NO. 10-1746

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

GEORGE SAIEG,

Plaintiff-Appellant,

v.

CITY OF DEARBORN, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE PAUL D. BORMAN
Civil Case No. 2:09-cv-12321-PDB-RSW

APPELLANT'S PRINCIPAL BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant George Saieg states the following:

Plaintiff-Appellant is not a subsidiary or affiliate of a publicly owned corporation. There are no publicly owned corporations, not a party to this appeal, that have a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiff respectfully requests that this court hear oral argument. This case presents for review important questions of law arising under the First and Fourteenth Amendments to the United States Constitution.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

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STATEMENT OF JURISDICTION

On June 16, 2009, Plaintiff filed this action, alleging violations of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. (R-1: Compl.). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On July 7, 2009, Plaintiff filed an amended complaint (R-13: Am. Compl.), which Defendants answered on August 12, 2009 (R-20: Answer).

After the close of discovery, the parties filed cross-motions for summary judgment. (R-30: Pl.'s Mot. for Summ. J. & Inj.; R-47: Defs.' Opp'n; R-41: Defs.' Mot. for Summ. J.; R-50: Pl.'s Opp'n).

On June 7, 2010, the court entered an opinion and order denying Plaintiff's motion for summary judgment, denying Plaintiff's request for injunctive relief, and granting Defendants' motion for summary judgment. (R-57: Op. & Order). Judgment was subsequently entered in favor of Defendants. (R-58: J.).

On June 7, 2010, Plaintiff filed a timely notice of appeal (R-59: Notice of Appeal), seeking review of the district court's opinion and order. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This case challenges Defendants' unconstitutional restriction on Plaintiff's right to distribute religious literature on the public streets, sidewalks, and other

public areas in the City of Dearborn ("City") during the Annual Dearborn Arab International Festival ("Arab Festival"). Defendants' restriction violates Plaintiff's rights protected by the First Amendment (freedom of speech, right to expressive association, and free exercise of religion),[1] and it deprives Plaintiff of the equal protection guarantee of the Fourteenth Amendment.

It is important to highlight that at no time has Plaintiff requested to engage in his religious activity on Warren Avenue or Miller Road—the streets that are *exclusively* reserved for the Arab Festival. Instead, he seeks only to peacefully exercise his constitutional rights on the *adjacent* public sidewalks, which remain open to the general public for purposes *unrelated* to the Arab Festival. Consequently, these sidewalks continue to serve their function as public sidewalks.

In addition to restricting Plaintiff's First Amendment activity on the adjacent public sidewalks, Defendants also created a broad prophylactic prohibition on the distribution of literature that extends beyond the actual festival to include more than 30 surrounding City blocks ("buffer zone" or "outer perimeter") *where no festival activities take place*.

Defendants' unconstitutional restriction prevents Plaintiff and his fellow Christian missionaries from expressing their religious beliefs, engaging in the free

[1] Contrary to the district court's assertion and as demonstrated further in this brief, Plaintiff did not "abandon" his free exercise claim. (*See* R-57: Op. & Order at 38 (stating that "the claim is deemed abandoned")).

exercise of religion, and associating to further their religious beliefs in violation of the Constitution.

In the final analysis, Defendants' restriction on Plaintiff's religious activity cannot withstand constitutional scrutiny. Consequently, this court should reverse the district court.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether the district court erred by denying Plaintiff injunctive relief, denying Plaintiff's motion for summary judgment, and granting Defendants' motion for summary judgment.

II. 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.

III. 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.

IV. Whether Defendants' 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.

V. Whether Defendants are liable for violating Plaintiff's constitutional rights under 42 U.S.C. § 1983 for selectively enforcing their restriction against Plaintiff's religious speech activity.

STATEMENT OF THE CASE

On June 16, 2009, Plaintiff filed this action against Defendants. (R-1: Compl.). And on June 17, 2009, Plaintiff filed an emergency motion for a Temporary Restraining Order (R-5: TRO Mot.), which was denied on June 18, 2009 (R-7: Order denying TRO).[2]

On July 7, 2009, Plaintiff filed an amended complaint. In his amended complaint, Plaintiff sought declaratory and injunctive relief, as well as "nominal and compensatory damages for the harm caused by Defendants."[3] (R-13: Am. Compl. at ¶ 5). Defendants answered on August 12, 2009. (R-20: Answer).

[2] The 2009 Arab Festival took place on June 19 through 21, 2009.

[3] Arabic Christian Perspective ("ACP") was a plaintiff in the original action; however, ACP board members voted to dissolve ACP in December 2009. (R-30: Saieg Decl. at ¶6 at Ex. 1). Consequently, ACP, which had the claim for *compensatory* damages, was subsequently dismissed from this case on January 25, 2010. (R-26: Order Dismissing ACP). Plaintiff Saieg's claims for declaratory and injunctive relief, as well as his claim for *nominal* damages, remain. Thus, the district court was incorrect when it stated that "Plaintiff does not seek monetary damages," (R-57: Op. & Order at 2), insofar as nominal damages are "monetary damages." Indeed, Plaintiff is entitled to nominal damages for the past loss of his constitutional rights as a matter of law. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991) (holding that nominal damages must be awarded as a matter of law upon finding a constitutional violation).

The parties engaged in discovery, and on March 15, 2010, Plaintiff filed a motion for summary judgment and request for injunctive relief. (R-30: Pl.'s Mot. for Summ. J. & Inj.). Plaintiff requested that the district court preliminarily enjoin the enforcement of Defendants' speech restriction so as to allow him to engage in his speech activity during the 2010 Arab Festival, which was scheduled for June 18 through 20, 2010. (R-30: Pl.'s Mot. for Summ. J. & Inj.). Defendants opposed the motion on April 16, 2010. (R-47: Defs.' Opp'n).

Previously, on April 9, 2010, Defendants filed a motion for summary judgment (R-41: Defs.' Mot. for Summ. J.), which Plaintiff opposed on April 23, 2010 (R-50: Pl.'s Opp'n).

The district court held a hearing on the motions on May 21, 2010. And on June 7, 2010, the court entered an opinion and order denying Plaintiff's motion for summary judgment, denying Plaintiff's request for injunctive relief, and granting Defendants' motion for summary judgment. (R-57: Op. & Order). Judgment was subsequently entered in favor of Defendants. (R-58: J.). That same day, Plaintiff filed a timely notice of appeal (R-59: Notice of Appeal), seeking review of the district court's opinion and order.

On June 8, 2010, Plaintiff filed with this court an emergency motion for expedited review and reversal of the district court's order denying his request for injunctive relief so as to allow him to engage in his First Amendment activity

pending this appeal. On June 17, 2010, this court, finding that Plaintiff would likely succeed on the merits of his appeal, granted Plaintiff's request as follows: "During the hours that the Festival is open to the public on June 18, 19, and 20, 2010, Saieg shall be permitted to distribute his religious literature in the streets contained within the area referred to as the 'outer perimeter' or 'buffer zone.'" (Order, Doc. No. 006110657885, at 3; R-60: Order Granting Inj.).

This appeal follows.

STATEMENT OF FACTS

A. Plaintiff's Protected Speech Activity.

Plaintiff is the founder and former director of ACP, a national ministry established for the purpose of proclaiming the Gospel of Jesus Christ to Muslims. Plaintiff is a Christian pastor with a deeply-held religious conviction to evangelize to non-Christians. Accordingly, Plaintiff travels around the country with other Christians attending and distributing Christian literature at various festivals and mosques. Because the City contains one of the largest Muslim communities in the country, it is an important location for Plaintiff's religious activities. (R-30: Saieg Decl. at ¶¶ 1-8 at Ex. 1).[4]

[4] All of the *relevant* references are available electronically through the court's electronic filing system.

B. The City's Sponsorship of the Arab Festival.

For the past fifteen years, the City has sponsored the Arab Festival.[5] (R-36: Dep. Ex. 20 at Ex. 4; Dep. Ex. 22 at Ex. 6; R-37: Dep. Ex. 16 at Ex. 11; Dep. Ex. 44 at Ex. 12). In 2009, as in past years, organizers requested and the City authorized the use of "***Warren Avenue and Miller Road***" for the festival. (R-36: Beydoun Dep. at 25-27, 29-30 at Ex. 3; R-38: Dep. Ex. 24 at Ex. 15; Dep. Ex. 25 at Ex. 16) (emphasis added). On May 4, 2009, the City Council granted "permission to conduct the [Arab Festival] from June 19 through June 21, 2009[,] ***subject to all applicable ordinances and the rules and regulations of the Police Department***." (R-36: Dep. Ex. 2 at Ex. 5 (emphasis added); R-37: Haddad Dep. at 21, 51-52 at Ex. 9). The City Council approved "the festival boundaries" in the City as follows: "***Warren Avenue*** between Hartwell and Kingsley Streets; ***Miller Road*** between Warren Avenue and Blesser Street." (R-36: Dep. Ex. 2 at Ex. 5) (emphasis added). Accordingly, the 2009 Arab Festival took place on Warren Avenue, with a few activities held on Miller Road. (R-36: Beydoun Dep. at 29, 42 at Ex. 3; Mrowka Dep. at 15-18 at Ex. 7; R-38: Dep. Ex. 3 at Ex. 17; Tr. at 27 at Ex. 18). ***The City erected barriers to separate the festival from the public***

[5] The City provides its services at no cost to the Arab Festival, (R-36: Beydoun 22-23, 44-46, 96-97 at Ex. 3; Dep. Ex. 20 at Ex. 4; Dep. Ex. 2 at Ex. 5; Dep. Ex. 22 at Ex. 6), even though the City's ordinance requires a sponsor of a special event receiving City services to enter into a contract to repay the cost for those services, (R-36: Morello Decl. ¶ 4, Ex. C ("Special Events" ordinance) at Ex. 2).

sidewalks. (R-30: Saieg Decl. at ¶ 19, Ex. B at Ex. 1; R-36: Beydoun Dep. at 73-74 at Ex. 3).

The Arab Festival is open to the general public; there is no admission fee required. (R-36: Mrowka Dep. at 74 at Ex. 7). Pedestrians have free access to the festival and the surrounding areas (R-36: Mrowka Dep. at 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 (R-37: Haddad Dep. at 16-18 at Ex. 9; R-36: Mrowka Dep. at 69-72 at Ex. 7; R-38: 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 have access to these businesses. (R-36: Mrowka Dep. at 69-72 at Ex. 7). Unlike Warren Avenue and parts of Miller Road, the public sidewalks adjacent to these streets were not used exclusively for the Arab Festival. Consequently, ***these sidewalks maintained their principle function as public sidewalks***.[6] Indeed, as noted previously, the City ensured that this was the case by erecting barriers between the public sidewalks and the actual festival activities taking place on Warren Avenue. (R-30: Saieg Decl. at ¶ 19, Ex. B at Ex. 1; R-36: Beydoun Dep. at 73-74 at Ex. 3).

[6] The fact that a "street vendor" may obtain a permit to sell his wares on a public sidewalk does not transform that sidewalk into something else.

C. Defendants' First Amendment-Free Zone: the "Inner" and "Outer" Perimeters.

During the 2009 Arab Festival, the City closed off two areas to vehicle (not pedestrian) traffic, creating two areas—the "inner perimeter" and the "outer perimeter." (R-36: Mrowka Dep. at 9-11 at Ex. 7). These same areas will be closed off for future festivals. (R-37: Haddad Dep. at 99-100 at Ex. 9).

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. 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). (R-36: Mrowka Dep. at 11-18 at Ex. 7; R-38: Dep. Ex. 29 at Ex. 19 (Map of the Perimeter Areas); R-30, R-31: Saieg Decl. at ¶¶ 20-21, Ex. C, at Ex. 1). The "outer perimeter" was established to address ***vehicle traffic***. (R-41: Haddad Dep. at 26-27 at Defs.' Ex. K) ("*They're set up strategically to give traffic some final point to turn away from the Warren Avenue Destination*.") (emphasis added)).

The total area that is closed off in the City for Plaintiff's speech activity is in excess of 30 City blocks.[7]

[7] The Arab Festival occupies approximately 12 City blocks along Warren Avenue. The "perimeter" area extends a block to the north and a block to the south (for a

D. Defendants' Enforcement of the Challenged Speech Restriction.

City police officers would not permit Plaintiff to distribute his religious literature in either the "inner perimeter" or the "outer perimeter" areas during the Arab Festival. (R-30: Saieg Decl. at ¶¶ 20-21 at Ex. 1; R-36: Mrowka Dep. at 18, 32-33 at Ex. 7; R-37: Haddad Dep. at 99-100 at Ex. 9; R-36: Beydoun Dep. at 55, 77 at Ex. 3). If Plaintiff did engage in such speech activity, he was subject to arrest. (R-37: Haddad Dep. at 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***." (R-36: Morello Decl. at ¶ 2, Ex. A ("Distribution of Handbills" ordinance) at Ex. 2) (emphasis added).

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

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total of 24 City blocks) and approximately 5 blocks to the west and 4 blocks to the east for a grand total of 33 City blocks. (R-36: Mrowka Dep. at 11-18 at Ex. 7; R-38: Dep. Ex. 29 at Ex. 19 *compare* R-57: Op. & Order at 35, n. 16 (affirming the size of the boundaries, but apparently refuting the math, claiming that Plaintiff's reference to "30 blocks" is "misleading")). Plaintiff is prohibited from distributing his literature on the public sidewalks and public streets within the *entire* ("inner" and "outer") perimeter area.

activity unrelated to the festival. (R-38: Tr. at 26-27, 29 at Ex. 18; R-37: Haddad Dep. at 16-18 at Ex. 9). Defendant Haddad testified as follows:

> 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***.

(R-38: Tr. at 26-27 at Ex. 18 (emphasis added); *see also* R-38: Tr. at 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***.

(R-37: Haddad 16-18 at Ex. 9) (emphasis added).

In addition, the City authorized the festival organizers to issue special sidewalk vending permits, at no charge, to the businesses along Warren Avenue.[8] (R-36: Beydoun Dep. at 34, 64-66, 72-73, 82-83 at Ex. 3). This commercial activity was permitted even though it caused traffic problems at prior Arab Festivals, (R-36: Beydoun Dep. at 34-35 at Ex. 3; Mrowka Dep. at 21-22 at Ex. 7; R-37: Dep. Ex. 36 at Ex. 13), including the 2009 Arab Festival (R-30, R-31, R-32, R-33: Saieg Decl. at ¶¶ 25-26, Exs. D, E at Ex. 1). And these special "permits" were provided to persons who owned a business along Warren Avenue. (R-36: Beydoun Dep. at 90-91 at Ex. 3; R-38: Dep. Ex. 42 at Ex. 14). Ms. Beydoun, the festival organizer, testified as follows:

Q: And the individuals listed on [Dep. Ex. 42], they're actually the businesses where the sidewalk vendor is; isn't that right?

[8] In their application, festival organizers requested that the City issue the sidewalk permits, per the City's ordinance. (R-36: Beydoun Dep. at 31 at Ex. 3; R-38: Dep. Ex. 24 at Ex. 15; R-36: Morello Decl. at ¶ 3, Ex. B ("Street Vendors" ordinance) at Ex. 2). However, not wanting to deal with the additional administrative burdens, the City took the unprecedented step of granting the authority it retains under its "Street Vendors" ordinance to the festival organizers. Nonetheless, the individual vendors still had to receive final City approval for their displays. (R-36: Beydoun Dep. at 66-69 at Ex. 3).

A: The business owner was permitted to put things on the sidewalk and that's why you think it's called sidewalk vendor. But it's actually the business owner that's allowed to set up right in front of their store.
Q: ***And they're the only ones that are allowed on their sidewalks, correct?***
A: ***That's correct.***

(R-36: Beydoun Dep. at 90-91 at Ex. 3 (emphasis added); R-38: Dep. Ex. 42 at Ex. 14).

F. Plaintiff's Speech Activities During the Arab Festival.

During the five years prior to 2009 (2004 to 2008), Plaintiff and his fellow Christians visited the City during the Arab Festival to evangelize and distribute their religious materials. 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 these 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 never caused any disruption, nor did they

ever block or obstruct pedestrian traffic. (R-30: Saieg Decl. at ¶¶ 9-10 at Ex. 1; R-36: Mrowka Dep. at 24 at Ex. 7).

Plaintiff's religious literature and materials do not contain solicitations, nor do they contain commercial speech. Plaintiff and his associates distribute their religious materials at no charge to those who are willing to accept them. (R-30: Saieg Decl. at ¶ 23, Ex. A at Ex. 1 *compare* R-38: Dep. Ex. 26 at Ex. 21; *see also* R-36: Morello Decl. at ¶ 2, Ex. A at Ex. 2). The distribution of Plaintiff's religious materials does not require that the recipient stop in order to receive the message; instead, the recipient is free to read and view the message at a later time. Consequently, Plaintiff's literature distribution does not entail the same kind of problems presented by face-to-face solicitations or sales, such as those permitted by Defendants during the 2009 Arab Festival. (R-30, R-31, R-32, R-33, R-35: Saieg Decl. at ¶¶ 14, 25-26, 29, 40, 41, Exs. D, E, I at Ex. 1).

Plaintiff does not want to participate in the Arab 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. (R-30: Saieg Decl. at ¶¶ 33-40 at Ex. 1).

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

In 2009, Plaintiff planned to visit the City every day of the Arab Festival to distribute religious literature and to evangelize. Prior to arriving in the City,

Plaintiff telephoned the City Police Department and spoke to Sgt. Jeff Mrowka. During this call, Plaintiff introduced himself and his organization, informed the police of his intention to visit the City during the festival to distribute religious literature and evangelize, and requested 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, that Plaintiff would be restricted to a fixed location within the festival, and that Plaintiff would not be allowed to use the public sidewalks to distribute his literature. Plaintiff objected. (R-30: Saieg Decl. at ¶¶ 11-15 at Ex. 1; R-36: Mrowka Dep. at 20 at Ex. 7).

During the festival, Plaintiff's literature distribution was restricted to a fixed tent location on Warren Avenue per Sgt. Mrowka's order. (R-30: Saieg Decl. at ¶¶ 33-34 at Ex. 1; R-36: Mrowka Dep. at 27-30 at Ex. 7). Because this location was near the festival rides, the people who came to Plaintiff's tent were mostly children. Evangelizing adult Muslims is made more difficult if Muslim children receive materials from Christians because the adult Muslims get angry when this happens. Moreover, the majority of the people attending the festival congregated around the stage that was located on the far opposite side from where Plaintiff was located. (R-30: Saieg Decl. at ¶¶ 35-38 at Ex. 1).

It is very difficult to evangelize Muslims from a fixed location without inviting attention to the individuals visiting the tent. 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 themselves 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 in 2009. To reach his intended audience, it is essential for Plaintiff to be able to distribute his religious materials on the public sidewalks and in other public places where the exchange between him and the person he is evangelizing is more personal and confidential. This method allows the person receiving the materials to do so discreetly and to view them later in private. (R-30: Saieg Decl. at ¶¶ 38-40 at Ex. 1).

During prior Arab 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. (R-30, R-35: Saieg Decl. at ¶ 41, Ex. L at Ex. 1).

H. Defendants' Disfavored Treatment of Plaintiff's Speech.

The testimonial and photographic evidence shows that Defendants did not enforce their speech restriction in an even-handed manner. As Plaintiff testified in his sworn declaration:

> Even though my fellow Christians and I were prohibited from distributing our religious literature on the adjacent and surrounding public streets and sidewalks during the Festival, certain individuals unrelated to us and our Christian outreach were not so prohibited. In fact, some individuals were distributing literature within the Festival itself on Warren Avenue and ***the City police did not stop them***. . . . It was evident to me based on my personal experience and personal observations during the 2009 Festival that the City police officers were discriminating against the Christian evangelists in the enforcement of the City's speech restrictions. They allowed non-Christians to distribute literature on the sidewalks and on Warren Avenue ***in plain view of the police officers*** and Festival security guards, most of whom appeared to be Muslims, but prohibited me and my fellow Christians from distributing literature anywhere in the public areas within the "inner perimeter" and the "outer perimeter." The Muslim security guards were constantly watching over us in an obvious effort to intimidate us. ***The City police officers allowed this to happen***, and when there was a complaint, ***the City police officers would side with the Muslim security guards***.

(R-30, R-34: Saieg Decl. at ¶¶ 27, 28, 31, (emphasis added), Exs. F, G, H at Ex. 1; *see also* R-36: Mrowka Dep. at 47-50 at Ex. 7; Dep. Ex. 32 at Ex. 8).

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. (R-30: Saieg Decl. at ¶¶ 44-45 at Ex. 1).

SUMMARY OF THE ARGUMENT

Plaintiff desires to distribute religious literature in traditional public forums in the City during the Arab Festival. The public streets and sidewalks where Plaintiff wants to distribute his religious literature are not properly part of the "fairgrounds." These areas are open to the general public and pedestrian traffic that is wholly unrelated to the festival. Consequently, these sidewalks continue to serve their function as public sidewalks. And based on controlling U.S. Supreme Court precedent, one who is rightfully on a street or sidewalk that the state has left open to the public carries with him there and elsewhere the right to express his views in an orderly fashion through the distribution of literature. Indeed, the public sidewalks 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 can be exercised elsewhere.

Here, Defendants do not have a compelling reason for completely banning Plaintiff's form of protected expression on the City's public sidewalks and streets, which are properly considered traditional public forums.

Moreover, Defendants' speech restriction is not a content-neutral, time, place, and manner restriction. First, Defendants' restriction is content-based because it prefers commercial activity (and commercial speech) over Plaintiff's noncommercial speech. Second, Defendants' speech restriction, and in particular the restriction on Plaintiff's speech within the "outer perimeter" or "buffer zone," burdens substantially more speech than is necessary to further Defendants' interests. Third, because Defendants are so willing to disregard the traffic and crowd control problems associated with the commercial activity permitted on the very sidewalks that are closed for Plaintiff's non-obstructive religious speech, Defendants' interests in restricting Plaintiff's speech are not substantial. Finally, Defendants' speech restriction is constitutionally inadequate because Plaintiff's ability to communicate effectively is threatened in that the remaining modes of communication are inadequate.

In sum, Defendants' speech restriction, for which the City is liable for enforcing, operates to violate Plaintiff's rights to freedom of speech, freedom of expressive association, and the free exercise of religion, and it deprives Plaintiff of the equal protection of the law, all in violation of the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I. STANDARD OF REVIEW.

This court reviews the district court's grant of summary judgment *de novo*. *Watkins v. City of Battle Creek*, 273 F.3d 682, 685 (6th Cir. 2001). It may affirm only if the record, *read in the light most favorable to Plaintiff*, reveals no genuine issues of material fact and shows that Defendants were entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Upon its review of the record, this court must consider the evidence and draw all reasonable inferences in favor of Plaintiff. *Siggers-El v. Barlow*, 412 F.3d 693, 699 (6th Cir. 2005).

Additionally, because this case implicates First Amendment rights, this court must closely scrutinize the record, without deference to the district court. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (requiring courts to "conduct an independent examination of the record as a whole, without deference to the trial court" in cases involving the First Amendment); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (noting that in cases raising First Amendment issues appellate courts must make an independent examination of the whole record).

II. DEFENDANTS' SPEECH RESTRICTION VIOLATES PLAINTIFF'S RIGHTS PROTECTED BY THE FIRST AMENDMENT.

Whether Defendants' speech restriction violates Plaintiff's right to freedom of speech is examined in essentially three steps. First, the court must determine

whether the speech in question—the distribution of religious literature—is protected speech. Second, the court must conduct a forum analysis as to the *precise* forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether Defendants' speech restriction comports with the applicable standard. *Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir. 2005) (setting forth three-part analysis). Upon completion of this analysis, it is evident that Defendants' speech restriction cannot withstand constitutional scrutiny.

A. Plaintiff's Speech Activity Is Protected by the First Amendment.

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). There is no dispute that the First Amendment protects Plaintiff's right to publicly express his religious beliefs through the distribution of literature. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (holding that the First Amendment protects literature distribution); *Jamison v. Texas*, 318 U.S. 413 (1943) (same); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (same). Indeed, "spreading one's religious beliefs" and "preaching the Gospel" are constitutionally protected activities. *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943); *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[Religious expression] is as fully protected under the Free Speech Clause as secular private

expression."). Accordingly, the First Amendment's Free Speech *and* Free Exercise Clauses protect Plaintiff's "religious proselytizing." *See Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J.) (observing that "*private* speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses"); (*see also* R-30: Pl.'s Mot. for Summ. J. & Inj. at 11).

B. All Streets and Sidewalks Are Traditional Public Forums, Including the Public Streets and Sidewalks in the City that Are Open to the General Public.

The Supreme Court adopted "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." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). This analysis traditionally divides public property into three categories: traditional public forums, designated public forums, and nonpublic forums. *Id.* Traditional public forums include streets and sidewalks. *See Hague v. CIO*, 307 U.S. 496, 515 (1939). Restrictions on speech in traditional public forums are sharply limited. *See American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (striking down city ordinance and stating, "Constitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public's use of streets and sidewalks for political speech").

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). Indeed, "the 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 City streets and sidewalks within the "inner perimeter" and the "outer perimeter" are no different. For example, in *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005), this court struck down a restriction on the plaintiff's right to distribute religious literature on the streets of Columbus, Ohio, *during a festival*, holding that the "streets remained a traditional public forum notwithstanding the special permit that was issued to the Arts Council" to use the streets for the Columbus Arts Festival, which was open to the public.

Moreover, contrary to the district court's imprecise conclusion (*see* R-57: Op. & Order at 23, n. 10 (quoting *Spingola v. Village of Granville*, 39 Fed. Appx.

978, 983 (6th Cir. 2002), and finding "that the public streets on which the Festival is held are 'not serving in that function during the festival,' . . . rather, they comprise part of a fairground")),[9] the public sidewalks *adjacent* to Warren Avenue and Miller Road were not part of the "fairgrounds." Instead, they maintained their "function" as public sidewalks. Thus, it was error to include these sidewalks with "the public streets on which the Festival is held" for purposes of Plaintiff's free speech claim. Indeed, identifying the *precise* forum is a crucial aspect of the First Amendment forum analysis. As the Supreme Court stated,

> [F]orum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have ***focused on the access sought by the speaker***. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken ***a more tailored approach*** to ascertaining the perimeters of a forum within the confines of the government property.

Cornelius, 473 U.S. at 801 (emphasis added) (finding that the Combined Federal Campaign charity drive rather than the federal workplace was the relevant forum).

In this case, Plaintiff *only* seeks access to the public sidewalks *adjacent* to Warren Avenue and Miller Road and the public sidewalks, streets, and other public areas within the "outer perimeter." Thus, it is imprecise (and incorrect as a matter of law) to *lump* these *adjacent* public areas and the City streets where the actual

[9] Indeed, as discussed *infra*, the district court's reliance on *Spingola v. Village of Granville*, 39 Fed. Appx. 978, 983 (6th Cir. 2002), is wholly misplaced.

festival activities take place (Warren Avenue and Miller Road) *into one forum* in the court's forum analysis, as the district court did below.

C. Defendants' Speech Restriction Cannot Withstand Constitutional Scrutiny.

1. Defendants' Complete Ban on Distributing Religious Literature in Traditional Public Forums Violates the First Amendment.

In *Jamison v. Texas*, 318 U.S. 413 (1943), the 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." *Id*. at 416 (emphasis added); *see also Martin*, 319 U.S. at 145-49 (invalidating a 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 in order 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 completely ban Plaintiff's distribution of religious literature

on public sidewalks ***that are open to the general public***, as they have done here.[10] *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 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—that is, these public sidewalks are serving in their ordinary function as sidewalks.[11] 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. Indeed, speech restrictions that impose "an absolute prohibition on a particular type of expression" in a public forum, 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) (emphasis added); *Schad v. Mount Ephraim*, 452 U.S. 61, 67 (1981) ("[E]xclusion of a broad category of protected expression [demands heightened scrutiny]."). Defendants have no such

[10] Consequently, the district court's conclusion that *Jamison v. Texas* and other related cases do not apply here is incorrect. (*See* R-57: Op. & Order at 24).

[11] The same cannot be said for Warren Avenue and parts of Miller Road—the areas used ***exclusively*** for festival activities—but Plaintiff is <u>not</u> seeking access to these areas.

compelling interest. Therefore, the restriction is unconstitutional as a matter of law.

2. The Speech Restriction Is Content-Based in Violation of the First Amendment.

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."). 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; *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).

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 undisputed evidence shows, the crowd control, traffic, and safety issues associated with this commercial activity *far exceed* those associated with individuals distributing

(albeit contrary to Defendants' speech restrictions) noncommercial materials in this same forum. (*See* R-30, R-31, R-32, R-33, R-34, R-35: Saieg Decl. at ¶¶ 26-29, Exs. D, E, F, G, H, I at Ex. 1).

Moreover, to claim, as the district court did below, that the application of this restriction does not discriminate on the basis of content because Plaintiff, an itinerant Christian missionary, could purchase a business along Warren Avenue and then set up a table to sell whatever he sold in his store is, quite frankly, nonsense. (*See* R-57: Op. & Order at 30-31). As the record reveals, the City and the festival organizers had concerns about congestion on the sidewalks during prior Arab Festivals, and the main source of that congestion was the sidewalk vendors—that is, those persons who had commercial establishments along Warren Avenue. However, Defendants permitted the sidewalks to be used for these exceedingly obstructive commercial sales, but prohibited non-obstructive, noncommercial activity, such as Plaintiff's distribution of religious literature, in this same forum. Thus, it is obvious what is going on here: the City is quite purposefully banning Christian missionaries from distributing religious literature at an Arab (Muslim) festival.[12] This is a content-based restriction.

[12] As the evidence shows *without contradiction*, distributing religious literature at the Arab Festival is ***the most effective way for Christians to evangelize Muslims*** attending this event. There can be little doubt then as to why Defendants have imposed such draconian measures to prohibit this effective form of peaceful religious expression.

As the Supreme Court stated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." Here, "mere compliance" with facial neutrality does not shield the actual and intended effect of Defendants' restriction: prohibiting Christian missionaries from handing out religious literature at the Arab Festival. Such "practical" effects are "still within the prohibition of the Constitution."[13]

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

[13] In the famous case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court held that a law which eliminated the use of wooden buildings for hand laundries violated the Constitution in its administration when all Chinese persons owning such laundries were forced to give up their businesses while all non-oriental persons who had similar laundries were not. In reaching its conclusion, the Supreme Court stated,

> Though the law itself be fair on its face and impartial in appearance, yet, ***if it is applied and administered by public authority with an evil eye and an unequal hand***, so as ***practically*** to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice ***is still within the prohibition of the Constitution***.

Id. at 373-74 (emphasis added).

> same is not necessarily true of leafletting. To the contrary, we have expressly noted that leafletting 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.

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).

Here, 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 for distributing religious literature.

In *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37 (1983), the Court stated, "[I]n a public forum . . . all parties have a constitutional right of access and the State must demonstrate ***compelling reasons*** for restricting access to a single class of speakers. . . ." *Id*. at 55 (emphasis added). By making special accommodations that favor commercial 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.

Indeed, 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." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). And as the Supreme Court stated in *Church of Lukumi Babalu Aye, Inc*., "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." 508 U.S. at 546-47.

In sum, Defendants' discriminatory treatment of Plaintiff's religious speech activity violates the Constitution.

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

Assuming, *arguendo*, that the restriction is content-neutral, it must still be narrowly tailored to advance a significant state interest and leave open ample alternative means of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). If the restriction "burden[s] substantially more speech than is necessary to further the government's legitimate interests," it is invalid. *Id*. at 799; *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (holding that a city ordinance was unconstitutional because it was not narrowly tailored and stating, "While the government may burden the exercise of First Amendment freedoms to serve its significant interests, *it may not burden substantially more speech than is necessary to further its goal*") (quotations and punctuation omitted) (emphasis added).

Here, Defendants' claimed interests are crowd control, traffic, and safety. However, it makes little sense to permit businesses to set up fixed locations that plainly block the sidewalks and then prohibit Plaintiff from distributing 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 participating in the festival—and allow the religious speech on the now open sidewalks. As this court observed in *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1166 (6th Cir. 1993), "Because the City is so willing to disregard

the traffic problems [by making exceptions], we cannot accept the contention that traffic control is a substantial interest." (quoting *Beckerman v. City of Tupelo*, 664 F.2d 502, 513 (5th Cir. 1981)). Similarly here, because the City is so willing to disregard the significant traffic problems associated with commercial sales on the sidewalks, this court should not accept "the contention that traffic control is a substantial interest." Thus, there is no legitimate basis for Defendants' speech restriction on the public sidewalks in the first instance.

Moreover, Defendants do not limit their speech restriction to the 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 to include more than 30 surrounding City blocks ("outer perimeter").[14] *See The World Wide Street Preachers' Fellowship v. Reed*, 430 F. Supp. 2d 411, 415 (M.D. Pa. 2006) (holding that a fifty-foot buffer zone around a private festival violated the First Amendment); (*see also* Order, Doc. No. 006110657885, at 2-3; R-60: Order Granting Inj.) (temporarily enjoining restriction in "outer perimeter" or "buffer

[14] The justification for banning vehicles, which is the reason for the "outer perimeter," (R-41: Haddad Dep. at 26-27 at Defs.' Ex. K) ("***They're set up strategically to give traffic some final point to turn away from the Warren Avenue Destination***.") (emphasis added), 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.").

zone" pending appeal)). Consequently, the City has created a "First Amendment-free zone" that has little to no connection with the festival. As the Supreme Court 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 Arab 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) (emphasis added).

In *United States v. Grace*, 461 U.S. 171 (1983), for example, 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.[15] 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

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

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 audience. *See The World Wide Street Preachers' Fellowship*, 430 F. Supp. 2d at 415 ("We also agree with Plaintiffs that a location across the street [from the festival] is not an ample alternative channel of communication when they could have been standing in the park."); *see generally 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 a]n 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); *see*

also American-Arab Anti-Discrimination Comm., 418 F.3d at 607 ("[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . ."); *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984) ("[L]aws regulating public fora cannot be held constitutional simply because they leave potential speakers alternative fora for communicating their views.").

In this case, the undisputed ***objective*** evidence (20,000 to 37,000 pieces of religious literature distributed *without* Defendants' restriction versus 500 pieces of religious literature distributed *with* it) compels the conclusion that "alternative means of communication" are constitutionally inadequate. (*See also* R-30: Saieg Decl. at ¶¶ 38-40 at Ex. 1 (stating specific, undisputed reasons for why it is difficult for a Christian to evangelize Muslims from a fixed location)).

In sum, Defendants' speech restriction violates the First Amendment.

D. *Heffron* Does Not Control.

Plaintiff and his associates have *never* desired to be a part of the Arab Festival, and they have *never* requested to distribute literature on the festival grounds, which consists of Warren Avenue and parts of Miller Road.[16] Instead,

[16] Warren Avenue and Miller Road are the specific locations *requested* by the festival organizers. They are the specific locations *authorized* by the City

Plaintiff desires to distribute his religious materials in the public forums adjacent to the festival—areas open to the general public for purposes wholly unrelated 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 actual "fairgrounds"—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.

E. *Spingola* Does Not Control.

Spingola v. Village of Granville, 39 Fed. Appx. 978 (6th Cir. 2002), is an unpublished decision addressing the denial of a request for a preliminary

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Council's resolution. And they are the specific locations where the festival activities *actually took place*.

injunction. In *Spingola*, the plaintiff made a *facial challenge* to a Village ordinance, which provided that "during an assemblage for which a permit has been issued the Village may designate a specific area for the purpose of public speaking and that public speaking shall be confined to the designated area." *Id*. at 979. The court noted in its decision that "it was important as a preliminary matter to determine the type of claim raised [because a] party attempting a facial challenge carries a 'significantly heavier burden.'" *Id.* at 981. The court also noted that "the district court made ***no factual findings regarding the as-applied claim***," thus, it was not addressed. *Id.* (emphasis added). Consequently, the district court's claim that Plaintiff's "argument is foreclosed by *Spingola*" is simply not true. (*See* R-57: Op. & Order at 32). Unlike *Spingola*, this is not a facial challenge to a content-neutral regulation (nor an appeal of a denial of a preliminary injunction). It is an as-applied challenge to a speech restriction based on a well developed factual record. Thus, any discussion in *Spingola* beyond the facial challenge presented in that case is simply dicta.

In this case, *it is essential to be precise about the facts*. Unlike the plaintiff in *Spingola*, *see id.* at 979 ("Spingola attended the Granville Kiwanis Fourth of July celebration. . . ."), Plaintiff does not want to attend the festival or be a participant in any of its activities. Instead, he wants to engage in free speech activity in the areas *adjacent* to the festival that are open to the general public for

purposes *unrelated* to the festival. There is no reasonable dispute that (1) the City authorized the festival to take place on Warren Avenue and Miller Road, with Warren being the main location for the event (and the associated crowds); (2) the City ensured that the public sidewalks adjacent to Warren Avenue and Miller Road remained open to the general public and the local businesses for purposes *unrelated* to the festival (the City constructed barriers to ensure the separation); (3) the City gave preferential treatment to local businesses by allowing them to engage in commercial activities, which were exceedingly obstructive, on the public sidewalks where Plaintiff was prohibited from engaging in his non-obstructive religious speech; and (4) the City created a 30-block "buffer zone" around the festival. In this zone, there were no crowds; yet, Plaintiff was denied the right to distribute his religious literature in these public areas as well. Furthermore, Plaintiff has no desire to distribute his religious literature on Warren Avenue or Miller Road—he has never requested to do so. Thus, similar to *Heffron*, *Spingola* is inapplicable because Plaintiff is not challenging Defendants' ability to restrict his speech activity on Warren Avenue or Miller Road—the ***designated*** location of the "street fair."

In sum, in light of controlling case law, which is not *Heffron* or *Spingola*, Defendants' speech restriction is unconstitutional.

III. DEFENDANTS' SPEECH RESTRICTION VIOLATES PLAINTIFF'S RIGHT TO EXPRESSIVE ASSOCIATION.

Plaintiff and his fellow Christian missionaries travel to the City from all across the United States to join together as part of a Christian outreach to Muslims which takes place during the Arab Festival. The primary purpose of this Christian association is to evangelize Muslims. And this purpose is accomplished through the distribution of religious literature. Consequently, this association and its purpose are constitutionally protected. Any government restriction, such as the challenged restriction at issue here, that prevents Plaintiff and his Christian companions from fulfilling the lawful purpose of their expressive association cannot withstand constitutional scrutiny.

"Among 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 this 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 protected by "the First Amendment's expressive associational right." *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000).

As an "inseparable aspect of freedom of speech," Plaintiff's expressive associational right is similarly violated by Defendants' unconstitutional speech restriction, which deprives Plaintiff and his fellow Christian missionaries of their right to pursue their religious ends free from government interference.

IV. DEFENDANTS' SPEECH RESTRICTION VIOLATES PLAINTIFF'S RIGHT TO THE FREE EXERCISE OF RELIGION.

Plaintiff testified in support of his motion for summary judgment as follows: "As part of my Christian outreach efforts, I travel around the country with fellow Christians attending and distributing Christian literature at various festivals and mosques ***to exercise my religion*** and ***to follow my religious duty based on the Great Commission***, which is the instruction of the resurrected Jesus Christ to His disciples that they spread His teachings to all the nations of the world." (R-30: Saieg Decl. at ¶ 4 at Ex. 1) (emphasis added).

Consequently, there can be no dispute that Plaintiff's activity—the very activity that the challenged restriction prohibits—is not only protected by the Free Speech Clause, but it is protected by the Free Exercise Clause as well. *See*, *e.g.*, *Murdock*, 319 U.S. at 110; *Mergens*, 496 U.S. at 250 (O'Connor, J.) (observing

that "*private* speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses").

In *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Court was faced with the issue of whether the Free Exercise Clause could prohibit the application of Oregon drug laws to the ceremonial ingestion of peyote and thus permit the state to deny unemployment compensation for work-related misconduct based on the use of this drug. The Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a ***valid*** and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id*. at 879 (quotations and citation omitted) (emphasis added). The Court further stated, "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id*. at 881. The Court then concluded that "[t]he present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id*. at 882. And while some courts, including this one, have been critical of the "hybrid" distinction, *see Kissinger v. Board of Trustees*, 5 F.3d 177, 180-81 (6th Cir. 1993) (describing the "hybrid" outcome as "illogical"), *but see Vandiver*

v. Hardin County Bd. of Educ., 925 F.2d 927, 933 (6th Cir. 1991) ("The *Smith* decision implies without stating that those hybrid claims which raise a free exercise challenge coupled with other constitutional concerns remain subject to strict scrutiny."), it makes perfect sense in this case. As noted previously, Defendants' restriction violates Plaintiff's rights to freedom of speech and expressive association under the First Amendment. This restriction, which is *invalid* (i.e., not a *valid* and neutral law of general applicability), *also* operates to deprive Plaintiff of his right to the free exercise of religion. Consequently, it cannot be gainsaid that Defendants' unconstitutional restriction on Plaintiff's religious activity violates the Free Exercise Clause as well as the Free Speech Clause of the First Amendment.

Moreover, as demonstrated previously, the restriction also runs afoul of the Supreme Court's reasoning set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). According to the Court, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* at 547. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." *Id*. at 546. As the Court further noted, "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict

other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id*. at 546-47.

Therefore, the fact that Defendants' speech restriction might be facially neutral does not protect it from challenge under the Free Exercise Clause because it operates to target Plaintiff's religious conduct for distinctive treatment. *Id*. at 534. Defendants restrict "conduct protected by the First Amendment"—that being the distribution of religious literature on the public sidewalks—but "fail[] to enact feasible measures to restrict other conduct," such as the commercial activity taking place on the public sidewalks that produces substantially greater harm of the same sort. Thus, the restriction is not "generally applicable," and it infringes upon rights protected by the Free Exercise Clause without a compelling reason in violation of the Constitution.

V. DEFENDANTS' SPEECH RESTRICTION VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT.

The relevant principles of law at issue here were articulated in *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) and in *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). In *Mosley*, the Court stated, "[***U***]***nder the Equal Protection Clause***, *not to mention the First Amendment itself*, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to

those wishing to express less favored or more controversial views." (emphasis added). And in *Carey*, the Court described the applicable test as follows:

> When government regulation ***discriminates among speech-related activities in a public forum***, the Equal Protection Clause mandates that the legislation be ***finely tailored to serve substantial state interests***, and the justifications offered for any distinctions it draws must be ***carefully scrutinized***.

Carey, 447 U.S. at 461-62 (emphasis added); *see also Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1166 (6th Cir. 1993) (striking down on equal protection grounds a speech restriction that made distinctions between privately-sponsored and publicly-sponsored exhibits and displays and stating that the ordinance at issue "violates the Equal Protection Clause unless the distinction can be shown to be finely tailored to governmental interests that are substantial").

In this case, Defendants' speech restriction makes a distinction between persons who want to engage in constitutionally protected speech activity through the distribution of religious literature on the public sidewalks, and those persons who want to engage in commercial activity in this very same forum. The former is prohibited by Defendants, while the latter is not. This restriction plainly implicates First Amendment liberties, as demonstrated previously. Thus, upon the court's *careful scrutiny* of the justifications offered by Defendants for the distinction, the question becomes whether the distinction is "finely tailored to governmental interests that are substantial"? As the overwhelming evidence shows, the answer

to this question is an unequivocal "no." The commercial activity, which causes ***greater*** traffic control problems (the alleged governmental interest), is permitted, while the less obstructive literature distribution in the same forum is not.[17] Therefore, "under the Equal Protection Clause, not to mention the First Amendment itself," Defendants' speech restriction is unconstitutional.

VI. THE CITY IS LIABLE FOR VIOLATING PLAINTIFF'S CONSTITUTIONAL RIGHTS.

In *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978), the Supreme Court affirmed that municipalities are liable under 42 U.S.C. § 1983 if municipal policy or custom was the "moving force" behind the alleged unconstitutional action. And "when ***execution*** of a government's policy or custom, *whether made by its lawmakers or* ***by those whose edicts or acts may fairly be said to represent official policy*** [such as the acts of the chief of police in this case], inflicts the injury . . . the government as an entity is responsible under § 1983." *Id*. at 694 (emphasis added). Here, the City passed an official resolution authorizing the Arab Festival, "*subject to all applicable ordinances and the rules and regulations of the Police Department*." This includes the "buffer-zone" restriction, the use of the City's police to restrict Plaintiff's speech on the public

[17] Consider further the fact that these businesses can still sell their items from within their stores, and, in addition, they could set up vending booths *within* the festival along with all of the other commercial activity, thereby leaving the public sidewalks clear for Plaintiff's constitutionally protected religious activity (as well as pedestrian traffic).

sidewalks, the decision to not enforce the City's "distribution of handbills" ordinance, which expressly allows Plaintiff's speech activity, the preferential treatment for the local businesses, and the ***widespread pattern of discriminatory treatment of Plaintiff and other Christians***. The City cannot escape liability for the unconstitutional acts it authorized.

CONCLUSION

Plaintiff respectfully requests that this court reverse the grant of summary judgment in Defendants' favor and reverse the denial of Plaintiff's motion for summary judgment and his request for injunctive relief.

Respectfully submitted,

THOMAS MORE LAW CENTER

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

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 11,352 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

THOMAS MORE LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

THOMAS MORE LAW CENTER

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

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Description
R-10	Transcript of Hearing on Motion for TRO
R-13	Amended Complaint
R-26	Order Dismissing Plaintiff Arabic Christian Perspective ("ACP")
R-30	Plaintiff's Motion for Summary Judgment and Request for Injunctive Relief
	Exhibit 1 Declaration of George Saieg (with attached Exhibits A through L)
	Exhibit A Religious Literature
	Exhibit B Photographs of Barriers Separating Sidewalks from Festival Activities
R-31	Exhibit C Photographs of Barriers
	Haddad Deposition Exhibit 4
	Haddad Deposition Exhibit 5
	Haddad Deposition Exhibit 6
	Additional Photographs
	Exhibit D Photographs of Business Activities on Public Sidewalks Adjacent to Warren Avenue During 2009 Festival
	Haddad Deposition Exhibit 7
	Haddad Deposition Exhibit 8

		Haddad Deposition Exhibit 9
		Haddad Deposition Exhibit 12
		Haddad Deposition Exhibit 13
R-32 / R-33	Exhibit E	Additional Photographs of Business Activities on Public Sidewalks Adjacent to Warren Avenue During 2009 Festival
R-34	Exhibit F	Photographs of Activities at 2009 Festival
		Haddad Deposition Exhibit 14
		Additional Photographs
	Exhibit G	Photographs of Individuals Distributing Literature at the 2009 Festival
		Haddad Deposition Exhibit 17
		Haddad Deposition Exhibit 18
	Exhibit H	Additional Photographs of Individuals Distributing Literature at the 2009 Festival
R-35	Exhibit I	Photograph of Public Sidewalks Adjacent to Festival on Warren Avenue
	Exhibit J	Photograph of Mobile Police Station
		Haddad Deposition Exhibit 19
	Exhibit K	Photographs of ACP “Booth”

	Exhibit L	Photograph of Leftover Religious Materials
R-36	Exhibit 2	Declaration of Francia Morello (with attached Exhibits A through C)
	Exhibit A	Section 14-81 ("Distribution of Handbills") of the Code of Ordinances for the City
	Exhibit B	Chapter 12, Article VII: ("Street Vendors") of the Code of Ordinances for the City
	Exhibit C	Chapter 17, Article II: ("Special Events") of the Code of Ordinances for the City
	Exhibit 3	Fay Beydoun Deposition Excerpts
	Exhibit 4	Haddad Deposition Exhibit 20: Department of Recreation Memorandum regarding City services for the Festival
	Exhibit 5	Haddad Deposition Exhibit 2: City Council Resolution
	Exhibit 6	Haddad Deposition Exhibit 22: Department of Recreation Memorandum regarding Festival
	Exhibit 7	Sergeant Jeffrey Mrowka Deposition Excerpts
	Exhibit 8	Mrowka Deposition Exhibits 31 & 32: Special Events Personnel Summary & After Action Report
R-37	Exhibit 9	Chief Ronald Haddad Deposition Excerpts
	Exhibit 10	Haddad Deposition Exhibits 15 & 19: Photographs of Police Command Trailer

	Exhibit 11	Haddad Deposition Exhibit 16: Photograph of Opening Ceremony
	Exhibit 12	Beydoun Deposition Exhibit 44: Poster Promoting Festival
	Exhibit 13	Mrowka Deposition Exhibits 36 & 37 and Beydoun Deposition Exhibit 43: Festival Meeting Notes and Agenda
R-38	Exhibit 14	Beydoun Deposition Exhibit 42: List of Businesses that Applied for Special Permits
	Exhibit 15	Haddad Deposition Exhibit 24: Special Events Application for Festival
	Exhibit 16	Haddad Deposition Exhibit 25: American Arab Chamber of Commerce memorandum to City and City Council
	Exhibit 17	Haddad Deposition Exhibit 3: Map of Festival Area
	Exhibit 18	Transcript Excerpts from Hearing on TRO
	Exhibit 19	Mrowka Deposition Exhibit 29: Map of "Inner Perimeter" and "Outer Perimeter" of Festival
	Exhibit 20	Photographs of Baby Strollers at Festival
	Exhibit 21	Haddad Deposition Exhibit 26: Festival "Rules & Regulations"
R-41	Motion for Summary Judgment by Defendants	
	Exhibit K	Haddad Deposition
R-57	Opinion and Order Denying Plaintiff's Motion for Summary Judgment, Denying Plaintiff's Request for Injunctive Relief,	

R-58	and Granting Defendants' Motion for Summary Judgment Judgment
R-59	Notice of Appeal
R-60	Order from U.S. Court of Appeals Granting Motion for Injunction Pending Appeal