No. 08-30047

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN NETHERLAND,
Plaintiff-Appellee,

v.

CITY OF ZACHARY AND TROY EUBANKS,
officially and individually,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of *Plaintiff-Appellee*
Supporting affirmance.

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed individuals and entities have an interest in the outcome of this case. None of the following individuals and entities, including *Amicus Curiae* The National Legal Foundation, are a corporation that issues shares of stock to the public. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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7. Troy Eubanks, Defendant-Appellant;
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10. Barry C. Hodge, Counsel for *Amicus Curiae*, The National Legal Foundation;
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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation upon which America was built. The NLF and its donors and supporters, including those in Louisiana, are vitally concerned with the outcome of this case because of the effect it will have on the constitutional rights of people on public property.

The NLF submits its brief by consent of all parties.

SUMMARY OF THE ARGUMENT

This Brief makes one argument not made by the party it supports, and expands upon one argument made by the Appellee. First, your *Amicus* argues that the District Court correctly rejected the argument based upon the "right to be let alone" made by the Appellant. Second, your *Amicus* argues that the District Court correctly rejected *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005), as an analogous case.

As to the first point, the application of the "right to be let alone" doctrine in this case would disguise a heckler's veto. The government may not prohibit speech based solely on the fact that listeners to that speech object to the message or may respond violently to it. Appellants, in arguing that patrons of Sidelines Grill have a right to be let alone, is asking this Court to enforce a veiled heckler's veto

in violation of the First Amendment. The "right to be let alone" was originally understood as a right against the government, enshrined in the Fourth and Fifth Amendments. While the Supreme Court has applied this "right" in one case against private parties, as an interest the state can seek to protect, it has never applied it in such a broad construction as Appellants would. Finally, this Court too has recognized that the heckler's veto cannot be permitted under the First Amendment.

As to the second argument, the District Court correctly distinguished *Ovadal* from the instant one. In that case, the protesting was occurring on a pedestrian overpass over a busy highway. The District Court found a significant difference between that and the Appellee's actions in the instant case, which were reading passages from the Bible on the side of the road. Furthermore, Appellants did not present any evidence showing that Appellee's actions were causing a traffic hazard, whereas in *Ovadal*, the record showed that an accident and several near-accidents had occurred. Finally, Appellants' true reason for censoring Appellee's speech was based on the content of his message and not his affect on nearby traffic. However, the government may not censor Free Speech based on distaste to the message, and in this case constitutes a heckler's veto.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REJECTED THE "RIGHT TO BE LET ALONE" ARGUMENT BECAUSE, IN THIS CASE, IT WOULD VEIL A HECKLER'S VETO.

The City of Zachary (hereinafter "City") is squelching free speech and the Court below appropriately issued a preliminary injunction, enjoining this violation of Mr. Netherland's constitutional rights. One look at the beginning of the Supreme Court's heckler's veto doctrine illustrates why the District Court was correct here. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Supreme Court faced a controversy regarding a speaker whose message was not well accepted. His message was extremely controversial and inflammatory, including a number of anti-Semitic, racist, and anti-Catholic statements, and accusations against various protestors of being communists. He, in turn, was accused of being a fascist. In fact, Justice Jackson even noted that his speech followed "the pattern of European fascist leaders." *Id.* at 22-23 (Jackson, J., dissenting). *Id.* Terminiello was charged with disturbing the peace because of the resulting civil unrest. *Id.* at 2. However, the Court wrote that the ordinance "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds [could] not stand." *Id.* at 5.

The Supreme Court has recognized that "mere public intolerance or

animosity cannot be the basis for abridgment of these constitutional freedoms." *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971). In fact, the Court opined that when faced with these types of ordinances it

> need not lament that [it does] not have before [it] the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.

Id. at 616.

In this case, the heckler's veto has been disguised by the City as the "right to be let alone." (Appellant's Br. 23). This "right to be let alone" was first articulated by Justice Brandeis in his dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis was discussing the right of privacy from intrusion of the government that the drafters of the Fourth and Fifth Amendments to the Constitution had contemplated. *Id.* at 478-79. As Justice Scalia noted in his dissent in *Hill v. Colorado*, this "right to be let alone" was "a right the Constitution 'conferred, *as against the government*' . . . ." 530 U.S. 703, 751 (2000) (Scalia, J., dissenting) (quoting *Olmstead*, 277 U.S. at 478).

In fact, Justice Stevens, the author of the Court's opinion in *Hill*, has even recognized the more conventional application of Justice Brandeis' passage from *Olmstead*. *California v. Hodari D.*, 499 U.S. 621 (1991). In his dissent from

Hodari D., Justice Stevens argued that the Court was departing from its precedent on the Fourth Amendment. *Id.* at 629. Justice Stevens said that

> Justice Brandeis wrote eloquently about the overarching purpose of the Fourth Amendment:
>
> > The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, *as against the Government, the right to be let alone* – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 646, n.18 (quoting *Olmstead*, 277 U.S. at 478) (alteration in original, emphasis added). However, in *Hill*, the Court noted that a person walking into medical facility has a "right to be let alone" from protestors drawing this principle from, among other cases, *Olmstead*. *Hill*, 530 U.S. at 717.

Thus, in addition to Mr. Netherland's argument that *Hill* is distinguishable, (Appellant's Br. at 30), your *Amicus* argues that *Hill*'s "right to be let alone" discussion is inapplicable. Other than in *Hill*, the Supreme Court has never applied this "right to be let alone" between private parties. Justice Stevens noted that this right "is more accurately characterized as an 'interest' that States can choose to protect in certain situations." *Hill*, 530 U.S. at 717, n.24. The Court specifically noted that the government has a greater regulatory interest in certain areas, including schools, courthouses, polling places, private homes, and health care

facilities. *Id.* at 728. Given this doctrine's limited history, and the Supreme Court's teaching that the interest in *Hill* was narrow, this Court should not extend the context in which the interest may be protected any further. If this Court were to extend this interest beyond the *Hill* Court's discussion, it would convert the heckler's veto into a state interest.

Additionally, the Supreme Court has stated that the government cannot prohibit free speech activities just because the speech is unwanted. As was noted above, the Court has held that cities cannot prohibit activity that others find "annoying." *Coates*, 402 U.S. at 616. In *Coates* the Court held an ordinance unconstitutional on its face, stating that it did not need to know the specific facts of the case, because the facts "could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech." *Id.*

This Court has wrestled with the heckler's veto doctrine when it evaluated a parade and sound license ordinance from Mississippi. *Beckerman v. Tupelo*, 664 F.2d 502 (5th Cir. 1981). This Court noted that the test to determine whether the speech would be allowed "must be related to the legitimate government interest in protecting health, safety, and welfare, and must be precisely and narrowly drawn to prevent discretionary decision-making." *Id.* at 509. However, in that case, the city denied the permit because it "determined the activity w[ould] provoke disorderly

conduct in others." *Id.* This Court held that that decision was not focused on the legitimate state interests mentioned above, but rather on the "so-called 'hecklers' veto,'" and as such "the state treads on thin ice." *Id.* This Court went on to review the Supreme Court's treatment of this doctrine, and noted that the Supreme Court had stressed that "'[a] state may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions.'" *Id.* (quoting *Feiner v. New York*, 340 U.S. 315, 320 (1951)).

If this Court were to accept the City's "right to be let alone" argument, it would be adopting a converted heckler's veto through which the City could curtail speech which it finds annoying or unwanted. Such censorship is a violation of the First Amendment.

II. THE DISTRICT COURT WAS CORRECT TO NOT APPLY *OVADAL*, BECAUSE IT IS NOT ANALOGOUS TO THE INSTANT CASE.

The City argued that *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005) provided an appropriate analogous case for this Court to consider. *Amicus* would like to expand upon Mr. Netherland's argument as to why the District Court was right to distinguish that case, since it has more differences from than similarities to the instant case.

The District Court correctly noted that the protestors in *Ovadal* were protesting on a pedestrian overpass and the police were called because the signs

were causing traffic problems. *Netherland v. City of Zachary*, 527 F. Supp. 2d 507, 516 (M.D. La. 2007). The District Court reasoned that there was a significant difference between holding a sign on an overpass, and speaking on an open easement. *Id.* Additionally, as the *Ovadal* District Court noted on remand, the City's actions were justifiable because the protests had created a traffic hazard on a busy road. *Ovadal v. City of Madison*, No. 04-322, 2005 U.S. Dist. LEXIS 32739, at *3 (W.D. Wis. Dec. 13, 2005). Not only was the protest causing a traffic hazard, but it was also creating traffic congestion during rush hour, with one accident and several near-accidents occurring. *Ovadal*, 2005 U.S. Dist. LEXIS 32739, at *1-2.

In this case, Mr. Netherland was not over a major highway, but rather on the easement, next to a road. *Netherland*, 527 F. Supp. 2d at 516. Furthermore, the City did not present any evidence showing that Mr. Netherland's Free Speech activities had caused any traffic accidents to occur, or even to nearly occur. Rather, the sole cause for concern in this case was hypothetical. Interestingly, this hypothetical concern regarding a potential traffic hazard only arose, as the District Court noted, after Lt. Eubanks instructed Mr. Netherland to move from the ditch part of the easement, to the unpaved shoulder directly next to the road. *Id.*

Furthermore, as the District Court correctly noted, Lt. Eubanks was focused primarily on the content of Mr. Netherland's speech. Lt. Eubanks stated under oath that Eubanks would arrest Netherland if he exercised his Free Speech rights

based on the content of his message, and not whether his message was affecting traffic. *Id.* at 514. The City's content-based focus can also be seen through its argument that Netherland's message "could harm Sidelines business." *Id.* at 516. If the City was truly concerned only with potential traffic hazards, any putative damage to Sideline's business would be irrelevant. The City has even highlighted its misunderstanding of the legally relevant question by maintaining the argument in its brief to this Court, asserting that "Netherland's actions" could put Sidelines Grill out of business. (Appellant's Br. at 26). These "actions," however, are Mr. Netherland's constitutional right to speak in a traditional public forum. The City has evinced its content-based restriction towards Mr. Netherland, and cannot use the Sidelines employees' complaints as a heckler's veto to squelch Netherland's constitutional right to Free Speech.

Conclusion

For the foregoing reasons, and for the reasons put forth in Appellant's Brief, this Court should affirm the District Court's grant of summary judgment.

Respectfully submitted,
this 29th day of May, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Netherland v. City of Zachary, et al.*, No. 08-30047, on all required parties by depositing two paper copies and one electronic copy in the United States mail, first class postage, prepaid on May 29, 2008 addressed as follows:

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