "illustrative" examples of a (b)(2) class are civil-rights actions where members of the class "are incapable of specific enumeration." *Id.* As the Third Circuit reasoned, "[i]n light of this guidance, a judicially created implied requirement of ascertainability—that the members of the class be *capable* of specific enumeration—is inappropriate for (b)(2) classes." *Shelton*, 775 F.3d at 561.

Here, the plaintiffs seek a single remedy: an injunction prohibiting the City from reenacting the Beale Street Sweep. As the district court observed, this injunction provides the sole remedy necessary to

protect the affected class. The precise identity of each class member need not be ascertained here, particularly given that notice is not required as it would be in a (b)(3) class. The decisions of other federal courts and the purpose of Rule 23(b)(2) persuade us that ascertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief.

IV.

The City's final claim of error is there was insufficient evidence that the Beale Street Sweep was the "moving force" behind Cole's arrest. The City acknowledges that it failed to preserve this issue by failing to renew its Rule 50(a) motion for judgment as a matter of law as required by Rule 50(b). Accordingly, this issue is forfeited. *See, e.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 407 (2006); *CFE Racing Prods., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 583–84 (6th Cir. 2015) ("[F]ailure to renew a motion for judgment as a matter of law following the jury verdict forecloses a party's challenge to the sufficiency of the evidence." (internal quotation marks omitted)).

Even assuming the issue is preserved, it fails on the merits. "If there is any credible evidence to support a verdict, it should not be set aside." *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990). At trial, Officer Williams testified that the MPD performed the Beale Street Sweep on the night of Cole's arrest and two officers, including one of Cole's arresting officers, Chris Bing, testified that Cole was arrested because he did not leave the street when the police told him to move. This is sufficient credible

evidence to support the jury's express finding that the Beale Street Sweep "was the cause of Plaintiff Cole's unlawful arrest." (DE 141, ID 1903–04.)

V.

For these reasons, we affirm the judgment of the district court.

CONCURRING IN PART AND DISSENTING IN PART

GRIFFIN, Circuit Judge, concurring in part and dissenting in part. This appeal implicates the right to intrastate travel, "an important and largely unexplained area of constitutional jurisprudence." *Lutz v. City of York*, 899 F.2d 255, 256 (3d Cir. 1990). When our court last examined it, we declared the right fundamental but left open the question of whether strict or intermediate scrutiny governs laws burdening the right. *Johnson v. City of Cincinnati*, 310 F.3d 484, 496–98, 502 (6th Cir. 2002). Today, the majority and I agree that intermediate scrutiny is the appropriate legal standard for constitutional review of the City of Memphis's practice of sweeping Beale Street. However, the district court judge and district court jury applied the more onerous legal standard of strict scrutiny. Despite the error of law and misdirected findings of fact, my colleagues affirm. I respectfully disagree and thus dissent in part.

Unlike my colleagues, I conclude that a reasonable juror could have rendered a different verdict with the instructions framed correctly in terms of a *reasonable potential threat* to public safety—as opposed to the

narrower and erroneous "existing, imminent or immediate threat to public safety." Here, applying the wrong legal standard of strict scrutiny, the district court relied wholly on the jury's factual findings in ruling that the practice is unconstitutional. Absent findings of fact addressing the material factors of intermediate scrutiny, we lack a sufficient factual basis to decide the case. I therefore respectfully dissent on the issue of whether the practice survives intermediate scrutiny. In all other respects, I concur in the majority opinion.

To survive intermediate scrutiny, a municipal practice must be "narrowly tailored to meet significant city objectives." *See Lutz*, 899 F.2d at 270; *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Unlike strict scrutiny, intermediate review does not require that the practice be the "least restrictive or least intrusive means" of serving the government's objectives. *See, e.g.*, *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 819–20 (6th Cir. 2005) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798–800 (1989)).

Under intermediate scrutiny, the burden is on the City to identify a "significant" government objective that the Beale Street Sweep is narrowly tailored to achieve. *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014) (citing *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)) ("The City bears the burden of showing the Policy satisfies [intermediate] scrutiny."); *see also Lutz*, 899 F.2d at 270. The City partially satisfied its burden by identifying its interest in protecting public safety, which we have recognized

as a "compelling" interest. *See, e.g.*, *Johnson*, 310 F.3d at 502.

In this case, the outcome-determinative question is whether the City's practice was narrowly tailored to protect public safety. However, the district court instructed the jury using a different and more onerous standard and decided the case applying the wrong law. Because the jury's factual findings and the district court's legal ruling are inextricably intertwined and premised upon the incorrect legal standard of strict scrutiny, I would reverse and remand to the district court for further proceedings applying the correct law.

A remand is warranted because "[r]eversal is appropriate when the trial court 'applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact.'" *Brumley v. Albert E. Brumley & Sons, Inc.*, 727 F.3d 574, 577 (6th Cir. 2013) (citation omitted); *see also Siding and Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 901–02 (6th Cir. 2016); and *National Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 717–20 (6th Cir. 2003).

In the district court, the City defended its sweep practice as furthering public safety, arguing that the City's decision to direct pedestrians to either enter a club or leave the street in the early morning hours "on some Saturday and Sunday nights is a narrow and reasonable intrusion" on individual rights, designed to "protect[] the safety of persons and property" on Beale Street. Applying strict scrutiny, however, the district court denied summary judgment in favor of the City on the grounds that there were genuine issues of material fact regarding the nature of the practice. Fact-finding

was therefore necessary. At the subsequent trial, the district court required the City to prove that it did not carry out the challenged practice "unless [the] conditions throughout the Beale Street area pose[d] an *existing, imminent or immediate* threat to public safety." (Emphasis added.) The jury found as a matter of fact that the City failed to meet this burden, and, on this basis, the district court entered an injunction ruling the practice unconstitutional under the legal standard of strict scrutiny.

The majority agrees that the district court erred in its jury instructions and application of the law. Under the correct legal standard of intermediate scrutiny, the government was not required to prove that its practice was the least restrictive means to protect public safety. Thus, a *reasonable potential risk* to public safety, as opposed to an "existing, imminent or immediate threat to public safety," was sufficient to justify a narrow time, place, and manner restriction like the Beale Street Sweep, which was limited to a two-block area for typically no longer than two hours in the early morning hours of some weekends.

As the City emphasizes, "Beale Street is a public roadway unlike any other" in the City of Memphis, the State of Tennessee, and perhaps the United States. By City ordinance, vendors may sell, and patrons may carry, alcoholic beverages on the sidewalks and street when the street is closed to motor traffic. *See* Tenn. Code Ann. § 57-4-102(27)(A)(iv); City of Memphis Ordinances §§ 7-4-15(C)(4), 7-8-23. Alcohol may be sold until 5:00 a.m. on Beale Street. *See* Tenn. Code Ann. §§ 57-4-102(27)(A), 57-4-203(d)(4). The City routinely uses barricades to restrict access to Beale

Street, both to motor vehicle and foot traffic, and subjects patrons to identification and weapons checks.

Law enforcement is tasked every day with maintaining public safety on Beale Street among thousands of intoxicated persons concentrated in a two-block area with a history of disorderly conduct, stampedes, fights, sexual assaults, and gang violence. In that context, the City's decision to clear a two-block section of Beale Street for fewer than two hours in the early morning hours of some weekends may be narrowly tailored (just not the least restrictive means) to protect public safety. Moreover, the record demonstrates that the City did not carry out the practice every weekend morning. Rather, officers awaited a real-time determination by a supervisor to sweep "if the lieutenants felt like . . . *there was a need to [do] it*." (Emphasis added.) Deputy Chief Arley Knight of the Memphis Police Department testified that the practice was usually carried out between 3:00 a.m. and 5:00 a.m. on weekends because that was the time when they "felt [the police] were having the most problems." Rather than sweep Beale Street regardless of the conditions, Knight further testified that the practice was carried out at "the discretion of [the supervising] lieutenant" and that "*the crowds dictated the safety*." (Emphasis added.) The jury's finding that this practice occurred "*mainly* on weekends at or about 3:00 a.m." (emphasis added) is consistent with the City's position.

Given Beale Street's unique context and history of incidents threatening public safety in the early morning hours, as well as the discretion that supervising officers exercised in carrying out the

practice, a reasonable juror could have found that the City took into account reasonable potential threats to public safety. When I consider this possibility next to the limited time restriction (less than two hours on some weekends) and limited place restriction (two-block street), I disagree with the majority's decision to affirm on the grounds of harmless error.

Here, the district court's ruling is premised upon factual findings framed in terms of strict, as opposed to intermediate, scrutiny. Although not articulated in the majority opinion, my colleagues must conclude that the preserved constitutional errors did not affect the substantial rights of the City of Memphis. *See* Fed. R. Civ. P. 61. I respectfully disagree.[1]

As the district court previously ruled regarding the motions for summary judgment, genuine issues of material fact exist regarding the Beale Street Sweep at issue. In my view, the constitutional legal errors committed by the district court cannot be cured by the inappropriate fact-finding attempted by my appellate colleagues.

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[1] While the majority does not specify its standard of review for these preserved, constitutional errors, the errors certainly affect the City's substantial rights and are not harmless beyond a reasonable doubt. *See O'Neal v. McAninch*, 513 U.S. 432, 441–42 (1995); *Chapman v. California*, 386 U.S. 18, 24 (1967); *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 303 (2007); and *United States v. Reid*, 751 F.3d 763, 767 (6th Cir. 2014) ("The civil and criminal harmless error rules after all spring from the same statute, use more or less the same language, and in general require courts to apply the same standard." (citation omitted).

I would reverse and remand for further proceedings applying the correct law of intermediate scrutiny. In all other respects, I concur in the majority opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 2:13-cv-02117-JPM-dkv

[Filed June 3, 2015]

LAKENDUS COLE and LEON EDMOND, individually and as representatives of all others similarly situated,	)
Plaintiffs,	)
v.	)
CITY OF MEMPHIS, TENNESSEE,	)
Defendant.	)

ORDER GRANTING DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, on behalf of the Class, have requested declaratory and injunctive relief in the instant case. For the reasons that follow, the Court finds that declaratory and injunctive relief will clarify and settle important legal relations in the Memphis Beale Street Entertainment District and afford relief from uncertainty and controversy regarding policing policies in connection with Beale Street. Based on the extensive

record developed and the evidence submitted in the jury trial in the case, the Court also determines that the City of Memphis' practice of ordering all persons to immediately leave the sidewalks and street on Beale Street **without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety** is unconstitutional. While the City of Memphis asserts that it has now abandoned the unconstitutional practice, evidence to the contrary, including the jury's factual findings, has been received by the Court. Accordingly, the Court finds that the weight of the evidence compels issuance of narrowly tailored injunctive and other equitable relief in order to remedy the City's constitutional violations.

I. BACKGROUND

A. Factual Background

Plaintiff Lakendus Cole is a police officer employed with the City of Memphis Police Department Organized Crime Unit, and Plaintiff Leon Edmond is a Special Agent employed with the Bureau of Alcohol, Tobacco, Firearms and Explosives. (Compl. at 1-2, ECF No. 1.)

Plaintiffs assert a class action claim against Defendant City of Memphis ("the City") for

> the policy, procedure, custom, or practice by which police officers of the Memphis Police Department ("MPD") order all persons to immediately leave the sidewalks and street on Beale Street when there are no circumstances present which threaten the safety of the public

> or MPD police officers ("the Beale Street [] Sweep").

(Id. at 2.) According to Plaintiffs, "[t]he Beale Street [] Sweep routinely occurs in the early morning hours on Saturdays and Sundays and during certain scheduled entertainment events on weekdays." (Id.) Plaintiffs assert that the Beale Street Sweep "incites violence amongst its employee police officers and creates an environment where they become aggressive, agitated, frenetic, and confrontational with persons lawfully standing on a sidewalk or upon Beale Street." (Id.)

Under 42 U.S.C. § 1983, Plaintiffs Cole and Edmond also assert individual claims against the City of Memphis. With regard to Plaintiff Cole, Plaintiffs assert the following: "Plaintiff Cole, while off-duty and dressed in civilian clothing, was outside of Club 152 on Beale Street. . . ." (Id. ¶ 30.) "Plaintiff Cole was not intoxicated and had not consumed an alcoholic beverage." (Id. ¶ 31.) "Pursuant to the Beale Street Sweep, prior to Plaintiff exiting Club 152, MPD police officers including the Individual Defendants ordered all individuals to immediately leave the sidewalks and street in the Beale Street Entertainment District." (Id. ¶ 32.) "The Individual Defendants suddenly grabbed Plaintiff Cole and[,] without reasonable cause to do so[,] began to assault and viciously attack him." (Id. ¶ 35.) "The Individual Defendants slammed Plaintiff Cole's body into the police vehicle twice with such force that the impact dented the body of the police vehicle." (Id. ¶ 36.) The Individual Defendants handcuffed Plaintiff Cole, placed him in the back of the police vehicle, and transported Plaintiff Cole to the Shelby

County Jail. (Id. ¶¶ 37-38.) All criminal charges were later dismissed. (Id.¶ 41.)

With regard to Plaintiff Edmond, Plaintiffs allege: "Plaintiff Edmond, while off-duty and dressed in civilian clothing and visiting Memphis[,] was walking in the Beale Street Entertainment District enjoying the sights and music." (Id. ¶ 46.) "Plaintiff Edmond was not intoxicated." (Id. ¶ 47.) As Plaintiff Edmond attempted to enter Club 152 on Beale Street, "Plaintiff Edmond and other family members were approached by Defendant Cooper who ordered Plaintiff Edmond and his family member [sic] to stop walking and demanded that they speak to her regarding their attempt to enter Club 152." (Id. ¶ 51.) "Defendant Cooper and Defendant Skelton placed Plaintiff Edmond under arrest for public intoxication." (Id. ¶ 54.) After advising Defendant Cooper and Defendant Skelton that Plaintiff Edmond was a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), MPD police officers contacted Plaintiff Edmond's supervisor, who contacted another ATF special agent Marcus Watson in charge of the Memphis Field Office. (Id. ¶¶ 55-57.) After Watson arrived on the scene, Plaintiff Edmond was released from police custody. (Id. ¶ 58.)

Defendant City of Memphis claims that the practice of "advis[ing] patrons standing on Beale Street at 2:30am to make their way into a club or make preparations to leave Beale Street" and, after 3:00 a.m., "uniformly ordering patrons off of Beale Street, with the option of entering a club" has been "abandoned by order of MPD command staff." (Def. City's Resp. to Pl.'s Mot. ¶¶ 1-2, ECF No. 40.) The City contends that the

practice was terminated on June 14, 2012. (ECF No. 40-1 at 2.) The City further asserts that Plaintiffs' interactions with police as described in their Complaint were in response to reports of Plaintiffs' illegal conduct. (ECF No. 40 ¶¶ 3–6.)

The City alleges that on August 26, 2012, MPD officers responded to a disorderly conduct call near 152 Beale Street, where "Officers instructed Plaintiff Cole to go inside the club [Club 152] or leave the street. Plaintiff Cole refused to comply and acted disrespectfully towards the officers." (Id. ¶¶ 3-4 (alteration in original).)

The City asserts that on May 5, 2012, "MPD officers responded to a disturbance call at the entrance to 152 Beale." (Id. ¶ 5.) "At that time officers came upon a visibly intoxicated Plaintiff Edmonds in an altercation with the doorman and bouncers at 152 Beale. MPD officers removed Plaintiff from the area and discovered that he was presently armed with a GLOCK Model 27 .40 caliber pistol." (Id. ¶ 6.)

B. The Trial

This case was tried by a jury beginning on January 20, 2015. (ECF No. 125.) The jury returned their verdict on January 27, 2015. (ECF No. 138.) In the verdict, the jury made four findings relevant to class relief: (1) that the City of Memphis had "through its police officers, carried out a custom and/or well-established practice mainly on weekends at or about 3:00 a.m. of preventing persons from standing and/or walking on the sidewalk or street of Beale Street prior to [and on or after] June 14, 2012" (Verdict ¶¶ 1-2, ECF No. 141); (2) that this well-established

practice "occurs without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety" (id. ¶ 4); (3) that the well-established practice was "the cause of persons being prevented from standing and/or walking on the sidewalk or street of Beale Street" (id. ¶ 3); and (4) that "since at least 2007, thousands of persons were cleared off of Beale Street pursuant to" that practice. (Id. ¶ 5.)

With regard to Plaintiff Cole's individual claim for damages, the jury made five findings: (1) that Cole had been removed from Beale Street in the manner described above; (2) that "conditions throughout the Beale Street area did NOT pose an existing, imminent or immediate threat to public safety at the time the police officers initiated" the sweep on the night Cole was removed and arrested; (3) that Cole was arrested without probable cause in violation of the Fourth Amendment; (4) that the Memphis Police Department used excessive force during Cole's arrest in violation of the Fourth Amendment; and (5) that the well-established practice caused the violations of Cole's Fourth Amendment rights and damages to Cole. (Id. ¶¶ 7-16.) The jury awarded Cole $35,000 in damages. (Id. ¶ 17.)

With regard to Plaintiff Edmond's individual claim for damages, the jury found that Edmond had not been removed from Beale Street pursuant to the well-established practice described above and Edmond's arrest was not unlawful.[1] (Id. ¶¶ 18, 21.)

[1] Although the jury was not required to answer question 19 on the Jury Verdict Form, the jury found that "the conditions throughout the Beale Street area did NOT pose an existing, imminent or

Accordingly, the jury did not award any damages to Edmond. (Id. ¶ 30.)

C. Procedural History

On February 25, 2013, Lakendus Cole and Leon Edmond (collectively, "Plaintiffs") filed a Class Action Complaint asserting deprivation of constitutional rights and seeking injunctive relief and monetary damages. (Compl. ECF No. 1.) On April 4, 2013, Defendant Cari Cooper filed an Answer. (ECF No. 6.) On April 11, 2013, Defendant City of Memphis filed an Answer. (ECF No. 8.) On June 14, 2013, Defendant Robert Skelton filed an Answer. (ECF No. 25.) On June 18, 2013, Defendants Christopher Bing, John Faircloth, Robert Forbert, and Samuel Hearn filed an Answer. (ECF No. 27.)

On April 2, 2013, Defendants Robert Forbert and John Faircloth filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 5.) On April 10, 2013, Plaintiffs filed a Response in opposition to the Motion to Dismiss. (ECF No. 7.) On June 4, 2013, the Court entered an Order granting in part and denying in part the Motion to Dismiss. (ECF No. 22.) The Court found that Plaintiffs have stated a claim pursuant to Rule 8(a) of the Federal Rules of Civil Procedure but dismissed Plaintiffs' substantive due-process claim under the Fourteenth Amendment as to Defendants Robert Forbert and John Faircloth. (ECF No. 22.)

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immediate threat to public safety at the time the police officers initiated the custom and/or well-established practice described in Question 1 on May 5, 2012." (Verdict ¶ 19.)

On May 16, 2013, Defendant Christopher Bing filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 12.) On May 28, 2013, Plaintiffs filed a Response in opposition to the Motion to Dismiss. (ECF No. 13.) On June 6, 2013, the Court entered an Order granting in part the Motion to Dismiss as to Plaintiffs' substantive due-process claim under the Fourteenth Amendment but denying in part the Motion as to all other claims against Bing. (ECF No. 23.)

On May 31, 2013, Defendant Samuel Hearn filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 21.) No Response was filed within the required time. On July 10, 2013, the Court entered an Order granting in part the Motion to Dismiss as to Plaintiffs' substantive due-process claim under the Fourteenth Amendment but denying in part the Motion as to all other claims against Hearn. (ECF No. 29.)

On November 27, 2013, Plaintiffs filed the Motion to Certify Class. (ECF No. 36.) Defendant City of Memphis filed a Response on December 18, 2013. (ECF No. 40.) On January 9, 2014, the Court held a hearing on the Motion. (ECF No. 42.) Plaintiffs filed a Supplemental Memorandum of Law in support of its Motion for Class Certification on June 30, 2014. (ECF No. 85.) Defendant filed its Response to the Supplemental Memorandum on July 7, 2014 (ECF No. 86), and Plaintiffs filed their Reply on July 14, 2014 (ECF No. 87). On September 29, 2014, the Court granted in part and denied in part Plaintiffs' Motion to Certify Class ("Order Certifying Class"). (ECF No. 88.) In the Court's Order, the Court certified Plaintiffs' proposed class under Rule 23(b)(2) of the Federal Rules of Civil Procedure for the purposes of injunctive and

declaratory relief, and denied certification under Rule 23(b)(3). (ECF No. 88 at 41.)

On October 23, 2014, Plaintiffs filed a Notice of Dismissal with Prejudice of Plaintiffs' Claims Against the Individual Officers upon Stipulation of the Parties. (ECF No. 91.) The Court dismissed Plaintiffs' claims against all individual officers with prejudice in an order entered October 27, 2014. (ECF No. 93.)

On October 27, 2014, the Defendant City of Memphis filed a Motion for Summary Judgment. (ECF No. 92.) Plaintiffs filed a Response in Opposition on November 24, 2014. (ECF No. 97.) Defendant filed a Reply on December 8, 2014. (ECF No. 101.) The Court entered an Order granting in part and denying in part the Motion for Summary Judgment ("Summary Judgment Order") on January 18, 2015. (ECF No. 121.)

On October 27, 2014, Plaintiffs filed a Motion for Partial Summary Judgment. (ECF No. 94.) Defendant filed a Response in Opposition on November 24, 2014. (ECF No. 95.) The Court denied Plaintiffs' Motion for Partial Summary Judgment on May 28, 2015. (ECF No. 159.)

A jury trial was held from January 20, 2015 to January 27, 2015. (ECF Nos. 125-28, 138.) The jury reached a verdict on January 27, 2015. (ECF Nos. 138, 141.) The jury found in favor of Plaintiff Cole and against Plaintiff Edmond. (ECF No. 141.)

On February 13, 2015, Defendant filed a Motion to Decertify or Modify Class. (ECF No. 148.) Plaintiffs filed a Response in Opposition to Defendant's Motion on February 20, 2015. (ECF No. 154.)

The Court issued a Scheduling Order setting a deadline of February 17, 2015 for additional briefing on remedies. (ECF No. 147.) On February 17, 2015, the parties submitted briefs regarding declaratory, injunctive and other equitable relief. (ECF Nos. 150-51.) The parties filed response briefs on February 20, 2015. (ECF Nos. 152-53.) The Court held a post-verdict hearing on injunctive relief on February 24, 2015. (ECF No. 157.) The Court entered an Order denying in part and granting in part the Motion to Decertify or Modify Class on May 28, 2015. (ECF No. 160.)

II. STANDARD OF REVIEW

A. Municipal Liability

Unlike state government entities, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief" for conduct that infringes the constitutional rights of individuals. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978). Municipalities are not subject to respondeat superior liability in cases where liability "does not arise out of the municipality's own wrongful conduct." Los Angeles Cnty., Cal. v. Humphries, 131 S. Ct. 447, 453 (2010); Monell, 436 U.S. at 691 ("In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory."). Consequently, to succeed on a claim against the City of Memphis, Plaintiffs "must prove two basic elements: (1) that a constitutional violation occurred; and (2) that the [City] is responsible for that violation." See Graham ex rel. Estate of Graham v. Cnty. of Washtenaw, 358

F.3d 377, 382 (6th Cir. 2004) (internal quotation marks omitted).

B. Declaratory Judgment

Under the Declaratory Judgment Act, 28 U.S.C. § 2201, "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . ." The statute has repeatedly "been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995).

The Supreme Court, however, has cautioned that "the federal courts . . . do not render advisory opinions. For adjudication of constitutional issues[,] 'concrete legal issues, presented in actual cases, not abstractions' are requisite." United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947) (quoting United States v. Appalachian Elec. Power Co., 311 U.S. 377, 423 (1940)). To that end, the Supreme Court has directed that federal courts

> must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous

> or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.

Pub. Serv. Comm'n of Utah v. Wycoff Co., Inc., 344 U.S. 237, 243-44 (1952). "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Preiser v. Newkirk, 422 U.S. 395, 402 (1975) (internal emphasis and quotation marks omitted).

> The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed.

Grand Trunk W.R. Co. v. Consol. Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984) (internal quotation marks omitted). Consequently, the Court considers the following factors in determining whether to issue declaratory judgment in a case:

> (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying

> the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Id. at 326. "[T]he Grand Trunk factors and their cousins in other circuits direct the district court to consider three things: efficiency, fairness, and federalism." W. World Ins. Co. v. Hoey, 773 F.3d 755, 759 (6th Cir. 2014). The Grand Trunk factors have not been given a set weight and the importance of each factor varies depending on the facts particular to each case. Id.

C. Permanent Injunction and Equitable Relief

"The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court . . . ." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Generally, a plaintiff requesting a permanent injunction must show:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id. In § 1983 actions, "[a] party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law." Saieg v. City of Dearborn, 641 F.3d 727, 733 (6th Cir. 2011) (internal quotation marks omitted).

III. ANALYSIS

A. Municipal Liability

Before determining whether declaratory, injunctive, and other equitable relief is appropriate in the instant case, the Court must first determine whether Plaintiffs have satisfied the requirements for establishing the availability of municipal liability. See Los Angeles Cnty., Cal. v. Humphries, 562 U.S. 29, 31 (2010) (concluding that "the 'policy or custom' requirement [] applies when plaintiffs seek prospective relief, such as an injunction or a declaratory judgment"). "A plaintiff asserting a section 1983 claim on the basis of a municipal custom or policy must 'identify the policy, connect the policy to the [municipality] itself and show that the particular injury was incurred because of the execution of that policy.'" Graham, 358 F.3d at 383 (quoting Garner v. Memphis Police Dep't, 8 F.3d 358, 364 (6th Cir. 1993)).

1. Unconstitutional Custom

A plaintiff bringing a claim under § 1983 against a municipality must prove the existence of an official policy responsible for the constitutional deprivation, or alternatively prove that the constitutional deprivations were caused by a "governmental 'custom' even though such a custom has not received formal approval

through the body's official decisionmaking channels." Monell, 436 U.S. at 691. A custom sufficient to establish municipal liability under § 1983 exists where "practices of [local] officials [are] so permanent and well settled as to constitute a custom or usage with the force of law." Id. (internal citations and quotation marks omitted); Doe v. Claiborne Cnty., Tenn. By & Through Claiborne Cnty. Bd. of Educ., 103 F.3d 495, 507 (6th Cir. 1996). Plaintiffs have identified the Beale Street Sweep as a municipal custom that resulted in the violation of Plaintiffs' Fourth and Fourteenth Amendment rights.

In the Summary Judgment Order, the Court found that the Beale Street Sweep, as alleged, implicates the constitutionally protected fundamental right "'to travel locally through public spaces and roadways.'" Cole v. City of Memphis, --- F. Supp. 3d ---, No. 2:13-cv-02117-JPM-dkv, 2015 WL 1567824, at *10-11 (W.D. Tenn. Jan. 18, 2015) (quoting Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002)). The Court also found that "the Beale Street Sweep as alleged was not narrowly tailored and fails a strict scrutiny analysis." Id. at *12. The Court, however, declined to find that municipal liability existed as a matter of law in the instant case due to the existence of several disputed factual issues. See id. The Court explained that due to the divergent descriptions of the circumstances giving rise to the Beale Street Sweep by the parties, "several genuine issues of material fact remain[ed]" that made granting summary judgment in favor of Plaintiffs on the issue of municipal liability inappropriate. Id.

The factual issues that existed at the time of the Summary Judgment Order are now resolved by the evidence presented at trial and the jury's factual findings. The jury, in its verdict, found that "the City of Memphis, through its police officers, carried out a custom and/or well-established practice mainly on weekends at or about 3:00 a.m. of preventing persons from standing and/or walking on the sidewalk or street of Beale Street [before and after] June 14, 2012." (Verdict ¶¶ 1-2.) The jury found that the well-established practice "occurs without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety[.]" (Id. ¶ 4.) With regard to Plaintiff Cole, the jury found that the well-established practice "prevented Plaintiff Cole from standing and/or walking on the sidewalk or street of Beale Street on August 26, 2012." (Id. ¶¶ 7-8.)

Based on these facts, the Court finds that the Beale Street Sweep, defined by the Court as "the policy, procedure, custom, or practice by which police officers of the Memphis Police Department order all persons to immediately leave the sidewalks and street on Beale Street without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety," existed as early as 2007 and continued past June 14, 2012. (See ECF No. 160 at 14.) The Court also finds that the Beale Street Sweep is "so permanent and well settled as to constitute a custom or usage with the force of law." See Monell, 436 U.S. at 691; Claiborne County, 103 F.3d at 507. The Court finds that sufficient evidence exists that the Beale Street Sweep is a continuing practice of the City and that class members

continue to be at risk of the deprivation of their constitutional rights.

Plaintiffs have also made a sufficient showing that the Beale Street Sweep "broadly denies individuals in the area access to the public roadways." Cole, 2015 WL 1567824, at *11. The Court finds that because the custom is conducted "without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety," the custom is not "'the least restrictive means to accomplish the City's goal.'" Id. (quoting Johnson, 310 F.3d at 503). Consequently, the Beale Street Sweep is in practice not narrowly tailored to achieve a compelling government interest. See Does v. Munoz, 507 F.3d 961, 964 (6th Cir. 2007). Accordingly, the Court finds that the Beale Street Sweep is an unconstitutional custom that satisfies the requirements for establishing municipal liability under § 1983.

2. Moving Force

Plaintiffs must also show that the municipal policy or custom is the "moving force behind the plaintiff's deprivation of federal rights." Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 400 (1997) (internal quotation marks omitted). "Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward." Id. at 404. "[P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." Id. at 405.

In the Summary Judgment Order, the Court found that with regard to due process violations, "[s]hould all factual determinations regarding the constitutionality of the Beale Street Sweep be resolved in favor of Plaintiffs, at a minimum, the individuals cleared from the area at the time of the street suffered a direct violation of their due process right to travel and remain on public roadways as a result of the practice." Cole, 2015 WL 1567824, at *7. Similar to the factual issues regarding the existence of an unconstitutional custom, the factual issues regarding causation have been resolved in favor of the Class and Plaintiff Cole. The jury found that the custom was in fact "the cause of persons being prevented from standing and/or walking on the sidewalk or street of Beale Street," and had caused "thousands of persons" to be cleared off of Beale Street "since at least 2007." (Verdict ¶¶ 3, 5.) With regard to Plaintiff Cole, the jury found that the well-established practice "prevented Plaintiff Cole from standing and/or walking on the sidewalk or street of Beale Street on August 26, 2012" and "was the cause of Plaintiff Cole's unlawful arrest" and "excessive force being used during the arrest of Plaintiff Cole in violation of the Fourth Amendment on August 26, 2012." (See id. ¶¶ 7-8, 11, 14.)

Accordingly, the Court finds that Plaintiffs have established "a direct causal link between a municipal policy or custom" — the Beale Street Sweep — and the deprivation of Fourteenth Amendment rights of the class members and the Fourth Amendment rights of Plaintiff Cole as described in the jury's verdict. The Court also finds that Plaintiffs have established the availability of municipal liability with regard to Plaintiff Cole and the Class as a whole.

B. Declaratory Judgment

Plaintiffs seek declaratory judgment that "since at least 2007, the City of Memphis violated the constitutional rights of thousands of persons who were subjected to the Beale Street Sweep . . . ." (ECF No. 151 at 5.) The Court's analysis centers chiefly on the Grand Trunk factors.

With regard to the first two Grand Trunk factors, the Court's Order Certifying Class and the Court's Summary Judgment Order are instructive. In the Order Certifying Class, the Court explained that "[a] single declaration that the Beale Street Sweep is unconstitutional and continues in practice today would provide a common answer to the claims of all class members." Cole v. City of Memphis, Tenn., No. 2:13-cv-02117-JPM-dkv, 2014 WL 8508560, at *16 (W.D. Tenn. Sept. 29, 2014) (ECF No. 88 at 36 (citing Dukes, 131 S.Ct. at 2551; Senter, 532 F.2d at 525). Absent certification of a class under Rule 23(b)(2) and issuance of declaratory relief, each individual class member would have to repetitively prove identical claims for the availability of municipal liability and the general constitutionality of the Beale Street Sweep.

In the Summary Judgment Order, the Court discussed the analysis for municipal liability step-by-step, but stopped short of finding municipal liability as a matter of law due to disputed issues of material fact. Cole, 2015 WL 1567824, at *4–9. The Court explained that in order for the City of Memphis to be liable for constitutional violations under § 1983 in the instant case, Plaintiffs must show the existence of a governmental custom such that "practices of local officials are so permanent and well settled as to

constitute a custom or usage with the force of law." Id. at *5. Plaintiffs also have the burden to show that the custom "is the 'moving force behind the plaintiff's deprivation of federal rights.'" Id. at *7 (quoting Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 400 (1997)). Additionally, Plaintiffs must prove that the custom, in this case the Beale Street Sweep, is unconstitutional. See id. at *4–5. Although each class member must still prove his or her own individual damages, issuance of declaratory relief determines the outcome of the preceding elements and settles the controversy of the availability of municipal liability for all class members.

Moreover, without declaratory relief, a significant risk of conflicting judgments regarding the availability of municipal liability would exist. Consequently, judgment declaring the existence of a well-settled custom carried out by the City of Memphis that causes the deprivation of the class members' constitutional rights is essential to "clarifying the legal relations in issue" in the instant case. See Grand Trunk, 746 F.2d at 326. Furthermore, declaratory relief in the instant case is not moot as a result of the jury's findings. Rather, the issue of municipal liability is now resolved in favor of the class members based on the Court's findings supra Part III.A.

For these reasons, the first two Grand Trunk factors support the grant of declaratory relief. The remaining Grand Trunk factors are discussed in detail as follows.

1. The Race for Res Judicata

"The third [Grand Trunk] factor is meant to preclude jurisdiction for 'declaratory plaintiffs who file

their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum.'" Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 558 (6th Cir. 2008) (quoting AmSouth Bank v. Dale, 386 F.3d 763, 788 (6th Cir. 2004)). "The question is whether the declaratory plaintiff has filed in an attempt to get her choice of forum by filing first." Id. (internal alteration and quotation marks omitted). A plaintiff's mere selection of the federal forum is "a choice given by Congress" and, without more, does not indicate procedural fencing. Id.

In the instant case, the City has not offered any evidence of procedural fencing. In the typical race for res judicata, the federal or declaratory plaintiffs are defendants or potential defendants in a state action. See id. Here, Plaintiffs would have been plaintiffs against the City regardless of the forum. Plaintiffs' choice to bring suit in federal court pursuant to 28 U.S.C. § 1331 is their statutory right granted by Congress. Accordingly, the third factor does not weigh against declaratory relief.

2. Encroachment on State Jurisdiction

"Where complex factual issues are present and the action parallels a state court action arising from the same facts and where alternative remedies are available, declaratory judgment is inappropriate." Am. Home Assur. Co. v. Evans, 791 F.2d 61, 64 (6th Cir. 1986). Considerations of federalism, however,

> are not controlling when no state prosecution is pending and the only question is whether declaratory relief is appropriate. In such case,

> the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.

Perez v. Ledesma, 401 U.S. 82, 103-04 (1971).

The City has produced no indication of the existence of a state action in the instant case. Rather, the instant cause of action was brought under federal law for violations of the United States Constitution. (ECF No. 1.) The federal courts, as "the primary guardians of constitutional rights," provide an appropriate forum for deciding violations of the Constitution by local governments. See Perez, 401 U.S. at 103-04; see also Kendrick v. Bland, 740 F.2d 432, 437 (6th Cir. 1984). Thus, the concern for increased friction between federal and state courts is minimal. Accordingly, the Court finds that the fourth Grand Trunk factor does not weigh against declaratory relief.

3. Alternative Remedy

A district court should "deny declaratory relief if an alternative remedy is better or more effective." Scottsdale Insurance, 513 F.3d 546, 562 (6th Cir. 2008) (quoting Grand Trunk, 746 F.2d at 326).

Similar to the fourth Grand Trunk factor, the federal forum is well-suited to declare the constitutionality of the Beale Street Sweep and establish the existence of municipal liability. This is not a case where a state court judgment or indemnity action would provide a "better or more effective"

remedy for the City's constitutional violations. See Scottsdale Insurance, 513 F.3d 546, 562 (6th Cir. 2008) (noting declaratory judgment in state court and filing of an indemnity action as possible alternative remedies). Accordingly, the fifth Grand Trunk factor weighs in favor of declaratory relief.

4. Balance of the Factors

Having considered each of the Grand Trunk factors, the Court finds that they weigh in favor of declaratory relief in the instant class action. Accordingly, the Court declares: Since at least 2007, the City of Memphis violated the constitutional rights of thousands of persons who were subjected to "the Beale Street Sweep" as defined in this Order.

C. Permanent Injunction

Plaintiffs have established that individual class members have suffered constitutional violations as a result of the Beale Street Sweep. See supra Part III.A.1. Consequently, the remaining issue facing the Court with regard to issuance of a permanent injunction is whether class members "will suffer continuing irreparable injury for which there is no adequate remedy at law." See Saieg, 641 F.3d at 733.

"Courts have [] held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." Overstreet v. Lexington-Fayette Urban Cnty. Gov't, 305 F.3d 566, 578 (6th Cir. 2002) (citing Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998); Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992); McDonell v. Hunter, 746 F.2d 785, 787 (8th Cir.1984)) (finding

plaintiff demonstrated irreparable harm because defendant's conduct violated plaintiff's Fourth and Fourteenth Amendment rights).

Plaintiffs argue that a permanent injunction is necessary in the instant case because they were deprived of a fundamental constitutional right. (ECF No. 151 at 13.) Plaintiffs assert that the jury's findings that the Beale Street Sweep was executed "without consideration of whether conditions throughout the Beale Street area pose an existing, imminent, or immediate threat to public safety" is conclusive of the existence of irreparable injuries suffered by Plaintiff Cole and the other class members. (See id. at 13-14.) Plaintiffs further assert that the jury's finding that the Beale Street Sweep has been ongoing since at least 2007 shows that harm caused by the City's unconstitutional conduct is continuing. (Id. at 14.)

The City argues that "[t]he public interest would be disserved by the issuance of an injunction as sought by the Plaintiff" because "an injunction restricting law enforcement from clearing streets and areas of the City would pose risk to the law abiding public." (ECF No. 150-1 at 9.) In arguing against an injunction, the City poses the questions:

> What existing, eminent [sic] or immediate threat to public safety would law enforcement have to prove before restricting access to or travel upon Beale or any other city street? At what point would law enforcement be able to limit citizens to travel within areas in which there is a fire or barricade situation[?]

(Id.) The City also argues that because "Mr. Cole was adequately compensated for harm to his constitutional rights," there is an adequate remedy at law for class members who have been injured by the Beale Street Sweep. (Id.)

The Court agrees to a large extent with Plaintiffs. The City's arguments ignore the permanent harm caused to Cole's career by the unconstitutional sweep that occurred on August 26, 2012 and Cole's resulting unlawful arrest. Although Cole was awarded monetary damages, he will never have the opportunity to serve in his position of choice due to the arrest record. Similar to Overstreet, Plaintiffs in the instant case have shown the City's conduct violates the class members' Fourteenth Amendment rights. See supra Part III.A. Additionally, the jury found that the Beale Street Sweep caused violations of Plaintiff Cole's Fourth Amendment rights. (Verdict ¶¶ 11, 14.)

The City's arguments also ignore the possibility of future, recurring harm due to unconstitutional sweeps that may occur absent a permanent injunction. In the Court's previous Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification, the Court found that "[a]s a general proposition, without injunctive relief, individuals frequenting the Beale Street Entertainment District will continue to be susceptible to injury caused by the potentially unconstitutional actions of MPD police officers." Cole, 2014 WL 8508560, at *16 (W.D. Tenn. Sept. 29, 2014). Because the jury has made specific factual findings that 1) the City "carried out a custom and/or well-established practice mainly on weekends at or about 3:00 a.m. of preventing persons from standing

and/or walking on the sidewalk or street of Beale Street on or after June 14, 2012"; and 2) the custom was carried out "without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety," the Court finds that a substantial likelihood of recurrence of the unconstitutional practice exists. Consequently, the Court finds that the City's unconstitutional conduct is continuing.

Moreover, because there is an ongoing risk of the deprivation of class members' fundamental rights, Plaintiffs have shown that legal remedies by themselves are inadequate to resolve the City's constitutional violations. For these reasons, the Court finds that without issuance of a permanent injunction, the class members "will suffer continuing irreparable injury for which there is no adequate remedy at law." See Saieg, 641 F.3d at 733.

To the extent that the balance of equities and public interest are in question, the Court finds that the risk of continuing constitutional violations substantially mitigates any burden suffered by the City in complying with a permanent injunction to end unconstitutional conduct. Additionally, "it is always in the public interest to prevent the violation of a party's constitutional rights." G & V Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383 (1979); Planned Parenthood Association v. City of Cincinnati, 822 F.2d 1390, 1400 (6th Cir. 1987)).

Accordingly, Plaintiffs have satisfied their burden to show that a permanent injunction is appropriate in the instant case. The City of Memphis and its agents

and employees, are hereby permanently enjoined from engaging in "the Beale Street Sweep" as defined in this Order. The Court notes that the ordered injunction does not prevent the MPD from conducting normal police work or clearing Beale Street under appropriate circumstances where an imminent threat exists to public safety throughout the Beale Street area.

With regard to the City's question of what specific circumstances would constitute an existing, imminent, or immediate threat sufficient to justify a clearing of Beale Street, the City may look to existing Sixth Circuit case law and the case law of other Circuits to guide its training and conduct.

D. Additional Equitable Relief

Plaintiffs have proposed further equitable relief in addition to a permanent injunction prohibiting the City from engaging in the Beale Street Sweep. "Section 1983 by its terms confers authority to grant equitable relief as well as damages, but its words allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding." Rizzo v. Goode, 423 U.S. 362, 378 (1976) (internal quotation marks omitted).

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971) (internal quotation marks omitted).

"It is fundamental that the federal forum, as the ultimate guardian of constitutional rights, possesses the authority to implement whatever remedy is necessary to rectify constitutionally infirm practices, policies or conduct." Kendrick v. Bland, 740 F.2d 432, 437 (6th Cir. 1984). "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937). In § 1983 cases, equitable remedies are "to be determined by the nature and scope of the constitutional violation." See Milliken v. Bradley, 433 U.S. 267, 280 (1977). Consequently, the scope of equitable relief granted by the Court must be "tailored to cure the condition that offends the Constitution." Id. at 282 (internal quotation marks omitted); see also Kendrick, 740 F.2d at 437 ("[T]he federal equity court in fashioning a remedy must afford relief which is no broader than necessary to remedy the constitutional violation." (internal quotation marks omitted)).

The Court has ruled that the City's conduct violates the Fourth and Fourteenth Amendment and that a permanent injunction prohibiting the Beale Street Sweep is appropriate in this case. See supra Parts III.A-C. The question that remains is what additional equitable relief, if any, is necessary to "cure" the City's constitutional violations. See Milliken, 433 U.S. at 282.

In addition to declaratory relief and "a permanent injunction prohibiting the City, and its agents and

employees, from engaging in the Beale Street Sweep," Plaintiffs request the following equitable relief:

> 3) Enter a permanent injunction prohibiting the City, and its agents and employees, from placing, or allowing to be placed signage on Beale Street declaring that the street will be cleared at 3:00 a.m.;
>
> (4) Order the City to remove any and all signage on Beale Street declaring that the street will be cleared at 3:00 a.m.;
>
> (5) Order the City to distribute an Informational Bulletin ordering officers to cease conducting the Beale Street Sweep;
>
> (6) Order the City to train its officers that the Beale Street Sweep is unconstitutional and shall not be carried out;
>
> (7) Order the City to train its officers as to why the Beale Street Sweep is unconstitutional and an unlawful use of police power;
>
> (8) Order the City to train its officers as to what constitutes an imminent threat to public safety so that the officers may clear the street when necessary in a constitutionally permissible way;
>
> (9) Order the City to train its officers as to the ordinances and other laws that apply to Beale Street;
>
> (10) Appoint a monitor, special master, or other agent of the Court to monitor the training of the officers as ordered by the Court and report to the Court regarding the City's compliance;

> (11) Appoint a monitor, special master, or other agent of the Court to monitor the arrests on Beale Street by reviewing records of arrests on Beale Street which occurred between the hours of 1:00 a.m. and 6:00 a.m. and determine whether the arrests occur as a result of the Beale Street Sweep and report to the Court regarding the results of the monitoring. The City shall provide the referenced records to the Monitor at 9:00 a.m. on Monday following each weekend;
>
> (12) Appoint a monitor, special master, or other agent of the Court to review all arrest records on Beale Street from 2007 to the present to determine which arrests occurred as a result of the Beale Street Sweep and report to the Court regarding the results of the review;
>
> (13) Schedule regular hearings to allow the court-appointed monitor, special master, or other agent of the Court to appear and testify regarding his or her findings in carrying out the duties assigned by the Court;
>
> (14) Any and all additional relief the Court believes is appropriate to end the City's widespread unconstitutional practice.

(ECF No. 151 at 6-7.)

Plaintiffs argue that the preceding equitable relief is necessary in the instant case because Officer Arley Knight testified during trial that his recommendation to end the Beale Street Sweep was not carried out by the MPD. (Id. at 17.) Plaintiffs also point to testimony by multiple police officers that "they and all other

officers on Beale Street were instructed by supervisors to enforce the signage on Beale Street, and/or that the City had enacted an Ordinance closing Beale Street to the public at 3:00 a.m. and police officers were required to enforce it." (Id.)

Plaintiffs also argue that appointment of a monitor, special master, or other agent of the Court is necessary "to ensure Defendants' full compliance with a judgment of this Court." (Id. at 20.) Plaintiffs assert that appointment of a third party monitor is appropriate in the instant case "[d]ue to the difficult and complex nature of rooting out an entrenched, invidious, and department-wide unconstitutional practice [] coupled with the City's history of failure to voluntarily end the Beale Street Sweep . . . ." (Id. at 19.) Plaintiffs aver that "[m]onitoring a defendant's remedial conduct through a court-appointed monitor, special master or other intermediary is common in cases requiring broad systemic reform to address widespread and longstanding unconstitutional policies or practices." (Id. (citing United States v. Yonkers Bd. Of Educ., 29 F.3d 40, 44 (2d Cir. 1994)).)

The City argues that the remedies proposed by Plaintiffs go beyond what is necessary to cure the City's unconstitutional conduct. (See ECF No. 152 at 3.) The City asserts that it has already removed the signage that indicated a regular police sweep at approximately 3:00 a.m. (Id.) The City further asserts that the Court is ill-suited to oversee training of the City's police officers. (Id.) The City avers that "[s]uch wide ranging and vague equitable relief seems to be for the purpose of procedural fencing as we proceed through the remedies stage of this litigation." (Id.) Finally, the City

argues that any equitable relief granted by the Court should be "the least intrusive remedy that will still be effective." (Id. at 4 (quoting Kendrick, 740 F.2d at 437 (6th Cir. 1984)).)

The Court agrees with Plaintiffs that some equitable relief beyond a permanent injunction prohibiting the City from carrying out the Beale Street Sweep is warranted given the facts of the present case. The condition that offends the Constitution in this case is the City's continued use of the Beale Street Sweep under circumstances where there is no imminent threat to public safety. One of the causes of the condition has been a lack of understanding and training on the part of MPD officers and their superiors. During trial, Plaintiffs produced evidence that the officers in charge of the Beale Street Entertainment District ordered clearings of Beale Street even after the announced discontinuance of the sweep. (See ECF No. 156 at 4-6.) Furthermore, multiple officers assigned to the Beale Street Entertainment District believed that the MPD was enforcing the law as written on various signs throughout the area even though those signs were not posted by the MPD. (See ECF No. 156 at 5-6.)

Of particular concern to the Court is the City's continued refusal to end the practice. Plaintiffs proffered evidence that the City determined to continue the Beale Street Sweep despite a recommendation from the highest ranking officer in the Entertainment District Unit, Arley Knight, to terminate the practice. The jury found that the Beale Street Sweep continued even after a command staff order officially terminated the practice on June 14, 2012. (See ECF No. 40-1 at 2.)

Also of concern is the City's failure to acknowledge the substantial harm the City's unconstitutional practice has had on the personal lives of the individual class members. Even after the jury found conclusively that the City violated the constitutionally protected rights of Plaintiff Cole, the City appears to persist in its belief that its conduct was justified and the results thereof insignificant:

> Plaintiffs' counsel further speculates that there will be "life-long consequences" to those who left the street at the direction of police officers, although the argument only addresses those "arrested for fabricated charges such as Disorderly Conduct, Criminal Trespass and Obstructing a Highway." Neither plaintiff proved any of the consequences suggested in Plaintiffs' Brief. Only Officer Cole was found to have been harmed by the 'sweep' and he continues his career with the Memphis Police Department.

(ECF No. 152 at 2.) Significantly, during trial, Plaintiff Cole testified that he could no longer serve in his desired position due to his unlawful arrest. Contrary to the City's assertion that "[w]hile the jury determined that Officer Cole was arrested for disorderly conduct and resisting arrest without probable cause, there was no proof of any persons falsely charged pursuant to the sweep," the jury in fact found that the City's unconstitutional sweep of the Beale Street Entertainment District caused the unlawful (or false) arrest of Cole. (Verdict ¶¶ 7-12.) The jury also awarded significant damages in compensation for the City's conduct and resulting injury to Cole. (Id. ¶¶ 7-17.)

Moreover, the jury found that thousands of individuals have been unconstitutionally removed from Beale Street since 2007. (Id. ¶ 5.) Based on Cole's testimony and the jury's findings, it is evident to the Court that, for the purposes of determining equitable relief, at least one class member and potentially a substantial number of class members have suffered long term consequences due to unlawful arrests as a direct result of the Beale Street Sweep.

The City also states, "The City maintains that the clearing is a tactic utilized after the commanding officers on the scene make a prudent and reasonable decision based upon circumstances about which they are aware." (ECF No. 150-1 at 4.) The City's assertion is contradicted by the jury's finding that the clearing of Beale Street "occurs without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety." (Verdict ¶ 4.) The City's post-verdict arguments reinforce the conclusion that the City has yet to accept and institutionalize the constitutional balance required by the Fourth and Fourteenth Amendments of the United States Constitution in policing the Beale Street Entertainment District. The City need only adhere to the constitutional requirements that it already follows in policing other parts of the City of Memphis. It is the institutional resistance to these broadly understood principles, however, that necessitates limited remedial steps, which if promptly implemented, should protect the constitutional rights of individuals throughout the Beale Street Entertainment District.

The Court finds that absent additional equitable relief, there is a reasonable likelihood that the

constitutional violations will not be abated. Accordingly, the Court finds that additional training of and dissemination of information among MPD officers regarding the constitutional rights of individuals on Beale Street is the appropriate cure to prevent further violations of the Fourth and Fourteenth Amendments.

The Court, however, agrees with the City that one of Plaintiffs' proposed remedies exceeds what is necessary to ensure compliance with the Constitution. Accordingly, the Court declines to adopt the following proposed remedy:

> (12) Appoint a monitor, special master, or other agent of the Court to review all arrest records on Beale Street from 2007 to the present to determine which arrests occur[r]ed as a result of the Beale Street Sweep and report to the Court regarding the results of the review[.]

This remedy would place undue expense on the City and unnecessarily deplete funds better applied to the protection of the public.

IV. CONCLUSION

For the reasons discussed, the Court ORDERS the following relief in the instant case:

> 1) The Court DECLARES that, since at least 2007, the City of Memphis violated the constitutional rights of thousands of persons who were subjected to "the Beale Street Sweep," that is, "the policy, procedure, custom, or practice by which police officers of the Memphis Police Department order all persons to immediately leave the sidewalks and street on

Beale Street without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety."

2) The City of Memphis and its agents and employees, are PERMANENTLY ENJOINED from engaging in "the Beale Street Sweep" defined as "the policy, procedure, custom, or practice by which police officers of the Memphis Police Department order all persons to immediately leave the sidewalks and street on Beale Street without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety."[2]

3) The City of Memphis and its agents and employees, are PERMANENTLY ENJOINED from placing, or allowing to be placed signage on Beale Street declaring that the street will be cleared at 3:00 a.m.

4) The City of Memphis is ORDERED to remove any and all signage on Beale Street declaring that the street will be cleared at 3:00 a.m.

5) The City of Memphis is ORDERED to distribute an Informational Bulletin to officers explaining that "the Beale Street Sweep," defined as "the policy, procedure, custom, or practice by which police officers of the Memphis

[2] The permanent injunction does not prevent the MPD from clearing Beale Street when there is an imminent threat to public safety throughout the Beale Street area.

Police Department order all persons to immediately leave the sidewalks and street on Beale Street without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety," is unconstitutional.

6) The City of Memphis shall train its officers that the Beale Street Sweep defined as "the policy, procedure, custom, or practice by which police officers of the Memphis Police Department order all persons to immediately leave the sidewalks and street on Beale Street without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety," is unconstitutional and shall not be carried out.

7) The City of Memphis shall train its officers as to why the Beale Street Sweep is unconstitutional and an unlawful use of police power; b) what constitutes an imminent threat to public safety so that the officers may clear the street when necessary in a constitutionally permissible way; and c) the ordinances and other laws that apply to Beale Street.

8) The Court DETERMINES that appointment of a limited neutral monitor is appropriate in the instant case. The monitor shall observe and report on the progress of the training of MPD officers, which may be carried out internally by the MPD. The monitor shall summarize the progress and status of the training of MPD officers in a quarterly report to the Court. The

monitor shall perform this task for a period of one year following his or her appointment.

9) The monitor shall also review the records of arrests for the Beale Street Entertainment District that occur between the hours of 1:00 a.m. and 6:00 a.m. and determine whether those arrests occur as a result of "the Beale Street Sweep" defined as "the policy, procedure, custom, or practice by which police officers of the Memphis Police Department order all persons to immediately leave the sidewalks and street on Beale Street without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety." The City shall provide the referenced records to the monitor by 3:00 p.m. on the Monday following each weekend. The monitor shall include the results and findings in a quarterly report to the Court. The monitor shall perform this task for a period of one year following appointment of the monitor.

10) The Court will hold quarterly hearings to be attended by Plaintiffs' counsel, a representative of the City of Memphis, counsel for the City of Memphis, and the monitor. The monitor shall provide a written quarterly report to the Court seven (7) days prior to the quarterly hearing and orally present his or her findings regarding the City of Memphis' compliance with the Court's Order. The hearings will occur for a period of one year following appointment of the monitor.

11) It is not contemplated that the position of monitor will be a full time position. The City of

> Memphis shall be liable, however, for reasonable compensation and expenses incurred by the monitor upon approval of the Court. The monitor shall submit invoices for costs to the Court on the first day of each month subsequent to the monitor's appointment.
>
> 12) The parties may jointly nominate an individual for the position of monitor and present that nomination to the Court in a hearing to be set by future setting letter. Alternatively, the parties may nominate separate individuals for the position of monitor. In the latter case, the Court may appoint one of the parties' nominees or another satisfactory individual to the position of monitor.

It is further ORDERED that Plaintiffs file additional briefing regarding monetary relief, including the jury's award of damages, pre and post-judgment interest, and attorney's fees and costs within fourteen (14) days of entry of this order. Defendant shall have seven (7) days from the filing of Plaintiffs' brief on monetary relief to file a response brief.

IT IS SO ORDERED, this 3rd day of June, 2015.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 2:13-cv-02117-JPM-dkv

[Filed January 18, 2015]

LAKENDUS COLE and LEON EDMOND, individually and as representatives of all others similarly situated,

Plaintiffs,

v.

CITY OF MEMPHIS, TENNESSEE, and ROBERT FORBERT, SAMUEL HEARN, CHRISTOPHER BING, JOHN FAIRCLOTH, CARI COOPER, and ROBERT SKELTON, individually and in their official capacities as City of Memphis Police Officers,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CITY OF MEMPSHIS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant City of Memphis' Motion for Summary Judgment, filed October 27, 2014.

(ECF No. 92.) Plaintiffs Cole and Edmond filed a Response on November 24, 2014. (ECF No. 97.) Defendant City of Memphis filed a Reply on December 8, 2014. (ECF No. 101.) For the reasons set for below, the Motion is GRANTED in part and DENIED in part.

I. BACKGROUND

A. Factual Allegations

Plaintiff Lakendus Cole is a police officer employed with the City of Memphis Police Department Organized Crime Unit, and Plaintiff Leon Edmond is a Special Agent employed with the Bureau of Alcohol, Tobacco, Firearms and Explosives. (Compl. at 1-2, ECF No. 1.)

Plaintiffs assert a class action claim against Defendant City of Memphis ("the City") for

> the policy, procedure, custom, or practice by which police officers of the Memphis Police Department ("MPD") order all persons to immediately leave the sidewalks and street on Beale Street when there are no circumstances present which threaten the safety of the public or MPD police officers ("the Beale Street [] Sweep").

(Id. at 2.) According to Plaintiffs, "[t]he Beale Street [] Sweep routinely occurs in the early morning hours on Saturdays and Sundays and during certain scheduled entertainment events on weekdays." (Id.) Plaintiffs assert that the Beale Street Sweep "incites violence amongst its employee police officers and creates an environment where they become aggressive, agitated,

frenetic, and confrontational with persons lawfully standing on a sidewalk or upon Beale Street." (Id.)

Under 42 U.S.C. § 1983, Plaintiffs Cole and Edmond also assert claims individually against the City of Memphis. "Plaintiff Cole, while off-duty and dressed in civilian clothing, was outside of Club 152 on Beale Street. . . ." (Id. ¶ 30.) "Plaintiff Cole was not intoxicated and had not consumed an alcoholic beverage." (Id. ¶ 31.) "Pursuant to the Beale Street Sweep, prior to Plaintiff exiting Club 152, MPD police officers including the Individual Defendants ordered all individuals to immediately leave the sidewalks and street in the Beale Street Entertainment District." (Id. ¶ 32.) "The Individual Defendants suddenly grabbed Plaintiff Cole and[,] without reasonable cause to do so[,] began to assault and viciously attack him." (Id. ¶ 35.) "The Individual Defendants slammed Plaintiff Cole's body into the police vehicle twice with such force that the impact dented the body of the police vehicle." (Id. ¶ 36.) The Individual Defendants handcuffed Plaintiff Cole, placed him in the back of the police vehicle, and transported Plaintiff Cole to the Shelby County Jail. (Id. ¶¶ 37-38.) All criminal charges were later dismissed. (Id. ¶ 41.)

"Plaintiff Edmond, while off-duty and dressed in civilian clothing and visiting Memphis[,] was walking in the Beale Street Entertainment District enjoying the sights and music." (Id. ¶ 46.) "Plaintiff Edmond was not intoxicated." (Id. ¶ 47.) As Plaintiff Edmond attempted to enter Club 152 on Beale Street, "Plaintiff Edmond and other family members were approached by Defendant Cooper who ordered Plaintiff Edmond and his family member [sic] to stop walking and demanded

that they speak to her regarding their attempt to enter Club 152." (Id. ¶ 51.) "Defendant Cooper and Defendant Skelton placed Plaintiff Edmond under arrest for public intoxication." (Id. ¶ 54.) After advising Defendant Cooper and Defendant Skelton that Plaintiff Edmond was a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), MPD police officers contacted Plaintiff Edmond's supervisor, who contacted another ATF special agent Marcus Watson in charge of the Memphis Field Office. (Id. ¶¶ 55-57.) Watson arrived on the scene, Plaintiff Edmond was released from police custody. (Id. ¶ 58.)

Defendant City of Memphis claims that the practice of "advis[ing] patrons standing on Beale Street at 2:30am to make their way into a club or make preparations to leave Beale Street" and, after 3:00 a.m., "uniformly ordering patrons off of Beale Street, with the option of entering a club" has been "abandoned by order of MPD command staff." (Def. City's Resp. to Pl.'s Mot. ¶¶ 1-2, ECF No. 40.) City of Memphis also contends and that "[a]t no time subsequent to June 21, 2012 did the MPD engage in this practice." (Id. ¶ 2.) Instead, City of Memphis asserts that Cole's and Edmond's interactions with police as described in their Complaint were MPD responses to reports of illegal conduct. (Id. ¶¶ 3–6.)

The City of Memphis contends that on August 26, 2012, MPD officers responded to a disorderly conduct call near 152 Beale Street, where "Officers instructed Plaintiff Cole to go inside the club [Club 152] or leave the street. Plaintiff Cole refused to comply and acted disrespectfully towards the officers." (Id. ¶¶ 3-4 (alteration in original).)

Defendant City of Memphis asserts that on May 5, 2012, "MPD officers responded to a disturbance call at the entrance to 152 Beale." (Id. ¶ 5.) "At that time officers came upon a visibly intoxicated Plaintiff Edmonds in an altercation with the doorman and bouncers at 152 Beale. MPD officers removed Plaintiff from the area and discovered that he was presently armed with a GLOCK Model 27 .40 caliber pistol." (Id. ¶ 6.)

B. Procedural History

On February 25, 2013, Lakendus Cole and Leon Edmond (collectively, "Plaintiffs" or "Named Plaintiffs") filed a Class Action Complaint for damages and a Complaint for deprivation of constitutional rights and injunctive relief. (Compl. ECF No. 1.) On April 4, 2013, Defendant Cari Cooper filed an Answer. (ECF No. 6.) On April 11, 2013, Defendant City of Memphis filed an Answer. (ECF No. 8.) On June 14, 2013, Defendant Robert Skelton filed an Answer. (ECF No. 25.) On June 18, 2013, Defendants Christopher Bing, John Faircloth, Robert Forbert, and Samuel Hearn filed an Answer. (ECF No. 27.)

On April 2, 2013, Defendants Robert Forbert and John Faircloth filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 5.) On April 10, 2013, Plaintiffs filed a Response in opposition to the Motion to Dismiss. (ECF No. 7.) On June 4, 2013, the Court entered an Order granting in part and denying in part the Motion to Dismiss. (ECF No. 22.) The Court found that Plaintiffs have stated a claim pursuant to Rule 8(a) of the Federal Rules of Civil Procedure but dismissed Plaintiffs' substantive due-process claim

under the Fourteenth Amendment as to Defendants Robert Forbert and John Faircloth. (ECF No. 22.)

On May 16, 2013, Defendant Christopher Bing filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 12.) On May 28, 2013, Plaintiffs filed a Response in opposition to the Motion to Dismiss. (ECF No. 13.) On June 6, 2013, the Court entered an Order granting in part the Motion to Dismiss as to Plaintiffs' substantive due-process claim under the Fourteenth Amendment but denying in part the Motion as to all other claims against Bing. (ECF No. 23.)

On May 31, 2013, Defendant Samuel Hearn filed a Motion to Dismiss for Failure to State a Claim. (ECF No. 21.) No Response was filed within the required time. On July 10, 2013, the Court entered an Order granting in part the Motion to Dismiss as to Plaintiffs' substantive due-process claim under the Fourteenth Amendment but denying in part the Motion as to all other claims against Hearn. (ECF No. 29.)

On November 27, 2013, Plaintiffs filed the Motion to Certify Class. (ECF No. 36.) Defendant City of Memphis filed a Response on December 18, 2013. (ECF No. 40.) On January 9, 2014, the Court held a hearing on the Motion. (ECF No. 42.) Plaintiffs filed a Supplemental Memorandum of Law in support of its Motion for Class Certification on June 30, 2014. (ECF No. 85.) Defendant filed its Response to the Supplemental Memorandum on July 7, 2014 (ECF No. 86), and Plaintiffs filed their Reply on July 14, 2014 (ECF No. 87). On September 29, 2014, the Court granted in part and denied in part Plaintiffs' Motion to Certify Class. (ECF No. 88.) In the Court's Order, the Court certified Plaintiffs' proposed class under Rule

23(b)(2) for the purposes of injunctive and declaratory relief, and denied certification under Rule 23(b)(3). (ECF No. 88 at 41.)

On October 23, 2014, Plaintiffs filed a Notice of Dismissal with Prejudice of Plaintiffs' Claims Against the Individual Officers upon Stipulation of the Parties. (ECF No. 91.) The Court dismissed Plaintiffs' claims against all individual officers with prejudice in an order entered October 27, 2014. (ECF No. 93.)

On October 27, 2014, the Defendant City of Memphis filed the instant Motion for Summary Judgment. (ECF No. 92.) Plaintiffs filed a Response in Opposition on November 24, 2014. (ECF No. 97.) Defendant filed a Reply on December 8, 2014. (ECF No. 101.)

II. STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Chapman v. UAW Local 1005, 670 F.3d 677, 680 (6th Cir. 2012). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." Bruederle v. Louisville Metro Gov't, 687 F.3d 771, 776 (6th Cir. 2012) (citing Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984)). "A dispute over material facts is 'genuine' 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "When the non-moving party fails to make a sufficient showing of

an essential element of his case on which he bears the burden of proof, the moving parties are entitled to judgment as a matter of law and summary judgment is proper." Chapman, 670 F.3d at 680 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)); see also Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 469 (6th Cir. 2012).

"The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact." Mosholder v. Barnhardt, 679 F.3d 443, 448 (6th Cir. 2012) (citing Celotex Corp., 477 U.S. at 323). "Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." Id. at 448-49 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(e)).

"To show that a fact is, or is not, genuinely disputed, both parties are required to either 'cite[] to particular parts of materials in the record' or 'show[] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.'" Bruederle, 687 F.3d at 776 (alterations in original) (quoting Fed. R. Civ. P. 56(c)(1)); see also Mosholder, 679 F.3d at 448 ("To support its motion, the moving party may show 'that there is an absence of evidence to support the nonmoving party's case.'" (quoting Celotex Corp., 477 U.S. at 325)).

"The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. 56(c)(3); see also Emerson v. Novartis Pharm. Corp., 446 F. App'x 733, 736 (6th Cir. 2011) ("'[J]udges

are not like pigs, hunting for truffles' that might be buried in the record." (quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991))); Chi. Title Ins. Corp. v. Magnuson, 487 F.3d 985, 995 (6th Cir. 2007) ("A district court is not required to 'search the entire record to establish that it is bereft of a genuine issue of material fact.'" (quoting Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989))).

"In considering a motion for summary judgment, [a court] must draw all reasonable inferences in favor of the nonmoving party." Phelps v. State Farm Mut. Auto. Ins. Co., 736 F.3d 697, 703-04 (6th Cir. 2012) (citing Matsushita, 475 U.S. at 587). "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. (quoting Anderson, 477 U.S. at 251-52). "[A] mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable jury could find in her favor." Tingle v. Arbors at Hilliard, 692 F.3d 523, 529 (6th Cir. 2012) (quoting Anderson, 477 U.S. at 252).

III. ANALYSIS

Defendant City of Memphis seeks summary judgment on the grounds that Plaintiffs have failed to establish a case for 1) municipal liability generally; 2) violation of Plaintiffs' First Amendment rights; 3) violation of Plaintiffs' Fourth Amendment rights; 4)violation of Plaintiffs' due process rights under the Fourteenth Amendment; 5) municipal liability for failure to train; 6) municipal liability for failure to

investigate and discipline; 7) municipal liability pursuant to the Tennessee Government Tort Liability Act (TGTLA); and 8) punitive damages. (See ECF Nos. 92-2, 101.) Plaintiffs concede that the record and relevant case law do not support claims for "failure to train, investigate or discipline, a claim under the Governmental Tort Liability Act, and a claim for punitive damages." (ECF No. 97 at 2 n.1.) Accordingly, the Court GRANTS Defendants' Motion as to those claims. Plaintiffs also state that they "do not assert that their rights under the First Amendment were violated." (Id.) As no claim for First Amendment violations appears in the Complaint (ECF No. 1), the Court finds that Plaintiffs have not asserted a First Amendment claim in this case. The Court will address the remaining disputed claims in turn.

A. Municipal Liability Generally

Unlike state government entities, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief" for conduct that infringes the constitutional rights of individuals. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978). Municipalities are not subject to respondeat superior liability in cases where liability "does not arise out of the municipality's own wrongful conduct." Los Angeles Cnty., Cal. v. Humphries, 131 S. Ct. 447, 453 (2010); Monell, 436 U.S. at 691 ("In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory."). Accordingly, to succeed on a claim against the City of Memphis, Plaintiffs "must prove two basic elements:

(1) that a constitutional violation occurred; and (2) that the [City] is responsible for that violation." See Graham ex rel. Estate of Graham v. Cnty. of Washtenaw, 358 F.3d 377, 382 (6th Cir. 2004) (internal quotation marks omitted).

1. Constitutional Violations

The merits of Plaintiffs' claims for constitutional violations are discussed infra Parts III.B-C. The Court finds a genuine issue of material fact exists as to whether the Beale Street Sweep is facially unconstitutional under the Due Process Clause of the Fourteenth Amendment, and whether the Beale Street Sweep is unconstitutional under the Fourth Amendment as applied to Plaintiffs Cole and Edmond.

2. City of Memphis' Responsibility for Constitutional Violations Suffered by Plaintiffs

Municipal liability exists in circumstances where an "official municipal policy of some nature caused a constitutional tort." Monell, 436 U.S. at 691. "A plaintiff asserting a section 1983 claim on the basis of a municipal custom or policy must 'identify the policy, connect the policy to the [municipality] itself and show that the particular injury was incurred because of the execution of that policy.'" Graham, 358 F.3d at 383 (quoting Garner v. Memphis Police Dep't, 8 F.3d 358, 364 (6th Cir. 1993)).

a) **Existence of Policy or Custom**

A plaintiff bringing a claim under § 1983 against a municipality must prove the existence of an official policy responsible for the constitutional deprivation, or

alternatively prove that the constitutional deprivations were caused by "governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell, 436 U.S. at 691. A custom sufficient to establish municipal liability under § 1983 exists where "practices of [local] officials [are] so permanent and well settled as to constitute a custom or usage with the force of law." Id. (internal citations and quotation marks omitted); Doe v. Claiborne Cnty., Tenn. By & Through Claiborne Cnty. Bd. of Educ., 103 F.3d 495, 507 (6th Cir. 1996). Plaintiffs have identified the Beale Street Sweep as a municipal custom that resulted in the violation of Plaintiffs' Fourth and Fourteenth Amendment rights.

Defendant City of Memphis argues that municipal liability fails in the instant case because it has provided evidence that no policy or custom, referred to as the Beale Street Sweep, existed at the time the named Plaintiffs Cole and Edmond allegedly suffered their injuries. (See ECF No. 92-2 at 7.) Although Defendant City of Memphis concedes that an official Beale Street Sweep practice existed prior to June 14, 2012, it asserts that the practice was terminated prior to the time Plaintiffs Cole and Edmonds' claims arose. (Id. at 9–10.)

Plaintiffs contend that they have submitted ample evidence of the Beale Street Sweep custom that existed after June 14, 2012. (See generally ECF No. 97 at 2-8.) According to Plaintiffs, they have submitted evidence of the City of Memphis' unconstitutional policy in the form of its answer to an interrogatory, in which the City of Memphis stated in relevant part:

> Prior to June 21, 2012,[1] it was common practice at 2:30 a.m. to start advising patrons standing on Beale Street to make their way into a club or make preparations to leave Beale Street. After 3:00 a.m., and when necessary, MPD officers would on occasion follow a practice of uniformly ordering patrons off of Beale Street, with the option of entering a club.

(Id. at 18 (citing ECF No. 32; Int. No. 9).) Regarding evidence of a custom that persisted after June 14, 2012, Plaintiffs assert that "the Affidavit of Justin Hipner, the Plaintiffs' testimony, and the City's Interrogatory Answers clearly establish that the Beale Street Sweep is a permanent and well-settled practice which, on each occasion it was used, deprived hundreds, if not thousands, of individuals of their constitutional rights." (ECF No. 97 at 18.)

The City of Memphis concedes that a "common practice" to remove individuals from the Beale Street area in the early morning hours existed prior to June 14, 2012 in its Reply Brief (ECF No. 101 at 3), in Deputy Chief Arley Knight's deposition (ECF 40-1 at 2), and in its answer to interrogatory no. 9 in Plaintiffs' First Set of Interrogatories (ECF No. 32 at 6-7). The City of Memphis contends, however, that the practice "happened only on occasion and when circumstances impacting public safety dictated." (ECF No. 101 at 3.) Accordingly, the Court finds that Plaintiffs have

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[1] The date stated in City of Memphis' interrogatory answer, differs from the date asserted in Defendant's Motion and Reply. Without making a factual determination, the Court will assume the date the official practice was allegedly terminated is June 14, 2012 for the limited purposes of this Order.

provided sufficient evidence to raise a genuine issue of material fact as to the existence of a custom sufficient under municipal liability requirements prior to June 14, 2012.

With regards to the existence of a custom on or after June 14, 2012, the Court also finds that Plaintiffs have provided sufficient evidence to establish a genuine issue of material fact. Plaintiffs Cole and Edmond have provided deposition testimony that a sweep and clearing occurred on the nights that they were arrested. (ECF No. 97-1 at PageID 1021; ECF No. 97-3 at PageID 1064-67.) Although Defendant has provided deposition testimony from Deputy Chief Knight that the Beale Street Sweep practice was terminated on June 14, 2012 in rebuttal of Plaintiffs' allegations, this statement alone does not support a finding that no reasonable jury could find for Plaintiffs on the issue of whether the Beale Street Sweep persisted after June 14, 2012.

b) **Causation of a constitutional tort**

Plaintiffs must also show that the municipal policy or custom is the "moving force behind the plaintiff's deprivation of federal rights." Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 400 (1997) (internal quotation marks omitted). "Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward." Id. at 404. "[P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." Id. at 405.

Defendant City of Memphis argues that it did not "maintain[] a policy or custom that was the moving force behind Plaintiffs' alleged constitutional deprivations . . . ." (ECF No. 92-2 at 6.) Regarding Plaintiff Edmond's claim specifically, Defendant City of Memphis asserts that "[t]he alleged 'clearing' was not the moving force of his detention," because "Edmond[] was detained after the Club 152 manager sought the assistance of the police." (Id. at 7 n.2.)

Plaintiffs argue that "the Beale Street Sweep – by its very nature – deprives the individuals on Beale Street of their fundamental right to travel locally in public spaces" pursuant to the Due Process Clause of the Fourteenth Amendment. (ECF No. 97 at 19.) Plaintiffs further assert that the Beale Street Sweep directly resulted in violations of Plaintiffs Cole and Edmond's Fourth Amendment rights by the police. (See id. at 19-20.) Plaintiffs rely on deposition testimony by Officer Skelton, which Plaintiffs assert describes the use of physical force to clear the street. (Id. (citing Ex. F. Excerpts of Dep. of Skelton at 34-44, ECF No. 97-6).) Because Plaintiffs have asserted claims based on due process and Fourth Amendment violations, the Court addresses the issue of causation for each.

(1) Fourteenth Amendment due process violations

With regards to Fourteenth Amendment violations, the Court agrees with Plaintiffs. As a threshold matter, Plaintiffs have stated a valid substantive due process claim for relief against the City of Memphis. Should all factual determinations regarding the constitutionality of the Beale Street Sweep be resolved in favor of Plaintiffs, at a minimum, the individuals cleared from

the area at the time of the street suffered a direct violation of their due process right to travel and remain on public roadways as a result of the practice. See infra Part III.B. Accordingly, in light of the disputed facts in the record, the Court finds that a genuine issue of material fact remains as to the issue of causation regarding alleged Fourteenth Amendment violations.

(2) Fourth Amendment violations

With respect to Plaintiffs' claims against the City of Memphis for Fourth Amendment violations, Defendant argues that "Plaintiffs' assert no basis upon which to attach municipal liability." (ECF No. 101 at 9.) According to Defendant City of Memphis, municipal liability does not exist based on Fourth Amendment violations because Plaintiffs do not assert that the Beale Street Sweep "constitutes a per se violation of the Fourth Amendment." (Id.)

Defendant misapprehends the test for municipal liability to attach to a claim. Once a custom is established, the inquiry properly focuses on causation. See Monell, 436 U.S. at 691; Graham, 358 F.3d at 383. The standard for causation, as set forth by the Supreme Court, is the existence of "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989). Defendant submits no authority that the policy or custom must be per se unconstitutional for liability to attach.

Plaintiffs' failure to challenge the Beale Street Sweep as per se unconstitutional under the Fourth Amendment is inapposite to the causation inquiry specifically and the responsibility inquiry generally.

Ostensibly, Defendant's argument relies on the concept that an as-applied challenge necessarily requires a showing of "deliberate indifference." The test in the Sixth Circuit for applying a "deliberate indifference" standard, however, is whether a plaintiff challenges the municipality's inaction versus an affirmative policy or custom. See infra Part III.A.2.c. That Plaintiffs bring an as-applied challenge under the Fourth Amendment, rather than a facial challenge, does not affect the outcome.

In the present case, Plaintiffs have submitted sufficient evidence that the Fourth Amendment violations allegedly suffered by Plaintiffs directly resulted from the Beale Street Sweep. Both Plaintiffs state that they heard a command related to clearing of the street prior to being detained. (ECF No. 97-1 at PageID 1021; ECF No. 97-3 at PageID 1064-67.) Defendant has provided rebuttal evidence that Plaintiff Edmond was detained "after an argument with an employee of Club 152." (ECF No. 92-1 ¶ 1.) Based on the evidence provided by the parties, the Court finds that a genuine issue of material fact exists as to whether the Beale Street Sweep was the cause of Fourth Amendment violations allegedly suffered by Plaintiffs.

c) **Deliberate indifference**

Defendant also argues that even if an unconstitutional custom or policy did exist at the time of Plaintiffs Cole and Edmonds' arrests, the City of Memphis is not responsible for any constitutional violation because Plaintiffs have not shown that the City acted with deliberate indifference in establishing the custom or policy. (ECF No. 92-2 at 7.) According to

Defendant, "Plaintiffs offer no evidence of any pattern of behavior of unlawful acts with deliberate indifference to the rights of persons on Beale." (ECF No. 92-2 at 7.)

Plaintiffs argue that the "deliberate indifference" standard is satisfied in this case because Plaintiffs have asserted that "the Beale Street Sweep is a **facially** unconstitutional municipal policy [and custom] that caused, and was the moving force behind, the violations of the rights of the Plaintiffs and class members." (ECF No. 97 at 17, 20.) According to Plaintiffs, "a **facially** unconstitutional practice . . . is by its very nature deliberate indifference to the constitutional rights of those affected." (Id. at 20 (citing Burge v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. La. 2003)).)

The Court agrees with Plaintiffs that, assuming the Beale Street Sweep custom as alleged is factually established, the existence of the custom also establishes the City's responsibility for the custom. The relevant Supreme Court and Sixth Circuit precedent applies the "deliberate indifference" standard in cases where a plaintiff asserts a § 1983 claim against a municipality for failure to act to protect an individual's constitutional right. See, e.g., Canton, 489 U.S. at 388 ("We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."); Collins v. City of Harker Heights, Tex., 503 U.S. 115, 124 (1992) ("[The term deliberate indifference] was used in the Canton case for the quite different purpose of identifying the threshold for

holding a city responsible for the constitutional torts committed by its inadequately trained agents."); Regets v. City of Plymouth, 568 F. App'x 380, 394 (6th Cir. 2014) ("To succeed on a failure to train or supervise claim, the plaintiff must prove [that] . . . 'the inadequacy was the result of the municipality's deliberate indifference' . . . ."") (quoting Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006)); Key v. Shelby Cnty., 551 F. App'x 262, 267 (6th Cir. 2014) ("Under the 'inaction theory,' a plaintiff must show the existence of . . . the county's tacit approval of the unlawful behavior amounting to deliberate indifference and an official policy of inaction . . . ."); Claiborne County, 103 F.3d at 508 ("The evidence must show that the need to act is so obvious that the [municipality's] conscious decision not to act can be said to amount to a policy of deliberate indifference to [the plaintiff's] constitutional rights.") (internal quotation marks omitted).

Contrary to Defendant's position, the "deliberate indifference" standard is inapplicable to the present case. Plaintiffs do not assert a claim against the City of Memphis for its "inaction." Rather, Plaintiffs assert that an unconstitutional custom exists to affirmatively remove individuals from the Beale Street area in violation of their constitutional rights. (See Compl. at 2, ECF No. 1.) Because the alleged custom is an affirmative one, if Plaintiffs are able to factually establish the existence of the custom, Defendant City of Memphis' responsibility for the custom would be established. See Alexander v. Beale St. Blues Co., 108 F. Supp. 2d 934, 949 (W.D. Tenn. 1999) (declining to require allegations of deliberate indifference in

complaint where plaintiff alleged affirmative policies caused violations of plaintiff's constitutional rights).

Plaintiffs cite to case law from other circuits to support the proposition that a facially unconstitutional custom or policy inherently satisfies the deliberate indifference standard. (ECF No. 97 at 20 (citing Burge v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. La. 2003); Craig v. Floyd Cnty., Ga., 643 F.3d 1306, 1310 (11th Cir. 2011)).) Sixth Circuit precedent does not go so far as to establish a bright line rule that a facially unconstitutional custom is exempt from the "deliberate indifference" standard. The line drawn in Sixth Circuit case law is whether a plaintiff claims a constitutional violation based on a municipality's inaction. Accordingly, the Court declines to dismiss Plaintiffs' claims for failing to provide evidence of deliberate indifference.

B. **Substantive Due Process under the Fourteenth Amendment**

Plaintiffs argue that the Beale Street Sweep is an unconstitutional restriction on an individual's fundamental right to intrastate travel. (ECF No. 97 at 8-11.) The Court first considers whether such a right is fundamental to the concept of ordered liberty contemplated by the Due Process Clause of the Fourteenth Amendment. Next, the Court considers whether the Beale Street Sweep comports with Plaintiffs' rights to due process under the Fourteenth Amendment. Third, the Court turns to whether Plaintiffs' Fourth Amendment claims preempt their claims brought pursuant to the Due Process Clause of the Fourteenth Amendment.

1. Fundamental right to travel

The Supreme Court has not directly addressed the issue of whether intrastate travel is a fundamental right within the context of substantive due process. Johnson v. City of Cincinnati, 310 F.3d 484, 496 (6th Cir. 2002); Wardwell v. Bd. of Ed. of City Sch. Dist. of City of Cincinnati, 529 F.2d 625, 627 (6th Cir. 1976). Sixth Circuit case law regarding the issue of intrastate travel rights differs depending on the circumstances in which the rights are asserted. In Wardwell, the Court of Appeals for the Sixth Circuit "f[ound] no support for [the] theory that the right to intrastate travel has been afforded federal constitutional protection." 529 F.2d at 627. Consequently, the Court of Appeals applied a rational basis test in upholding a school board's rule that "any employee hired by the [school district] . . . must either reside within the [school district], or agree, as a condition of employment, to establish residency within the district within ninety days of employment." Id. at 626, 628.

The Court of Appeals addressed the issue again in Johnson. 310 F.3d 484. The Johnson court held that "the Constitution protects a right to travel locally through public spaces and roadways," as a fundamental right. Id. at 498. In support of the holding, the Court of Appeals found that similar to interstate travel, "the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage." Id. at 597-98. The Court of Appeals distinguished the Johnson case from Wardwell. The Court of Appeals found that the holding in Wardwell was limited to "employee residency requirements" and that the suggestion that

"the rational basis test should govern all potential intrastate travel claims . . . would be dicta and would not bind this court." Johnson, 310 F.3d at 494. The Sixth Circuit Court of Appeals declined to follow Third Circuit case law which applied intermediate scrutiny to an anti-cruising ordinance. Id. at 502 (citing Lutz v. City of York, Pa., 899 F.2d 255, 270 (3d Cir. 1990)). The Court of Appeals explained that strict scrutiny was the correct standard because "instead of regulating the manner in which affected individuals access [the area] . . . the [o]rdinance [at issue] impose[d] a more severe restriction, broadly prohibiting individuals to access the entire neighborhood." Id.

Taken broadly, the Johnson and Wardwell holdings are in direct conflict. Therefore, in order to reach a congruous interpretation of the two holdings, the Court must construe the holdings narrowly. Accordingly, the Court finds that the holding in Wardwell is limited to the context of "employee residency requirements." Further, the holding in Johnson "is limited to the right to travel locally through public spaces and roadways." 310 F.3d at 494.

In the instant case, Plaintiffs' assert the argument that during the Beale Street Sweep the MPD "deprives the individuals on Beale Street of their fundamental right to travel locally in public spaces." (ECF No. 97 at 8-9, 19.) Although the Beale Street Sweep does not go so far as to prohibit access to the entire Beale Street area, it goes beyond merely restricting the manner in which people access the area. As alleged, the Beale Street Sweep broadly denies individuals in the area access to the public roadways. (See Compl. at 2 ("[The] police officers of the Memphis Police Department . . .

order all persons to immediately leave the sidewalks and street . . . .") This prohibition is more analogous to a general restriction of access to a public area than to an ordinance that prohibits "driving repeatedly through a loop of certain major public roads." Johnson, 310 F.3d at 502. Accordingly, the Court finds that a street sweep and clearing implicates the fundamental right defined in Johnson. Consequently, the Court applies strict scrutiny to the constitutionality of the Beale Street Sweep.

2. Strict scrutiny analysis

"Government actions that burden the exercise of those fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest." Does v. Munoz, 507 F.3d 961, 964 (6th Cir. 2007) (internal quotation marks omitted). Because the Court finds the right to intrastate travel is a fundamental right protected by the Constitution, the Court evaluates the Beale Street Sweep custom under a strict scrutiny standard. See supra Part III.B.1. To satisfy strict scrutiny, the burden of proof shifts to the government to show a narrowly tailored compelling government interest. Johnson v. California, 543 U.S. 499, 505 (2005).

Defendant City of Memphis argues that the Beale Street Sweep survives strict scrutiny because "public safety, the wellbeing of persons and property on Beale, is a compelling state interest." (ECF No. 101 at 8.) Defendant asserts that "[t]emporarily clearing the two block stretch of Beale under circumstances which prudent policing dictates is narrowly tailored to serve the interest of public safety." (Id.) According to

Defendant, "[i]t would be irresponsible [for the] police to allow conditions on the street [to] overwhelm traditional police response." (Id.)

Plaintiffs argue that the Beale Street Sweep is not narrowly tailored and no compelling interest justifies its existence. (See ECF No. 97 at 11-12.) According to Plaintiffs, a temporary curfew in response to an emergency would be justified as a compelling state interest. (Id. at 12 (citing Moorhead v. Farelly, 727 F. Supp. 193 (D.V.I. 1989); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971); In re: Juan C., 28 Cal. App. 4th 1093 (Cal. App. 1994); Smith v. Aviano, 91 F. 3d 105, 109 (11th Cir. 1996)).) Plaintiffs assert that rather than carrying out the Beale Street Sweep in response to an emergency, the Beale Street Sweep "facilitate[s] a 3:00 a.m. work shift end for police officers." (Id.) Plaintiffs further assert that Defendant "cites no authority – and the Plaintiffs are aware of none – for the proposition that routine law enforcement and the arbitrary work hours of police officers constitute a compelling interest sufficient to warrant the exclusion of persons engaged in lawful conduct from a public street." (Id.) Additionally, Plaintiffs contend that "[e]vidence of typical, reoccurring crime plainly is inadequate to constitute a compelling interest warranting a permanent policy of routinely clearing Beale Street of adults engaged in lawful conduct." (Id. (citing Ruff v. Marshall, F. Supp. 303, 306 (M.D. Ga. 1977)).)

Regarding the existence of a compelling state interest, the Court agrees with Defendant that "public safety," "preserving the wellbeing of persons and property on Beale," and not "allow[ing] conditions on

the street [to] overwhelm traditional police response" are compelling interests to the City of Memphis. (See ECF No. 101 at 8.) In Johnson, the Court of Appeals for the Sixth Circuit found that the City of Cincinnati had a compelling interest "to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas." 310 F.3d at 502. Defendant's interest in maintaining order in the Beale Street area is much the same.

The Court of Appeals, however, struck down the ordinance in Johnson on the grounds that it was not narrowly tailored to achieve the City's stated interest. Id. at 504. In determining whether the city ordinance was narrowly tailored, the Court of Appeals looked to whether the ordinance "implicate[d] an individual's interest in localized travel," and whether it was "the least restrictive means to accomplish the City's goal." Id. at 503. The Johnson court found that the ordinance "infringe[d] on the right to localized travel through the public spaces and roadways," and held that "[b]y excluding innocent individuals, the Ordinance . . . unquestionably violated the constitutional rights of affected individuals, [and] failed to serve the purposes of the Act." Id. at 503-04. Moreover, the Court of Appeals affirmed the District Court's holding, which listed several alternatives to the ordinance, including "authoriz[ing] more funds and more police officers to patrol neighborhoods[, and] . . . organiz[ing] neighborhood watches . . ." Johnson v. City of Cincinnati, 119 F. Supp. 2d 735, 744 (S.D. Ohio 2000) aff'd, 310 F.3d 484 (6th Cir. 2002).

Like the city ordinance in Johnson, the Beale Street Sweep indiscriminately restricts an individual's travel

through local spaces and roadways. Furthermore, the Beale Street Sweep imposes this restriction without regard to whether the individual barred from access to Beale Street is engaged in "wholly innocent conduct," or even whether the individual is likely to engage in illegal activity. See Johnson, 310 F.3d at 503. Some of the same alternative means available in Johnson were also available to the City of Memphis in the instant case. Consequently, less restrictive alternatives that do not directly infringe on an innocent person's right to localized travel exist in order to preserve the wellbeing and security of persons and property on Beale Street. Accordingly, the Court finds that the Beale Street Sweep as alleged was not narrowly tailored and fails a strict scrutiny analysis.

The Court, however, stops short of declaring the Beale Street Sweep unconstitutional as a matter of law. Plaintiffs describe the Beale Street Sweep as "the policy, procedure, custom, or practice by which police officers of the Memphis Police Department (hereinafter referred to as the "MPD") order all persons to immediately leave the sidewalks and street on Beale Street when there are no circumstances present which threaten the safety of the public or MPD police officers." (Compl. at 2, ECF No. 1.) Plaintiffs further characterize the sweep as routine law enforcement executed primarily for the purpose of facilitating the end of police officers' work shift. (ECF No. 97 at 12.) In contrast, Defendant City of Memphis characterizes the sweep as an occasional practice executed only when "circumstances impacting public safety dictated." (ECF No. 101 at 3.) Defendant also indicates the purpose of the Beale Street Sweep was "to control rowdy crowds."

(Id. (internal quotation marks omitted).) Accordingly, several genuine issues of material fact remain.

3. Preemption

The Supreme Court has held that "all claims that law enforcement officers have used excessive force–deadly or not–in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." Graham, 490 U.S. at 395. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Id. The Supreme Court, however, has further explained:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied.

Lewis, 523 U.S. at 843-44 (internal quotation marks omitted). Consequently, where a § 1983 claim does not fall within the textual scope of a Constitutional Amendment, it is then appropriate to evaluate the

claim under the broader protections of due process. Johnson, 310 F.3d at 493.

In the instant case, the named Plaintiffs were arrested by police officers and detained for a period of time. (See Compl. ¶ 35-38, 51-58.) As a result, the named Plaintiffs' claims against the City of Memphis for constitutional violations that followed Plaintiffs' seizure fall within the scope of the Fourth Amendment. To the extent the named Plaintiffs seek individual relief for violations of due process under the Fourteenth Amendment, the named Plaintiffs' claims only apply to injuries suffered prior to each one's seizure. The named Plaintiffs' due process claims are therefore only partially preempted.

C. Fourth Amendment Violations

Plaintiffs assert claims of Fourth Amendment violations by the City of Memphis for unreasonable seizure due to excessive force. To succeed on a claim for a Fourth Amendment violation based on unreasonable seizure, Plaintiffs must show 1) seizure of the person occurred; and 2) the seizure was unreasonable. See Brower v. Cnty. of Inyo, 489 U.S. 593, 595, 599 (1989).

1. Seizure under the Fourth Amendment

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons." Terry v. Ohio, 392 U.S. 1, 20 (1968). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v.

Mendenhall, 446 U.S. 544, 554 (1980). Although it is clear that both named Plaintiffs were ultimately seized, given that they were arrested during the encounter at issue, the timing of when the encounter ripened into a seizure is an issue of fact properly determined by the jury.

2. Reasonableness

"[T]he Fourth Amendment governs all intrusions by agents of the public upon personal security . . . ." Terry, 392 U.S. at 19 n.15. The reasonableness analysis centers on "the scope of the particular intrusion, in light of all the exigencies of the case." Id. Generally, "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 490 U.S. at 396 (internal quotation marks omitted).

Defendant City of Memphis argues that the interests of public safety justify use of force in carrying out the Beale Street Sweep. (See ECF No. 92-2 at 11.) According to Defendant:

> [D]ecisions made to protect public safety on Beale Street in directing persons to enter a club or leave the street and sidewalks at 2:30 or 3:00am on some Saturday or Sunday nights is a narrow and reasonable intrusion into the alleged constitutionally protected interests when balanced against the governmental interest in protecting the safety of persons and property on Beale.

(Id. at 11-12.) Plaintiffs assert two grounds on which unreasonable seizure may be found: 1) unconstitutional arrest; and 2) excessive physical force applied during arrest and detention. (See ECF No. 97 at 15.)

a) **Unconstitutional arrest**

Arrests made with probable cause do not violate the Fourth Amendment's prohibition of unreasonable seizure. Graham, 490 U.S. at 396. Furthermore, "[i]t is a well-settled principle of constitutional jurisprudence that an arrest without probable cause constitutes an unreasonable seizure in violation of the Fourth Amendment." Ingram v. City of Columbus, 185 F.3d 579, 592-93 (6th Cir. 1999) (citing Donovan v. Thames, 105 F.3d 291, 298 n.7 (6th Cir. 1997)).)

In the instant case, Plaintiffs have raised a genuine issue of material fact as to whether Plaintiff Cole and Plaintiff Edmond were detained without probable cause. Plaintiffs assert that Cole was arrested while "eating a slice of pizza on Beale Street" with his cousin. (ECF No. 97 at 15.) Likewise, Edmond states that he "was engaged in lawful conduct and no probable cause existed" when he was detained by Memphis police officers. (Id. at 16.) According to Plaintiffs, Edmond was merely "enjoying the entertainment on Beale Street" with his family. (Id.) Both Cole and Edmond assert that prior to being detained, they heard police make the announcement that persons in the area must either leave the streets or enter into an establishment. (ECF No. 97-1 at PageID 1021; ECF No. 97-3 at PageID 1064-67.) Defendant asserts that Edmond was detained only "after engaging in an argument with a bouncer at Club 152." (ECF No. 92-1 ¶ 17.) Accordingly, the Court finds that a genuine issue of material fact exists as to

Fourth Amendment violations by the police on grounds of arrest without probable cause.

b) **Excessive physical force**

Use of excessive physical force in the arrest of an individual may also amount to unreasonable seizure in certain circumstances. See generally Graham, 490 U.S. at 396-97. Factors to be considered in determining whether the force applied in the seizure was unreasonable include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. Additionally, "[t]he "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397. Consequently, neither evil intent nor good faith of the arresting officer bear on the reasonableness determination. Id. "[T]he question [is] whether the totality of the circumstances justifie[s] a particular sort of search or seizure." Tennessee v. Garner, 471 U.S. 1, 8-9 (1985).

Plaintiffs assert that Cole was subjected to excessive force during his arrest on Beale Street. According to Cole, after being arrested for remaining Beale Street after the police announced to clear the streets, "MPD officers slammed Mr. Cole on the hood of a police squad car so hard that it dented the car's

hood." (ECF No. 97 at 15-16.) Given that Cole was ostensibly participating in a lawful activity – eating a slice of pizza – the Court finds that a reasonable jury could find that the police officers' conduct in arresting Cole was unreasonable and violated his Fourth Amendment rights. Accordingly, the Court finds a genuine issue of material fact exists as to whether Cole's Fourth Amendment rights were violated by police on grounds of excessive physical force.

IV. CONCLUSION

For the reasons stated above, Defendant City of Memphis' Motion for Summary Judgment (ECF No. 92) is GRANTED as to the following claims: 1) municipal liability for failure to train; 2) municipal liability for failure to investigate and discipline; 3) municipal liability pursuant to the Tennessee Government Tort Liability Act; and 4) punitive damages. With regards to First Amendment violations, the Court finds that Plaintiffs have not asserted a First Amendment claim in this case. Defendant's Motion for Summary Judgment is DENIED as to all other claims.

IT IS SO ORDERED, this 18th day of January, 2015.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 15-5725/5999

[Filed January 4, 2017]

LAKENDUS COLE; LEON EDMOND, INDIVIDUALLY AND AS REPRESENTATIVES OF ALL OTHERS SIMILARLY SITUATED,	)
Plaintiffs-Appellees,	)
v.	)
CITY OF MEMPHIS,	)
Defendant-Appellant.	)

BEFORE: GIBBONS, GRIFFIN, and DONALD, Circuit Judges.

O R D E R

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk