UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NOHORA RIVERO, et al., Plaintiffs, v. MONTGOMERY COUNTY, MARYLAND, et al., Defendants.	Case No.: 8:16-cv-01186-PWG

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiffs Nohora Rivero and Legal Aid Bureau, Inc. hereby oppose the Motion to Dismiss of Defendants Montgomery County, Maryland and Alexander Kettering (collectively, "the County") (Doc. 45, filed Nov. 4, 2016) and the Motion to Dismiss of Defendants Fruits and Vegetables by Lewis Orchards, LLC, Robert Lewis, and Linda Lewis (collectively, the "Lewis Defendants") (Doc. 44, filed Nov. 4, 2016) as follows:

INTRODUCTION

"For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings." *Martin v. City of Struthers*, 319 U.S. 141, 141 (1943). More than 70 years of crystal-clear law across no fewer than *nine* Supreme Court cases establishes the rights of interested persons to enter private property for the purpose of speaking with residents in their homes. The right to refuse such a person lies with the *listener*—not with the state, and not with a third party. Since time immemorial, such speech has been "essential to the poorly financed causes of little people." *Id.* at 146. And the Supreme Court has over and over again recognized it as "clearly vital to the preservation of a free society." *Id.* at 146-47.

No reasonable police officer in Alexander Kettering's shoes, familiar with these well-established legal principles, could conclude that the police could act to prohibit Plaintiffs—by threat of criminal sanction—from speaking with migrant farmworkers residing on employer-owned land. Kettering's unlawful order that Plaintiffs leave the Lewis property violated their First Amendment rights, causing actual damages for which he is liable under 42 U.S.C. § 1983.

Moreover, the Maryland Declaration of Rights and other Maryland law protect Plaintiffs' rights coextensive with the First Amendment, permit County liability for Kettering's actions, and do not recognize qualified immunity. State and federal law also empower this Court to declare the law where, as here, the legal relations between parties are a matter of actual controversy.

Defendants' Motions to Dismiss are full of material that is irrelevant, obfuscatory, or just plain wrong. They conflate issues, invoke irrelevant standards, and seek to introduce impermissible and incorrect facts. These are feints to distract from the simple, central validity of the Plaintiffs' complaint. The First Amendment guarantees Plaintiffs the right to speak with migrant farmworkers residing on employer-owned land. The Court can and should grant Plaintiffs all the relief requested in their First Amended Complaint and should deny Defendants' Motions.

FACTUAL BACKGROUND

Plaintiff Nohora Rivero works full-time for Legal Aid in their Farmworkers Program. First Amended Complaint (Doc. 42, filed Sept. 23, 2016) (hereinafter, "FAC") ¶ 10. As part of this program, Rivero and Legal Aid try to visit each farm in Maryland and Delaware each year to speak with resident migrant farmworkers about their legal rights, distribute literature on common topics of concern, and discuss any issues the workers might have. *Id.* ¶ 11. This work is vital to migrant farmworkers, who are routinely subjected to unlawful abuses and are generally unable to vindicate their rights without help from advocates like Rivero. *Id.* ¶¶ 18-26. Because Legal Aid employees can provide migrant farmworkers with tools to remedy abuses, they are regularly denied access to farm workers, confronted, and sometimes threatened. *Id.* ¶ 28. State and local police often disregard existing legal authorities and assist farm employers in their efforts to deny Legal Aid employees access to migrant farmworkers. *Id.* ¶ 29.

That is what happened on August 18, 2015 at Lewis Orchard in Montgomery County, Maryland. Linda and Robert Lewis own Fruits and Vegetables by Lewis Orchard, LLC, which employs 12 seasonal migrant farm workers each year and houses them on Lewis property. *Id.* ¶ 14. Rivero and Spencer Evans, a summer clerk with Legal Aid, visited the Lewis Defendants' property in Dickerson, Maryland, around 7:00 pm. *Id.* ¶ 35. The Lewis property has two separate migrant worker residences. *Id.* ¶ 34. After speaking with workers at one camp, and receiving information about alleged wage and hour abuses, *id.* ¶ 36, Rivero and Evans left the first camp in search of the second. *Id.* ¶ 38. Failing to find it, they returned to the first for directions. *Id.*

As Rivero spoke with workers in the first camp to obtain better directions, Linda and Robert Lewis arrived.[1] *Id.* Upon learning that Rivero and Evans worked for Legal Aid, Linda Lewis flew into a rage, insisting that they had no right to visit migrant farmworkers. *Id.* ¶ 39. She called the Montgomery County Police Department, which dispatched Officer Alexander Kettering. *Id.* ¶¶ 39-40. Though Rivero explained her mission on the property and that she had a right to visit the migrant farmworkers—even producing a copy of an opinion of the Maryland

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[1] Plaintiffs have no knowledge of whether before this time the Lewises were "picking flowers on their property before visiting the gravesite of their deceased son." Lewis Defendants' Memorandum (Doc. 44-1, filed Nov. 4, 2016) (hereinafter, "LD Mem.") at 2. Nor do Plaintiffs know how long the Lewis Defendants have owned their farm, how popular their retail market is, or whether the Mexican Consulate "found no wrongdoing," *id.* at 3-4. These allegations have the dual distinction of being both impermissible for the Court to consider, *see Brockington v. Boykins*, 637 F.3d 503, 505 (4th Cir. 2011), and legally irrelevant. [*cont'd next page*]

The Lewis Defendants assert other facts that are flatly inconsistent with the allegations in the FAC, *see, e.g.*, LD Mem. at 3 ("At no time did Mr. or Mrs. Lewis ever interfere with the [sic] Ms. Rivero's communication with the workers.") According to the FAC, Mrs. Lewis "flew into a rage," called the police, and convinced Officer Kettering to order Plaintiffs to leave the property. FAC ¶¶ 39-44. She then called a meeting, at which she intimidated the migrant workers into refusing to speak with Legal Aid. *Id.* ¶¶ 46-51. The Court must credit all well-pled facts in the FAC and resist the Lewis Defendants' attempt to reshape the narrative in their favor. *Brockington*, 637 F.3d at 505.

Attorney General affirming that right—Kettering nonetheless issued "no-trespass orders" to Rivero and Evans, threatening them with criminal prosecution if they should return to the property within one year. *Id.* ¶¶ 40-45. Though the no-trespass order applied to an address that, as a technical matter, does not exist, Kettering's actions and instructions made it clear that Rivero and Evans were to leave immediately and not return to the Lewis property. *Id.* ¶ 43.

During this process, Rivero overheard Linda Lewis on her cell phone, calling a "big meeting" for the next day. *Id.* ¶ 46. Though workers had complained to Rivero of labor violations, Rivero was unable to follow up on these allegations because the workers were intimidated into silence by the confrontation and the Lewises' instructions not to communicate.[2] *Id.* ¶¶ 47-51.

LEGAL STANDARDS

When deciding a motion under Rule 12(b)(6), the Court a court "accept[s] as true the well-pled facts in the complaint and view[s] them in the light most favorable to the plaintiff." *Brockington v. Boykins*, 637 F.3d 503, 505 (4th Cir. 2011). A complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted).[3]

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[2] Though the intimidation of workers is pled on information and belief, FAC ¶¶ 47-48, 50, it is reasonable to infer intimidation from the confrontation, Linda Lewis's call for a "big meeting," and the migrant farmworkers' sudden unwillingness to talk.

[3] The County's brief repeatedly accuses the FAC of lacking a "factual predicate" for certain allegations. Montgomery County Defendants' Memorandum (Doc. 45-1, Nov. 4, 2016) (hereinafter, "MC Mem.") at 4, 8, 15, 18, 20; *see also id.* at 2, 23 (similar language). In most cases, this appears to be an attempt to paint individual sentences of the FAC as conclusory. Of course, the Court need not credit "mere conclusory statements" as true, *Iqbal*, 556 U.S. at 678; but the presence of a legal conclusion in the complaint does not render all the allegations that

A defendant may make facial or factual challenges to subject matter jurisdiction. With respect to the former, "the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). Alternatively, the defendant may contend "that the jurisdictional allegations of the complaint are not true," in which case the Court may "*in an evidentiary hearing* determine if there are facts to support the jurisdictional allegations." *Id.* (emphasis in original). In such a circumstance, the Plaintiffs bear the burden of proving jurisdiction.[4] *Adams*, 697 F.2d at 1219.

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bear on it null. The question for the Court is whether the facts pled, accepted as true and in light of the law, establish a claim for relief.

In some cases, the County's "factual predicate" argument seems to be a demand for more detail. *See, e.g.*, MC Mem. at 4 ("Legal Aid was allegedly forced to expend additional staff time and resources . . . . Again, the FAC lacks a factual predicate for this conclusion."). These arguments demand a level of specificity not required to meet the *Iqbal*/*Twombly* plausibility standard; even under the strictures of Rule 9, no further detail as to the nature and extent of Plaintiffs' damages would be required at this stage.

The County also faults Plaintiffs for not alleging *legal* support for an allegation. *See* MC Mem. at 2, 8, 18. To the extent the County means Plaintiffs have failed to identify the basis for their legal claims, it is wrong; to the extent it means anything else, the County provides no authority suggesting that Plaintiffs must *plead* a legal argument about the extent and clarity of their First Amendment rights.

[4] Defendants' jurisdictional arguments appear to be facial attacks, insofar as they rely on the legal effect of an undisputed fact, i.e., the County's rescission of the no-trespass notice. In the event the Court finds its declaratory judgment jurisdiction rests on a factual issue, e.g., whether Plaintiffs' rights are disputed by the Defendants, Plaintiffs reserve the right to request an evidentiary hearing.

The County's jurisdictional arguments appear to be limited to Plaintiffs' request for declaratory judgment. MC Mem. at 18-22. The argument heading and motion proper, however, suggest that the County thinks the entire complaint should be dismissed on justiciability grounds. MC Mot. at 1, MC Mem. at 18. Plaintiffs' unsatisfied claims for damages, however, clearly establish a "concrete interest, however small, in the outcome of the litigation" such that "the case is not moot," *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013)). *See also City of Los Angeles v. Lyons*, 449 U.S. 934, 936 (1980) (White, J., dissenting from denial of certiorari) ("There is no question that there is a case

ARGUMENT

I. Plaintiffs Have a Clearly Established First Amendment Right to Speak With Willing Migrant Farmworkers at Their Residences, Regardless of the Lewis Defendants' Wishes

The First Amendment to the United States Constitution establishes the unequivocal right of persons to seek out and speak with their neighbors, regardless of the wishes of third parties who might seek to interfere. Governments may hinder this right only for compelling reasons, and then only in narrowly tailored ways. The contours of Plaintiffs' rights here are not fuzzy or ambiguous; Plaintiffs' attempts to speak with migrant farmworkers about their rights fall in the heartland territory of core protected speech. The Supreme Court has repeatedly struck down even much less forceful and arbitrary restrictions on speech. Any reasonable police officer even passingly familiar with clearly established law—or even with the American ethos of free speech—would know that he could not intrude on Plaintiffs' efforts and threaten criminal sanctions if Plaintiffs fail to relinquish their rights.

A. The First Amendment Protects Attempts to Speak with Migrant Farmworkers on Private Property

"Freedom of speech and of the press, which are protected . . . by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action" *Lovell v. City of*

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or controversy with respect to respondent's right to damages for an alleged past violation of his constitutional rights."). To the extent the County is arguing that the Plaintiffs' damages claim is "abstract" under *Lyons*, MC Mem. at 19-20, it is wrong. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983) (noting that the plaintiff's illegal choking "presumably afford[ed] Lyons standing to claim damages against the individual officers and perhaps against the City"). The County's threadbare recitation of mootness, ripeness, and standing rules seem to have no applicability to Plaintiffs' damages claims and, absent impermissible second-bite argumentation on Reply, Plaintiffs rest for these issues on the strength of their FAC and the law.

Griffin, Ga., 303 U.S. 444, 450 (1938). "Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." *Schneider v. New Jersey*, 308 U.S. 147, 150 (1939).

Since the earliest days of modern First Amendment jurisprudence, the Supreme Court has again and again held that First Amendment rights protect efforts to speak with and distribute literature to people in their homes, and has repeatedly struck down even the lightest state burdens on these rights.

The Court first affirmed the right to "impart information and opinion to citizens at their homes" in *Schneider*, which struck down a municipal ordinance requiring anyone wishing to "canvass, solicit, distribute circulars, or other matter, or call from house to house" to acquire a permit to do so from the town police. *Id.*at 149-50. The Court affirmed freedom of speech and the press as "fundamental" and laid the foundations of a strict scrutiny standard for abridgments of these freedoms:

> The phrase ["fundamental personal rights and liberties"] is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of those liberties.
>
> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

*Id.*at 150-51. The Court then found that the ordinance was unconstitutional on its face, because "[i]t bans unlicensed communication of any views or the advocacy of any cause from door to

door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it." *Id.* at 152. The Court particularly objected to the manner in which the plaintiff's "liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion." *Id.*

Schneider thus establishes (1) that the First Amendment protects the rights to enter onto private property to speak with and distribute literature to people at their homes; (2) that the state may not restrict these rights without some "substantial" reason; and (3) that a restriction's dependence on the discretion of a police officer is likely fatal to the constitutionality of the restriction. Over the next 65 years the Court continued to expand on these principles.

Cantwell v. Connecticut, decided the following year, again abrogated an unconstitutional restriction on First Amendment rights to speak with people at their homes. 310 U.S. 296 (1940). In *Cantwell*, a New Haven statute prohibited solicitation for "any alleged religious, charitable or philanthropic cause" unless the cause was determined by an official to be "a bona fide object of charity or philanthropy." *Id.* at 301-02. The Connecticut courts upheld the statute as a regulation of solicitation, justified as "an effort by the State to protect the public against fraud and imposition in the solicitation of funds." *Id.*at 302. The Court reversed, again objecting to the statute's dependence on the discretion and judgment of a governmental official.[5] Notably, judicial review of the official's action to prevent "arbitrar[y], capricious[], or corrupt[]" decisions was insufficient to redeem the regulation, *id.* at 305; the statute authorized prior restraint on

[5] *Cantwell*, like most of this line of cases, involved door-to-door canvassing by Jehovah's Witnesses. *Id.* at 300. *Cantwell*'s reasoning focused on free exercise rights, but the Court has since recognized that *Cantwell*'s reasoning also implicates freedom of speech. *See Vill. of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980).

expression and was thus "obnoxious to the Constitution," *id.* at 306; *see also Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."); *Largent v. Texas*, 318 U.S. 418, 422 (1943) (invalidating a discretionary permit ordinance).

Similarly, *Murdock v. Pennsylvania* invalidated a city ordinance that "set[] aside the residential areas as a prohibited zone, entry of which is denied petitioners unless [a] tax is paid." 319 U.S. 105, 117 (1943). Such a tax, though it did not *prevent* the plaintiffs from going door-to-door, nonetheless was held to be "an abridgment of freedom of press," invalid on its face. *Id.*

In *Martin v. City of Struthers*, decided the same day as *Murdock*, the Court clarified that the right to *refuse* door-to-door canvassers "not specifically invited" belongs to "the individual master of each household," and does not depend "upon the determination of the community." 319 U.S. 141 (1943). The Court recognized that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people," *id.* at 146, and held that

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, *leaving to each householder the full right to decide whether he will receive strangers as visitors*, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

*Id.*at 146-47 (emphasis added). *Martin* thus forecloses any idea that state private property rights can be used to prohibit speakers like Rivero and Legal Aid from reaching out to migrant farmworkers on private property. As *Martin* makes clear, a speaker is presumed to be entitled to approach a listener until the listener has expressed "that he is unwilling to be disturbed." *Id.* at 148.The case also makes clear that the right to refuse a speaker belongs to the intended listener

only, and not to any third party. Because freedom of speech and the press "embraces the right to distribute literature . . . and necessarily protects the right to receive it," it is an affront to the rights of both to "substitute[] the judgment of the community for the judgment of the individual householder." *Id.* at 143-44. *A fortiori*, the community may not, through its officers, impose the judgment of a third party like the Lewises on Plaintiffs or their intended listeners.

Vigorous protection of the right to enter private property to speak with willing listeners continues through to the present day. In 1976, the Court considered a municipal ordinance that merely required political canvassers to *notify* local police. *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 613 (1976). The ordinance

> may be satisfied in writing, suggesting that resort may be had to the mails. It need be fulfilled only once for each campaign. There is no fee. The applicant does not have to obtain or carry a card or license. And perhaps most importantly, no discretion reposes in any municipal official to deny the privilege of calling door to door.

*Id.*at 616. But even this carefully crafted, minimally burdensome regulation was struck down as unconstitutionally vague. *Id.*at 620. Though too long to reproduce here, the Court's vagueness analysis is enlightening insofar as it calibrates the solicitude with which courts are expected to treat impositions on First Amendment rights; the scrutiny applied to the ordinance in question is exacting in the extreme. It is self-evidently reflective of a judicial presumption that impositions on the right to canvass are generally impermissible, even if the First Amendment *might*, in truly extraordinary circumstances, permit minor burdens for compelling reasons.[6] As Justice Brennan

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[6] *Cf. Hynes*, 425 U.S. at 631-36 (Rehnquist, J., dissenting) (arguing that the Oradell ordinance was not vague). *See also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (striking down ordinance requiring door-to-door canvassers to register); *Vill. of Schaumburg*, 444 U.S. at 633-39 (striking down an ordinance requiring permitting of solicitation for charitable organizations that use less than 75 percent of its contributions for charitable causes). As Justice Rehnquist's string of bewildered dissents in these

noted in concurrence, "it seems inescapable that ordinances of the Oradell type, however precisely drafted to avoid the pitfalls of vagueness, must present substantial First Amendment questions." *Id.* at 630.

More recently, the Village of Stratton, Ohio, attempted to prohibit "'canvassers' and others from 'going in and upon' private residential property for the purpose of promoting any 'cause' without first having obtained a permit." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 154 (2002). Predictably, this restriction, too, was found unconstitutional. *Id.* at 164. The seemingly exasperated Court noted that "[f]or over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering," and that "several themes emerge that guide our consideration" of such restrictions. *Id.* at 160-61. In brief, the themes are: (1) door-to-door speech is valuable to the polity "as vehicles for the dissemination of ideas," *id.* at 161-62; (2) though "early cases. . . recognized the interest a town may have in some form of regulation . . . . our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights," *id.* at 162-63; and finally, (3) "efforts of the Jehovah's Witnesses to resist speech regulation have not been a struggle for their rights alone. . . . Jehovah's Witnesses are not the only 'little people' who face the risk of silencing by regulations like the Village's." *Id.* at 163.The Court went on to conclude that

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse

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cases make clear, it is effectively impossible for a government's burden on the right to canvass to pass constitutional muster, at least absent both an extraordinarily compelling interest and an unusual level of legislative care and craft. *See Watchtower*, 536 U.S. at 180 (Rehnquist, J., dissenting) (noting that, had the Court applied intermediate scrutiny, the regulation at issue requiring registration of religious canvassers would have been permissible).

> a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

*Id.*at 165-66.

From these cases it is unequivocally clear that the government may not interfere with Plaintiffs' right to seek out migrant farmworkers on private land to educate them about their rights. Even apart from the overwhelming ethos of free speech identified in *Watchtower*, the cases specifically clarify that (1) Plaintiffs have a constitutionally-protected expressive interest in speaking with their neighbors; (2) this interest requires that, in the absence of some indication of unwillingness on the part of the *listener*, Plaintiffs may enter onto private property for the purpose of speaking with people at their homes; (3) the right to refuse a speaker belongs to the listener alone, and not to the state, the community at large, or any other party; (4) even carefully drafted, content-neutral ordinances will be found to be unconstitutional if they place even modest burdens on Plaintiffs' expressive rights; and (5) a burden that depends in any way on the discretion of a governmental official will be unconstitutional as a matter of course.

It should be clear that the speech of Legal Aid employees, who seek to inform migrant farmworkers of their rights and discuss any problems the workers might have, is as protected by the Free Speech Clause as the rights of Jehovah's Witnesses, political candidates, and environmental groups. Instruction in the rights owed to migrant workers, and the means of exercising those rights, is at the very core of First Amendment speech. It is intrinsically political, insofar as it equips the powerless with access to power. Lest there be any doubt, however, the Supreme Court has specifically found that public interest legal practices like Legal Aid have First Amendment expression and association interests in the process of reaching out and providing legal services to their clients. *See In re Primus*, 436 U.S. 412 (1978); *NAACP v.*

Button, 371 U.S. 415 (1963). *Button* and *Primus* both invalidated solicitation rules that would have subjected lawyers to discipline for seeking out clients. As the Court noted in *Primus*, "[t]he First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advising another that his legal rights have been infringed and referring him to a particular attorney or group of attorneys for assistance.'" 436 U.S. at 432 (quoting *Button*, 371 U.S. at 434, 437) (alterations and citations omitted). For groups whose purpose is to litigate in the public interest, solicitation of clients is "at the core of the First Amendment's protective ambit." *Id.* at 424. Subsequently, courts have explicitly recognized that this protection extends to work performed by Legal Aid groups. *See Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 597 (E.D.N.Y. 2004), *vacated in part on other grounds sub nom. Brooklyn Legal Servs.Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006); *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1407-09 (D. Haw. 1997); *Westchester Legal Servs., Inc. v. Westchester Cty.*, 607 F. Supp. 1379, 1382-83 (S.D.N.Y. 1985); *N. Penna. Legal Servs., Inc. v. Lackawanna Cty.*, 513 F. Supp. 678, 684 (M.D. Pa. 1981). These cases affirm "the value of the speech involved," *Watchtower*, 536 U.S. at 161, and establish on their own strength an independent basis for affirming Plaintiffs' First Amendment rights to seek out and speak with migrant farmworkers.

Thus, even if Montgomery County had an official ordinance regulating Plaintiffs' communications with migrant workers, the ordinance would be subject to rigorous and searching scrutiny to ensure content neutrality, compelling governmental interests, and narrow tailoring in service of those interests. *See Watchtower*, 536 U.S. at 160-69. *A fortiori*, the County's de facto prior restraint of Plaintiffs' speech, applied arbitrarily and at the discretion of a line officer, cannot possibly withstand constitutional scrutiny. *See Staub*, 355 U.S. at 322; *see also Occupy*

Columbia v. Haley, 738 F.3d 107 (4th Cir. 2013) (holding that plaintiffs' arrests while engaged in protected First Amendment expression violated plaintiffs' clearly established rights).

The County contends that "[a]s of August 18, 2015 when this incident occurred, there was no constitutional right under the First Amendment for representatives of the Legal Aid Bureau to access migrant workers living on employer owned quarters."[7] MC Mem. at 8. As demonstrated above, this contention is flatly wrong. In demanding "case law . . . to support their claim," the County improperly conflates Plaintiffs' First Amendment rights with the question of Officer Kettering's liability under qualified immunity doctrines. *Id.* These are distinct issues; we now turn to the latter.

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[7] Neither the County nor the Lewis Defendants appear to contend that Plaintiffs actually violated any state or local law or ordinance. Indeed, as the County makes clear, state trespass law specifically *allows* migrant workers to receive visitors. Presumably, it also does not prohibit Plaintiffs from entering the Lewis property, uninvited, to speak with migrant workers, because such a prohibition would be unconstitutional, as demonstrated above.

The County's argument that "the subject incident is controlled" by the trespass law, MC Mem. at 8, puts the cart before the horse. The Constitution establishes Plaintiffs' rights to enter the property to speak with migrant farmworkers; state law must conform itself to those rights, and does not control their shape. U.S. CONST. art. VI, cl. 2. Similarly, the County's argument about the Maryland Attorney General's opinion is inapposite. MC Mem. at 9. Concededly, the Maryland AG does not rely on the First Amendment to conclude that, under Maryland law, "ownership of real property does not grant the owner dominion over the lives and rights of those within its borders." *Owners of Migrant Labor Camps May not Prevent Access by Others to Migrants Residing in Camps*, 67 Op. Att'y Gen. 64, 68 (1982). But the First Amendment nonetheless secures Plaintiffs' rights, regardless of what the Maryland Attorney General might think. The AG's opinion is relevant to this case for two reasons: First, because Officer Kettering was presented with the opinion and told that it established Plaintiffs' rights to be on the property, it helps establish Kettering's reckless disregard for those rights, as discussed below. Second, it affirms the rights flowing from the migrant farmworkers' tenancy on Lewis property. It makes clear that, under Maryland law as well as the Constitution, the right to refuse Plaintiffs' overtures belonged to the migrant farmworkers, rather than the Lewises. Again, this point appears to be undisputed, as least by the County, which seems to agree that the Lewises lacked legal authority to exclude Plaintiffs from such access to the property as was necessary to access the migrant farmworkers resident thereon.

B. No Reasonable Officer Would Doubt Plaintiffs' Rights to Speak With Migrant Farmworkers

"Qualified immunity is an affirmative defense that 'shields government officials performing discretionary functions from personal-capacity liability for civil damages under § 1983, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Occupy Columbia*, 738 F.3d at 118 (quoting *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006). Officials are liable for damages under § 1983 when "(1) the allegations underlying the claim, if true, substantiate a violation of a federal statutory or constitutional right; and (2) this violation was of a clearly established right of which a reasonable person would have known." *Id.* (quoting *Ridpath*, 447 F.3d at 306).

In analyzing a question of qualified immunity, the Court should first "identify the specific right that [Plaintiffs] assert[] was infringed by the challenged conduct, recognizing that the right must be defined at the appropriate level of particularity." *Id.* (quoting *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997). The ultimate question is whether

> [t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987). Qualified immunity questions are analyzed through a lens of "objective legal reasonableness," in which the official is presumed to be familiar with "the law of the relevant jurisdiction"—i.e., "the decisions of the Supreme Court,

this court of appeals, and the highest court of the state in which the case arose."[8] *Occupy Columbia*, 738 F.3d at 124.

The County identifies the right in question as the right "for representatives of the Legal Aid Bureau to access migrant workers living on employer owned quarters." MC Mem. at 11. This formulation buries the lede somewhat; it would be more accurate to ask whether representatives of the Legal Aid Bureau have a right to access migrant workers living on employer-owned quarters *to speak with the workers about their legal rights, when none of the workers have indicated an unwillingness to speak to the Legal Aid representatives*. The answer, of course, is yes; such a right was clearly established in the law of this Circuit at the time of the incident in question, by the authorities cited above in Section I.A.[9] The County has not articulated a reasonable train of thought that, in light of the authorities cited above, would permit Officer Kettering to order Rivero and Evans off Lewis property. Nor can it.

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[8] The County argues that to be held liable "the official must be 'plainly incompetent' or have 'knowingly violated' the law." MC Mem. at 10 (quoting *Pritchett v. Alfred*, 973 F.2d 307, 313 (4th Cir. 1992). This is not correct. Qualified immunity protects "'good faith' mistakes of judgment *traceable to unsettled law, or faulty information, or contextual exigencies*," *Pritchett*, 973 F.3d at 313; liability does not require incompetence along all dimensions. The objective reasonableness standard presumes familiarity with all binding authorities, as unrealistic as that standard may be; the "incompetence" demanded in *Pritchett* relates to the official's exercise of his or her duties in light of that presumed familiarity.

The County also argues that "Mere negligence is not sufficient to subject a public official to liability." MC Mem. at 11 (citing *Daniels v. Williams*, 474 U.S. 327 (1986). This is misleading. *Daniels* held that a state official's tortious negligence does not constitute a "deprivation" of a plaintiff's constitutional liberty interest in freedom from bodily injury. *Daniels*, 474 U.S. at 328-29. It does not authorize government officials to violate Plaintiffs' First Amendment rights because they negligently do not know the law.

[9] As noted *supra* n.7, Plaintiffs rely on the binding authority of the jurisdiction, not the Maryland Attorney General's opinion, to determine what law is clearly established. *Cf.* MC Mem. at 11-12.

"[I]t is fundamental that the First Amendment prohibits governmental infringement on the right of free speech." *Occupy Columbia*, 738 F.3d at 125 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982)). The Supreme Court has over and over again upheld the rights of interested persons to enter onto private residential property to speak with residents at their homes. *See Watchtower*, 536 U.S. at 160, and cases cited therein. It has applied the strictest scrutiny to governmental impositions on these rights, *see id.*, and has struck down even the lightest touch of burden, *see Hynes*, 425 U.S. at 620. The Court has specifically condemned burdens that rely on the discretion of an individual government official rather than a narrowly-tailored regulation enacted to serve a compelling governmental interest. *See Staub*, 355 U.S. at 322. Indeed, the Fourth Circuit has upheld § 1983 liability—including a denial of qualified immunity—for officials who arrested peaceful protesters during their exercise of First Amendment rights.[10]

The County may focus on the "employer-owned quarters" portion of the right in question, arguing that it was unclear whether state trespass law gave the Lewises a state-enforceable right to order Plaintiffs off their property.[11] *Cf. Occupy Columbia*, 738 F.3d at 123 (noting appellants' argument that state criminal trespass and vandalism laws were valid time, place, and manner restrictions on protesters' actions).

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[10] Issuing a no-trespass notice and ordering Plaintiffs off the Lewis property, under threat of arrest, obviously interferes with Plaintiffs' First Amendment rights just as fully and clearly as an actual arrest.

[11] The specificity the County applies in clarifying that Plaintiffs are "representatives of Legal Aid" cannot render Plaintiffs' First Amendment rights murky. The law establishes that *anyone* may enter onto private property to speak with residents; if anything, *Primus* and *Button* establish that, as representatives of an organization with an expressive interest in providing legal services to clients, Plaintiffs are even *more* protected than an average door-to-door canvasser.

This argument is unavailing, however. First, the cases cited above establish that the right to refuse visitors who wish to speak with residents belongs to "each householder" rather than any third party. *Martin*, 319 U.S. at 147. The basic application of reason to these cases leads to an unmistakable conclusion that the state may not, at the behest of a third-party landlord, ban a speaker from contacting the landlord's tenants who are willing to receive the speaker.

Second, the face of the relevant Maryland statute itself makes clear that, as the County acknowledges, migrant farmworkers on employer-owned residences have a right to "receiv[e] a person who seeks to provide a lawful service." Md. Code Ann., Crim. Law § 6-406(d). From the face of the statute, it is clear that the Lewises had no right to exclude Plaintiffs from the property. Because Officer Kettering's order was plainly beyond his statutory authority, it can present no reasonable ground for abridging Plaintiffs' First Amendment rights. *Cf. Rogers v. Pendleton*, 249 F.3d 279, 291-92, 293-94 (4th Cir. 2001) (holding that, because plaintiff's conduct was clearly not prohibited by either of two defendant-proffered Virginia statutes, police officers violated clearly established law in arresting him without probable cause).[12]

The Fourth Circuit encountered a very similar fact pattern in *Occupy Columbia*. In that case, as here, government officials interfered with plaintiffs' exercise of long-established First Amendment rights—there, the rights to protest, assemble, and petition the government. 738 F.3d at 120. The defendants attempted to wriggle out of liability on qualified immunity grounds,

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[12] Even if some version of the facts *might* entitle Officer Kettering to qualified immunity, this motion is not the place to grant dismissal on that basis. *See Occupy Columbia*, 738 F.3d at 122-23 ("It may well be that these statutes are in fact valid time, place, and manner restrictions . . . . It may also be true that, under appropriate circumstances, Appellants could enforce these statutes . . . . Yet, what Appellants 'could' do is irrelevant here. What matters, at this stage, is whether Appellants can demonstrate an entitlement to the defense of qualified immunity based on the Third Amended Complaint and the exhibits attached thereto.")

arguing first that the rights in question did not exist (reframing them as "the right to squat indefinitely on State House grounds," *id.*), and then that the rights were not clearly established, *id.* at 122-24, suggesting that state laws cast doubt on the applicability of the First Amendment rights in question. The circuit court roundly rejected these efforts, finding that plaintiffs had adequately alleged violation of clearly established law. *Id.* at 124-25. The *Occupy Columbia* court lays out a well-tailored playbook for analyzing this case. This Court should follow the Fourth Circuit's lead and reject the County's qualified immunity defense.

In the alternative, even assuming *arguendo* that the Court determined from the face of the FAC that Officer Kettering was entitled to qualified immunity—a conclusion the Court should not reach—then it would still be appropriate for the Court to clarify that Kettering did in fact violate Plaintiffs' First Amendment rights, as suggested in *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) and *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Though no longer mandatory, the *Saucier* two-step of deciding the constitutional question before reaching qualified immunity is particularly appropriate here. As *Saucier* recognized, this order of decision "is the process for the law's elaboration from case to case . . . . The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." 533 U.S. at 201. And as *Pearson* recognized in retreat from the *mandatory* "order of battle," it is nonetheless "often beneficial." 555 U.S. at 235-36. *Pearson* specifically called out cases like this one, in which "there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong." *Id.* Indeed, where, as here, Plaintiffs have brought a supplemental state-law claim *in pari materia* with the constitutional question that admits no

qualified immunity defense, it would be a gross waste of judicial resources not to elucidate the rights in question as suggested under *Saucier*.[13]

C. Officer Kettering Acted with Reckless Disregard of Plaintiffs' Rights, Establishing Plaintiffs' Entitlement to Punitive Damages

The FAC includes a prayer for punitive damages under §1983. FAC ¶ 61. It does not plead punitive damages under Maryland law. *Cf.* FAC ¶¶ 65-66. Nonetheless, the County argues that the Court should dismiss Plaintiffs' punitive damages claim because it does not plead the "actual malice" required under *state* punitive damages law. MC Mem. at 12-13. This is the wrong standard under federal law, which authorizes punitive damages when an official demonstrates "reckless or callous disregard" for the Plaintiffs' rights. *Smith v. Wade*, 461 U.S. 30, 51 (1983). The Supreme Court has specifically rejected an "actual malicious intent" standard. *Id.* Plaintiffs pled facts sufficient, drawing the reasonable inferences most favorable to them, to support their allegations of reckless or callous disregard. In particular, Plaintiffs pled that Officer Kettering was presented with an opinion of the Maryland Attorney General that he was told clarified Plaintiffs' right to visit migrant farmworkers. FAC ¶ 41. Though he said he "didn't have time to read the opinion," Kettering nonetheless spent fifteen minutes filling out an official no-trespassing order. *Id.* These facts, taken as true, do not *conclusively establish* Plaintiffs' claim to punitive damages—the extent of Kettering's disregard for Plaintiffs' rights will be elucidated in discovery and ultimately left for "the jury's discretion 'to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future.'"

[13] Should the Court dismiss Plaintiffs' § 1983 damages claims on qualified immunity grounds, it should nevertheless retain jurisdiction to provide Plaintiffs' requested federal-law declaratory and injunctive relief, which are not subject to qualified immunity defenses.

Smith, 461 U.S. at 54(quoting Restatement (Second) of Torts § 908(1) (1977)). The Court should not dismiss them at this stage of the case.

II. The County Defendants Are Liable Under Maryland Law Notwithstanding Kettering's Liability Under § 1983

Article 40 of the Maryland Declaration of Rights assures Marylanders "[t]hat the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that privilege." The "freedoms protected by Article 40 are co-extensive with those protected by the First Amendment." *DiPino v. Davis*, 729 A.2d 354, 367 (Md. 1999); *accord Nefedro v. Montgomery County*, 996 A.2d 850, 855 n.5 (Md. 2010). A violation of Plaintiffs' First Amendment rights is also a violation of their rights under Article 40.[14]

Moreover, under Maryland law "a common law action for damages lies when an individual is deprived of his or her liberty in violation of the Maryland Constitution." *Okwa v. Harper*, 757 A.2d 118, 140 (Md. 2000). Article 40 is among the rights protected by this common law action. *DiPino*, 729 A.2d at 371-73. "A state public official alleged to have violated . . . any article of the Maryland Declaration of Rights[] is not entitled to qualified immunity," because these

> provisions . . . of the Maryland Constitution[] are specifically designed to protect citizens against certain types of unlawful acts by government officials. To accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions.

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[14] Indeed, Article 40 protections are in some ways *more* protective than the First Amendment; for instance, as explained below, Maryland does not recognize qualified immunity as a defense to constitutional harms.

Okwa, 757 A.2d at 140. The state also recognizes no distinction between an officer's individual and official capacity, and requires no "policy or custom" for liability. *Id.*at 136. Moreover, local governmental entities like the County are liable for the torts of their employees both under a common law *respondeat superior* theory, *DiPino*, 729 A.2d at 372-73, and under the Local Government Tort Claims Act (LGTCA), Md. Code Ann., Cts. & Jud. Proc.§ 5-303(b)(1).

The County does not contest these principles (though it does challenge the scope of Plaintiffs' First Amendment rights).[15] MC Mem. at 16. Rather, it contends that Plaintiffs have failed to meet the notice requirements of the LGTCA, Md. Code Ann., Cts. & Jud. Proc. § 5-304. That statute applies only to "an action for unliquidated damages," and is thus not grounds for dismissal of Plaintiffs' claims for equitable relief under any circumstances. Moreover, Plaintiffs

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[15] The County also argues that the Court "lacks subject matter jurisdiction" over Maryland state-law claims if the Court dismisses Plaintiffs' § 1983 claims. MC Mem. at 16. This is wrong. 28 U.S.C. § 1367 grants supplemental jurisdiction over state law claims that "form part of the same case or controversy" as a claim over which federal courts have original jurisdiction, such as 42 U.S.C. § 1983. A district court "*may* decline to exercise supplemental jurisdiction" if it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). "[T]rial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995); *accord Crosby v. Gastonia*, 635 F.3d 634, 644 n.11 (4th Cir. 2011). "Among the factors that inform this discretionary determination are convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy." *Shanaghan*, 58 F.3d at 110.

Here, these factors strongly weigh in favor of the Court retaining jurisdiction. Because the state and federal claims in this case are essentially parallel, it would make little sense for the Court to decide the federal claims and send the others to state court for a new examination of the same body of case law. Because the case presents few disputed facts, the thorniest issues in the case have already been presented for judicial determination. It would be inconvenient, if not unfair, for the parties to have to relitigate these issues in state court. It would also be a waste of judicial resources. Finally, because no particularly sensitive or novel issue of state law is presented, there are no policy or comity issues suggesting that this case should be resolved in state court. Defendants have offered no argument to dispute the efficiencies of the Court's retention of jurisdiction here.

either complied with the statute or satisfy its good cause exception because of the difficulty of timely obtaining pro bono counsel in a complex litigation.

The statute presently reads (and read on April 20, 2016, when the original Complaint was filed), in pertinent part:

> (b)(1) Except as provided in subsections (a) and (d) of this section, an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 1 year after the injury.
>
> . . . .
>
> (d) Notwithstanding the other provisions of this section, unless the defendant can affirmatively show that its defense has been prejudiced by the lack of required notice, upon motion and for good cause shown the court may entertain the suit even though the required notice was not given.

Md. Code Ann., Cts. & Jud. Proc. § 5-304.[16] The County concedes that it received effective notice of the claim "approximately 247 days after the alleged wrongful act," when Plaintiffs served their original complaint. MC Mem. at 15. Such notice obviously falls within the one-year period set forth in the current requirements of the LGTCA.

As the County points out in its brief, on August 18, 2015, the date of the alleged injury, the statute read identically, except that the words "1 year" read "180 days." Md. Code Ann., Cts. & Jud. Proc.§ 5-304(b)(1) (eff. July 1, 2014 to Sept. 30, 2015). The notice timeline was extended effective October 1, 2015. Md. Code Ann., Cts. & Jud. Proc.§ 5-304(b)(1) (eff. Oct. 1, 2015 to June 30, 2016). The County insists, without further argument, that the old version of the law should apply.

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[16] The statute has been amended again twice, most recently effective October 1, 2016, but the additional changes are effectively irrelevant to the analysis of this case.

The County has waived other grounds for argument, *Clawson v. Fedex Ground Package Sys., Inc.*, 451 F. Supp.2d 731, 734 (D. Md. 2006) ("The ordinary rule in federal courts is that an argument raised for the first time in a reply brief or memorandum will not be considered."); the Court is thus entitled to take the present version of the Code as "evidence of the law," *see Brenner v. Plitt*, 34 A.2d 853, 859-60 (Md. 1943), and accept the current version as applicable to the present case.[17] Lest Plaintiffs be accused of hiding the ball, however, we note that the statute that amended the LGTCA to extend its notice deadline included a provision that it "shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before the effective date of this Act." 2015 Md. Laws Ch. 131 (May 12, 2015).

Whether this clause is determinative or not is immaterial to the Court's decision. Both versions of the statute explicitly instruct that "upon motion and good cause shown the court may entertain the suit even though the required notice was not given" unless "the defendant can affirmatively show that its defense has been prejudiced by lack of required notice." Md. Code Ann., Cts. & Jud. Proc. § 5-304(d).

> The test for good cause is "whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." There are at least four general categories of good cause that have been recognized in Maryland: "[1] excusable neglect or mistake (generally determined in reference to a reasonably prudent person standard); [2] serious physical or mental injury and/or location out-of-state; [3] the inability to retain counsel in cases involving complex litigation; and [4] ignorance of the statutory notice requirement."

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[17] Waiver is particularly appropriate where, as here, Plaintiffs have been forced in the exercise of their due diligence to do the County's work for them. The County's waiver might also constitute an additional ground on which to find good cause for entertaining the suit pursuant to Md. Code Ann., Cts. & Jud. Proc. § 5-304(d).

Quigley v. United States, 865 F. Supp. 2d 685, 693 (D. Md. 2012) (quoting *Rios v. Montgomery County*, 872 A.2d 1 (2005). As pled in the FAC, even if Plaintiffs *were* technically noncompliant with the then-applicable notice provision, the noncompliance was for good cause. Plaintiffs request that, in the event the Court finds Plaintiffs to have failed to satisfy the notice provisions of the LGTCA with respect to their state-law damages claims against the County, the Court deem this opposition a motion to waive the requirements for good cause. In support of their motion Plaintiffs attach the Declaration of C. Shawn Boehringer as Exhibit A, and request an evidentiary hearing.

As the declaration demonstrates, Plaintiffs decided to pursue this suit relatively quickly after August 18, 2015—formally reaching out to the Maryland ACLU for pro bono counsel on October 13, 2015, roughly 2 months after the incident. Ex. A. ¶ 6. Procuring competent pro bono counsel is not easy; Plaintiffs could not secure a representation agreement until March 10, 2016. ¶ 8. By this time the 180-day notice window had already passed. Having finally secured counsel, however, Plaintiffs diligently pursued the case, filing its complaint on April 20, 2016. *See* Pls. Original Compl. (Doc. 1).

Plaintiffs clearly "prosecuted [their] claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." *Quigley*, 865 F. Supp. 2d at 693. Legal Aid recognized the importance of the constitutional issues presented in this case and sought experienced private counsel to help them pursue it on a pro-bono basis. Ex. A ¶ 4. Having procured it, they moved forward with the case as rapidly as possible under the

circumstances. Given Plaintiffs' "inability to retain counsel" more quickly in this case "involving complex litigation," Plaintiffs have shown good cause why the Court should entertain this suit.[18]

Moreover, the statute expressly provides that the notice requirement only precludes an action from going forward if the defendant can "affirmatively show that its defense has been prejudiced" by the lack of notice within the requisite time period. Here, the County suggests no prejudice they have suffered from the alleged untimely notice. They argue that they "did not have an opportunity to conduct an investigation or rescind Officer Kettering's mistaken Trespass Notification prior to Plaintiffs' institution of a lawsuit." MC Mem. at 15. Note that the County does not argue that it did not have an opportunity to conduct a *sufficient* investigation; they argue only that their investigation did not take place prior to the lawsuit.[19] Moreover, the Defendants concede that it would have been entirely proper to provide notice 180 days after the event in question. They have not made any "affirmative[] show[ing]" that their receipt of notice after 247 days, instead of 180, has in any material way prejudiced their defense. The reasoned judgment of the Maryland legislature, as reflected in the most recent version of the statute, further suggests that notice within one year is adequate for the County to prepare its defense. *See* Md. Code Ann., Cts. & Jud. Proc.§ 5-304.

III. The Court Should Issue a Declaratory Judgment Against the Defendants

Both the County and the Lewis Defendants argue that the Court lacks jurisdiction to issue a declaratory judgment against them. Both sets of Defendants are wrong.

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[18] Plaintiffs do *not* mean to imply that they relied on the language of the LGTCA as effective on or near the date of the complaint. Their argument for good cause is rooted in the difficulty of obtaining counsel capable of handling complex litigation on a pro bono basis.

[19] The opportunity to rescind the no-trespass order is of course irrelevant to Plaintiffs' claims for damages and consequently to the County's defense thereof.

A. The Court Is Empowered to Issue Declaratory and Injunctive Relief Against the County

Under 28 U.S.C. § 2201, "In 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, whether or not further relief is or could be sought." The prototypical declaratory judgment case is *prospective*, because it seeks to declare the parties' rights before an anticipated injury has been realized; when courts are presented with requests for declaratory judgment that probe the right to prospective relief, they sometimes refer to case-or-controversy requirements implicating the justiciability of events that have not yet come to pass. *See Sterling v. Ourisman Chevrolet of Bowie, Inc.*, 943 F. Supp. 2d 577, 600-01 (D. Md. 2013) (denying a request for a declaration of plaintiff's "rights with respect to [a defendant] under the theory of Respondeat Superior"); *Gardner v. Montgomery County Teachers Federal Credit Union*, 864 F. Supp. 2d 410, 420-21 (D. Md. 2012) (denying a request for a declaration "as to whether the Defendant has the right to make withdrawals from deposit accounts for credit card debt").[20]

But not all declaratory judgments are prospective. Parties routinely ask for, and courts routinely grant, declarations that a plaintiff's rights *have been* violated by a defendant's conduct. Declaratory judgment is a particularly useful remedy in civil rights cases, where qualified

[20] In such cases it is true that "past exposure to illegal conduct does not in itself show a present case or controversy." *Sterling*, 943 F. Supp. 2d at 601 (quoting *Gardner*, 864 F. Supp. 2d at 421. In those cases, however, the plaintiffs sought hypothetical relief on issues tangentially related to the remainder of their cause of action; the gist of the "past exposure" rule is that a plaintiff seeking prospective relief must have some reason to fear an impending injury. Indeed, *Los Angeles v. Lyons*, on which the cases rely, held that the plaintiff lacked standing to pursue injunctive and declaratory relief against the "*threatened* impairment of rights" because he failed to demonstrate a sufficient likelihood of future personal harm. 461 U.S. 95, 98, 101-04 (1983) (emphasis added).

immunity might otherwise allow violations of constitutional rights to go unremedied. *See, e.g.*, *Lefemine v. Wideman*, 133 S. Ct. 9, 10-11 (2012) (per curiam) (awarding attorneys' fees to plaintiffs who prevailed on requests for declaratory and injunctive relief for First Amendment violations, despite the district court's dismissal of plaintiffs' damages case on qualified immunity grounds);[21] *Garcia v. Montgomery County*, 145 F. Supp.3d 492, 512-13 (D. Md. 2015) (denying summary judgment to Montgomery County police officers on plaintiff's request for declaratory judgment that they violated his First Amendment rights); *Liverman v. City of Petersburg*, 106 F. Supp. 3d 744, 772 (E.D. Va. 2015) (granting in part summary judgment for plaintiffs declaring that defendants violated plaintiffs' First Amendment rights; granting in part summary judgment for defendants on qualified immunity grounds). The very fabric of the *Saucier* two-step assumes the Court's power to declare the law.

Clearly, then, rescission of Kettering's no-trespass order does not moot the controversy as to whether Kettering violated Plaintiffs' rights in the first place. The best evidence that the issue is still a matter of dispute is the County's memorandum of law in this present motion, which insists that Plaintiffs "Do Not Have a First Amendment Right to Visit Migrant Workers." MC Mem. at 8. This case presents a ripe dispute about the parties' respective legal rights, not an "abstract" or "hypothetical" question in which the Plaintiffs have no "personal stake." *Cf.* MC Mem. at 19.

Nor are Plaintiffs' prospective claims for declaratory and injunctive relief improper. Such relief is available where the plaintiffs demonstrate that they are "likely to suffer irreparable harm

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[21] Note that the declaratory judgment in *Lefemine* concluded "that Plaintiff's First Amendment rights *were violated* by Defendants' actions." *Lefemine v. Wideman*, 672 F.3d 292, 302 (4th Cir. 2012) (emphasis added) (vacated and remanded on other grounds, 133 S. Ct. 9 (2012)).

in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). The County argues that rescission of the no-trespass order[22] moots the controversy and renders the likelihood of future harm to Plaintiffs' First Amendment rights remote, relying on *Lyons*. But unlike the plaintiff in *Lyons*, Rivero and Legal Aid are repeat players in First Amendment conflicts. The FAC notes that Plaintiffs attempt to visit every single migrant farmworker encampment in Maryland and Delaware every year to speak with the workers about their rights. FAC ¶¶ 10-11. The FAC also notes that farm employers "frequently" interfere in the work of Rivero and legal aid providers like her; and that "state and local police often disregard" the now decades-old established legal authorities and "sid[e] instead with farm owners and employers."[23] ¶¶ 28-29. It should be clear that, at least on a 12(b)(6) motion, Plaintiffs have stated a live and potentially meritorious claim for prospective relief.[24] And clearly, declaratory and injunctive relief "will serve a useful purpose in clarifying the legal relations in issue" and "will terminate

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[22] The County also relies on an MCPD training bulletin issued in the wake of this case. MC Mem. at 21, County Ex. D. This is improper extrinsic evidence which the Court may not consider on a motion to dismiss. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) The training bulletin is not "integral" or "relied on" in the FAC. *See id.* Plaintiffs do not doubt its authenticity, but absent discovery have no way of determining the breadth of its distribution or the effectiveness of such bulletins in shaping officer conduct.

[23] Should the Court doubt the imminent threat to Plaintiffs' rights, Plaintiffs request leave to amend the FAC to include up-to-date allegations establishing looming threats to immigrant and migrant populations in America and those who serve them, including from law enforcement officials.

[24] Note that injunctive relief against the County does not require a "policy or practice" under Maryland law as it would under *Los Angeles County v. Humphries*, 562 U.S. 29 (2010). Indeed, the *Monell* liability rule that backs *Humphries* does not exist under Maryland law. Plaintiffs may be entitled to injunctive relief under Maryland law under a test that essentially mirrors *Winter*. *Fogle v. H&G Restaurant, Inc.*, 654 A.2d 449, 455-56 (Md. 1995). The LGTCA is inapplicable to this claim. Md. Code Ann., Cts. & Jud. Proc.§ 5-304.

and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Cf.* MC Mem. at 21 (quoting *Syndicated Pubs., Inc. v. Montgomery County*, 921 F. Supp. 1442, 1446 (D. Md. 1996).

B. The Court Can and Should Craft Declaratory and Injunctive Relief Against the Lewis Defendants

The Lewis Defendants also argue that the County's rescission of the no-trespass order "mooted any alleged controversy between the parties." LD Mem. at 6. This is a remarkable proposition, because the Lewis Defendants continue to argue that Plaintiffs lack the First Amendment rights of entry and visitation they seek to declare in this case. *See* LD Mot. at 1 ("The Lewis Defendants adopt and incorporate by reference the County Defendants' Motion to dismiss and arguments advanced therein," including presumably the County's contention that Plaintiffs lack a First Amendment right to visit migrant farmworkers); LD Mem. at 7 ("[The Lewis Defendants] could have . . . appl[ied] to a State District Court Commissioner for a variety of misdemeanor charges . . . ."); *id.* at 7-8 ("[T]he Lewis Defendants are entitled to prohibit individuals from entering their farmland."); *id.* at 9-10 (arguing that Plaintiffs' requested declaration would "create[] a new right for Legal Aid Workers, not founded in common law or statutes"). While the exact contours of the Lewis Defendants' legal position are, perhaps, a matter of fact, it certainly *seems* from the face of the Lewis Defendants' papers that "[a]n actual controversy exists between contending parties" and Plaintiffs have "assert[ed] a legal relation, status, right, or privilege and this is challenged or denied by an adversary party," Md. Code Ann., Cts. & Jud. Proc. §3-409; *see also* 28 U.S.C. § 2201 (authorizing declaratory judgment "in a case of actual controversy within [the Court's] jurisdiction"); *O'Bannon v. Friedman's, Inc.*, 437 F. Supp. 2d 490, 494 (D. Md. 2006) (actual case or controversy requires a dispute that is "definite and concrete, touching the legal relations of parties having adverse interests, of sufficient

immediacy and reality to warrant the issuance of a declaratory judgment"). The failure of Plaintiffs and the Lewis Defendants to resolve the legal dispute presented here—and agree on appropriate terms of a settlement agreement—also suggests an actual controversy over the law.

This obvious disagreement, combined with Plaintiffs allegations that they "attempt to visit each migrant labor camp in Maryland and Delaware at least once each year," establishes a threat of injury that is "real and imminent and neither conjectural nor hypothetical." *Gardner*, 864 F. Supp. 2d at 421 (internal quotations omitted). Plaintiffs will visit Lewis Orchards again to speak with resident migrant farmworkers and educate them about their rights. The last time Plaintiffs encountered the Lewis Defendants they accosted Plaintiffs, called the police, and had Plaintiffs unlawfully ordered off the property. The Lewis Defendants continue to insist that they have a right "to prohibit individuals from entering their farmland." LD Mem. at 7-8. Under these circumstance, Plaintiffs must and do believe that the Lewises will again seek to interfere with Plaintiffs' exercise of their First Amendment rights.[25]

The Lewis Defendants next attack the substance of Plaintiffs' requested relief. First, they argue that the declaration would "create[] a new right for Legal Aid workers." LD Mem. at 9-10. As demonstrated above in Section I, this is wrong. Next, they impermissibly deny the facts alleged in the FAC, arguing that the Lewis Defendants "did not seek the aid of the Montgomery County Police Department to exclude Plaintiffs from visiting the migrant workers" and that the

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[25] It would be a waste of judicial resources to interpret the "imminence" standard to require Plaintiffs to file a new suit for declaratory judgment at some date closer to the time when Plaintiffs again expect to visit Lewis Orchards workers. The parties have already presented a well-framed legal dispute based on actual facts to the Court, which is ripe for resolution. They should not have to refile at a later date and pressure a future court to act in haste to meet the "imminence" prong. In any case, the Court may declare a retrospective judgment that the Lewises' actions on August 18, 2015 *did* lack a legal basis.

no-trespass order did not apply to workers' residences.[26] LD Mem. at 10-11. This is also wrong.[27] FAC ¶¶ 39-45.

Next, the Lewises argue that Plaintiffs have "offered no facts suggesting that the Lewis Defendants will prevent plaintiffs from visiting H2-A farmworkers residing on the Lewis' property in the future." LD Mem. at 11. As noted above, the Lewises' past conduct in combination with their present stated legal position establishes a reasonable inference that the Lewises intend to interfere with Plaintiffs' rightful efforts in the future.

The Lewis Defendants resist Plaintiffs' request for an injunction forbidding them from retaliating against their migrant workers, insisting that "Plaintiffs are not in danger of being injured by retaliation by the Lewis Defendants." LD Mem. at 11. To the contrary, Plaintiffs have a First Amendment expressive interest in providing legal services to the migrant farmworkers employed by the Lewis Defendants. *See In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963). Retaliation against migrant farmworkers can obviously harm that interest, *and did in this case*. *See* FAC ¶¶ 36, 46-51 (detailing workers' allegations of violations, the Lewises' deliberate intimidation of the workers, and the workers' subsequent silence). While it is true that "Plaintiffs have not alleged" labor law violations against the Lewises, LD Mem. at 11,

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[26] Though certain of the Lewis Defendants' sentences could be read by a charitable reader to concede Plaintiffs' rights to enter Lewis property to speak with migrant farmworkers, there is clearly still a live dispute about the extent of those rights. Plaintiffs seek declaratory and injunctive relief in part to establish their rights in language that is unequivocal and unimpeded by mealy-mouthed qualifications and reservations. The ambiguity of the Lewis Defendants' language suggests an intent to further impede Plaintiffs' attempts to speak with migrant farmworkers by resort to these qualifications and reservations, which are irrelevant to the issues at hand and the facts Plaintiffs allege and intend to establish.

[27] The Lewis Defendants' tortured interpretation of the no-trespass order as applying only to "the actual farmland" at 19101 Peach Tree Road, LD Mem. at 8, is particularly ludicrous in light of the fact that 19101 Peach Tree Road does not exist. FAC ¶ 43.

the Lewises conveniently fail to mention that their own intimidation tactics may be the primary reason Plaintiffs cannot do so.

CONCLUSION

This last point demonstrates the stakes of this lawsuit. This is not an academic dispute over a non-issue. The Defendants' interference with Plaintiffs' work *successfully prevented* Legal Aid from following up on—and, potentially, remedying—alleged abuses of migrant workers' rights. Plaintiffs have legitimate First Amendment interests in their efforts to speak with and provide services to migrant farmworkers, not the least of which is their expressive interest in providing legal services to remedy such abuses. But those interests can only be vindicated if this Court and others vigilantly protect Plaintiffs' rights to seek out and speak with migrant farmworkers on private land.

As demonstrated above, Plaintiffs have clearly established First Amendment rights to enter onto private property for the purpose of speaking with migrant farmworkers at their residences about their legal rights, regardless of the wishes of the property owner. The Defendants violated these rights. This Court can and should grant all the relief requested in Plaintiffs' First Amended Complaint; it should therefore DENY Defendants' Motions to Dismiss.

November 29, 2016

Respectfully submitted,

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PROOF OF SERVICE

I certify that on the 29th day of November, 2016, a true and correct copy of the foregoing: "Memorandum of Law in Opposition to Defendants' Motions to Dismiss" was served by operation of the electronic filing system of the U.S. District Court for the District of Maryland upon all counsel who have consented to receive notice of filings in the matter styled *Rivero, et al. v. Montgomery County, Maryland, et al.*, Case No. 8:16-cv-01186-PWG.

/s/ Kit A. Pierson

Kit A. Pierson