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

GEORGE SAIEG,

Plaintiff,

v.

CITY OF DEARBORN; and RONALD HADDAD, in his official capacity as Chief of Police, City of Dearborn Police Department,

Defendants.

CASE NO: 09-12321

Hon. Paul D. Borman

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PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR INJUNCTIVE RELIEF

ISSUES PRESENTED

I. Whether denying Plaintiff access to traditional public forums for the purpose of engaging in peaceful, non-obstructive, noncommercial religious speech through the distribution of literature violates Plaintiff's constitutional rights.

II. Whether denying Plaintiff access to a traditional public forum for the purpose of engaging in peaceful, non-obstructive, noncommercial religious speech activity, while permitting commercial speech and other commercial activity in the same forum, violates Plaintiff's constitutional rights.

III. Whether Defendant's broad, prophylactic restriction on Plaintiff's peaceful, non-obstructive, noncommercial religious speech activity in traditional public forums burdens more speech than is necessary to achieve the particular interests of the government in violation of Plaintiff's constitutional rights.

IV. Whether the loss of Plaintiff's constitutional rights warrants preliminary and immediate injunctive relief.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Issue I:

Frisby v. Schultz, 487 U.S. 474 (1988)

Jamison v. Texas, 318 U.S. 413 (1943)

Martin v. City of Struthers, 319 U.S. 141 (1943)

Schneider v. New Jersey, 308 U.S. 147 (1939)

Issue II:

Carey v. Brown, 477 U.S. 455 (1980)

Frisby v. Schultz, 487 U.S. 474 (1988)

Jamison v. Texas, 318 U.S. 413 (1943)

Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972)

Schneider v. New Jersey, 308 U.S. 147 (1939)

Issue III:

United States v. Grace, 461 U.S. 171 (1983)

Issue IV:

Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th cir. 1990)

Connection Distributing Co. v. Reno, 154 F.3d 281 (6th Cir. 1998)

Elrod v. Burns, 427 U.S. 347 (1976)

Norfolk v. Cobo Hall Conference & Exhibition Ctr., 543 F. Supp. 2d (E.D. Mich. 2008)

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Rules

This case challenges Defendants' unconstitutional restriction of Plaintiff's protected speech activity on the public streets, sidewalks, and other public areas in the City of Dearborn ("City") during the Annual Dearborn Arab International Festival ("Festival").

SUMMARY JUDGMENT STANDARD

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed *to secure the just, speedy and inexpensive determination of every action*." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotations omitted) (emphasis added). Rule 56 provides that a summary judgment motion should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law."[1] Fed. R. Civ. P. 56(c).

STATEMENT OF MATERIAL FACTS

A. Plaintiff's Constitutionally Protected Speech Activities.

Plaintiff George Saieg is the founder and former director of Arabic Christian Perspective ("ACP"), a national ministry established for the purpose of proclaiming the Gospel of Jesus Christ to Muslims.[2] Plaintiff is a Christian pastor with a deeply-held religious conviction to evangelize to non-Christians. Evangelizing and handing out religious literature and materials are important aspects of Plaintiff's religious beliefs and vocation. Plaintiff travels around the country with other Christians attending and distributing Christian literature at various festivals and mosques to exercise his religion and to follow his religious duty based on the Great Commission, which is the instruction

[1] *See also* Fed. R. Civ. P. 65 ("Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing.").
[2] ACP board members voted to dissolve ACP in December 2009. Nonetheless, Plaintiff will continue his Christian ministry of evangelizing Muslims at the Festival. (Saieg Decl. at ¶6 at Ex.1).

of the resurrected Jesus Christ to His disciples that they spread His teachings to all the nations of the world. Because the City contains one of the largest Muslim communities in the country, it is an important location for Plaintiff's religious activities. (Saieg Decl. ¶¶ 1-8 at Ex.1).

B. City Sponsorship of the Festival.

For the past fourteen years, the City has sponsored the annual Festival. The City "continues to be one of the major sponsors of this event providing numerous services from various city departments," including the police, fire, recreation, building and safety, and public works departments, at no cost to the Festival.[3] (Beydoun 22-23, 44-46, 96-97 at Ex.3; Dep.20 at Ex.4; Dep.2 at Ex.5; Dep.22 at Ex.6). In 2009, for example, the police department provided 970.5 man-hours, which included 46.5 "volunteer hours." (Mrowka 44-45, 58 at Ex.7; Dep.31, 32 at Ex.8). At a rate of approximately $45 per hour and excluding the "volunteer hours," the City contributed approximately $41,580 worth of free police services alone.[4] (Mrowka 44-45, 58 at Ex.7; Dep.31, 32 at Ex.8; Haddad 54 at Ex.9). The City also provides a mobile police command trailer. (Haddad 52, 77 at Ex.9; Dep.15, 19 at Ex.10). City police officers patrol the Festival and the surrounding areas to ensure compliance with the rules and regulations. (Haddad 15-18, 70-72, 75-76 at Ex.9; Mrowka at 18, 20, 24 at Ex.7; Saieg Decl. ¶¶ 12, 20 at Ex.1; Beydoun 40, 66, 68-69, 77 at Ex.3). City officials participate in the opening ceremony. (Haddad 65-68 at Ex.9; Dep.16 at Ex.11). The City allows the use of its official seal in the public advertising and marketing of the event. (Beydoun 74-76, 96-97 at Ex.3; Dep.16 at Ex.11; Dep.44 at Ex.12). Prior to its commencement, Festival organizers hold

[3] Pursuant to the City's ordinance, a sponsor of a special event receiving City services is required to enter into a contract to repay the cost for those services. (Morello Decl. ¶ 4, C at Ex.2).

[4] According to Ms. Fay Beydoun, the director of the Festival and the executive director of the American Arab Chamber of Commerce, the cost of running the entire Festival, excluding the free City services, is approximately $180,000. (Beydoun 11, 14, 22-23 at Ex.3).

numerous planning meetings that are attended by City officials. (Beydoun 20-21, 81-82, 94-96 at Ex.3; Mrowka 8-9, 63-68 at Ex.7; Dep.36, 37, 43 at Ex.13). City officials review the various applications, rules, and regulations of the Festival to ensure compliance with City requirements. (Beydoun 63 at Ex.3; Haddad 87, 89-91, 93, 95-96, 110-12 at Ex.9; Dep.2 at Ex.5; Mrowka 7 at Ex.7). City officials make special accommodations for local businesses that want to engage in commercial activity on the sidewalks during the Festival. (Beydoun 64-66, 82-83, 90-91 at Ex.3; Dep.42 at Ex.14; Haddad 34 at Ex.9). And City officials make special accommodations for local businesses to ensure that their commercial activity unrelated to the Festival is not adversely affected by the event. (Haddad 16-18, 36-38 at Ex.9; Mrowka 69-73 at Ex.7; Beydoun 39 at Ex.3).

C. Festival Boundaries: Creating a "First Amendment-Free Zone."

Organizers requested via a "special events" application the use of "Warren Avenue and Miller Road" for the Festival. (Beydoun 25-27, 29-30 at Ex.3; Dep.24 at Ex.15; Dep.25 at Ex.16). The City approved the application on April 27, 2009. (Dep.24 at Ex.15). On May 4, 2009, the City Council granted "permission to conduct the 14th Annual Dearborn Arab International Festival from June 19 through June 21, 2009[,] subject to all applicable ordinances and the rules and regulations of the Police Department." (Dep.2 at Ex.5 (emphasis added); Haddad 21, 51-52 at Ex.9). The City Council approved "the festival boundaries" as follows: "Warren Avenue between Hartwell and Kingsley Streets; Miller Road between Warren Avenue and Blesser Street." (Dep.2 at Ex.5). Accordingly, the Festival's activities took place on Warren Avenue, with a few activities held on Miller Road.[5] (Beydoun 29, 42 at Ex.3; Mrowka 15-18 at Ex.7; Dep.3 at Ex.17).

[5] Defendant Haddad testified as follows:
Q: How about those public sidewalks, those are open all around the periphery of the festival?
A: They're basically open.

The Festival is open to the general public; there is no admission fee required. (Mrowka 74 at Ex.7). Pedestrians have free access to the Festival and the surrounding areas (Mrowka 74-75 at Ex.7), and the City ensures pedestrian access to the local Warren Avenue businesses that do not want to participate in the Festival (Haddad 16-18 at Ex.9; Mrowka 69-72 at Ex.7; Tr. 19-20, 22-23, 26-27 at Ex.18). In fact, the City created special parking areas that were open to persons who had no interest in the Festival, but who wanted to park so as to have access to these businesses. These parking areas were located along Oakman Boulevard. (Mrowka 69-72 at Ex.7).

During the 2009 Festival, the City closed off two areas to vehicle (not pedestrian) traffic, thus creating two border areas—the "inner perimeter" and the "outer perimeter."[6] (Mrowka 9-11 at Ex.7). The "inner perimeter" contained the actual Festival activities, and its borders ran east to west along Warren Avenue and a block south along Miller Road.[7] (Mrowka 11-18 at Ex.7; Dep.29 at Ex.19). The "outer perimeter," which contained no Festival activities, included Morrow Circle to the north (running east to west), Blesser Street to the south (running east to west), Wyoming to the east (running north to south), and Schaeffer to the west (running north to south).[8] (Saieg Decl. ¶¶ 20-21, C, at Ex.1). The special parking areas for the business patrons were located within the "outer perimeter." (Mrowka 69-73 at Ex.7).

Q: The festival itself, though, is closed off[,] those particular streets, isn't that the area that they have responsibility for, the actual streets themselves, isn't that right, the festival?
A: That's correct.
(Tr. 27 at Ex.18; Mrowka 15-18 at Ex.7). The City also erects barriers to separate the Festival activities from the public sidewalks. (Saieg Decl. ¶ 19, B at Ex.1; Beydoun 73-74 at Ex.3).

[6] The City intends to close off the same areas for the Festival in 2010. (Haddad 99-100 at Ex.9).

[7] The "inner perimeter" consisted of areas A-1/A-2 to B-1/B-2 running east to west and area C to the north and area D to the south as depicted on Dep. 29. (Mrowka 11-18 at Ex.7; Dep.29 at Ex.19).

[8] The "outer perimeter" consisted of area G to the north, which runs east to west, area H to the south, which runs east to west, area E to the east, which runs north to south, and area F to the west, which runs north and south, as depicted on Dep. 29. (Mrowka 11-18 at Ex.7; Dep.29 at Ex.19).

D. Defendants' Enforcement of the Challenged Speech Restriction.

City police officers would not permit Plaintiff to distribute noncommercial handbills, such as religious literature, in either the "inner perimeter" or the "outer perimeter" areas during the Festival.[9] (Saieg Decl. ¶¶ 20-21 at Ex.1; Mrowka 18, 32-33 at Ex.7; Haddad 99-100 at Ex.9; Beydoun 55, 77 at Ex.3). If Plaintiff did engage in such speech activity, he was subject to arrest.[10] (Haddad 70-72 at Ex.9). Defendants enforced this restriction despite the fact that the City ordinance dealing with the distribution of handbills expressly states, "It shall not be unlawful for any person to hand out or distribute, without charge to the receiver thereof, any noncommercial handbill in any public place to any person willing to accept such noncommercial handbill." (Morello Decl. ¶ 2, A at Ex.2).

E. Defendants' Favored Treatment of Commercial Speech.

The City made special provisions to accommodate the businesses along Warren Avenue to ensure that the public sidewalks remained open for commercial activity, including commercial activity unrelated to the Festival. Defendant Haddad testified as follows:

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[9] Baby strollers were not banned from the sidewalks or other pedestrian areas during the Festival, even though they were a "huge" safety concern for the City. (Haddad 18-20 at Ex.9; Ex.20).

[10] Defendant Haddad testified as follows:

Q: You indicated if this was distributing literature, it wouldn't be permitted. Would that be something if police officers were [walking] through, saw someone distributing literature within the confines of the festival, they would direct them to stop doing so?

A: I would hope so.

Q: Why would you hope so?

A: Because that's what's expected, and you asked me would they do that, my hope would be that they would.

* * * *

Q: Is it fair to say, for example, distributing literature either in the festival or on the sidewalks adjacent, somebody persisted in doing that, that there's a possibility he could be arrested by not complying with your instructions, your officers' instructions?

A: Did you say possibility or probability?

Q: There's a possibility?

A: Yeah, possibility. . . .

(Haddad 70-72 at Ex.9) (emphasis added).

Q: You indicated you had some communications with the Warren businesses, is that right, sir?
A: That's correct.
Q: And they indicated to you that they had a serious concern about making sure that the public sidewalks are open for their business patrons, is that right?
A: That's correct.
Q: And these would be business patrons who perhaps might not have any interest at all in the festival but want to attend that business for business purposes, is that right?
A: Any interest in anything else going on on Warren was the actual concern.
Q: So it might not even be people associated with the festival, but people who just want to, that afternoon, they want to go down to whatever business is open, like they have done in the past, and they want to make sure they can get in and out of that business and have nothing to do with the festival, is that right, sir?
A: That's right.
Q: And the City is doing everything it can to accommodate those business interests to make sure those sidewalks are open, is that right?
A: We're going to do our best.

(Tr. 26-27 at Ex.18 (emphasis added); *see also* Tr. 29 at Ex.18).

* * * *

Q: Did you explain to [the businesses] that you were going to take any steps or measures to accommodate their concerns?
A: I just advised them that we'd do our very best to keep the sidewalks open.
Q: And how were you going to do that?
A: Have patrol on the sidewalks, officers walking up and down.
Q: What were the things that these police officers patrolling the sidewalks, that they would be looking for to ensure that you were accommodating the businesses' needs?
A: Just make sure that sidewalks stayed open, nobody was unduly standing around in places that weren't designed for that.
Q: How about with regard to people distributing literature or other materials on the sidewalk?
A: That was not going to be permitted.

(Haddad 16-18 at Ex.9) (emphasis added).

In addition to ensuring that the public sidewalks remained open for commercial activity, the City permitted the Festival organizers to issue special sidewalk vending permits, at no charge, to the

businesses along Warren Avenue.[11] (Beydoun 34, 64-66, 72-73, 82-83 at Ex.3). This commercial activity was permitted even though it caused traffic problems at prior Festivals, (Beydoun 34-35 at Ex.3; Mrowka 21-22 at Ex.7; Dep.36 at Ex.13), and during the 2009 Festival (Saieg Decl. ¶¶ 25-26, D, E at Ex.1). And these special "permits" were provided to persons who owned a business along Warren Avenue and no one else. (Beydoun 90-91 at Ex.3; Dep.42 at Ex.14). To distribute noncommercial materials to persons during the Festival, a private citizen would have to remain at a fixed location on Warren Avenue and pay a fee in the amount of $150.00, as well as a $100.00 refundable deposit. If the person wanted to post a sign, there was an additional $55.00 fee for doing so. (Beydoun 50-51 at Ex.3; Dep.26 at Ex.21).

F. Plaintiff's Speech Activities During the Festival.

During the five years prior to 2009 (2004 to 2008), Plaintiff and his fellow Christians visited the City during the Festival to evangelize and distribute their religious materials without charge to persons willing to accept them. During each of these prior years, they freely roamed the perimeter of the Festival, including the public sidewalks adjacent to the Festival ("inner perimeter") and the public streets and sidewalks immediately surrounding the Festival ("outer perimeter"), handing out religious literature and discussing their Christian faith. During theses prior visits, City officials directed Plaintiff and his associates to distribute their religious materials on the public sidewalks adjacent to the Festival and not to distribute them on the road where the Festival activities were taking place. Plaintiff complied with this direction and received approval from City police officers to distribute his religious materials accordingly. During these prior visits, Plaintiff and his associates

[11] In their application, Festival organizers requested that the City issue the sidewalk permits, per the City's ordinance. (Beydoun 31 at Ex.3; Dep.24 at Ex.15; Morello Decl. ¶ 3, B ("Street Vendors" ordinance) at Ex.2).

never caused any disruption to the Festival with their speech activity, nor did they ever block or obstruct in any way the pedestrian traffic along the sidewalks. (Saieg Decl. ¶¶ 9-10 at Ex.1; Mrowka 24 at Ex.7).

Plaintiff's religious literature and materials do not contain solicitations nor do they contain commercial speech. Plaintiff is not a "vendor." His activities do not constitute "political solicitations." He does not endorse a "political candidate" or a "political cause." His religious materials are not "political literature or paraphernalia." And he and his associates distribute their religious materials at no charge to those who are willing to accept them. (Saieg Decl. ¶ 23 at Ex.1; *compare* Dep.26 at Ex.21; *see also* Morello Decl. ¶ 2, A at Ex.2). The distribution of Plaintiff's religious materials does not require that the recipient stop in order to receive the message that Plaintiff wishes to convey; instead the recipient is free to read and view the message at a later time. Consequently, Plaintiff's distribution of his religious materials does not entail the same kind of problems presented by face-to-face solicitations or sales, such as those permitted by City officials during the 2009 Festival. (Saieg Decl. ¶¶ 14, 25-26, 29, 40, 41, D, E, I at Ex.1).

Plaintiff does not want to participate in the Festival; he wants to evangelize the people who come to Warren Avenue during the Festival. In 2009, Defendants prohibited him from doing so and required him to remain at a fixed location as a Festival participant. (Saieg Decl. ¶¶ 33-40 at Ex.1).

G. Plaintiff's Speech Activities During the 2009 Festival.

In 2009, Plaintiff planned to visit the City every day of the Festival to distribute religious literature and materials and to evangelize. Prior to arriving in the City, Plaintiff telephoned the City Police Department and spoke to Sgt. Jeff Mrowka. Plaintiff 's purpose for the courtesy call was to introduce himself and his organization, to inform the police of his peaceful intention to visit the City

during the Festival to distribute religious literature and evangelize, and to request information concerning the precise location of the event. Sgt. Mrowka said he would call Plaintiff back with the information. During this subsequent conversation, Sgt. Mrowka advised Plaintiff of the Festival's location and that Plaintiff would be restricted to a fixed location within the Festival. Sgt. Mrowka informed Plaintiff that he would not be allowed to use the public sidewalks to distribute his literature. (Saieg Decl. ¶¶ 11-15 at Ex.1; Mrowka 20 at Ex.7).

H. Defendants' Denial of Access to Plaintiff's Intended Audience.

During the 2009 Festival, Plaintiff and his associates had to restrict their literature distribution to a fixed location on Warren Avenue pursuant to the direction of Sgt. Mrowka. Sgt. Mrowka initially gave Plaintiff a choice of two locations: one was near the mobile police station, which was centrally located, and the other was a more remote location on the far eastern side of the Festival between two carnival rides. Plaintiff chose the central location because it would allow him to reach more people and because it was near the police station, which would deter people from disrupting his activities and making false claims against him. (Saieg Decl. ¶¶ 33-34 at Ex.1).

Shortly after moving to the central location, Sgt. Mrowka informed Plaintiff and his associates that they had to now move to the remote eastern location. (Mrowka 27-30 at Ex.7 ("I informed them at that point they would have to move.")). Plaintiff complied with the order. As expected, because the eastern location was near the Festival rides, the vast majority of people who came to this location were children. The ability to evangelize adult Muslims is made more difficult if Muslim children receive materials from Christians because the adult Muslims get angry if this happens. (Saieg Decl. ¶¶ 35-37 at Ex.1).

Additionally, the majority of the people attending the Festival congregated around the stage that was located on the far western side of the Festival to listen to the free concerts. Plaintiff's eastern location was on the far opposite side of where the stage was located. Moreover, it is very difficult to evangelize Muslims from a fixed location without inviting attention to the individuals visiting the booth. Because Islamic law provides for severe penalties, including death, for converting to Christianity, such attention is naturally undesirable to anyone wishing to hear Plaintiff's message. The Muslims who do approach will inevitably be watched by family, neighbors, and friends, subjecting them to possible ridicule, scorn, and punishment. Consequently, Muslims who are interested in Christianity are typically not willing to go to and be seen at a location that is known to be occupied by Christians. Plaintiff experienced this difficulty at the 2009 Festival. To reach their intended audience with their religious message, it is essential for Plaintiff and his associates to be able to distribute their religious materials while walking on the public sidewalks and in other public places where the exchange between the Christian and the person he or she is evangelizing is expected to be more personal and confidential. This method allows the person receiving the materials to do so discretely and to view them later in private. (Saieg Decl. ¶¶ 38-40 at Ex.1).

During prior Festivals in which Plaintiff was permitted to distribute his religious literature on the public sidewalks, Plaintiff was able to reach significant numbers of people with his message. In 2007, Plaintiff and his associates distributed approximately 37,000 packets of religious materials, and in 2008, they distributed approximately 20,000. From the fixed location in 2009, Plaintiff and his associates distributed approximately 500 packets, thereby significantly diminishing their ability to express their message and reach their intended audience. (Saieg Decl. ¶ 41, L at Ex.1).

Plaintiff wants to visit the City during future Festivals to engage in his speech activities. However, he is deterred from doing so by the threat of arrest. (Saieg Decl. ¶¶ 44-45 at Ex.1).

ARGUMENT

I. Plaintiff's Speech Activity Is Protected by the First and Fourteenth Amendments.

The First Amendment is made applicable to the States and their political subdivisions through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The First Amendment protects Plaintiff's right to publicly express his religious beliefs and distribute his religious materials. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (holding that the First Amendment protects handing out pamphlets and leaflets). As the United States Supreme Court has long recognized, "[S]preading one's religious beliefs" and "preaching the Gospel" are activities protected by the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). Supreme Court precedent "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Accordingly, the First Amendment's Free Speech and Free Exercise clauses protect Plaintiff's "religious proselytizing." *Id*.

Moreover, "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). As the Sixth Circuit echoed, "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998). "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a

corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Thus, Plaintiff's activities are also protected by "the First Amendment's expressive associational right." *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000).

II. All City Streets and Sidewalks Are Traditional Public Forums.

To determine the extent of Plaintiff's free speech rights, the court must engage in a forum analysis. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (adopting "a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for [expressive] purposes"). Forum analysis traditionally divides public property into three categories: traditional public forums, designated public forums, and nonpublic forums. *Id.* Traditional public forums, such as streets and sidewalks, are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Restrictions on speech in traditional public forums are sharply limited.

As the Supreme Court emphasized, "[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché,' but recognition that wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public. No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) (internal quotations and citation omitted). "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have

the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The public sidewalks and streets at issue here are no exception.

III. Defendants' Speech Restriction Cannot Withstand Constitutional Scrutiny.

A. The Restriction on Distributing Religious Literature Violates the Constitution.

In *Jamison v. Texas*, 318 U.S. 413, 416 (1943), the Supreme Court stated, "[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." Indeed, the constitutional importance of this traditional method of communication is well established. *Lovell*, 303 U.S. at 451-452 (invalidating ordinance that banned the distribution of pamphlets); *Martin v. City of Struthers*, 319 U.S. 141, 145-149 (1943) (invalidating ban on literature distribution and stating, "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 . . . it must be fully preserved").

There is no dispute that Defendants "may provide for control of travel on their streets to insure the safety and convenience of the traveling public" and thus "may punish conduct on the streets which is in violation of a valid law," such as a City ordinance against littering, obstructing travel, disorderly conduct, or disturbing the peace. *Jamison*, 318 U.S. at 416. But the Constitution does not allow Defendants to ban Plaintiff's distribution of religious literature on public sidewalks that are open to the general public, as they have done here. *Jamison*, 318 U.S. at 416.

In this case, Defendants ensure that the public sidewalks leading into and immediately adjacent to Warren Avenue ("inner perimeter" and "outer perimeter"), as well as nearby parking lots

located on Oakman Boulevard ("outer perimeter"), remain open for commercial traffic and commercial activity unrelated to the Festival. Thus, all of the public sidewalks in the City remain open to the general public for travel and activity unrelated to the Festival. Yet, these areas—and the persons using them—are deemed off limits for Plaintiff to express his views through the distribution of religious literature in violation of the Constitution. *Jamison*, 318 U.S. at 416. Moreover, speech restrictions that impose "an absolute prohibition on a particular type of expression," as here, "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. 171, 177 (1983) (citing cases). Defendants have no such compelling interest.

B. The Speech Restriction Is Content-Based in Violation of the Constitution.

Content-based speech restrictions are subject to strict scrutiny. *Cornelius*, 473 U.S. at 802 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). They "are presumptively unconstitutional." *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998). And speech restrictions that discriminate between commercial speech and noncommercial speech are content-based. *Id.* at 1145 ("By distinguishing between commercial and noncommercial forms of expression, the [ordinance] is content-based."); *see generally Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (holding unconstitutional a city ordinance prohibiting outdoor advertising because it discriminated on the basis of content by permitting on-site commercial speech while broadly prohibiting noncommercial messages) (White, J., plurality opinion); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993) (invalidating an ordinance that permitted news racks on public streets for newspapers, but not news racks for commercial handbills).

In this case, Defendants permit the local businesses—and no one else, including Plaintiff—to engage in commercial speech (advertising) and commercial activities (distributing items for sale) on the public sidewalks immediately adjacent to Warren Avenue during the Festival—at no cost, no less. As the photographic evidence shows, the crowd control, traffic, and safety issues associated with the commercial sale of items along the sidewalks of Warren Avenue during the Festival far exceed those associated with individuals distributing (albeit contrary to the Festival restrictions) noncommercial materials at no cost in this same forum. (*See* Saieg Decl. ¶¶ 26-29, D, E, F, G, H, I at Ex.1). In *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 690 (1992), Justice O'Connor, whose concurring opinion provided the narrowest grounds for the decision upholding the ban on solicitation and striking down the ban on leafleting in a nonpublic forum, stated the following:

> While the difficulties posed by solicitation in a nonpublic forum are sufficiently obvious that its regulation may ring of common-sense, the same is not necessarily true of leafleting. To the contrary, we have expressly noted that leafleting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, one need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand. The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. With the possible exception of avoiding litter, it is difficult to point to any problems intrinsic to the act of leafleting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here.

Id. at 690 (O'Connor, J., concurring) (internal quotations, citations, and punctuation omitted).

In *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), Justice Blackmun made the following relevant observation:

> I think that commonsense differences between literature distribution, on the one hand, and solicitation and sales, on the other, suggest that the latter activities present greater crowd control problems than the former. The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. . . . In contrast, . . . sales and the collection of solicited funds not only require the fairgoer to stop, but also engender additional confusion because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.

Id. at 665 (Blackmun, J., dissenting) (internal citations and punctuation omitted).

Indeed, there is no legitimate—let alone compelling—reason for allowing businesses to engage in commercial activity on the public sidewalks adjacent to the Festival while denying Plaintiff access to this same public forum by subjecting him to possible arrest for distributing religious literature. By making special accommodations that favor commercial speech and activity in this traditional public forum and completely banning persons who want to engage in the distribution of noncommercial, religious literature, Defendants are violating the Constitution.[12] As the Court noted in *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994), exemptions from a speech restriction—such as allowing commercial activity on the sidewalks that Defendants claim must remain open for pedestrian traffic—"may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place."

In sum, Defendants' discriminatory treatment of Plaintiff's speech activity in a traditional public forum violates the Constitution. *Simon & Schuster, Inc. v. Members of N.Y. State Crimes*

[12] For similar reasons, Defendants' speech restriction violates the Equal Protection Clause. *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) (striking down under the Equal Protection Clause a city ordinance that prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute); *Carey v. Brown*, 447 U.S. 455 (1980).

Victim Bd., 592 U.S. 105, 117 (1991) (rejecting the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas").

C. The Speech Restriction Is Not a Valid Time, Place, and Manner Restriction.

Assuming, *arguendo*, that the restriction is content-neutral, the Supreme Court explained that even a content-neutral, time, place, and manner restriction must be narrowly tailored to advance a significant state interest, and must leave open ample alternative means of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). If it "burdens substantially more speech than is necessary to further the government's legitimate interests," it is invalid. *Id*. at 799.

Here, the government's interests are crowd control, traffic, and safety. However, as noted previously, it makes little sense to permit businesses to set up fixed locations that plainly block the public sidewalks and then prohibit individuals from distributing noncommercial, religious literature in the same forum. If anything, Defendants should ban the sidewalk vendors—who could set up a booth on Warren Avenue like all of the other vendors if they wanted to participate in the Festival—and allow the religious speech on the now open sidewalks.

Moreover—and perhaps most important—Defendants do not limit their speech restriction to the public sidewalks immediately adjacent to where the Festival activities are taking place on Warren Avenue and Miller Road. Instead, they created a broad, prophylactic prohibition on the distribution of literature that extends beyond the actual Festival grounds to include more than 30 surrounding City blocks ("outer perimeter").[13] Consequently, the City has created a "First-Amendment-free-zone" that has little to no connection with the Festival. As the Supreme Court

[13] The justification for banning vehicles does not extend to restricting literature distribution. *Schneider*, 308 U.S. at 160 ("So long as legislation [designed to keep streets open] does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, [the City] may lawfully regulate the conduct of those using the streets.").

stated, "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Indeed, if creating a 30-block buffer zone around the area actually used for the Festival is a "narrowly tailored" means of ensuring crowd control, free flow of pedestrian traffic, or safety at the Festival, which is mostly occurring on one City street—Warren Avenue—then "narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Hill v. Colorado*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting).

In *United States v. Grace*, 461 U.S. 171 (1983), the Court struck down a restriction on certain expressive activity, including the distribution of literature, on the grounds of the Supreme Court, which included the surrounding sidewalks.[14] The government argued that the restriction qualified as a reasonable time, place, and manner restriction that was content-neutral, *id*. at 180, claiming that its purpose "was to provide for the protection of the building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum," *id*. at 182. The Court rejected the argument, noting that while the restriction did further the government's interests, it did so with insufficient precision and hence at excessive cost to the freedom of speech. *Id*. at 181. There was, as the Court stated, "an insufficient nexus" between the government's interest and all of the expressive activity that was banned, *id*.—just as here there is an insufficient nexus between the City's interests and the banning of all literature distribution within a 30-block area within the City.

Additionally, by banning the distribution of religious literature on the sidewalks and in other public areas and forcing Plaintiff to a fixed location, Defendants' restriction does not leave open ample alternative means of communication, and it prevents Plaintiff from reaching his intended

[14] The restriction did not prohibit oral expression. *Grace*, 461 U.S. at 181, n.10.

audience in violation of the Constitution. *See Bay Area Peace Navy v. United States,* 914 F.2d 1224, 1229 (9th Cir. 1990) ("[A]lternative mode[s] of communication may be constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened [and] an alternative is not ample if the speaker is not permitted to reach the 'intended audience.'"); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) ("[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.") (citations omitted).

IV. *Heffron* Does Not Control.

Plaintiff and his associates have never desired to be a part of the Festival, and they have never requested to distribute literature on the Festival grounds. Rather, Plaintiff desires to distribute his religious materials in the public forums adjacent to the Festival. Consequently, *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), is inapplicable.

In *Heffron*, the entire fairground was used for the fair, and persons paid an admission fee to enter. The fair occurred at a closed, fixed location entirely dedicated for that purpose—there was no ongoing business activity on the fairgrounds nor pedestrian traffic moving through that was unrelated to the fair, as in this case. Indeed, here, the only locations dedicated solely for Festival activities are Warren Avenue and parts of Miller Road—the areas requested by the organizers and approved by the City—excluding the sidewalks, which are open to pedestrian traffic unrelated to the Festival. And none of the "outer perimeter"—the 30-block buffer zone—is dedicated to Festival activities. In sum, *Heffron* involved a "place" restriction upon expressive activity undertaken on property that was designated for a limited, special purpose. The restriction did not extend beyond the fairgrounds and into the surrounding city sidewalks and streets, as in this case.

V. Plaintiff Is Entitled to Preliminary and Immediate Injunctive Relief.

In determining whether to grant a preliminary injunction, a court considers four factors:

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distributing Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998)*; Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). In a First Amendment case, however, "the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because, as in this case, the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the [restriction]." *Id*; *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms . . . constitutes irreparable injury.").

Here, Plaintiff is entitled to judgment on his constitutional claims as a matter of law. Consequently, this court should enjoin the enforcement of Defendants' speech restriction so as to allow Plaintiff to engage in his speech activity during the 2010 Festival, which is scheduled for June 18-20, 2010. *See Norfolk v. Cobo Hall Conference & Exhibition Ctr.*, 543 F. Supp. 2d 701 (E.D. Mich. 2008) (preliminarily enjoining a restriction on leafleting inside Cobo Center).

CONCLUSION

Plaintiff respectfully requests that this court grant his motion and immediately enjoin the enforcement of Defendants' speech restriction.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/Robert J. Muise
Robert J. Muise (P62849)
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2010, a copy of **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR INJUNCTIVE RELIEF** and a copy of **PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR INJUNCTIVE RELIEF** and accompanying exhibits were filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

THOMAS MORE LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)