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

IAN MOBLEY, et al.,

Plaintiffs,

vs.

CITY OF DETROIT, et al.,

Defendants.
_____/

Case No. 10-cv-10675

Hon. Victoria A. Roberts
Magistrate Judge Mona K. Majzoub

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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANT CITY OF DETROIT

NOW COME Plaintiffs in the above-captioned case, by and through their counsel, and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move for partial summary judgment against Defendant City of Detroit.

Specifically, Plaintiffs seek summary judgment that they were detained, searched, charged with a criminal offense, and that their cars were seized in violation of the Fourth and Fourteenth Amendments to the Constitution, and that Defendant City of Detroit is liable for these constitutional violations because they were carried out pursuant to municipal policy or custom.

Regarding the *detention, search, and criminal prosecution of Plaintiffs*, summary judgment as to Defendant City of Detroit's liability should be granted to Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg on Counts One, Three, Four, and Six of their Amended Complaint (Dkt. # 21).

Regarding the *seizure of Plaintiffs' cars*, summary judgment as to Defendant City of Detroit's liability should be granted to Plaintiffs Ian Mobley, Kimberly Mobley, Angie Wong, Nathaniel Price, Jerome Price, Jason Leverette-Saunders, Wanda Leverette, Darlene Hellenberg, and Laura Mahler on Counts Five and Seven of their Amended Complaint (Dkt. # 21).

At this time Plaintiffs are not seeking summary judgment against the individual officers named as defendants in this action, nor on their claims (Count Two) for excessive force.

In support of this motion, Plaintiffs state as follows:

1. This case arises from a raid conducted by the Detroit Police Department at the Contemporary Art Institute of Detroit ("CAID") on May 31, 2008.

2. On the last Friday of each month, the CAID hosted a popular late-night event known as "Funk Night."

3. Funk Night provided an opportunity for people interested in the local arts and music scene to visit the CAID, become members or supporters of the organization, look at art, listen to music, dance, and socialize with one another.

4. There was a cover charge or membership fee to attend Funk Night, and alcohol was served.

5. Although the CAID could have obtained a special liquor license for non-profit organizations that would have made it legal for the CAID to serve alcohol at Funk Night, the CAID did not obtain a license.

6. However, the CAID *patrons* who attended Funk Night on May 31, 2008 did not know that the CAID had failed to obtain the license allegedly required to host the event legally.

7. The CAID patrons were therefore shocked and terrified when, during a Funk Night event, dozens of officers stormed the CAID with their weapons drawn in a brazen display of overwhelming force.

8. Instead of simply arresting the CAID's *proprietors* for serving alcohol without a license and shutting down the event, the police detained all 130 of the CAID's *patrons*, searched them, held them in the CAID for up to three hours, and charged them with "loitering in a place of illegal occupation," a criminal misdemeanor under Detroit's city code.

9. The police then impounded the cars of every patron who had driven to the CAID that night and parked outside or nearby, claiming that the cars were all subject to civil forfeiture under Michigan's "nuisance abatement" statute.

10. Although the police had a warrant to search the CAID for evidence of "blind pig" activity, the warrant did not authorize them to search or arrest any specific person, much less

every CAID patron who happened to be attending Funk Night when the raid occurred. The warrant also did not authorize them to seize anyone's car.

11. It is undisputed that the CAID patrons were detained, searched, and charged with loitering under the Detroit loitering ordinance solely because they were physically present at the CAID when the raid occurred.

12. The police had no basis to believe that the CAID patrons knew that the CAID was unlicensed or knew any other facts that made Funk Night unlawful.

13. It is likewise undisputed that the CAID patrons' cars were seized for forfeiture under Michigan's nuisance abatement law solely because they were driven to Funk Night and parked outside.

14. The police had no basis to believe that the CAID patrons' cars were used to transport alcohol to the CAID or used for any other unlawful act.

15. Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg were among the 130 patrons detained, searched, and charged with loitering in a place of illegal occupation based on their mere presence at the CAID.

16. They were obliged to go to court and answer the charges against them.

17. Their criminal cases were eventually dismissed.

18. Plaintiffs Ian Mobley, Angie Wong, Nathaniel Price, Jason Leverette-Saunders, and Darlene Hellenberg were among the 41 patrons whose cars were seized for forfeiture under Michigan's nuisance abatement statute. Plaintiffs Kimberly Mobley, Jerome Price, Wanda Leverette, and Laura Mahler were not present at the CAID but were the owners of cars seized during the raid because they were being driven by CAID patrons.

19. The Mobley, Leverette, Mahler, Wong, and Hellenberg vehicles were eventually returned to their owners. The Price vehicle was stolen from the lot to which it had been towed.

20. The searches and seizures of Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg were unreasonable in violation of the Fourth Amendment because:

a. Detroit's ordinance making it a crime to "loiter in a place of illegal occupation" was not a strict liability offense;

b. the officers who detained, searched, and charged Plaintiffs with loitering lacked probable cause to believe Plaintiffs knew the facts that allegedly made the CAID a "place of illegal occupation";

c. the officers who searched them lacked reasonable suspicion that they were armed and dangerous; and

d. if "loitering in a place of illegal occupation" was a strict liability offense, then it was unconstitutional as applied to Plaintiffs.

21. The seizures of the vehicles owned or possessed by Plaintiffs Ian Mobley, Kimberly Mobley, Angie Wong, Nathaniel Price, Jerome Price, Jason Leverette-Saunders, Wanda Leverette, Darlene Hellenberg, and Laura Mahler were unreasonable in violation of the Fourth Amendment because:

a. the officers who seized the cars lacked probable cause to believe the cars had been used for any unlawful act; and

b. if the nuisance abatement statute does not require knowledge of an unlawful act by a person using the abated property, then it is unconstitutional as applied to Plaintiffs.

22. Defendant City of Detroit is liable for the violation of Plaintiffs' constitutional rights because it is undisputed that the acts described above were undertaken pursuant to a policy or custom of the Detroit Police Department.

23. As to Plaintiffs' claims for relief against Defendant City of Detroit on Counts One, Three, Four, Five, Six, and Seven of their Amended Complaint (Dkt. # 21), there is no genuine dispute as to any material fact and Plaintiffs are entitled to a judgment of liability against Defendant City of Detroit as a matter of law.

24. Pursuant to Local Rule 7.1(a), Plaintiffs' counsel telephoned counsel for Defendant City of Detroit to explain the nature of this motion and its legal basis. Plaintiffs' counsel requested but did not obtain concurrence in the relief sought.

In further support of this motion, Plaintiffs refer the Court to their accompanying brief and its exhibits.

Respectfully submitted,

/s/ *Kathryn Bruner James*

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Dated: April 17, 2012

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT CITY OF DETROIT

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QUESTIONS PRESENTED

I. Were Plaintiffs' constitutional rights violated when they were detained, searched and charged with a crime for merely being present at a late-night music event hosted by a local arts organization where there was no probable cause to believe that Plaintiffs knew the organization had failed to obtain the proper license to host the event?

Plaintiffs answer "Yes."

II. Were Plaintiffs' constitutional rights violated when their cars were seized for forfeiture proceedings after driving to a late-night music event hosted by a local arts organization where there was no probable cause to believe the cars had been used for any unlawful act?

Plaintiffs answer "Yes."

III. Is the City of Detroit liable where police officers violated Plaintiffs' rights pursuant to a policy or custom of the City?

Plaintiffs answer "Yes."

AUTHORITY FOR RELIEF SOUGHT

Fed. R. Civ. P. 56

Bennis v. Michigan, 516 U.S. 442 (1996) (see Thomas, J., concurrence)

City of Chicago v. Morales, 527 U.S. 41 (1999)

Com. v. Schoen, 25 Pa. Super. 211 (1904)

Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807 (6th Cir. 2007)

Gov't of Virgin Islands v. Rodriguez, 423 F.2d 9 (3d Cir. 1980)

Hensley v. City of Norfolk, 218 S.E.2d 735 (Va. 1975)

In re Maynard, 53 N.W.2d 370 (Mich. 1952)

Morissette v. United States, 342 U.S. 246 (1952)

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)

People v. Meyer, 157 N.Y.S. 997 (1914)

People v. Tombs, 697 N.W.2d 494 (Mich. 2005)

Soldal v. Cook County, 506 U.S. 56 (1992)

Staples v. United States, 511 U.S. 600 (1994)

Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010)

United States v. Salisbury, 983 F.2d 1369 (6th Cir. 1993)

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)

Ybarra v. Illinois, 444 U.S. 85 (1979)

27 C.J.S. *Disorderly Houses* § 10

INTRODUCTION

The Fourth Amendment embodies several fundamental principles that help distinguish our free society from a police state. One is that before a person is detained and charged with a crime, there must be probable cause with respect to that particular person that he or she is committing or has committed a criminal offense. Another is that the government may not seize private property for forfeiture without probable cause that it was used unlawfully. Plaintiffs brought this lawsuit to preserve and protect these constitutional guarantees.

The case arises from a police raid conducted by Defendants at the Contemporary Art Institute of Detroit ("CAID") on May 31, 2008. On the last Friday of each month, the CAID hosted a popular late-night event known as "Funk Night," where people who were interested in the local arts and music scene (mostly young people in their twenties) visited the CAID, became members or supporters of the organization, listened to music, danced, and socialized. Unfortunately, the CAID was hosting this event without the license that was allegedly required under state law due to the fact that alcohol was being served. Based upon probable cause that the CAID was thus a "blind pig"[1] and a nuisance, police obtained a warrant to search the CAID.

Of course, the vast majority of CAID patrons in attendance at Funk Night (as opposed to CAID personnel who organized the event) had no knowledge that the CAID was unlicensed or was otherwise operating unlawfully. So they were shocked and terrified when, in the middle of a Funk Night event, the search warrant was executed by dozens of police officers who stormed into the CAID with their weapons drawn in a commando-style display of overwhelming force.

The events that followed led to this lawsuit. Despite there being no indication that the

[1] A "blind pig" is a regional Prohibition-Era term for a "speakeasy," an establishment that sells and serves alcoholic beverages illegally. *See American Heritage Dictionary of the English Language* 196, 1680 (5th ed. 2011); Karen Blumenthal, *Bootleg: Murder, Moonshine, and the Lawless Years of Prohibition* 64, 81, 128 (2011).

patrons innocently attending Funk Night knew that the CAID was unlicensed or knew that Funk Night was in any other way unlawful, the police searched every single person inside the CAID, detained them there for up to three hours, and charged them with "loitering in a place of illegal occupation"—*merely for being present*. Then, the police demanded to know who had driven a car to the CAID that night and parked outside or nearby. And despite there being no indication that any of those cars had been used for any unlawful act, the police impounded every single one of them for forfeiture proceedings under Michigan's "nuisance abatement" law—again, *merely because they were parked outside*.

Plaintiffs in this case are eight of the patrons who attended Funk Night when the raid occurred and four people who were not present but owned cars that were improperly seized. Plaintiffs do not challenge the legal basis for obtaining a warrant to search the CAID; they assume, for the purpose of this motion, that the CAID should have had a liquor license and was in that sense a nuisance under state law. Rather, they challenge the unjustified search and prolonged seizure of their persons merely because they were present at the CAID; their unlawful criminal prosecution for "loitering in a place of illegal occupation," also merely for being present; and the seizure of their cars merely for being parked outside—all without any evidence or probable cause that each such individual had done anything wrong or knew that the CAID had done anything wrong.

Plaintiffs bring this motion because (1) there is no genuine and material dispute that these events occurred as described above, and (2) they occurred pursuant to the routine and apparently longstanding custom or policy of the Detroit Police Department. Accordingly, Plaintiffs are entitled to a judgment of liability against Defendant City of Detroit as a matter of law.[2]

[2] As discussed in Section III of Plaintiffs' argument, *infra* at pages 31-32, the practices challenged in this lawsuit are policies or customs of Defendant City of Detroit and its police department. While

UNDISPUTED FACTS

The CAID is a known local arts organization that hosts exhibitions, performances, and other arts-related events at its headquarters on Rosa Parks Boulevard in the City of Detroit.[3] On the last Friday of each month, the CAID hosted a popular late-night event and fundraiser known as "Funk Night," which was advertised online.[4] Funk Night was an opportunity for those interested in local arts and music to visit the CAID, become members or supporters of the organization, look at art, listen to music, dance, and socialize with one another.[5]

The CAID served alcohol at Funk Night even though it had no liquor license.[6] After conducting undercover surveillance at a few Funk Night events, on May 29, 2008, Defendant Sergeant Buglo obtained a warrant to search the CAID for evidence of "blind pig" activity.[7] On May 31, 2008, Defendants Vicki Yost and Daniel Buglo entered the CAID in an undercover capacity that night to confirm that alcohol was being served unlawfully.[8] Lieutenant Yost observed the unlawful sale of alcohol shortly after 2:00 a.m. and called in a heavily armed raid team to execute the search warrant.[9]

Although the CAID and its proprietors were allegedly violating the law by serving

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this in no way excuses the conduct of the individual Defendant officers who acted pursuant to those unconstitutional policies or customs, it does make it unnecessary for Plaintiffs to seek summary judgment against those officers at this time. In the interest of narrowing the issues involved, Plaintiffs seek summary judgment against the City of Detroit only.

[3] Ex. 1, Korobkin Declaration w/ attachments; Ex. 2, Leverette-Saunders 11-13; Ex. 3, Leverette 11-15; Ex. 4, L. Maher 34.

[4] Ex. 5, Hellenberg 34; Ex. 6, Funk Night Ad.

[5] Ex. 2, Leverette-Saunders 30; Ex. 5, Hellenberg 31, Ex. 7, I. Mobley 25-27; Ex. 8, Washington 21-22.

[6] Ex. 9, Buglo 42-44; Ex. 10 at 4, Anticipatory Search Warrant & Affidavit.

[7] Ex. 10, Anticipatory Search Warrant & Affidavit.

[8] Ex. 9, Buglo 57; Ex. 11 at 7, DPD Crime Report.

[9] Ex. 11 at 7, DPD Crime Report; Ex. 9, Buglo 88-89; Ex. 12, Yost 68.

alcohol without a license, Yost and the other officers had no basis for thinking that the unlawfulness of Funk Night would have been readily apparent to each of the CAID *patrons* who were merely present when the raid took place. Everyone attending Funk Night was required to show ID to enter, and only persons of drinking age were given a wrist band or hand stamp to indicate that they could drink.[10] Although under Michigan law alcohol may not be sold after 2:00 a.m., the consumption of alcohol is allowed until 2:30, and given the proper license and permit an organization like the CAID may host special events that continue through the night.[11] There were 130 patrons attending Funk Night at the time of the raid, many of whom were nowhere near the bar.[12] There was no basis for believing that these patrons knew that the CAID did not have a license, sold alcohol after 2:00, or was otherwise flouting the law.

Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg were among the 130 patrons attending Funk Night when the raid occurred. Ian, Paul, Angie, James, Stephanie, and Jason were all in a fenced-in courtyard or patio area just outside the building, where no alcohol was being served.[13] Paul and Angie were about to leave, having just stopped by briefly to pick up a friend who, as it turned out, was not actually there.[14] Ian, Paul, and James had never been to

[10] Ex. 13, Timlin Declaration and Ex. 14, DVD Tracks 1 & 2; Ex. 9, Buglo 42; Ex. 2, Leverette-Saunders 14; Ex. 5, Hellenberg 21, 27; Ex. 7, I. Mobley 22; Ex. 8, Washington 19; Ex. 15, Hollander 11-12; Ex. 16, Kaiser 28, 65; Ex. 17, T. Mahler 7-8, 18-19; Ex. 18, N. Price 11; Ex. 19, Wong 21, 26.

[11] Ex. 41 at 4, 6-7, MLCC Club Licensee Information; Ex. 12, Yost 91-98.

[12] Ex. 9, Buglo 76-77; Ex. 12, Yost 81-90; Ex. 2, Leverette-Saunders 24-25, 29-31; Ex. 5, Hellenberg 27, 32; Ex. 7, I. Mobley 26, 28; Ex. 8, Washington 21-23; Ex. 15, Hollander 20-24; Ex. 16, Kaiser 30-34; Ex. 17, T. Mahler 27-31; Ex. 18, N. Price 18-20; Ex. 19, Wong 27-30.

[13] Ex. 2, Leverette-Saunders 30-31; Ex. 7, I. Mobley 28; Ex. 8, Washington 22; Ex. 15, Hollander 22-24; Ex. 16, Kaiser 34; Ex. 19, Wong 27-30.

[14] Ex. 16, Kaiser 33; Ex. 19, Wong 26-28.

the CAID before.[15] Nathaniel had just arrived at the CAID and was standing near the front door, and Darlene was in a back room where people were dancing.[16]

At approximately 2:10 or 2:20 a.m. dozens of police officers stormed the CAID in paramilitary raid gear and with their weapons drawn.[17] CAID patrons and staff were trampled, manhandled, thrown to the ground, hit, and kicked.[18] Although the warrant did not authorize the search or arrest of any person, the police searched and detained every single person present.[19] Men and women were separated into different rooms, patted down, and required to wait for several hours under police guard while the officers "processed" them.[20]

Supervised by Lieutenant Yost, the police charged all 130 patrons attending Funk Night with the crime of "loitering in a place of illegal occupation" in violation of City Code § 38-5-1.[21] No inquiry was made as to whether any of the patrons knew the CAID was unlicensed or had served alcohol after hours.[22] Instead, each patron was charged with a crime merely for being

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[15] Ex. 7, I. Mobley 19; Ex. 8, Washington 14; Ex. 16, Kaiser 17.

[16] Ex. 5, Hellenberg 32; Ex. 18, N. Price 18-20.

[17] Ex. 14, Tracks 3, 4, and 5; Ex. 11 at 1, 7, DPD Crime Report; Ex. 20, DPD Activity Logs; Ex. 21, Turner 53.

[18] Ex. 14, Track 3; Ex. 2, Leverette-Saunders 32-33; Ex. 7, I. Mobley 30-32; Ex. 8, Washington 25-28; Ex. 15, Hollander 26-27; Ex. 16, Kaiser 38, 42; Ex. 17, T. Mahler 34-37; Ex. 18, N. Price 21, 23, 30; Ex. 19, Wong 31-32.

[19] Ex. 10, Anticipatory Search Warrant & Affidavit; Ex. 14, DVD, Tracks 6 and 7; Ex. 22, Potts 40.

[20] Ex. 14, DVD, Tracks 8 and 9; Ex. 9, Buglo 122; Ex.12, Yost 72, 119-20, 128-29; Ex. 22, Potts 46-48; Ex. 23, Cole 63-64; Ex. 2, Leverette-Saunders 34-37; Ex. 5, Hellenberg 37-39; Ex. 7, I. Mobley 32-34, 40; Ex. 8, Washington 32; Ex. 15, Hollander 25-28; Ex. 16, Kaiser 38, 42-46, 49; Ex. 17, T. Mahler 37-39; Ex. 18, N. Price 20-22; Ex. 19, Wong 36.

[21] Ex. 11, DPD Crime Report; Ex. 9, Buglo 75-77, 85-86; Ex. 12, Yost 104, 129-30; Ex. 24, Gray 65. After this lawsuit was filed, the ordinance was amended to prohibit loitering in a place of illegal occupation "with the intent to engage in such illegal occupation." Detroit Ordinance (Mich.) No. 29-10 (2010), Ex. 25.

[22] Ex. 9, Buglo 62, 83-86, 98; Ex. 12, Yost 89-90; Ex. 21., Turner 35; Ex. 23, Cole 83-84; Ex. 24, Gray 23, 65.

present.[23] It is undisputed that, aside from "loitering in a place of illegal occupation," there was no probable cause to believe any plaintiff had committed any criminal offense.[24] Each patron was required to go to court to defend against the criminal loitering citation.[25] Plaintiffs' criminal cases were eventually dismissed.[26]

Before they were allowed to leave the CAID, patrons were also all asked if they had driven to the CAID and parked outside.[27] If they had, the police impounded their car for forfeiture proceedings under Michigan's "nuisance abatement" statute, M.C.L. § 600.3801 *et seq.*[28] Some drivers were handed a piece of paper entitled "Nuisance Abatement: Notice of Impoundment of Vehicle," which stated:

> The motor vehicle you were driving or in which you were a passenger was seized pursuant to an arrest or a state misdemeanor or a comparable city ordinance violation involving lewdness, assignation, and/or solicitation for prostitution, *or used for the unlawful manufacture, storing, possessing, transporting, sale,*

[23] Ex. 9, Buglo 98; Ex. 12, Yost 89; Ex. 21, Turner 59-60; Ex. 22, Potts 72-73; Ex. 24, Gray 63, 66; Ex. 26, Johnson 76-80; Ex. 27, McWhorter 70; Ex. 28, Singleton 42-43.

[24] By interrogatory, Plaintiffs asked Defendants: "State any and all facts and circumstances known to Defendants at the time of the raid that would support a finding of probable cause that Plaintiffs had committed or were committing a criminal offense other than loitering in a place of illegal occupation. Name the offense(s) and provide a citation to the relevant statute or ordinance." Ex. 29. Defendants' only response was that Defendant Buglo had testified on page 149 of his deposition transcript that weapons were seized. *Id.* However, Buglo's testimony on page 149 is clearly about a different raid at a different place on a different date (i.e., the "Cozy House"). Ex. 9, Buglo 147-49. Defendants did not provide any other basis for probable cause that Plaintiffs were committing any other offense.

[25] Ex. 2, Leverette-Saunders 42; Ex. 5, Hellenberg 45; Ex. 7, I. Mobley 43; Ex. 8, Washington 34; Ex. 15, Hollander 30-33; Ex. 16, Kaiser 61-63; Ex. 30, Declaration of Nathaniel Price; Ex. 31, Declaration of Angie Wong.

[26] Ex. 32, Dismissal Orders.

[27] Ex. 9, Buglo 110-11; Ex. 21, Turner 67-68; Ex. 2, Leverette-Saunders 39-40; Ex. 5, Hellenberg 39; Ex. 7, I. Mobley 34-35; Ex. 15, Hollander 28-29; Ex. 17, T. Mahler 39; Ex. 18, N. Price 22-23; Ex. 19, Wong 36-37.

[28] Ex. 5, Hellenberg 39; Ex. 19, Wong 36-37.

> *keeping for sale, giving away, bartering, or furnishing of any controlled substance or any intoxicating liquors . . . .*[29]

Although the search warrant did not authorize the seizure of any cars, at Lieutenant Yost's directive the police "abated" the car of every CAID patron attending Funk Night who had parked outside or nearby.[30] Among the 44 cars taken that night were those driven by Ian Mobley (who had parked *a mile away* at the house of an acquaintance and walked to the CAID), Angie Wong, Nathaniel Price, Jason Leverette-Saunders, and Darlene Hellenberg.[31] Plaintiffs Kimberly Mobley, Jerome Price, Wanda Leverette, and Laura Mahler owned the cars being driven by their respective sons Ian, Nathaniel, Jason, and Thomas.[32]

It is undisputed that the only basis for seizing Plaintiffs' cars was Michigan's "nuisance abatement" statute.[33] There is also no dispute that the police took the cars solely because they had transported Plaintiffs to, or near, the CAID.[34] There was no allegation, and no reason to believe, that Plaintiffs used their cars to transport alcohol, or even that they drove their cars to the CAID knowing that they were driving to an unlicensed establishment or event.[35] According to Defendants, simply driving the vehicle to the location of an unlawful sale of alcohol was considered sufficient to seize the car.[36]

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[29] Ex. 33, Notice of Impoundment of Vehicle (emphasis added); Ex. 4, L. Mahler 18-19; Ex. 5, Hellenberg 39-40; Ex. 19, Wong 36-37; Ex. 34, K. Mobley 11.

[30] Ex. 10 at 1, Anticipatory Search Warrant & Affidavit; Ex. 12, Yost 130; Ex. 21, Turner 67, 72-73.

[31] Ex. 37, DPD Follow Up Report; Ex. 2, Leverette-Saunders 40; Ex. 5, Hellenberg 39-40; Ex. 7, I. Mobley 19-21, 34-40; Ex. 18, N. Price 22-23; Ex. 19, Wong 36-38.

[32] Ex. 3, Leverette 17; Ex. 4, L. Mahler 16-18; Ex. 34, K. Mobley 10; Ex. 38, J. Price 7-8.

[33] Ex. 29, Defs' Resp. to Interrog. #17.

[34] Ex. 12, Yost 140-141; Ex. 21, Turner 73; Ex. 23, Cole 78.

[35] Ex. 9, Buglo 110; Ex. 23, Cole 78.

[36] Ex. 12, Yost 140; Ex. 21, Turner 73; Ex. 26, Johnson 88.

The dismissal of all criminal charges against Plaintiffs did not result in the return of their cars or the dismissal of their forfeiture proceedings. Angie Wong, Wanda Leverette, and Laura Mahler each paid $900 plus towing and storage fees to get their cars back,[37] but Ms. Leverette could not get to work for a week because she had no other means of transportation, and Ms. Mahler had to wait three weeks while she borrowed money from family.[38] The Mobleys refused to pay over $900 to recover their car because Ian had done nothing wrong (and had not even parked his car near the CAID), so they contested its forfeiture in circuit court.[39] This strategy was ultimately successful but their car was not returned to them for over four months.[40] Darlene Hellenberg also challenged the forfeiture, but after *ten* months without her car she agreed to pay $400 and do community service to secure its return (it was covered in dust and had a flat tire).[41] Jerome Price paid a $900 "redemption fee" thinking he would get his car back, but his car had already been stolen from the tow lot so he never again saw it (or his $900) again.[42]

Finally, it is undisputed that the police actions described above were the standard operating procedure of Defendant City of Detroit's Police Department.[43] According to the undisputed testimony of officers who have participated in countless "blind pig" raids, all patrons

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[37] Plaintiffs paid the $900 "redemption fee" to the Wayne County Prosecutor's Office, which is responsible for nuisance abatement actions under M.C.L. § 600.3805. Ex. 3, Leverette 25-26; Ex. 4, L. Mahler 23-24; Ex. 19, Wong 41; Ex. 38, J. Price 22. The City of Detroit then recovered two-thirds of those fees from the County. Ex. 35, Defs' Resp. to Interrog. #11. The City of Detroit has recovered over $1 million in "nuisance abatement" revenue since 2005 as a result of motor vehicle seizures under M.C.L. § 600.3801. Ex. 36.

[38] Ex. 3, Leverette 23-26; Ex. 4, L. Mahler 23-25, 28, 35-37; Ex. 19, Wong 41-42.

[39] Ex. 34, K. Mobley 14.

[40] Ex. 34, K. Mobley 15-16.

[41] Ex. 5, Hellenberg 47-51.

[42] Ex. 38, J. Price 22, 25-26.

[43] Ex. 39 at 3, Defs' Resp. to RFA #3.

present during such raids are detained, searched, and charged with loitering in a place of illegal occupation, and their cars seized for nuisance abatement, regardless of whether the patron knows the place is unlicensed or operating unlawfully and regardless of whether the patron intended to engage in any illegal activity.[44]

SUMMARY-JUDGMENT STANDARD

A motion for summary judgment must be granted if the movant shows, as to one or more claims or defenses, 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). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," there is no genuine dispute of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). The central inquiry 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." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-52 (1986). Partial summary judgment may be entered for a plaintiff as to liability alone, with the issue of damages proceeding to trial. Fed. R. Civ. P. 56(g); 10B Wright, Miller & Kane, *Federal Practice and Procedure* § 2736 (3d ed.).

ARGUMENT

I. Plaintiffs' constitutional rights were violated because they were detained, searched, and charged with a crime without probable cause that they were committing any criminal offense.

The warrant that authorized police to search the CAID did not authorize them to search or arrest the patrons who happened to be there when the search took place.[45] *See Ybarra v. Illinois*,

[44] Ex. 9, Buglo 77-79, 85-86, 107-10, 145-49; Ex. 12, Yost 104, 129; Ex. 21, Turner 24, 32-35, 72-73; Ex. 22, Potts 44, 78; Ex. 23, Cole 27, 83; Ex. 24, Gray 21-23, 29-30, 62, 74-75.

[45] Ex. 10 at 1, Anticipatory Search Warrant & Affidavit.

444 U.S. 85, 91-94 (1979). And it is undisputed that, aside from "loitering in a place of illegal occupation," there was no probable cause to believe Plaintiffs had committed any criminal offense.[46] Therefore the central question in this case is whether there was probable cause to support the loitering offense with which every single CAID patron was charged merely because of that patron's presence at the CAID. As explained below, there was not.

A. "Loitering in a place of illegal occupation" was not a strict liability offense.

The first step in the court's inquiry should be one of statutory construction. Statutory construction of a city ordinance is a question of state law. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). "If the state's highest court has not addressed the issue, the federal court must attempt to ascertain how that court would rule if it were faced with the issue." *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1181 (6th Cir. 1999). A federal court may look to rules of statutory construction used and adopted by the state's highest court in an effort to discover how that court would construe the ordinance. *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 300 (4th Cir. 2009).

At the time of the raid,[47] the Detroit disorderly conduct ordinance stated:

> Any person . . . who shall loiter in a place of illegal occupation[] shall be guilty of a misdemeanor.

Detroit City Code § 38-5-1. Although this ordinance did not contain explicit language requiring proof of knowledge or intent, such a requirement was implied as a matter of law. As explained below, a person in a "place of illegal occupation" did not violate the ordinance unless she knew the facts that made it illegal. Mere presence in such a place was not a crime.

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[46] *See supra* footnote 24.

[47] After this lawsuit was filed, the ordinance was amended. *See* Detroit Ordinance No. 29-10 (2010), Ex. 25 (making it illegal to "loiter in a place of illegal occupation *with the intent to engage in such illegal occupation*" (emphasis added)).

1. As a matter of statutory construction under Michigan law, knowledge was presumed to be an implied element of the offense.

Although the Michigan Supreme Court has never construed Detroit's ordinance, it uses a well-established rule of statutory construction to infer a knowledge or intent element in criminal statutes even when the statutory language is silent as to such an element: "Statutes that create strict liability for all their elements are not favored. Hence, we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, even if it was left unstated." *People v. Tombs*, 697 N.W.2d 494, 497 (Mich. 2005). "Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature's intent not to eliminate *mens rea*." *Id.* at 500. "Inferring some type of guilty knowledge or intent is necessary when a statute is silent regarding *mens rea* because without it innocent conduct could be criminalized." *People v. Kowalski*, 803 N.W.2d 200, 209 n.12 (Mich. 2011); *see also Tombs*, 697 N.W.2d at 505 (Taylor, C.J., concurring).[48]

In *Tombs*, the Michigan Supreme Court adopted this rule of statutory construction as developed by the United States Supreme Court in *Morissette v. United States*, 342 U.S. 246 (1952), *Staples v. United States*, 511 U.S. 600 (1994), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). In *Morissette*, the Court held that, despite the lack of an explicit *mens rea* requirement in the relevant statute, the law does not prohibit the "conversion" of government property where the defendant believes the property abandoned. In *Staples*, the Court ruled that the federal statute prohibiting possession of an unregistered machinegun requires proof that the defendant knew that the firearm in question was a machinegun, again notwithstanding the

[48] A knowledge requirement can also be inferred to preserve the constitutionality of a statute that would otherwise criminalize innocent conduct. *People v. Balog*, 224 N.W.2d 725, 726 (Mich. App. 1974). Thus, a knowledge requirement should be presumed here because, as explained in Section I.D, *infra*, to construe Detroit's loitering ordinance as a strict liability offense would raise serious constitutional questions.

statutory silence regarding criminal intent. And in *X-Citement Video*, the Court ruled that the law that prohibits the receipt or distribution of material depicting a minor engaged in sexually explicit conduct applies only where the defendant knows the material depicts a minor.

The same rule applies here: an implied knowledge element in Detroit's loitering ordinance was presumed even though it did not appear explicitly on the face of the ordinance. A "conventional *mens rea* element . . . would require that the defendant know the facts that make his conduct illegal." *Staples*, 511 U.S. at 606. Thus, to have been "loitering in a place of illegal occupation" in violation of the ordinance, Plaintiffs had to have at least known the facts that made the CAID a "place of illegal occupation." Without this construction, "innocent conduct could be criminalized." *Kowalski*, 803 N.W.2d at 209 n.12. The CAID patrons' innocent presence at Funk Night, not knowing that the CAID was unlicensed or in any other way operating unlawfully, was not a crime.

2. The ordinance was derived from a common-law offense that contained a knowledge requirement.

Beyond the presumption against strict liability, courts also look to the common law for clues as to whether an offense contains a knowledge requirement. *Staples*, 511 U.S. at 605. Citing *Morissette*, 342 U.S. 246, the Michigan Supreme Court has stated that "where the criminal statute is a codification of the common law, and where *mens rea* was a necessary element of the crime at common law, the Court will not interpret the statute as dispensing with knowledge as a necessary element." *People v. Quinn*, 487 N.W.2d 194, 198 (Mich. 1992).

Here, Detroit's ordinance likely had its origins in a common-law offense where knowledge was an element. Although the exact phrase "loitering in a place of illegal occupation" did not appear in common law, there was a common-law offense of "frequenting a disorderly house." 27 C.J.S. *Disorderly Houses* § 10 (Ex. 40). A disorderly house, presumably

much like a "place of illegal occupation" in Detroit's ordinance, can be any place "of public resort" that is put to some "improper use." *Id*. §§ 11, 15. This can include a place where "liquor is . . . habitually sold in violation of law." *Id*. § 13. To be guilty of "frequenting" a disorderly house, a defendant must actually know it to be such a house; mere presence at the house is insufficient. *Id*. § 10; *Gov't of Virgin Islands v. Rodriguez*, 423 F.2d 9, 14 (3d Cir. 1980); *Hensley v. City of Norfolk*, 218 S.E.2d 735, 738 (Va. 1975); *People v. Meyer*, 157 N.Y.S. 997 (1914); *Com. v. Schoen*, 25 Pa. Super. 211 (1904). Accordingly, "in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly established," *Staples*, 511 U.S. at 605 (citation omitted), Detroit's ordinance was not intended to criminalize innocent presence.

3. The ordinance was not a "public welfare" or "regulatory" offense.

The Supreme Court has explained that, in "limited circumstances," and where an offense is *not* derived from common law, strict liability is occasionally recognized in the "public welfare" or "regulatory" category:

> Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to ascertain at his peril whether his conduct comes within the inhibition of the statute.

Staples, 511 U.S. at 607 (citations, quotation marks, and brackets omitted).[49]

[49] Examples of strict-liability public welfare offenses include improper disposal of scrap tires, *People v. Schumacher*, 740 N.W.2d 534 (Mich. 2007), unregistered possession of grenades, *United States v. Freed*, 401 U.S. 601 (1971), and shipping of misbranded and adulterated drugs, *United States v. Dotterweich*, 320 U.S. 277 (1943).

"Loitering in a place of illegal occupation" was not a public welfare offense. It is true that the state has an interest in regulating the *dispensing* of liquor and prohibiting such without a license. *See Morissette*, 342 U.S. at 262 n.20. But a criminal statute for that regulatory purpose, while perhaps imposing strict liability on a tavern keeper or distiller, would not impose such penalties on those who merely happen to set foot inside an unlicensed establishment. The Supreme Court has stated that public welfare offenses "heighten the duties of *those in control* of particular industries, properties or activities that affect public health, safety or welfare." *Id.* at 254 (emphasis added). Public welfare offenses are directed at those in control of the regulated industries or activities because such a defendant is the person in the best position to know of and prevent the danger the statute is intended to regulate. *Id*. at 256; *Quinn*, 487 N.W.2d at 199. Accordingly, *loitering* in a place of illegal occupation cannot be deemed a public welfare offense because it is the person who *engages* in the illegal occupation—not any person who merely happens to be present—who is in a position to know of and prevent the dangers inherent in the activity the state seeks to regulate.

In this case, Plaintiffs and other CAID patrons had no control over the CAID or its activities; in fact, the very concept of "loitering in a place" implies that the person is not in control of it. Society might reasonably expect that those involved in the actual operation of the CAID take notice of whether it is operating legally. But no regulatory purpose is served by requiring each member of the general public who merely *attends* an event at the CAID to know whether the CAID has a license to host the event and is complying with all relevant government regulations. Regulatory statutes do not place that burden on everyday consumers and patrons.

If this were not the rule, the consequences would be absurd. All patrons at a supermarket that sells alcohol before noon on a Sunday, and all diners at a restaurant that serves wine without

a liquor license, would be guilty of loitering in a place of illegal occupation, even if they have no idea that the unlawful sale is taking place.[50] If the owner of a general store secretly allows gambling in a back room, customers who walk into the store to buy cough drops or chewing gum would be committing a crime even though they are ignorant of the illegal acts taking place there. To construe the ordinance in this way "would be to criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985).

B. The police lacked probable cause to believe Plaintiffs knew that the CAID was unlicensed or knew any other facts that allegedly made the CAID a "place of illegal occupation."

Because loitering in a place of illegal occupation is not a strict liability offense, the police could not enforce that ordinance against everyone who happened to be attending Funk Night without probable cause that each CAID patron knew the facts that allegedly made the CAID a place of illegal occupation. "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Probable cause is required as to each element of an offense. *Evans v. City of Etowah*, 312 F. App'x 767, 771 (6th Cir. 2009); *United States v. Griffith*, 193 F. App'x 538, 541 (6th Cir. 2006). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized* with respect to that person." *Ybarra*, 444 U.S. at 91 (emphasis added). Thus, "[e]ven assuming that [police] had probable cause to believe that *some people* present . . . had committed arrestable offenses, [they] nonetheless lacked probable cause for detaining *everyone* who happened to be [at the CAID]." *Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006) (emphasis in original).

[50] Speaking of absurd consequences, one of the police officers in this case testified that if Ford Field's liquor license expired but beer was sold at a football game, then every single Lions fan attending the game would be guilty of loitering in a place of illegal occupation. Ex. 23, Cole 95-96.

Here, it is undisputed that the police enforced "loitering in a place of illegal occupation" as a strict liability offense, treating a person's mere presence there as a crime.[51] It was not suspected that Plaintiffs each knew the CAID was unlicensed or otherwise operating illegally; they were detained and charged with loitering merely because they were there.[52]

Furthermore, the facts actually known to Yost and the other officers involved in the decision to detain and charge Plaintiffs would not yield a reasonable conclusion that Plaintiffs knew the facts that allegedly made the CAID a "place of illegal occupation." This point is perfectly illustrated by Yost's testimony that she spoke with the CAID's proprietor and advised him that the CAID could host Funk Night events lawfully if he obtained the proper "24-hour liquor license" in advance.[53] At the time she made the decision to call in the raid, Yost knew that the CAID, rather than heeding her advice, remained unlicensed—but she had no reason to believe that the CAID's *patrons* knew that the CAID did not have the liquor license that would have made the event legal.[54]

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[51] Ex. 9, Buglo 61-62, 83-84, 98; Ex. 12, Yost 89-90.

[52] Ex. 21, Turner 33-35, 59-60; Ex. 22, Potts 72-73; Ex. 23, Cole 83-84; Ex. 24, Gray 66; Ex. 26, Johnson 77-80.

[53] Ex. 12, Yost 91-98. Michigan law allows non-profit organizations such as the CAID to serve alcohol at a special event fundraiser if they obtain a 24-hour liquor license. Ex. 41 at 4, MLCC Club Licensee Information. In addition, an "extended hours permit" is available for entertainment and dancing to continue all night. *Id.* at 7.

[54] As Yost acknowledged at her deposition, the fact that the raid took place after 2:00 a.m. did not mean that everyone at the CAID was somehow "on notice" that the CAID was a "place of illegal occupation." Ex. 12, Yost 81-90. Although properly licensed facilities must stop *selling* alcohol at 2:00 a.m., they may allow their patrons to *consume* alcohol until 2:30. Ex. 41 at 6, MLCC Club Licensee Information. In this case, the raid took place *before* 2:30. Ex. 14 Track 3; Ex. 11 at 1, 7 DPD Crime Report; Ex. 20, DPD Activity Logs; Ex. 21, Turner 53.

Although there is evidence that the CAID did not stop serving alcohol at precisely 2:00, there was no reason to believe that within a few minutes after 2:00 every single person who was at the CAID knew that the 2:00 rule was being violated. There were over 130 patrons, many of whom were not near the bar (or even in the same room) and could not be expected to know at 2:10 or 2:20 that alcohol was being sold. Ex. 2, Leverette-Saunders 25; Ex. 5, Hellenberg 27, 32; Ex. 8, Washington

To be clear, for the purpose of this motion, Plaintiffs are not arguing that *no one* at the CAID was committing a crime, or that the CAID had dutifully complied with the relevant licensing regulations. Based on probable cause that the CAID's *proprietors* were acting unlawfully and creating a nuisance, the police could have arrested them, shut down Funk Night, and told the patrons to go home. But the Fourth Amendment prohibits the search and prolonged seizure of an undifferentiated mass of persons merely for being present at an event that could very well be lawful but, unbeknownst to them, happens to be unlicensed.

C. The police violated Plaintiffs' Fourth Amendment rights by detaining them, searching them, and charging them with a crime.

Because Detroit's ordinance is not a strict liability offense and there was no probable cause that Plaintiffs had committed any other crime, Plaintiffs have established a violation of their Fourth Amendment rights as alleged in Counts One, Three, and Four of their complaint.

1. Count One: Unlawful Detention

For a plaintiff to prevail on a claim of unlawful detention under the Fourth Amendment, there is no need to establish that she was formally arrested. *Dunaway v. New York*, 442 U.S. 200, 207 (1979). A person has been seized within the meaning of the Fourth Amendment if a reasonable person under the circumstances would not have felt free to leave. *Gardenhire v. Schubert*, 205 F.3d 303, 313 (6th Cir. 2000). The seizure of a person may be reasonable under the *Terry* doctrine if it is no more than a *brief* investigatory stop based on reasonable suspicion.

20-21; Ex. 15, Hollander 20-21; Ex. 16, Kaiser 30-31; Ex. 18, N. Price 19-20; Ex. 19, Wong 28-30. For example, a number of CAID patrons were in a separate outdoor courtyard or patio area. Ex. 2, Leverette-Saunders 29-31; Ex. 7, I. Mobley 28; Ex. 8, Washington 22; Ex. 15, Hollander 23-24; Ex. 16, Kaiser 32-34; Ex. 17, T. Mahler 27-31; Ex. 19, Wong 28. Yost made the decision to call in the raid after seeing alcohol being sold indoors at 2:10, yet she had no idea whether alcohol was being provided to patrons on the patio after 2:00 and thus no basis to believe the CAID patrons on the patio knew that the CAID was operating unlawfully by violating the 2:00 rule. She decided that *all* the patrons should be charged with loitering based on their *presence* at the CAID, not based on any evidence that each of them knew that alcohol was being served after 2:00. Ex. 10 at 7, DPD Crime Report; Ex. 12, Yost 68, 85-90, 104.

United States v. Arvizu, 534 U.S. 266, 273-74 (2002). A more prolonged detention, however, can ripen into a de facto arrest requiring probable cause. *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 827-28 (6th Cir. 2007). And regardless of whether the standard is reasonable suspicion or probable cause, it must apply to the *particular* individual being detained. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *Ybarra*, 444 U.S. at 91, 94.

Here, it is undisputed that Plaintiffs were detained at the CAID.[55] They were clearly not free to leave or to walk around; men and women were separated and held in different rooms.[56] The detention lasted several hours, in some cases the rest of the night.[57] Thus, there can be no question that the seizure of every CAID patron attending Funk Night ripened into a de facto arrest requiring probable cause. *See Ctr. for Bio-Ethical Reform*, 477 F.3d at 827-28 (hours-long detention was de facto arrest). As explained above, there was no probable cause to arrest Plaintiffs for loitering in a place of illegal occupation or any other crime. Accordingly, Plaintiffs have established a violation of their rights under the Fourth Amendment as alleged in Count One.

2. Count Three: Unreasonable Search

A pat-down or frisk is a search within the meaning of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). As with brief investigatory stops, such searches must be supported by individualized suspicion with respect to the particular person searched. *Ybarra*, 444 U.S. at 91-94. Upon executing a search warrant, police may not pat down or frisk a person who merely happens to be present unless they suspect that specific individual of being armed and presently

[55] Ex. 42, Defs' Resp. to RFA #4; Ex. 14, Tracks 6 and 7; Ex. 9, Buglo 137; Ex. 22, Potts 40.

[56] Ex. 12, Yost 119-20; Ex. 22, Potts 39, 46-47; Ex. 23, Cole 63-64; Ex. 24, Gray 54; Ex. 2, Leverette-Saunders 35-36; Ex. 5, Hellenberg 37-39; Ex. 7, I. Mobley 32-34; Ex. 15, Hollander 25, 28; Ex. 16, Kaiser 42-46; Ex. 17, T. Mahler 36-37; Ex. 18, N. Price 19-20; Ex. 19, Wong 36.

[57] Ex. 14, Tracks 8 and 9; Ex. 9, Buglo 122; Ex. 12, Yost 72, 119-20; Ex. 22, Potts 46-48; Ex. 23, Cole 63-64; Ex. 7, I. Mobley 40; Ex. 8, Washington 32; Ex. 16, Kaiser 49; Ex. 18, N. Price 22; Ex. 19, Wong 37.

dangerous. *Id.*; *United States v. Ritter*, 416 F.3d 256, 268-69 (3d Cir. 2005). Generalized cursory searches are unconstitutional. *Ybarra*, 444 U.S. at 93-94.

In this case, it is undisputed that Plaintiffs were searched.[58] Yet there was no basis for the police to suspect that any one of them was armed and dangerous.[59] Instead, upon entering the CAID the police did a pat-down or frisk search of *every single person* who was present regardless of whether that particular person was suspected of being armed and dangerous.[60] Because these generalized searches are unconstitutional, Plaintiffs have established a violation of their rights under the Fourth Amendment as alleged in Count Three.

3. Count Four: Malicious Prosecution

To prevail on a claim of malicious prosecution under the Fourth Amendment, a plaintiff must show (1) a criminal prosecution was initiated against her and the defendant made, influenced, or participated in the decision to prosecute; (2) a lack of probable cause for the criminal prosecution; (3) a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor. *Sykes v. Anderson*, 625 F.3d 294, 308-09 (6th Cir. 2010). Under the Fourth Amendment (as opposed to common law), malice is not an element of malicious prosecution. *Id*. at 309. Rather, the cause of action allows a plaintiff to recover for the "wrongful institution of legal process" against her. *Id*. at 308.

Beginning with the first element, Plaintiffs were each charged with loitering in a place of illegal occupation.[61] The Sixth Circuit has stated that "an officer may be responsible for

[58] Ex. 14, Tracks 6 and 7; Ex. 12, Yost 128-29; Ex. 23, Cole 64; *see also* footnote 20, *supra*.

[59] Ex. 12, Yost 60; Ex. 21, Turner 38-39.

[60] Ex. 12, Yost 128-29; Ex.22, Potts 40; *see also* footnote 20, *supra*.

[61] Ex. 11, DPD Crime Report; Ex. 9, Buglo 85-86; Ex. 12, Yost 104, 129-30; Ex. 24, Gray 65-66; Ex. 2, Leverette-Saunders 42; Ex. 5, Hellenberg 44; Ex. 7, I. Mobley 39, 43; Ex. 8, Washington 32, 34; Ex. 15, Hollander 28; Ex. 16, Kaiser 47; Ex. 18, N. Price 22; Ex. 19, Wong 36, 40.

commencing a criminal proceedings against a plaintiff." *Id*. at 311. In Detroit, a police officer's act of signing and issuing a city misdemeanor ticket to the defendant *is* the act that initiates the prosecution; no independent prosecutorial decision is made to initiate the criminal charges.[62] Moreover, because a violation of a city ordinance was alleged, the prosecutions were carried out by the City of Detroit (not the State of Michigan).[63] Therefore, a criminal prosecution was initiated against Plaintiffs and the decision to prosecute was made, influenced, or participated in by the defendant officers and by the City of Detroit.

The second element, lack of probable cause, is satisfied as explained above. Officers at the CAID initiated criminal charges against Plaintiffs merely for being present,[64] in some cases without making *any* personal or direct observations of the person being charged.[65]

The third element, deprivation of liberty, does not require actual incarceration. *Gallo v. City of Philadelphia*, 161 F.3d 217, 222-25 (3d Cir. 1998). The Sixth Circuit, in defining this element of malicious prosecution, requires only a deprivation of liberty "as understood in our Fourth Amendment jurisprudence," *Sykes*, 625 F.3d at 309, citing *Gregory v. City of Louisville*, 444 F.3d 725, 748-50 (6th Cir. 2006). *Gregory*, in turn, cites Justice Ginsburg's statement that "'an arrested person's seizure was deemed to continue even after release from initial custody'" because "their freedom of action was restrained due to the pending criminal proceedings." *Gregory*, 444 F.3d at 748 (quoting *Albright v. Oliver*, 510 U.S. 266, 277-78 (1994) (Ginsburg, J., concurring)). The Third Circuit has adopted this reasoning in the context of malicious prosecution, holding that a person "obliged to go to court and answer the charges against him" is

[62] Ex. 23, Cole 73-74.

[63] Ex. 32, Dismissal Orders.

[64] Ex. 9, Buglo 61-62; Ex. 12, Yost 104, 129-30; Ex. 21, Turner 33-35.

[65] Ex. 28, McWhorter 65-66, 75.

"seized" within the meaning of the Fourth Amendment. *Gallo*, 161 F.3d at 223. Here, it is undisputed that Plaintiffs were obliged to go to court and answer the charges against them.[66]

Lastly, all criminal charges against Plaintiffs were dismissed, thereby resolving the criminal proceedings in their favor.[67] *See Wolfe v. Perry*, 412 F.3d 707, 715 (6th Cir. 2005). Accordingly, Plaintiffs have established a malicious prosecution claim as alleged in Count Four.

D. If "loitering in a place of illegal occupation" was a strict liability offense, then the ordinance was unconstitutional as applied to Plaintiffs.

Plaintiffs also assert a due process challenge to the constitutionality of Detroit's ordinance, but only in the event the court concludes that the ordinance must be a construed as a strict liability offense. As explained above, the ordinance is properly construed as having contained an implied knowledge requirement, meaning that probable cause for enforcing it against Plaintiffs was lacking. However, if the loitering ordinance did *not* contain an implied knowledge requirement, then the ordinance was unconstitutional as applied to Plaintiffs as alleged in Count Six. Furthermore, to the extent a statute or ordinance is unconstitutional, enforcing it violates the Fourth Amendment. *Leonard v. Robinson*, 477 F.3d 347, 361 (6th Cir. 2007). Thus, Count Six must be analyzed in connection with Counts One, Three, and Four.

The Supreme Court and the Sixth Circuit have recognized that "the freedom to loiter *for innocent purposes* is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (emphasis added); *Kennedy v.*

[66] Ex. 23, Cole 73-74, 96; Ex. 26, Johnson 91; Ex. 2, Leverette-Saunders 42; Ex. 5, Hellenberg 45; Ex. 7, I. Mobley 43; Ex. 8, Washington 34; Ex. 15, Hollander 30-33; Ex. 16, Kaiser 61-63; Ex. 30, Declaration of Nathaniel Price; Ex. 31, Declaration of Angie Wong.

[67] Ex. 32, Dismissal Orders.

City of Cincinnati, 595 F.3d 327, 335 (6th Cir. 2010). Loitering ordinances that reach a broad or substantial range of innocent conduct are unconstitutional. *Morales*, 527 U.S. at 60, 69.[68]

Here, there can be no question that the "loitering in a place of illegal occupation" ordinance, construed as a strict liability offense, criminalizes a substantial and broad range of completely innocent conduct. As one officer in this case acknowledged, the ordinance would make it a crime for thousands of football fans merely to attend a Lions game if, unbeknownst to the fans, Ford Field's liquor license expired but its vendors continued to sell beer.[69] According to that officer, it would then be up to the judge to decide what to do about each fan's criminal case.[70] But "[t]he Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Morales*, 527 U.S. at 60. *Innocent* presence in a place where *someone else* violates the law cannot, without more, be a crime. The ordinance thus violates due process by criminalizing "activities which are by modern standards normally innocent." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972).

II. Plaintiffs' constitutional rights were violated because their cars were seized for forfeiture proceedings without probable cause that they had been used for any unlawful act.

As with the search and seizure of Plaintiffs' persons, the seizure of Plaintiffs' cars was not authorized by the warrant authorizing the search of the CAID.[71] After ticketing each patron

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[68] *See also Lytle v. Doyle*, 197 F. Supp. 2d 481, 489 (E.D. Va. 2001) (striking down loitering ordinance for "fail[ing] to distinguish between innocent conduct and conduct calculated to cause harm"); *NAACP Anne Arundel County Branch v. City of Annapolis*, 133 F. Supp. 2d 795, 808 (D. Md. 2001) ("[A]nti-loitering ordinances that do not contain a mens rea element generally have been invalidated . . . .").

[69] Ex. 23, Cole 95-96.

[70] Ex. 23, Cole 96.

[71] Ex. 10 at 1, Anticipatory Search Warrant & Affidavit.

for "loitering" merely for being present at the CAID, the police impounded the cars of everyone who had parked outside or nearby.[72] It is undisputed that the *only* basis for seizing Plaintiffs' cars was Michigan's "nuisance abatement" statute, M.C.L. § 600.3801 *et seq.*, which allows the taking and sale of property (including vehicles) that are declared a nuisance.[73] Thus the question here is whether the police had probable cause to believe Plaintiffs' cars were subject to "abatement" under that statute. Based on the undisputed facts in the record, they did not.

A. Probable cause was required to seize Plaintiffs' cars under the nuisance abatement statute.

A person's property is seized within the meaning of the Fourth Amendment "when there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (internal quotation marks omitted). The Fourth Amendment applies in the civil as well as criminal context, *id*. at 67, and "place[s] restrictions on seizures conducted for purposes of civil forfeiture," *United States v. James Daniel Good Real Property*, 510 U.S. 49, 49 (1993).

The "abatement" of vehicles under Michigan law is treated as such a seizure. *Michigan ex rel. Wayne County Prosecutor v. Bennis* ("*Bennis I*"), 527 N.W.2d 483, 493-94 (Mich. 1994) ("property subject to forfeiture"), *aff'd sub nom. Bennis v. Michigan* ("*Bennis II*"), 516 U.S. 442, 453 (1996) (referring to the Michigan's nuisance abatement law as a "forfeiture statute"). Therefore, to seize a vehicle under the nuisance abatement law, the police must have probable cause that it is a nuisance subject to forfeiture under that law. *See Florida v. White*, 526 U.S. 559 (1999); *Soldal*, 506 U.S. at 69; *Krimstock v. Kelly*, 306 F.3d 40, 49-51 (2d Cir. 2002). As with

[72] Ex. 21, Turner 67, 73; *see also* footnotes 28-32, *supra*.

[73] Ex. 29, Defs' Resp. to Interrog. #17.

the seizures of persons, *see Ybarra*, 444 U.S. at 91, the seizure of property must be supported by probable cause as to the particular item being seized.

B. The police lacked probable cause to believe Plaintiffs' cars were used for any unlawful act.

The Michigan nuisance abatement statute provides:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons or used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or of any vinous, malt, brewed, fermented, spirituous, or intoxicating liquors or any mixed liquors or beverages, any part of which is intoxicating, is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

M.C.L. § 600.3801.[74] As noted previously, in this case Plaintiffs are not contesting the allegation that the CAID itself was a nuisance. The question is whether Plaintiffs' *vehicles* were a nuisance. They were not abatable under § 600.3801 unless they were "*used for* the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or . . . intoxicating liquors" (emphasis added).

Probable cause was lacking in this case because there was plainly no reason for the police to believe that each car driven to the CAID by a person attending Funk Night had been "used for the unlawful manufacture, sale, keeping for sale, bartering, or furnishing of any controlled

[74] The statute provides that the county prosecutor may institute forfeiture proceedings against the nuisance property. M.C.L. § 600.3805. If the property is found to be a nuisance, an injunction is granted against the nuisance activity. *Id*. Then, "all furniture, fixtures and contents" of the property are sold pursuant to an order of abatement. *Id*. § 600.3825. If the nuisance property is a vehicle, boat or aircraft, it must be sold as well. *Id*.

substance . . . or intoxicating liquors." *Id.* The proprietors of the CAID may have "used" their building for the unlawful sale of liquor, but there was no reason to think that Plaintiffs—who were mere patrons attending Funk Night—"used" their cars for such an act. The police did not know the means by which the liquor inside the CAID had arrived there, and they certainly had no reason to believe that every single patron had brought liquor to the CAID and used his or her personal vehicle to transport it.[75]

Defendants apparently believe that the CAID patrons' cars were subject to abatement not because they were used to transport liquor, but merely because they were used to transport *people* to the nuisance.[76] That is a dubious interpretation of the statutory requirement that the abated property be "used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or . . . intoxicating liquors." *Id.* In other cases where cars were abated under Michigan's nuisance statute, the cars were held to have played a central role in the nuisance activity itself. For example, in *State ex rel. Dowling v. Sill*, 17 N.W.2d 756 (Mich. 1945), the court upheld the abatement of a car whose driver was running a "numbers racket" gambling operation and using the car to transport betting slips and betting proceeds: "The use of automobiles *as essential tools* in this type of gambling is generally recognized." *Id.* at 758 (emphasis added).[77] By contrast, in *In re Maynard*, 53 N.W.2d 370 (Mich. 1952), the court held that that the nuisance statute did not authorize the forfeiture of a third party's vending machines just because they were located inside an establishment that was being used for the unlawful sale of liquor: "[T]he presence of these machines may add to the

[75] Ex. 23, Cole 78.

[76] Ex. 12, Yost 140-41, 145-47.

[77] *See also State ex rel. Reading v. Western Union Tel. Co.*, 57 N.W.2d 537, 540 (Mich. 1953) ("In each of those cases an automobile, used, as an *'essential tool' and vital link* in a gaming operation, to transport mutuel betting tickets, was held to be a nuisance, subject to seizure and sale." (emphasis added)).

convenience of the customers in purchasing candy or cigarettes but certainly did not contribute to the violation of the liquor law, neither were they *implements in the hands of the unlawful operators to further the sale of liquor*." *Id.* at 371 (emphasis added). In this case, Plaintiffs merely "used" their cars to drive to the CAID. Their cars were not "essential tools" in the nuisance activity, *Sill*, 17 N.W.2d at 758, and they certainly were not "implements in the hands of the [CAID's] unlawful operators to further the sale of liquor," *Maynard*, 53 N.W.2d at 371.

Defendants' claimed basis for seizing Plaintiffs' cars is especially troubling in this case because (as previously discussed) there was no probable cause to believe that the CAID's patrons, by their mere attendance at Funk Night, knew that the CAID was unlicensed or in any other way a "nuisance."[78] Just as a person is not guilty of "loitering in a place of illegal occupation" if she does not know the facts that make the place illegal, *see supra* Section I.A, a car is likewise not "*used* for the *unlawful* manufacture, transporting, sale, keeping for sale, bartering, or furnishing of [a] controlled substance . . . or intoxicating liquors" within the meaning of M.C.L. § 600.3801 when no one who actually "used" the car knew the facts that made the activity inside the CAID unlawful. Plaintiffs "used" their cars to drive to a location where, unbeknownst to them, someone else (i.e., the CAID's proprietor) was violating the law.

In this respect it is important to distinguish innocent *ownership*, which can give rise to forfeiture, from innocent *use*, which cannot. Because forfeiture is based on the legal fiction that the property itself is "guilty" of an offense, a successful forfeiture action does not require that the *owner* of the forfeited property know or approve of its unlawful use. *Bennis II*, 516 U.S. at 446; *Austin v. United States*, 509 U.S. 602, 615-16 (1993). However, guilty knowledge by *someone*

[78] As explained in Section I.B, *supra* at pages 15-17, Yost informed the CAID's proprietor that he could host Funk Night lawfully if he procured the proper license. Ex. 12, Yost 91-98. There was thus no reason to believe that everyone who drove to the CAID for Funk Night and parked outside knew that CAID had in fact *not* obtained the license that would have made Funk Night legal.

who either *uses* or *controls* the property has always been required as an element of forfeiture. *See, e.g.*, *State ex rel. Patterson v. Motorama Motel Corp.*, 307 N.W.2d 349, 350 (Mich. App. 1981); *State ex rel. English v. Fanning*, 149 N.W. 413, 414 (Neb. 1914). Without this requirement, it can hardly be said that the property is truly being "used in a proscribed manner." *Bennis I*, 527 N.W.2d at 490.[79]

If a vehicle could be abated merely for being driven to the scene of a nuisance without any guilty knowledge on the part of someone using the vehicle, an unending list of innocently used property would be subject to forfeiture. For example, suppose an innocent person dines at a fancy restaurant with her car parked outside. Her car could be seized for "abatement" if:

- the restaurant does not have a liquor license and a customer at another table in another room is served a glass of wine;
- the wait staff gambles unlawfully in the kitchen;
- the restaurant's owner grows marijuana in the basement.

This is not what the Legislature intended when it provided for the abatement of vehicles "used for" unlawful acts. "There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which [a] particular automobile was put that subjects [its owner] to its

[79] In *Bennis II*, 516 U.S. at 446, the U.S. Supreme Court observed that a "long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." But in each case cited by the Court, *someone* used the forfeited property unlawfully, even if the actual owner of the property was innocent. *Calero-Toledo v. Person Yacht Leasing Co.*, 416 U.S. 663 (1974) (leased yacht used to transport marijuana); *Van Oster v. Kansas*, 272 U.S. 465 (1926) (automobile used to transport bootleg liquor); *Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921) (same); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878) (leased property used for tax fraud); *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844) (foreign vessel used for piracy); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (same). In this case, by contrast, Plaintiffs' "use" of their cars was wholly innocent. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) ("There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which [a] particular automobile was put that subjects [its owner] to its possible loss.").

possible loss." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). If a car is used innocently, it cannot be "abated."

Although Defendants will likely try to justify their seizure of Plaintiffs' vehicles by citing *Ross v. Duggan*, 402 F.3d 575 (6th Cir. 2004), that case is distinguishable. In *Ross*, the plaintiffs' cars had been impounded under Michigan's nuisance abatement law in conjunction with their arrests for soliciting prostitutes and other lewdness offenses identified in M.C.L. § 600.3801. *Id*. at 578-79. Two of the plaintiffs challenged the seizure of their cars on grounds that their alleged sex offenses had taken place outside their cars. *Id*. at 580, 586. The court rejected their claims, holding that their cars had been "used for the purpose of lewdness, assignation or prostitution" within the meaning of M.C.L. § 600.3801 because "they had transported the criminal perpetrators to the sites of their crimes." *Id*. at 586.

There are at least two reasons why the holding of *Ross* does not apply here. First, in *Ross* the plaintiffs had effectively "*conceded* that the challenged arrests [for solicitation and other lewdness offenses] were supported by probable cause," *id*., thereby giving them probable cause to seize the vehicles they had used for the purpose of committing those offenses. In this case, by contrast, there was no probable cause to believe the CAID patrons knew the CAID was unlicensed or that they drove to the CAID with any criminal intent whatsoever. In upholding the seizure of cars that "had transported the *criminal perpetrators* to the sites of *their crimes*," *id*. (emphasis added), the *Ross* court did not approve the seizure of cars that transport *innocent* persons to the site of a crime being committed by *someone else*. Here, the only crime was committed by the CAID's proprietors, none of whom was transported in Plaintiffs' cars.

Second, a careful reading of Michigan's nuisance abatement statute reveals that the statutory requirements for abating property in connection with "lewdness, assignation or

prostitution," as in the *Ross* case, are different from the requirements for abating property in connection with liquor, at issue here. In *Ross*, the plaintiffs' cars were subject to abatement because they were "used *for the purpose of* lewdness, assignation or prostitution." M.C.L. § 600.3801 (emphasis added). Because there was probable cause that the cars were driven to the scene of the crime "for the purpose of" engaging in those acts, there was probable cause to seize them for nuisance abatement. *Ross*, 402 F.3d at 586. In this case, by contrast, the statute provides that Plaintiffs' cars were subject to abatement *only* if they were actually "*used for*"— not "used for the *purpose* of"— "the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or intoxicating liquors." M.C.L. § 600.3801 (emphasis added).

This careful distinction between "used for the purpose of" and "used for" is maintained throughout the nuisance abatement law.[80] Looking to state law for guidance on matters of statutory construction, such a clear distinction cannot be ignored:

> When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory.

Pohutski v. City of Allen Park, 641 N.W.2d 219, 226 (Mich. 2002) (citation and quotation marks omitted). By using the phrase "used for," in contrast to the phrase "used for the purpose of," the Legislature limited the reach of the nuisance abatement law as to acts involving controlled substances and intoxicating liquors. If a vehicle is not actually "used for" one of the specific

[80] *See* M.C.L. § 600.3801 ("Any person . . . who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the *purposes or acts* set forth in this section is guilty of a nuisance." (emphasis added)); *id.* § 600.3805 (authorizing civil action to abate property that is "used for *any of the purposes* or by any of the persons set forth in section 3801, *or for any of the acts* enumerated in said section" (emphasis added)).

unlawful acts enumerated in the statute (i.e., transporting, sale, etc.), it is not an abatable nuisance—even if a driver or passenger uses the car to arrive at a place where those unlawful acts are taking place. A car transporting bootleg liquor is a nuisance; but a car transporting a *person* to the distillery where bootleg liquor is manufactured is not. *Cf. Howard v. United States*, 423 F.2d 1102, 1104 (9th Cir. 1970) ("The use of an automobile to commute to the scene of a crime does not justify the seizure of that automobile . . . ."). In this case, Plaintiffs' cars were used to drive to the CAID. There was no probable cause to believe they were used to unlawfully manufacture, transport, sell, keep, barter, or furnish drugs or alcohol.

In sum, the police lacked probable cause that Plaintiffs' cars were used for any unlawful act. Accordingly, Plaintiffs have established a violation of their Fourth Amendment rights as alleged in Count Five of their complaint.

C. If the nuisance abatement statute does not require knowledge of an unlawful act, then it is unconstitutional as applied to Plaintiffs.

Count Seven of Plaintiffs' complaint challenges the nuisance abatement statute as violative of due process to the extent it is construed to allow the seizure of their cars under the facts and circumstances of this case. Due process "requires that a statutory prohibition be sufficiently defined so that ordinary people, exercising ordinary common sense, can understand it and avoid conduct which is prohibited, without encouragement of arbitrary and discriminatory enforcement." *United States v. Salisbury*, 983 F.2d 1369, 1377-78 (6th Cir. 1993). Unless a statute's prohibitions and guidelines for enforcement are clearly defined, it is unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The vagueness of Michigan's nuisance abatement law, as applied to conduct such as Plaintiffs' in this case, has been aptly described by Justice Thomas: "The limits on *what* property can be forfeited as a result of what wrongdoing—for example, what it means to 'use' property in

crime for purposes of forfeiture law—*are not clear to me*." *Bennis II*, 516 U.S. at 455 (Thomas, J., concurring) (second emphasis added). Indeed, an ordinary person would not read M.C.L. § 600.3801 as clearly authorizing the abatement of Plaintiffs' cars under the circumstances of this case. Only an extremely strained reading of the phrase "used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . or . . . intoxicating liquors" would legitimize the seizure of Plaintiffs' cars where there was no probable cause to believe any drugs or liquor were unlawfully transported or kept in their cars.

It is even less plausible that ordinary persons of common sense would understand that their cars could be forfeited under M.C.L. § 600.3801 for being *innocently* driven to a place where, unbeknownst to them, liquor is unlawfully sold. The lack of a knowledge or intent requirement makes it more likely that a statute will "trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). In this case, construing the statute without a requirement of knowledge or intent virtually guarantees that the innocent will be trapped. Aside from not driving at all, there is no way for someone to avoid nuisance abatement under a statutory regime that is construed to allow the forfeiture of cars *unknowingly* driven to a place where unlawful conduct occurs. Due process requires that citizens be "free to steer between lawful and unlawful conduct," *Grayned*, 408 U.S. at 108, and Plaintiffs were quite literally denied that freedom here.

III. The City of Detroit is liable because the unconstitutional acts described above were undertaken pursuant to a policy or custom of the Detroit Police Department.

A municipality is liable under 42 U.S.C. § 1983 if the acts that violated a person's constitutional rights were undertaken pursuant to municipal policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978). An official legislative or executive act is not required to establish liability; "local governments, . . . may be sued for constitutional deprivations visited

pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id*. at 690-91. A custom is a widespread practice that is so permanent and well-settled as to carry the force of law. *Id.* at 691; *Cash v. Hamilton County Dep't of Adult Probation*, 388 F.3d 539, 543 (6th Cir. 2004).

In this case, there is no question that the constitutional violations described above occurred pursuant to a policy or custom of the City of Detroit. In response to a request for admission under Rule 36, the City admitted that its "*standard operating procedure* when raiding an establishment that was selling alcohol without a license and/or selling alcohol after 2 a.m. was to ticket *all persons in attendance* for loitering in a place of illegal occupation and to seize their vehicles under the nuisance abatement statute."[81] This admission was consistent with the testimony of Yost and other officers who had participated in countless raids of suspected "blind pigs" over many years.[82] The admission and officer testimony establishes, beyond dispute, that the unconstitutional acts of detaining Plaintiffs, searching them, charging them with a crime, and impounding their cars were part of a widespread and well-settled practice by the Detroit Police Department in which a person's mere presence in a "place of illegal occupation" was the basis for searches and seizures of that nature. Accordingly, Defendant City of Detroit is liable for the unconstitutional searches and seizures of Plaintiffs and their vehicles.

CONCLUSION

This is a case in which the most significant questions are not about the facts, but instead about what legal conclusions should be drawn from those facts. Were the police permitted to enforce the "loitering in a place of illegal occupation" ordinance as a strict liability offense based

[81] Ex. 39 at 3, Defs' Resp. to RFA #3 (emphasis added).

[82] Ex. 9, Buglo 77-79, 85-86, 107-10, 145-49; Ex. 12, Yost 104, 129; Ex. 21, Turner 24, 32-35, 72-73; Ex. 22, Potts 44, 78; Ex. 23, Cole 27, 83; Ex. 24, Gray 21-23, 29-30, 62, 74-75.

on Plaintiffs' mere presence at the CAID? Were they permitted to confiscate Plaintiffs' cars for "nuisance abatement" without probable cause that they had been used for any unlawful act? Because the answer to both these questions is no, the evidence "is so one-sided that [Plaintiffs] must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. at 252. Accordingly, Plaintiffs request that their motion for partial summary judgment be granted as follows:

Regarding the detention, search, and criminal prosecution of Plaintiffs, summary judgment as to Defendant City of Detroit's liability should be granted to Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg on Counts One, Three, Four, and Six of their Amended Complaint (Dkt. # 21).

Regarding the seizure of Plaintiffs' cars, summary judgment as to Defendant City of Detroit's liability should be granted to Plaintiffs Ian Mobley, Kimberly Mobley, Angie Wong, Nathaniel Price, Jerome Price, Jason Leverette-Saunders, Wanda Leverette, Darlene Hellenberg, and Laura Mahler on Counts Five and Seven.

Respectfully submitted,

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Dated: April 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2012, I electronically filed the foregoing paper and its exhibits with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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