#### Case 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

#### APPELLEE'S PRINCIPAL BRIEF

ROBERT J. MUISE Thomas More Law Center Attorney for Plaintiff-Appellant P.O. Box 393 Ann Arbor, Michigan 48106 (734) 827-2001

LAURIE M. ELLERBRAKE (P38329) DEBRA A. WALLING (P37067) Attorneys for Defendants-Appellees 13615 Michigan Avenue Dearborn, MI 48126 (313) 943-2035

# DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6<sup>th</sup> Cir. R. 26.1, Defendant Ronald Haddad makes the following disclosure:

- 1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.
- 2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

Respectfully submitted,

\_\_\_/s/

Attorney 13615 Dearborn, (313) E-m LAURIE M. ELLERBRAKE
LAURIE M. ELLERBRAKE (P38329)
for Defendants-Appellees
Michigan Ave., Ste. 8
MI 48126
943-2035

ail: <u>lellerbrake@ci.dearborn.mi.us</u>

DATED: September 7, 2010

## TABLE OF CONTENTS

		INTERESTS	i
INDEX	OF A	UTHORITIES	vi
STATE	MENT	WITH RESPECT TO ORAL ARGUMENT	X
JURISI	DICTIO	ONAL STATEMENT	1
STATE	MENT	OF ISSUES	2
STATE	MENT	OF THE CASE	4
	A.	Introduction	4
	B.	The Arab International Festival	5
	C.	Police presence at the Festival	8
	D.	The application process and Festival rules	9
	E.	Plaintiff's Christian ministry and preparation for the 2009 Festival	10
	F.	The Temporary Restraining Order denial and the 2009 Festival	12
	G.	The Motions for Summary Judgm ent, hearing, and 2010 Festival	13
	Н.	The Sixth Circuit appeal and request for injunctive relief	15
SUMM	ARY (	OF THE ARGUMENT	16
ARGUI	MENT		19
I.	STA	NDARDS OF REVIEW	19

	A.	Sun	nmary Judgment	19
	B.	Inju	nctive Relief	20
II.	THA TO I FOU PRO SIDI	AT PL FREE JND ' PERL EWAI	STRICT COURT CORRECTLY RULED LAINIFF'S FIRST AMENDMENT RIGHT SPEECH WAS NO T VIOLATED, AS IT THAT ALL FESTIVAL RULES WERE LY APPLIED TO ALL STREETS AND LKS WITHIN THE FESTIVAL	21
	A.	side foru man	tival grounds, including the streets and ewalks within a street fair, are part of a single am that is properly subject to time, place, and oner restrictions identifying fixed locations literature distribution.	21
		1.	Heffron and Spingola control the instant case	21
		2.	The streets and side walks constitute part of the Festival grounds subject to <i>Heffron</i> and <i>Spingola</i> .	23
		3.	The "outer perimeter" is within the Festival grounds, does not serve as a "buffer" to free speech, and is subject to <i>Heffron</i> and <i>Spingola</i>	25
		4.	The "inner perimeter," sidewalks, an d "outer perimeter" all comprise a single forum – the Festival.	31
	В.		ntiff has not suffered an abridgm ent of his t Amendment right to free speech	32
		1.	Standards for time, place, and manner	32

	:		The handbilling regulations are content- neutral.	. 34
		3.	The regulations are narrowly-tailored.	. 37
			Plaintiff enjoys am ple alternative channels of communication and is reaching his intended audience.	. 38
			estival rules and regulations are tutional, as applied.	. 41
III.	THAT	PLA	RICT COURT CORRECLTY HELD AINIFF'S FREEDOM TO ASSOCIATE BEEN RESTRICTED	. 43
IV.	DETE: SUFFI UNDE	RMIN ERED ER T	VISTRICT COURT PROPERL Y WED THAT PLAINTIFF HAS NO T A VI OLATION OF HIS RIGHTS WHE FIRST AMENDMENT FREE CLAUSE	. 45
V.	THAT REGU PROT	T LATI ECTIO	TRICT COURT CORRECTLY HELD THE FESTIVAL RULES AND ONS DO NOT VIOLATE THE EQUAL ON CLAUSE OF THE FOURTEENTH	. 47
VI.	THAT	DEF	RICT COURT PROPERLY RULED ENDANT DEARBORN IS NOT LIABLE U.S.C. §1983	. 48
VII.	ITS ]	DISCI	RICT COURT PROPERLY EXERCISED RETION IN DENYING PLAINTIFF VE RELIEF	. 50
CONCL	USION	AND	REQUEST FOR RELIEF	. 52
CERTIF	ICATE	OF C	OMPLIANCE	. 53

Case: 10-1746	Document:	006110726290	Filed: 09/07/2010	Page: 6
---------------	-----------	--------------	-------------------	---------

CERTIFICATE OF SERVICE	5	4
elitilitetiil of elitife	_	

## **INDEX OF AUTHORITIES**

Cases	<u>Page</u>
ACLU v. Taft, 385 F.3d 641 (6 <sup>th</sup> Cir., 2004)	20
Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986)	
Bay Area Peace Navy v. U.S., 914 F.2d 1224 (9 <sup>th</sup> Cir., 1990)	39-40
Board of County Commissioners v. Brown, 520 U.S. 397 (1997)	48
Boos v. Barry, 485 U.S. 312 (1988)	32-33
Brown v. City of Pittsburgh, 586 F.3d 263 (3 <sup>rd</sup> Cir., 2009)	43
Church of the Lukumi Babalu Aye, Inc. v. City of Hiaeleah, 508 U.S. 520 (1993)	45
City of Canton v. Harris, 489 U.S. 378 (1989)	48
Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985)	31
Employment Division v. Smith, 494 U.S. 872 (1990)	45-46
Frisby v. Schultz, 487 U.S. 474, 479 (1988)	32
Guarino v. Brookfield Twp. Trustees, 980 F.2d 399, 405 (6 <sup>th</sup> Cir., 1992)	45

H.D.V. – Greektown, LLC v. City of Detroit, 568 F.3d 609 (6 <sup>th</sup> Cir., 2009)	20
Heffron v. International Society for Krishna Consciousness, Inc.,         452 U.S. 640 (1981)14-15, 16, 21-22, 23, 24, 34,	39
Jamison v. Texas, 318 U.S. 413 (1943)	24
<i>Kallstrom v. Columbus,</i> 136 F.3d 1055 (6 <sup>th</sup> Cir., 1998)	20
Lovell v. City of Griffin, 303 U.S. 444 (1938)	38
Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994)	41
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943)	38
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	19
Michigan Up & Out of Poverty Now Coalition v. Michigan, 210 Mich. App. 162 (1995)	23
<i>Mitchell v. Chapman,</i> 343 F.3d 811 (6 <sup>th</sup> Cir., 2003)	20
Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)	48
Mount Elliott Cemetery Association v. City of Troy, 171 F.3d. 398 (6 <sup>th</sup> Cir., 1999)	46
Norfolk v. Cobo Hall, 543 F. Supp. 2d 701 (E.D. Mich., 2008)	37

Perry Education Association v. Perry Local Educator's Association, et. al.,	
460 U.S. 37 (1983)	33
Phelps-Roper v. Strickland, 539 F.3d. 356 (6 <sup>th</sup> Cir., 2008)	33, 36, 41
Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972)	35, 47
Prime Media, Inc. v. City of Franklin, 181 Fed. Appx. 536 (6 <sup>th</sup> Cir., 2006)	33
Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)	43-44
<i>Spingola v. Village of Granville,</i> 39 Fed. Appx. 978 (6 <sup>th</sup> Cir., 2002)	2, 24, 33, 36
<i>Trustees of the Mich. Laborer's Health Care Fund v. Gibbons</i> , 209 F.3d 587 (6 <sup>th</sup> Cir., 2000)	19
<i>U.S. v. Grace</i> , 461 U.S. 413 (1983)	24
<i>U.S. v. Lee,</i> 455 U.S. 252 (1982)	46
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	33
Worldwide Street Preachers' Fellowship, et. al. v. Reed, 430 F. Supp. 2d 411 (M.D. PA., 2006)	25-27
<u>Statute</u>	
42 U.S.C §1983	18, 48, 50

## **Court Rules**

6 Cir. R. 34	X
Fed. R. Civ. P. 4.	1
Fed. R. Civ. P. 34	X
Fed R Civ P 56	19

#### STATEMENT WITH RESPECT TO ORAL ARGUMENT

Defendants request, pursuant to Fed. R. Civ. P. 34 and 6 Cir. R. 34(a), that this matter be docketed for oral argument. This case involves the constitutionality of a City's actions to enforce content-neutral time, place manner regulations, and turns on the significant question of whether the regulations withstand First Amend ment scrutiny. This case also involves a fact-intensive inquiry about the boundaries of a street festival, and whether those boundaries fit within existing precedent involving street festivals. Therefore, this case involves issues of a nature and complexity that justifies the type of consideration and exchange inherent in oral argument. Defendant respectfully requests that oral argument be scheduled in this matter.

#### **JURISDICTIONAL STATEMENT**

This is Plaintiff's a ppeal of right from the District Court's Opinion and Order, dated June 7, 2010, (1) Denying Plaintiff's Motion for Summ ary Judgment, (2) Denying Plaintiff's Request for Injunctive Relief, and (3) Granting Defendants' Motion for Summary Judgment. (Record Entry No. 57. [Hereinafter "RE No."]) Plaintiff filed his Notice of Appeal on June 7, 2010, within the thirty-day period required by Fed. R. Civ. P. 4(a)(1)(A). (RE No. 59.) This Co urt has jurisdiction to hear an appeal of right from a decision of the Eastern District of Michigan.

#### **STATEMENT OF ISSUES**

I. Did the District Court correctly rule that Plaintiff's First Amendment right to free speech was not violated, where the District Court found that all Festival rules were properly applied to all streets and sidewalks within the Festival grounds?

Defendants answer "yes." Plaintiff answers "no." The District Court answers "yes."

II. Did the District Court correctly hold that Plaintiff's freedom to associate has not been restricted?

Defendants answer "yes." Plaintiff answers "no." The District Court answers "yes."

III. Did the District Court properly determine that Plaintiff has not suffered a violation of his rights under the First Amendment Free Exercise clause?

Defendants answer "yes." Plaintiff answers "no." The District Court answers "yes."

IV. Did the District Court correctly hold that the Festival rules and regulations do not violate the equal protection clause of the Fourteenth Amendment?

Defendants answer "yes." Plaintiff answers "no." The District Court answers "yes."

V. Did the District Court properly rule that Defendant Dearborn is not liable under 42 U.S.C. §1983?

Defendants answer "yes." Plaintiff answers "no." The District Court answers "yes."

VI. Did the District Court properly exercise its discretion in denying Plaintiff injunctive relief?

Defendants answer "yes." Plaintiff answers "no." The District Court answers "yes."

### **STATEMENT OF THE CASE**

#### A. Introduction

This case is about a Plaintiff-Appellant ("Plaintiff") who is freely exercising his First Amendment rights during the Dearborn Arab International Festival ("the Festival"), but who seeks a level of access to the Festival beyond what is enjoyed by all other speakers within the same forum . While Plaintiff alleges that he does not seek access to the Festival, his argument is refuted by the uncontroverted evidence that the areas within which he seeks to distribute materials are, in fact, within the boundaries of the Festival. He challenges a narrowly-tailored contentneutral regulation on handbilling within the Festival that is enforced to promote public safety and crowd control. Plaintiff has twice been denied the relief he seek s below. Plaintiff requests reversal of Eastern District Judge Paul Borman's grant of summary judgment to Defendants-Appellees ("Defendants"), and seeks an injunction against enforcement of regulations at future Festivals. However, in light of Plaintiff's demonstrated failure on the m erits, the lack of error on the part of Judge Borman, and the fact that Plaintiff was offered am ple access to the 2010 Festival, Judge Borman's Opinion and Order granting Defendants summary judgment should be affirmed.

#### B. The Arab International Festival

For the past fifteen years, Dear born has served as the venue for the Festival. The 14<sup>th</sup> Festival occurred June 19-21, 2009. The 15 <sup>th</sup> Festival occurred June 18-20, 2010. It is free and open to the public. (Defendant's Motion for Summary Judgment, Exhibit D, at Record Entry No. 41-4. [Hereinafter "RE No."] ) The Festival is intended to celebrate Arabic culture, build bridges, and "prom ote the Warren Avenue Business District." (RE No. 41-5.) Some of the activities includ e a carnival, music, food booths, merchandise vendors, and a fashion show. (RE No. 41-4.) It is organized by the American Arab Chamber of Co mmerce ("Arab Chamber"). (Transcript of Deposition of Fay Beydoun, p. 14, at RE No. 41-3. [Hereinafter "Beydoun dep."]) Contributions supporting the Festival are provided by sponsors including AT&T, General Motors, Chrysler, Oakwood Hospital, the U.S. Army, and the City of Dearborn. (RE No. 41-4.)

The Festival extends approximately 14 city blocks, east to west, on Warren Avenue in east Dearborn, and occupies both the streets and sidewalks. (Maps attached as RE No. 41-6; Beydoun dep., p. 34, 37.) Tents line the street and are dedicated to festival sponsors, children's activities, food ve ndors, artisans, and information tables staffed by community, religious, and corporate organizations. (RE No. 41-4, 5.) The 2009 Festival featured 96 booths or tables. (RE No. 41-4.)

The Festival attracts hundreds of thousands of people. The Dearborn Press and Guide reported on June 17, 2009 that more than 250,000 people were expected to attend the 2009 Festival. (RE No. 41-7.) With such a large num ber of visitors, close attention is paid by Festival organizers to public safety issues.

To ensure an orderly and safe transition from the open streets and the streets occupied by the Festival, Festival organizers requested that an area be maintained between the open streets and the area where the core Festival activities were occurring. (Beydoun dep., p. 40; Transcript of deposition of Jeffrey Mrowka, p. 15, at RE No. 41-8. [Hereinafter "Mrowka dep."]) The City agreed and accomplished this by setting up a second set of barricades. This resulted in the establishment of what has been referred to for purposes of this litigation as tw 0 "perimeters" – the "inner perimeter" and the "outer perimeter." In 2009, the western inner perimeter boundary w as established at Warren and Hartwell. (Mrowka dep., p. 14, and RE No. 41-6.) The eastern perimeter boundary was established at Middlepoint. (Mrowka dep., p. 14, and RE No. 41-6.) The northern and southern "inner" borders were established at the front of the businesses along Warren Avenue, thus encompassing the sidewalks. (Mrowka dep., p. 14, and RE No. 41-6.) The Festival also occurred on Miller Road, wh ere the northern and

While this area, at times, has been de scribed in common parlance as a "buffer zone," the area actually was the outer edge of the festival boundaries. (Transcript of hearing on cross-motions for summary judgment, p. 6. [Hereinafter "MSJ Tr."]) As will be fully explaine d in this brief, the area did not function as a "buffer" to any speech, as all speakers were welcome within the Festival area, subject to the Festival's content neutral time, place, and manner regulations.

southern boundaries extended one block behind the businesses. (Mrowka dep., p. 14, and RE No. 41-6.) The "outer pe rimeter" was established to the west at Schaefer, Wyoming to the east, Morrow Circ le South to the north, and Blesser to the south. (Mrowka dep., p. 16, and RE No. 41-6.)

Festival-related activities took place within both "perimeters." The core Festival activities took place within the inner perimeter, and covered area on both the streets and sidewalks. (RE 41-10.) Ancillary activities, such as parking for Festival vendors, took place within the outer perimeter. (Beydoun dep., p. 43-44.)

In 2009, new leaders joined the Festival planning process, thus providing the opportunity to im plement changes. The Arab Cham ber had a new Executive Director, Fay Beydoun. Ronald Haddad was in his first year as Dearborn Police Chief. (Transcript of deposition of Ronald Had dad, p. 1 4, at RE No. 41-11. [Hereinafter "Haddad dep."]) It also was Sgt. Jeffrey Mrowka 's first year as Special Events Coordinator for the Dearborn Police. (Mrowka Dep., p. 9.) Through the planning process, these individuals were among the leaders that addressed "the city/public concerns from previous festival years (traffic safety, parking, temporary food license com pliance, issuing of sidewalk sales perm its, carnival license, noise and litter)." (RE No. 41-12.)

Regarding sidewalk sales, in past years (when the Festival did not extend to the fronts of the businesses), any busine ss located around the Festival area could

apply to the <u>City</u> for a permit. (Beydoun dep., p. 31.) This changed in 2009. To address concerns about impediments to pedestrian traffic, the Arab Chamber asked to take control of the sidewalk sales perm itting process. (Beydoun dep., p. 31, 34, 37.) The City agreed. Consequently, any business along Warren Avenue that wanted to set up a sidewalk sale was required to subm it an application. (Beydoun dep., p. 32.) If it was feasible to allow the sidewalk sale, the Arab Chamber would approve the application. (Beydoun dep., p. 32.) Significantly, this change caused the sidewalks to be come subsumed within the Festival boundaries. As noted during oral argument on the parties' cross-m otions for summary judgment, the Dearborn City Council passed a resolution identifying the boundaries of the 2010 Festival as extending from business alley to business alley, thus incorporating the storefronts, streets, and sidewalks.

### C. Police presence at the Festival

While the Festival is not a City of Dearborn event, any large-scale event that occurs within the City of Dearborn inevitably requires City services. For example, the Arab Cham ber cannot close the streets and sidewalks without the City's permission. (RE No. 41-5.) Polices upport is needed for crowd control, to maintain a perimeter around the event, and to ensure public safety. (Haddad dep., p. 15, 18.) The police achieve their goals by enforcing content-neutral, narrowly-tailored regulations. Am ong the regulations enforced are rules and regulations

promulgated by the Arab Chamber to ensure an orderly Festival. To facilitate this support, the Dearborn Police Department set up a command post within the Festival boundaries. (Haddad dep., p. 52.)

#### D. The application process and Festival rules

Any person or entity wishing to participate in the Festival m ust submit an application to the Arab Chamber by a deadline, which in 2009 was April 31. (RE No. 41-15.) All applicants m ust pay a fee. The application packet includes rules and regulations, including:

#### Miscellaneous Rules:

2. No unauthorized perform ances, sales, dem onstrations, exhibits, or solicitations of any kind shall be permitted.

\* \*

8. No loitering shall be perm itted at the Festival entrance points or in any area where such activity would impede pedestrian flow.

#### RE No. 41-15.

The Festival rules apply to all solicitation and distribution activities.

(Beydoun dep., p. 51-52.) Pedestrian flow clearly is a concern of the Arab

Chamber, as the Chamber not only re ferenced pedestrian flow in its

"Miscellaneous Rules," but also in rules restricting political solicitation and materials distribution in order to m aintain "an orderly and uninterrupted schedule of Festival activities and a free flow of pedestrian and vehicular traffic." (RE No .

41-15.) The regulations further warn, "any infraction of above rules will result in immediate ejection from the Festival site and other appropriate enforcement action." (RE No. 41-15.)

#### E. Plaintiff's Christian ministry and preparation for the 2009 Festival

Plaintiff is a Christian who has been ministering to Muslims since 1987. (Transcript of Deposition of George Saieg, p. 21, at RE No. 42. [Hereinafter "Saieg Dep."]) In 2003, he founded the California-based nonprofit organization Arabic Christian Perspective ("ACP"), which served to "present the gospel of Jesus Christ to the Muslim s in the U.S." (Saieg dep., p. 16.) ACP dissolved in 2009, after the Festival. (Saieg dep., p 16.) ACP trained people throughout the country to minister to Muslims, and coordinated with other groups to organize large-scale outreach missions such as attending an Arabic Festival in Seattle. Washington, an international fe stival in St. Louis, Missouri, and an Arab Festival in Dearborn, Michigan. (Saieg dep., p. 27-32.) A dditionally, Plaintiff and ACP would orchestrate smaller-sca le visits to mosques. (Saieg dep., p. 26-27.) Although ACP has been dissolved, Plaintiff plans to continue m inistering, including in Dearborn. (Saieg dep., p. 66.)

Plaintiff regularly seeks the assistance of police departments when planning mission trips to inform the police of his intentions and receiv e guidance. (Saieg dep., p. 30.) When planning a mosque visit, Plaintiff specifically requests a police

presence to "keep peace between both side[s]" and to prevent any "false accusations" from being made against him or his colleagues. (Saieg dep., p. 34.)

Attending the Festival has been one of Plaintiff's major activities since 2004. (Saieg dep., p. 36.) In conjunction with the Festival, Plaintiff and ACP coordinated an annual event titled "Facing the Muslim Challenge," which in 2009 extended from June 16-21, and included training progra ms, debates, prayer sessions, mosque visits, and door-to-door outreach. (RE No. 41-2.) Planning fo r the program began at least six months in advance. (Saieg dep., p. 66.) Activities took place at numerous venues, including Dearborn's Hemlock Park. (RE No. 41-2.) Plaintiff organized approximately 90 people to visit Dearborn that weekend. (Saieg dep., p. 69.) As part of their outreach, Plaintiff's group distributes materials including the Gospel of John, religious tracts, and Jesus DVDs. (Saieg dep., p. 29.)

Despite planning his outreach mission for at least six months, Plaintiff did not inquire about participating in the Festival until after the application deadline had passed. When Plaintiff finally did contact Sgt. Mrowka in May 2009, he learned about the regulation requiring that materials could only be handed out from a fixed location. (Mrowka dep., p. 20.) Plaintiff told Sgt. Mrowka that he would not pay for a booth. (Mrowka dep, p. 25.) Sgt. Mrowka informed Plaintiff that the Festival could accommodate him at a table on the edge of the Festival. (Mrowka dep., p. 25.) However, Plaintiff resisted, noting that he wanted to bring 90 people

to the Festival. (Mrowka dep., p. 25.) Sgt. Mrowka assured Plaintiff that his group could be accommodated at a location on Warren Avenue and Kingsley. (Mrowka dep., p. 25.) Plaintiff still protested. (Mrowka dep., p. 25.)

#### F. The Temporary Restraining Order denial and the 2009 Festival

plaint and Motion for a Tem Plaintiff filed his original Com porary Restraining Order on June 16, 2010. A hearing on Plaintiff's Motion was held before the Hon. Nancy G. Edm unds on June 18, 2010. Judge Edm unds ruled that "there is a significant distinction between a public sidewalk that is a sidewalk during an ordinary weekend . . . and a sidewalk which is contiguous to a festival which . . . involves basically wall-to-wall people, over 250,000 over the three day period." (Transcript of hearing on Plaintiff's Motion for a Tem porary Restraining Order, p. 34, at RE No. 10. [Hereinafter "TRO Tr."]) She concluded that the "area immediately adjacent to the street, sep arated only by a curb . . . [is ] subject to the same crowd and safety concerns during the period of the fair as the street area itself." (TRO Tr., p 35.) Judge Edmunds ruled that the regulation and its enforcement are content-neutral time, place, and manner restrictions that provide an alternative means of communication. (TRO Tr., p., 36.) She cited Spingola v. Granville, 39 Fed. Appx. 978 (6<sup>th</sup> Cir., 2002) for the proposition that the sidewalks are not serving their norm al function during the Festival, and that interm scrutiny should apply. (TRO Tr., p. 37.) Accordingly, Judge Ed munds declined to

issue a temporary restraining order. (TRO Tr., p. 38.) She concluded by inquiring whether Plaintiff would still be offered "the same accommodations that they were willing to provide prior to the hearing." (TRO Tr., p. 38.) Dearborn's counsel agreed. (TRO Tr., p. 38.) Plaintiff was provided the originally-offered location at Warren and Kingsley, at no charge.

Plaintiff successfully reached his audience. Plaintiff's group m ingled with the crowd, and people visited his booth. (RE No. 41-17.) Plaintiff does not deny that he distributed litera ture, conducted a training program at a city park, and canvassed Dearborn's residential neighborhoods without City interference. (Saieg dep., p. 68, 109.) Plaintiff does not point to any problems at any booths. Perhaps one of the most successful booths was that of Dr. Josh McDowell, a Christian minister to Muslims who properly applied for a booth, and who had such a pleasant time that he wrote a letter to the editor describing his experience. (RE No. 41-20.)

### G. The Motions for Summary Judgment, hearing, and 2010 Festival

Oral argument on the parties' cross-Motions for Summary Judgm ent was heard before the Hon. Paul D. Borman in the Eastern District of Michigan on May 21, 2010. Prior to oral argum ent, Judge Borman requested that Defendants indicate where Plaintiff's booth would be located within the 2010 Festival. (RE No. 55.) Upon consulting with the Arab Cham ber, Defendants presented a letter and map indicating that Plaintiff would be offered a location in the artesian tent,

which is centrally located within the Festival, and included electricity and lighting. (RE No. 56.) It was also established during oral argum—ent that the City would recommend that the Arab Chamber waive Plaintiff's fee. (Transcript of hearing on cross-motions for summary judgment, p. 32. [Hereinafter "MSJ Tr."])

Judge Borman issued his Opinion and O rder denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment on June 7, 2010. (RE No. 57, 58.) Judge Borman ruled that the streets and sidewalks within both the "inner" and "outer" perimeters are part of the fairground and are not serving as streets and sidewalks during the Festival. (Opinion p. 23 n. 10, and 36-37, at RE No. 57. [Hereinafter "Op. "]) He concluded that Plaintiff's missionaries "have never been denied access to the Festival forum." (Op., p. 26-27.) The Court also agreed that allowing businesses to set up tables outside of their stores on Warren Avenue is content-neutral, noting,

If ACP had an existing office located in the inner perim eter along Warren Avenue, there is nothing in the record to suggest that it could not set up a table outside its office like everyone else occupying space along Warren Avenue.

Op., p. 30-31.

Significantly, like Judge Edmonds, Judge Borman concluded that *Spingola*, *supra*, and *Heffron v. International Socie ty of Krishna Consciousness*, 452 U.S. 640 (1981), control the instant case. Judge Borman emphasized, as the *Spingola* court did, that "The question is whether preventing uncontrolled public speaking in

these areas promotes a significant governmental interest that would be less effectively achieved without the law." (Op., p. 33, citing *Spingola*, at 984.)

Ultimately, Judge Borman concluded that Defendants' enforcement of handbilling regulations in this case serves the significant government interests of "maintaining crowd control, relieving pedestrian congestion, and ensuring an orderly Festival." (Op., p. 33.) Likewise, Judge Borman found that the regulation is narrowly tailored. (Op., p. 33-34.) Accordingly, Judge Borman granted summary judgment to Defendants, and denied summary judgment to Plaintiff on Plaintiff's First Amendment free speech claiment, and denied Plaintiff injunctive relief. Judge Borman also granted summary judgment to Defendants on Plaintiff's freedom of association, free exercise, equal protection, and medical liability claims. (Op., p. 40.)

### H. The Sixth Circuit appeal and request for injunctive relief.

Plaintiff filed his claim of appeal on June 7, 2010. On June 8, 2010, he filed an Emergency Motion for Expedited Re view and Reversal of Order Denying Request for Injunctive Relief. Pending review of the merits of Plaintiff's claim, this Court granted Plaintiff a limited injunction that allowed Plaintiff, only, to distribute literature within the area referred to as the "outer perimeter" during the 2010 Festival held on June 18, 19, and 20, 2010. (RE No. 61.) The Order expired at the close of the 2010 Festival. Within its Order, this Court recognized the

applicability of *Heffron* to the Festival boundaries, noting "This order leaves undisturbed the ability of the defendants to prohibit Saieg from distributing his religious literature within the Festival itself. *See Heffron*." (RE No. 61.) Of course, this Court also recognized that the order "shall be fully subject to reconsideration and revision or modification." (RE No. 61.)

Defendants now submit their brief in opposition to Plaintiff's principal brief, and request that this Honorable Court affirm the District Court's grant of summary judgment for Defendants, as the sidewalks and the area commonly referred to as the "outer perimeter" are within the Festival grounds and are subject to content-neutral time place manner regulations under *Heffron* and its progeny.

#### **SUMMARY OF THE ARGUMENT**

Defendants are charged with enforcing content-neutral time, place, and manner regulations designed to prom ote significant governmental interests in furtherance of public health, safety, and welfare. Each year, during the privately organized Festival, Defendants provide police support and enforce the Festival's content-neutral regulations, with the goal of prom oting smooth traffic flow, controlling pedestrian flow, and providing for general public safety. Specifically, it enforces a rule requiring that all literature distribution, vending, soliciting, and

<sup>&</sup>lt;sup>2</sup> Contrary to Plaintiff's assertion that this Court found that Plaintiff "would likely succeed on the merits of his appeal," this Court did not reach any conclusions on the merits, as it only determined that, due to time constraints and the nature the issues presented by the appeal, a limited temporary injunction would be appropriate. (RE No. 61.)

similar activity occurring within the Festival grounds be conducted from a fixed location.

The Festival is a street fair and is properly regulated as a lim ited public forum; thus any regulations m ust be evaluated under intermedia te scrutiny. The Festival grounds include streets and sidewalks that are offset from the rest of the streets and sidewalks by a perimeter of barricades. The outer border of the Festival grounds provides a separation of the Festival from the outside world, and further serves the Festival by providing parking for Festival volunteers and as an accommodation for patrons of businesses along the Festival perimeter whose parking is displaced by the Festival. All portions of the Festival – including streets, sidewalks, and the "outer perimeter" area are part of the Festival grounds and subject to content-neutral time, place, manner regulations, including the requirement that all literature distribution occur from a fixed location.

Plaintiff was offered a booth inside the Festival, and was free to roam the streets to spread his message to Festiva 1 attendees – there is no "buffer zone" prohibiting free speech at any place in the Festival. Only materials distribution is regulated. The rules apply to all Christian, Arab, non-profit, and corporate groups, and many such groups willingly abide by the requirement. If Plaintiff were to be exempted from the regulation, the City's interest in crowd control and public safety would be jeopardized as all control would be lost over the activities of many

vendors and organizations seeking to distribute materials. The regulations are narrowly-tailored to achieve the interests of crowd control and public safety, and leave Plaintiff amp le alternative chann els of communication. Accordingly, Plaintiff's First Amendment right to free speech has not been violated. Because the regulations are content-neutral and enforced in an evenhanded manner, Plaintiff also fails to state a claim—under the Equal Protection Clause of the Fourteenth Amendment.

Because Plaintiff's First Amend ment right to free speech has not been violated, he cannot demonstrate the violation of a hybrid right necessary to establish a violation of his free exercise. Likewise, he cannot demonstrate that the City has in any way compelled him to engage in practices offensive to his religion, or to abstain from those required by his religion. Because Plaintiff failed to state issues of material fact in response to Defendants' Motion for Summary Judgment, his free exercise claim was abandoned, and is otherwise not viable.

Plaintiff also has failed to demonstrate that his freedom of association has been violated, as he has not been required to accept views with which he disagrees, to associate with people with whom he does not wish to associate, and the City has not prohibited him from engaging in any of his activities with like-m inded people or any other people who he chooses to approach.

Additionally, because there has been no constitutional violation, and Plaintiff has produced no evidence of a pattern or policy of selective enforcement, Defendant Dearborn has no liability under 42 U.S.C. §1983.

Ultimately, because Plaintiff failed to state a genu ine issue of material fact for trial, and failed to demonstrate a constitutional violation, the Eastern District of Michigan properly denied Plaintiff's Motion for Summary Judgm ent, properly denied injunctive relief to Plaintiff, and properly granted De fendants' Motion for Summary Judgment. This Court should affirm Judge Borman's Opinion and Order dated June 7, 2010.

#### **ARGUMENT**

#### I. STANDARDS OF REVIEW

#### A. Summary Judgment

This Court reviews a grant or denial of sum mary judgment de novo.

Trustees of the Mich. Laborers' Health Care Fund v. Gibbons, 209 F.3d 587, 590

(6<sup>th</sup> Cir., 2000). Summary judgment is proper under Fed. R. Civ. P. 56(c) where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In evaluating a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party.

Matsushita, at 587. The proper inquiry is "whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251-52 (1986). When confr onted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Mitchell v. Chapman*, 343 F.3d 811 (6<sup>th</sup> Cir. 2003). In this case, the evidence is so one-sided that Defendants should prevail as a matter of law.

#### **B.** Injunctive Relief

When examining a district court's denial of an injunction, this Court applies the clear error standard for factual findings, and reviews legal conclusions de novo. "But the district court's ultimate decision regarding injunctive relief is reviewed under the 'highly deferential' abuse-of-discretion standard." *H.D.V. - Greektown, LLC v. City of Detroit,* 568 F.3d 609, 618-619 (6<sup>th</sup> Cir., 2009). This Court reviews the district court's findings for "clear error" and its legal conclusions "de novo." *ACLU v. Taft,* 385 F.3d 641, 645 (6<sup>th</sup> Cir., 2004). Permanent injunctive relief will only be available upon the plaintiff's e stablishment of a constitutional violation, and "upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." *Kallstrom v. Columbus,* 136 F.3d. 1055, 1067 (6<sup>th</sup> Cir., 1998).

- II. THE DISTRICT COURT CORRECTLY RULED THAT PLAINTIFF'S FIRST AMENDMENT RIGHT TO FREE S PEECH WAS NOT VIOLATED, AS TH E FESTIVAL RULES WERE PROPERLY APPLIED TO ALL STREETS AND SIDEWALKS WITHIN THE FESTIVAL GROUNDS.
  - A. Festival grounds, including the street s and sidew alks within a street fair, are part of a single forum that is properly subject to time, place, and manner restrictions identifying fixed locations for literature distribution.
    - 1. Heffron and Spingola control the instant case.

Judge Borman correctly held that this c ase is controlled by *Heffron* and *Spingola, supra*. In *Heffron*, the International Society for Krishna Consciousness ("ISKCON"), sought to distribute materials during Minnesota's State Fair. *Heffron*, at 645. H owever, the State Fair prom ulgated rules requiring that "all persons, groups or firms which desire to sell, exhibit, or distribute materials during the annual State Fair m ust do so only from fixed locations on the fairgrounds." *Heffron*, at 643. The rule did not prohibit speakers from traversing through the fair and speaking to fair-goers provided that no materials were distributed. *Heffron*, at 643-644. Though ISKCON compared the fairgrounds to city streets, the Court ruled:

The flow of the crowd and demands of safety are more pressing in the context of the Fair. As such any comparisons to public streets are necessarily inexact.

Heffron, at 651.

In upholding the rule facially and as applied to ISKCON, the Supreme Court noted that the Fairgrounds were a "relat ively small area," that the average daily attendance had been 115,000-160,000 people, and that at least 1,400 other exhibitors rented space at the Fair, including many non-profit and religious organizations representing a broad spectrum of views. *Heffron*, at 643-644.

Though ISKCON's oral and written distribution of its religious views was an important ritual of the religion, the Court declared that ISKCON "and its ritual . . . . have no special claim to First Amendment protection." *Heffron*, at 652. It concluded that, if the rule was invalidated with respect to ISKCON,

There would be a mu ch larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise m ove freely about the fairgrounds distributing and selling literature and soliciting funds at will.

Heffron, at 653.

The Court therefore upheld the regulation as a valid time, place, and manner restriction serving a substantial government interest. *Heffron*, at 655.

In *Spingola*, this Court applied *Heffron* to a village ordina nce restricting public speaking during street fairs. *Spingola* involved a two-block fair, at which the plaintiff had previously preached at various locations. *Spingola*, at 979. After the ordinance was passed, he was restricted to a single location. *Spingola*, at 980. The plaintiff argued that strict scrutiny should apply because he sought to preach on the "public streets," which are traditional public fora. *Spingola*, at 982.

However, this Court declared that the plaintiff's argum ent was "m isguided," stating,

The designated speaking area within the festival perimeters, though comprised of public streets, is not serving that function during the festival . . . Clearly, the festival area is more akin to a fair than a normal city street. But, regardless . . . the Ordinance is examined under the same intermediate level of scrutiny.

*Id.*, at 983.

Thus, this Court ruled that, when public streets are closed for a fair, they can be regulated like the fairgrounds in *Heffron*.

Likewise, the Michigan Court of Appeals has acknowledged that regulations restricting picketing on capitol grounds could validly apply to the sidewalks just as they do to the grounds, provided that the side walks are included in the area intended to be regulated. *Michigan Up & Out of Poverty Now Coalition v. Michigan,* 210 Mich. App 162, 174, n. 7 (1995). Indeed, the sidewalks "command no greater status as a traditional public forum" when they are within a regulated area. *Michigan Up & Out of Poverty,* at 162, 174, n. 7.

# 2. The streets and sidew alks constitute part of the Festival grounds subject to *Heffron* and *Spingola*.

In the instant case, the streets and sidewalks *are* the Festival grounds and are subject to the type of content-neutral regulations approved in *Heffron* and *Spingola*. By seeking to distribute literature on the sidewalks, Plaintiff is seeking access to the Festival grounds, and must follow Festival rules. Moreover, because

the streets and sidewalks are not functioning as streets and sidewalks during the Festival, Plaintiff's reliance on cases such as *Jamison v. Texas*, 318 U.S. 413 (1943), and *U.S. v. Grace*, 461 U.S. 171 (1983), is m isplaced since those cases address open streets and sidewalks, and any comparison between the facts of those cases and the facts of a case involving a festival is "necessarily inexact." *Heffron*, at 651.

Plaintiff argues that the presence of some Festival activities on the sidewalk frustrates the goals of m aintaining crowd control and keeping open passageways through the Festival. However, as em phasized by Judge Borman, Spingola instructs that the question is not whethe r the regulation cures all obstructions and pedestrian flow problem s, but rather "whether preventing uncontrolled public speaking in these areas promotes a significant governmental interest that would be less effectively achieved without the la w." Spingola, at 984. It is sufficient that the rules provide "a smoother flow of traffic within the festival crowd." Spingola, at 984. By taking control of the sidewalks, the Arab Chamb er has been able to maintain open spaces throughout the sidewalk system for pedestrian passage fro m one area to another. (RE No. 41-21.) If the Arab Cham ber were to lose control, then the risks of overcrowding and disorderliness would be m ultiplied exponentially, especially as other individuals, groups, and vendors m igrated to the sidewalks, just as the Supreme Court feared in Heffron. This is especially a

concern given the fact that more than 250,000 people attend the Festival, and as the crowds gather, the streets are filled with people from curb to curb. (RE No. 41-22.) Consequently, the regulation at issue in this case does promote the free flow of pedestrians and traffic through the Festival. The Eastern District of Michigan's Opinion and Order granting Defendants summary judgment should be affirmed.

3. The "outer perimeter" is within the Festival grounds, does not serve as a "buffer" to free speech, and is subject to *Heffron* and *Spingola*.

This Court and Plaintiff have expresse d specific interest in the question of whether the Festival rules regarding ha indbilling apply to the area that has been termed for convenience through this litigation as the "outer perimeter." The question necessarily hinges on whether the "outer perimeter" constitutes a portion of the Festival grounds. As has been established by the facts on the record, the "outer perimeter" is within the Festival grounds, and therefore it was proper for Judge Borman to conclude that the "outer perimeter" is controlled by *Heffron* and *Spingola* just like the streets and sidewalks.

Plaintiff has referred to the "outer per rimeter" as a "buffer zone" and has suggested that this case should be likened to *Worldwide Street Preacher s' Fellowship, et. al. v. Reed,* 430 F. Supp. 2d 411 (M.D. PA, 2006). However, *Worldwide Street Preachers'* is not instructive not only because it is a non-binding case from the District Court for the Middle District of Pennsylvania, but even more

significantly because that case involved an actual "buffer zone" that functioned to exclude speakers from a forum, which is not comp arable to the instant case. In Worldwide Street Preachers,' the Court found a First Am endment violation where the defendant "did enforce a fifty-foot buffer zone . . . directing the Christian protestors to keep back fifty feet from "the area for which the defendants had a permit to host a Pride Fest. Worldwide Street Preachers, at 414. There, the Pride Fest obtained a permit to use a designated area of a park for their event, and asked the City to enclose a portion of that area with a fence to control access to the event. Id., at 413. According to the plaintiff in that case, when the plaintiff approached the area fenced off for the Pride Fest, he was told that the p ermit holders for the event "had the exclusive right to use the perm itted area and could exclude anyone they chose." Worldwide Street Preachers, at 414. He was instructed to conduct his First Amendment activity across the street. Worldwide Street Preachers, at 414. Thus, the distance between the fenced area and the area where plaintiff w as told to engage in his activities truly was a "buffer" to plaintiff's speech. However, the Court recognized that the fact that a "buffer zone" existed was not in itself fatal to defendants, concluding that "a buffer zone is not per se im proper under the First Amendment, but it must be analyzed as a 'time place and manner restriction.'" Worldwide Street Preachers, at 415. Because the defendants made no attempt to explain why the buffer zone had been esta blished, and defendants even denied its

existence, the Court concluded that the zone violated the First Amend ment.

Worldwide Street Preachers, at 415.

Two critical factual distinctions exist between *Worldwide Street Preachers*' and the instant case that cause the instant case to fall outside the am bit of *Worldwide Street Preachers*. First, as will be detaile d within the discussion of alternative channels of communication, *infra*, Plaintiff has not been excluded from the Festival. Second, whereas in *Worldwide Street Preachers*, there was ambiguity about whether the "buffer zone" was part of the "perm itted area" (and the defendants even denied its existence), there is no such ambiguity in the instant case, and it is clear that the "outer perimeter" is part of the Festival boundaries and subject to the same Festival rules and regulations.

In *Worldwide Street Preachers*, only a portion of the permitted area was actually fenced off for the event, and the non-fenced area was not in any way being used in connection with the Pride Fest, whereas in the instant case, the "outer perimeter" is expressly intended to service the Festival. Indeed, the Festival organizers specifically requested that the City establish the "outer perimeter" to maintain an area between the core festival activities and the open streets.

(Beydoun dep., p. 40; Mrow ka dep., p. 15.) Establishm ent of this additional perimeter effectively expanded the Festival boundaries, and the perimeter ultimately was utilized to support the Festival, namely by keeping vehicular traffic

at a distance and turning it away on major roads, providing parking for Festival employees and Festival attendees, and establishing parking for the Warren Avenue businesses that were adversely im pacted by the closure of Warren Avenue. (Beydoun dep., p. 43-44.) Thus, while the "outer perimeter" may not ha ve included carnival rides, stages, or vendors, that was exactly the point. Without the "outer perimeter," vehicles could have driven right up to the Festival, traffic encountering the Fair would inevitably direct itself onto residential streets rather than turning on to the major roads of Schaefer or Wyoming, and there would have been a logistical problem finding places for Festival workers and for patrons of the Warren Avenue businesses to park. Likewise, as explained during oral argum ent, if the instant Plaintiff or any other pamphleteer or vendor was permitted to conduct literature distribution or solicitation activities within the "outer perim eter," then that opportunity would be necessarily extended to *everybody*, and ultimately the "inner perimeter" would be extended to the boundaries of the "outer perimeter." (MSJ Tr., p. 28.) This would produce one of two results: either there would be 1) absolutely no separation or sm ooth transition between the outside world and the "core" Festival activities and no ability for the Festival to maintain an area designated to service the Festival, or 2) a new "outer perim eter" would need to be established, and the cycle would begin all over again. Judge Borman aptly summarized the importance of the "outer perimeter," stating,

It is crucial to note that this c ase is not just about Plaintiff's right to exercise his First Amendment rights in the outer perimeter; it is about the right of everyone to do so. That is, if the Court struck down the ban as unconstitutional, everyone – not just Plaintiff and his associates - would be perm itted to distribute lite rature in the outer perimeter. Organizations of all kinds, businesses, and individuals alike would all flock to the outer perimeter to promote their respective interests and messages. The consequence of this would be to effectively extend the Festival grounds into an area that is meant to serve as a buffer zone between the Festival and the outside world. This result would undermine the legitimate and substantial interest of the city to 'ensure an orderly and safe transition from the open streets and the streets occupied by the Festival.' It is for this reason that a ban o handbilling in the outer perimeter is narrowly tailored. A result to the contrary would severely undercut the City's substantial interest in maintaining a safe zone, clear of wall-to-wall Festival crowds, between the Festival grounds and the outside world.

### Op., p. 36.

The role of the "outer perimeter" and the distinction from *Worldwide Street Preachers* can be further accentuated by envisioning a "single perimeter" Festival. Suppose, to avoid confusion over the boundaries, the Arab Chamb er chose to remove the barricades constituting the "inner perimeter" but keep all o ther aspects of the Festival layout – including the location of the rides, tents, and ancillary activities such as Festival parking – exactly the same. The result would be the exact same Festival, with each area – including the form er "outer perimeter" – serving the Festival in the exact same way. The only difference would be that, with a single barricaded "perimeter," the grounds would be solely defined by that the perimeter, and those grounds – whether they be occupied by a Ferris Wheel or a

Festival volunteer's vehicle – would be subject to the Festival rules and regulations, including regulations regarding the location and manner of literature distribution activity. This is quite different from the situation in *Worldwide Street Preachers*, where the "buffer zone" in question was not fenced off, apparently was not being used in any way to facilitate the Pride Fest, and which even the defendants could not begin to explain. As Judge Borman subm itted, the two perimeters of the Festival are analogous to an airport:

The inner perimeter is like the main runway, while the outer perimeter is like a taxiway which serves the purpose of unimpeded ramp up and ramp down of traffic speeds into the inner perimeter.

Op, p. 37.

Finally, Plaintiff argues about the size of the outer perimeter, but as Judge Borman correctly noted, Plaintiff's description of the outer perimeter as "30 blocks" is "misleading because . . . the outer perimeter runs only one block to the north and south of the inner perimeter and five and four blocks, respectively, to the west and east of the inner perimeter." (Op. p. 35, n. 16.) Plaintiff's argument is further diminished by the fact that, for the 2010 Festival, the Festival boundaries were expressly expanded "a block in either direction, and business alley to business alley." (MSJ Tr., p. 29.) Regardless, the fact that the "outer perimeter" is as much a part of the Festival as the "inner perimeter" and is sized to serve the legitimate interest of traffic control and public safety, ne cessarily renders

Plaintiff's argument unavailing inasmuch as it is subject to the same the same time, place, manner restrictions as the "inner perimeter."

Given the essential role of the "outer perimeter" to the Festival as a whole, Judge Borman correctly concluded that the handbilling ban in the outer perimeter, like the ban in the inner perimeter, "meets the requirements for a valid time, place, and manner restriction on speech." (Op., p. 37.) Accordingly, Judge Bor man's Order granting Defendants summary judgment should be upheld.

4. The "inner perimeter," sidew alks, and "outer perimeter" all comprise a single forum – the Festival.

Plaintiff invokes *Cornelius v. NAACP Legal Def. & Educ. Fund,* 473 U.S. 788, 800 (1985) to suggest that the forum should be defined based on "the access sought by the speaker." (Appellant's brie f, p. 24.) Assuming for purposes of this brief that Plaintiff is correct and Plaintiff *can* define the forum, it does not help him in this case, as there is only one forum in play in this case: the Festival. Plaintiff admits in his brief that he "is not challenging Defendants' ability to restrict his speech activity on Warren Avenue or Miller Road – the designated location of the "street fair." (Appellant's brief, p. 39.) Plaintiff's concession is fatal because, a sestablished above, the "designated location of the 'street fair'" includes the sidewalks and the "outer perimeter." Thus, while Plaintiff repeats throughout his brief that he "does not want to attend the Festival," the reality is that, *by seeking to distribute literature on the sidewalks along Warren and M iller Roads or in the* 

"outer perimeter" – a<u>ll of which ar e within the Festival boundaries</u> – he is\_
seeking to participate in the Festival. Rather than identifying the proper forum, it
appears that Plaintiff wishes to re-define the boundaries of the forum by excluding
the sidewalks and "outer perimeter," but that goes against the facts of this case.

Ultimately, then, neither the sidewalks nor the "outer perimeter" are a "buffer" to free speech. On the contrary, the Arab Chamb — er and the City of Dearborn have *invited* Plaintiff to come in to the Festival, m ingle with the crowd, and establish an information table like every other organization that seeks access to the Festival audience. — Consequently, Plaintiff m ust abide by the rules and regulations set forth by the Arab Chamber that he ad — mits the City can enforce pursuant to *Heffron* and *Spingola*. And, pursuant to *Heffron* and *Spingola*, a Festival is a limited public forum where regulations need only satisfy intermediate scrutiny.

- B. Plaintiff has not suffered an abridgement of his First Amendment right to free speech.
  - 1. Standards for time, place, and manner regulations.

"Even protected speech is not equally perm issible in all places at all times." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Content-neutral regulations of the time, place, and manner of communicati ve activity are per mitted where necessary to further significant government interests. *Frisby*, at 474, 479. A content-neutral regulation is "justified without reference to the content of the regulated speech."

Boos v. Barry, 485 U.S. 312, 320 (1988). Even where an ordinance has an effect on speakers, it is neutral if it "serves purposes unrelated to the content of the expression." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Content-neutral regulations a re evaluated under interm ediate scrutiny. *Phelps-Roper v. Strickland*, 539 F.3d 356, 362 (6<sup>th</sup> Cir. 2008). The regulation must 1) serve a significant governm ental interest; 2) be narrowly tailored; and 3) leave open ample alternative channels of communication. *Perry Education Association v. Perry Local Educator's Association et. al*, 460 U.S. 37, 45 (1983).

Significant government interests include protecting public safety during a festival, ensuring sm ooth traffic flow, and balancing one 's free speech against another's freedom to be free from hindrance. *Spingola*, at 983.

"A statute is narrowly tailored if it targets and elim inates no more than the exact source of the "evil" it seeks to remedy." *Frisby*, at 485. The m eans of regulation need not be the "least restrictive alternative." *Ward*, at 797-798.

Finally, if a speaker is able to reach his "intended audience," then ample alternative channels of communication exist. *Phelps-Roper*, at 372-373, citing *Prime Media, Inc. v. City of Franklin*, 181 Fed. Appx. 536, 541 (6 <sup>th</sup> Cir. 2006). "Ample alternative channels" does not guarantee a person his "best m eans of communication." *Phelps-Roper*, at 372.

### 2. The handbilling regulations are content-neutral.

As explained in the Statement of Fact s, the Arab Chamb er requires that all individuals or entities seeking to distribute information within the Festival area fill out an application, pay a fee, and limit their activities to a designated location. The regulations were passed without reference to Plaintiff's spe ech activity, and they are expressly intended to prom ote pedestrian traffic and an orderly Festival. (RE No. 41-15.) The City's interest in enforcing the regulations is to keep sidewalks flowing and maintain crowd safety (Hadda d dep., p. 18, 35-36; Mrow ka dep., p. 15), each of which is a legitimate government interest. *Heffron*, at 651.

Plaintiff attempts to argue that distinctions have been made between commercial and non-commercial speech, but the evidence dem onstrates that no such content-based decisions were made. First and forem ost, the sidewalks were incorporated into the Festival grounds, and the Arab Chamb er controlled what occurred on the sidewalks. Beydoun explained, "We don't allow just anybody to come and set up, and they're not allowed to decide where they want to set up. We have specific areas for specific things." (Beydoun dep., at 33.) For exam ple, there were numerous themed tents – one for food, one for artisans, and one for children's activities. (RE No. 41-4.) The Warren Avenue businesses constitute their own themed area of the Festival, and they are able to take advantage of their location by setting up in front of their business, when logistically feasible,

regardless of what their business prom otes. (Beydoun dep., p. 36.)

Notwithstanding this fact, Beydoun stated that entities other than Warren Avenue businesses might be permitted to distribute in the "sidewalk" area:

- Q: So some outside organization that didn't have a business along Warren Avenue and they wanted to put a table . . . along Warren Avenue within the festival boundarie s, that was not going to be permitted?
- A: If they had gone through the festival, completed an application and went through the process and if it was logistically feasible, then we would have agreed to it and yes, if it did not interfere.

Beydoun dep., p. 32.

Agreeing with the Defendants' characterization of the Warren Avenue businesses as their own themed area of the Festival, Judge Borman ruled,

To the ex tent that Defendant's enforce the [Arab Cham ber's] rule permitting occupants of space along Warren Avenue to set up on the sidewalk outside their storefronts at the exclusion of those who do not occupy space along Warren Avenue, the restriction is not contentbased because no expression is being restricted based on 'its m essage, its ideas, its subject matter, or its content.' See [Police Department of the City of Chicago v.] Mosley, 408 U.S. [92], 95. Rather Defendants, by enforcing the [Arab Chamber's] rule, are favoring, if anyone, those with space along Warren Avenue no matter who they are or what their message. In reality, this is a guid pro quo for stores negatively impacted by the Festival. In exchange for subjecting them to Festival crowds in front of their stores and closed-off streets that block regular customers' ingress and egress, the existing merchants are permitted to set up tables out front to sell their wares. . . . There is nothing to suggest that the criterion to set up a sidewalk sale along Warren Avenue has anything to do with the message of the occupant, or the subject matter of the occupant's speech (i.e., co mmercial versus noncommercial).

Op., p. 31.

Plaintiff invokes the existence of this limited sidewalk activity as suggesting that the interest in traffic control and safety is not le gitimate, and to make the bald assertion that the regulations are content-based. However, again, as noted in Spingola, the question is not whether the regulation cures all obstructions and pedestrian flow problem s, but rather "whether preventing uncontrolled public speaking in these areas promotes a significant governmental interest that would be less effectively achieved without the la w." Spingola, at 984. It is sufficient that the rules provide "a smoother flow of traffic within the festival crowd." Spingola, at 984. Plaintiff alleges it is "obvious" that the City is "purposefully banning Christian missionaries from distributing religious literature at an Arab (Muslim ) festival", but Plaintiff cites no evidence dem onstrating any such "obvious" intent or purpose. On the contrary, the record clearly dem onstrates that the regulations were adopted and enforced in a content neutral way, and, m ost significantly, Christians (including Plaintiff) were allowed to, and actually did, distribute religious literature at the Arab Festival, subject to the content neutral time, place, and manner restrictions allowed under Heffron and Spingola.

Because the regulations at issue are content-neutral, they should be evaluated under intermediate scrutiny. *Phelps-Roper*, at 372.

#### 3. The regulations are narrowly-tailored.

The regulations are enforced in a narrowly-tailored fashion. The evils targeted by the regulations are pedestrian overcrowding, tra—ffic flow, threats to public safety, and disorderliness at the Festival. Requiring distribution of literature from fixed locations and enforcing a peri meter around the Festival prevents these evils without restricting people from—mingling with the crowd or distributing literature from a fixed location. In fact, Plaintiff acknowledges the importance of a police presence, as he asks for a police presence as part of his outreach efforts in order to "keep peace between both side[s]." (Saieg dep., p. 34.) The Eastern District of Michigan has indicated that, while a complete prohibition on expressive activity that has the effect of removing a speaker from a forum may be enjoined, a regulation can be valid when it seeks to

restrict the location of leafleting, limit the time during which information can be distributed, restrict the size of the brochure s or the number of leafletters, or otherwise im pose limits on the activity that might address their asserted concerns.

Norfolk v. Cobo Hall, 543 F. Supp. 2d 701, 711 (E.D. Mich., 2008)

Here, the rules and regulations only seek to place materials distribution in a fixed location. Neither the Arab Chamber nor the City has told Plaintiff that he cannot bring 90 or m ore people to the Festival and spread throughout the crowd, that he cannot pass out whatever materials he wishes to distribute, nor have they restricted the time during which he can conduct his distribution, and therefore the

regulation here is much m ore narrowly tailored than what the Eastern District of Michigan has previously contemplated as being acceptable. The rules here are also completely distinguishable from the ordinance in Lovell v. City of Griffin, 303 U.S. 444 (1938), a case relied upon by Plaintiff, where an ordinance required anybody seeking to distribute literature anywhere within the city to first obtain a permit from the City Manager. Lovell, at 447, 451. Here Plaintiff was not required to obtain perm ission to canvass door-to-door <sup>3</sup> or engage in any kind of speech activity throughout the City, and he was not required to gain perm ission to walk freely about the crowd at the Festival. He only was asked to abide by a universal rule of the Arab Ch amber to confine his distribution activities to a fixed location within the Festival grounds. Because this rule is reasonably calculated to cure the evils it targeted, it is narrowly-tailored. Plaintiff's Motion for Summary Judgment and Request for Injunctive Relief should be denied, Defendants' Motion for Summary Judgment should be grante d, and Judge Borm an's Opinion and Order granting Defendants summary judgment should be affirmed.

4. Plaintiff enjoys ample alternative channels of communication and is reaching his intended audience.

Finally, Plaintiff has am ple alternative channels of comm unication. Even though Plaintiff was late in seeking space at the 2009 Festival, the Arab Cham ber

<sup>&</sup>lt;sup>3</sup> Accordingly, Plaintiff's reference to *Martin v. City of Struthers*, 319 U.S. 141 (1943), striking down a prohibition on door-to-door solicitation, also fails to provide support for Plaintiff's position.

found a place for him to set up a booth, *at no charge*. (Mrowka dep., p. 25, 29.) From the booth, Plaintiff distributed materials and discussed his message with visitors. (RE No. 41-17.) Additionall y, Plaintiff and his colleagues spread throughout the crowd to talk with Festival attendees. (RE No. 41-17.) Members of Plaintiff's group also held a weekend-long training program at locations including a City of Dearborn park, and they went door-to-door throughout Dearborn's residential neighborhoods. (Saieg dep., p. 52, 68, 109.)

Plaintiff cites *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9<sup>th</sup> Cir., 1990), as proposed controlling authority on the point of alternative channels, but the case is a non-binding decision out of the Ninth Circuit, and is not on point. *Bay Area Peace Navy* involved a non-profit organization that annually staged a peace-oriented flotilla, targeted at a group of 3, 000 invited guests who viewed an annual Naval parade from a specific location at Aquatic Park Pier. When the Coast Guard imposed a 75-yard safety and security zone around the pier, the peace flotilla could not be observed by the targeted audience. *Bay Area Peace Navy*, at 1226. The audience on the pier also could not be reached by alternative means because all other access to the visitors and the pier was blocked. *Id.*, at 1228. In fact, the Ninth Circuit distinguished the case from *Heffron*, stating that

In *Heffron*, requiring [ISKCON] to deliver its m essage to state fair patrons from a booth did not prevent it from reaching its audience. . . In contrast, the 75-yard security zone on the water side and the large crowd of the general public on the land side has clearly been shown to

insulate the 3,000 or m ore Fleet Week official invitees on the pier from receiving the messag e of the Peace Navy and other demonstrators.

Bay Area Peace Navy, at 1229-1230.

Thus, in *Bay Area Peace Navy*, the alternative channels were inadeq uate because *there were no alternative channels*.

In contrast, in the instant case, as recognized by Judge Borman, Plaintiff's audience is not "insulated." Plaintiff does not deny that he is reaching his intended audience. He simply argues that conducting his activities from a booth is not his preferred means of communication. (Saieg dep., p. 75.) While he also argues that the location of his booth in 2009 (near children's rides) was not ideal, he adm its that the presence of children would not actually deter him from approaching adults who are with children. (Saieg dep., p. 29.) Plaintiff adm its that the City did not prohibit him from distributing literature, tracts, DVDs, or any other m aterials during the Festival. (Saieg de p., p. 89, 90, 109.) Plaintiff likewise has not been prohibited from mingling with the crowd, and extending his outreach into Dearborn's residential neighborhoods and a city park. While Plaintiff attempts to portray a "First Amendment-free zone," Plaintiff has been freely exercising his First Amendment rights throughout Dearborn, and only has had to accept m inimal regulation of his activities – like every other speaker – where his activities have merged with those of many other speakers, vendors, and a group of nearly 300,000

period. The law clearly instructs that Pl aintiff is not entitled to his "best" time, place, and manner of expressing himself. *Phelps-Roper, supra,* at 372. Nevertheless, for 2010, Plaintiff was offered an even more advantageous central location within the Festival grounds, at a booth that included electricity, at no cost. (MSJ Tr., p. 3, 32.) Plaintiff has ample alternative means of communication.

Because the regulations at issue are valid time, place, and manner restrictions, Judge Borman's Opinion and Order granting Defendants summary judgment should be upheld.

#### C. The Festival rules and regulations are constitutional, as applied.

Plaintiff argues that, even if the Festival rules and regulations are de emed facially constitutional, they should be deemed unconstitutional as applied, but the evidence demonstrates that the regulations have been enforced in a consistent manner, and apply to all groups seeking access to the Festival. An as-applied challenge could prevail, for instance, if the regulation burdens more speech than necessary to achieve the purpose of the regulation. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 771 (1994). However, as has already been established above, unlike in *Madsen*, there is no "buffer" to free speech at the Festival, as speakers are still welcome to mingle with the crowd at all locations, including the "outer perimeter." Additionally, the requirement of distributing literature from a

booth is narrowly tailored to acco mplish the goals of reducing pedestrian overcrowding, controlling traffic flow, and providing for order and public safety at the Festival.

To the ex tent that Plaintiff's as-app lied challenge implicates a charge of "selective enforcement," Judge Borman also correctly ruled that the evidence did not support a clai m of "sel ective enforcement." The facts have already clearly established, as Judge Bor man noted, that the businesses with tables outside their storefronts were effectively their own themed area of the Festival, and any Warren Avenue storefront was qualified for a table whether it was commercial, nonprofit, or religious. Additionally, Plaintiff provides no specific facts to demonstrate that Chief Haddad or any other City official authorized a selective enforcement policy, because there was no such policy. As demonstrated above, all Festival participants - including other C hristian groups, Arab groups, non-profit organizations, and corporate entities – were required to obtain a booth to conduct their activities within the Festival. Though Plaintiff alleges that the police allowed others to distribute literature on the sidewalks, <sup>4</sup> as Judge Bor man noted, "these four instances, even if true, do not amount to 'a pattern of enforcement activity evincing a governmental . . . custom of intentional discrimination on the basis of viewpoint

<sup>-</sup>

<sup>&</sup>lt;sup>4</sup> Though Plaintiff asserte d in an affi davit that the police allowed sidewalk distribution to occur, he did not conclusively state that he saw police allowing it to occur. However, as Judge Borman noted, even if everything Plaintiff states is true, it still does not amount to a policy of selective enforcement.

or content." (Op., p. 42, citing *Brown v. City of Pittsburgh*, 586 F.3d 263, 294 (3<sup>rd</sup> Cir., 2009).)

Ultimately, because the Festival regulations regarding hand billing constitute clear standards, they do not burden more speech—than necessary to achieve their stated goals, and all speakers who wish to participate in the Festival are bound by the regulations, Plaintiff's as-a pplied challenge necessarily fails. There has been no selective enforcement and, accordingly, no unconstitutional application of the regulations—against Plaintiff. Judge Borman's Opinion and Order granting Defendants summary judgment should be upheld.

### III. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF'S FREEDOM TO ASSOCIATE HAS NOT BEEN RESTRICTED.

Count II of Plaintiff's Com plaint alleges infringem ent of his First Amendment right to freedom of association, as applied to the states through the Fourteenth Amendment. Freedom of association rights can be summarized as falling into one of two categories: 1) the State is not to intrude in an individual's decision to "enter into and m aintain certain intimate human relationships," and 2) an individual has a right to "associate for the purpose of engaging in" activities protected by the First Amendment. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-618 (1984). An infringem ent of freedom of association m ay occur, for example, when the government "imposes penalties or withhold[s] benefits from individuals because of their memb ership in a disfavored group," requires disclosure of the

members of an anonym ous group, or requires that the group accept mem bers it does not desire. *Roberts*, at 622-623. Where freedom of association is implicated, the government action must serve a compelling state interest. *Roberts*, at 623-624.

The regulations and enforcement activities at issue in this case do not implicate Plaintiff's right to freely associate. Nobody from the Arab Chamber or the City prevented Plaintiff from being a memb er of the Arabic Christian Perspective organization or any other missionary organization, nor w as Plaintiff told that he could not bring his group of approximately 90 people to conduct a training program, go door-to-door throughout the City of Dearborn, or establish a booth and mingle with Festival attendees. Likewise, Plaintiff was not prohibite d from seeking out additional like-m inded people through these means, nor was Plaintiff required to associate with anybody who did not em brace his message. Plaintiff's brief is devoid of specific facts supporting his freedom of association claim, and no evidence exists in the record to support this claim. Likewise, when moving beyond the general legal principles highlighted in Plaintiff's brief, and evaluating Plaintiff's claim in light of the full set of standards set forth in *Roberts*, it is clear that his claim is not supported. Because there has been no governm ent violation of Plaintiff's freedom to associate, Judge Borm an correctly dismissed Count II of Plaintiff's Complaint, finding that "here, the government is not forcing Plaintiff to do anything." (Op., p. 38.)

## IV. THE DISTRICT COURT PROPERLY DETERMINED THAT PLAINTIFF HAS NOT SUFFERED A VIOLATION OF HIS RIGHTS UNDER THE FIRST AMENDMENT FREE EXERCISE CLAUSE.

Judge Borman ruled that Plaintiff's free exercise claim was abandoned for failure to set forth specific facts dem onstrating a material issue of fact in response to Defendants' Motion for Summary Judgm ent. (Op., p. 38, citing *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 405 (6 <sup>th</sup> Cir., 1992).) Accordingly, Plaintiff's free exercise count should continue to be deemed abandoned, and Judge Borman's Opinion and Order should be upheld.

Alternatively, assuming for purposes of this brief that the free exercise claim is not abandoned, it was properly dism issed on the merits. (Op., p. 38.) Where a law is "neutral and of general applicability," the law does not need to be justified by a compelling governmental interest even if it has an incidental effect on the exercise of a religious practice. *Church of the Lukumi Babalu Aye, Inc. v. City of Hiaeleah,* 508 U.S. 520, 531 (1993). An individual's religious beliefs do not excuse him from his obligation to comply with a valid law prohibiting conduct that the state is free to regulate. *Employment Division v. Smith,* 494 U.S. 872, 878-879 (1990). A law will not be considered neutral if the "object of the law, whether overt or hidden," is to interfere with religious practice. *Mount Elliott Cemetery Association v. City of Troy,* 171 F.3d 398, 405 (6<sup>th</sup> Cir. 1999). The courts generally do not strike down a law solely on free exercise grounds, but rather must find a

violation of a hybrid right – e.g., free exercise plus free speech. *Smith*, at 881. Laws deemed to be neutral and of general applicability include a zoning ordinance enforced against a Catholic cemetery (*Mount Elliott Cemetery Assoc.*, at 405), and denial of tax exemptions to members of the Amish religion who did not believe in participating in governmental support programs (*U.S. v. Lee*, 455 U.S. 252, 258-261 (1982)).

The regulation involved in this case is a content-neutral law of general applicability that does not infringe on Plaintiff's free exercise or a hybrid right. As demonstrated, *supra*, the regulations at issue were enacted prior to, and without reference to, Plaintiff's speech or religion, thus making them content-neutral and generally applicable. More over, the regulations have been applied uniform—ly to Christian groups, Arabic groups, and non-religious groups. A dditionally, as noted by Judge Borman, there is no evidence that the City prohibited activity required by Plaintiff's religion, required activity prohibited by Plaintiff's religion, or otherwise burdened—Plaintiff's religious observations. (Op., p. 38-39.) Significantly, Plaintiff has not suffered a violation of his rights to free speech or free association, thus negating the key com—ponent of his asserted hybrid right. Judge Borman's Opinion and Order granting Defendants summary judgment should be upheld.

V. THE DISTRICT COURT CORRECTLY HELD THAT THE FESTIVAL RULES AND REGULATIONS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

As recognized by Judge Borman, Plaintiff's equal protection claim must fail inasmuch as the r egulations are content-neutral and no action has been taken by Defendants to favor one form of speech over another. (Op., p. 31 n. 15.) Plaintiff cites Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972); however, that case involved a very different scenario where a city ordinance prohibited all picketing at schools during designated tim es of the day, except "peaceful picketing of any school involved in a labor dispute." *Mosley*, at 92. The mpliance with the Equal Protection ordinance was subject to evaluation for co treated o ne class of picketers differently from Clause because it specifically another. Mosley, at 94-95. Rather than being a time, place, manner restriction, the Chicago ordinance was a subject matter restriction. *Mosley*, at 99. The ordinance was deemed unconstitutional since it imposed a "selective restriction on expressive conduct" that exceeded what was necessary to advance a significant government interest. Mosley, at 101.

The regulation at issue in the instant case is not comparable to *Mosley*, as it does not discrim inate between different types of handbilling, is not based on subject matter, and is applie d in a consistent man ner that requires all speakers at the Festival to distribute literature from fixed locations. Because the regulation is

content-neutral and enforced in a content-neutral manner, it does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution. Judge Borman correctly dismissed Plaintiff's Equal Protection claim, and h is Opinion and Order should be affirmed.

### VI. THE DISTRICT COURT PROPERLY RULED THAT DEFENDANT DEARBORN IS NOT LIABLE UNDER 42 U.S.C. §1983.

Plaintiff asserts municipal liability under 42 U.S.C. §1983 for all causes of action. A municipality can be held liable under §1983 only if "the municipality itself causes the [alleged] constitutional violation at issue." City of Canton v. Harris, 489 U.S. 378, 385 (1989), citing Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). The plaintiff m ust demonstrate that the municipality, through its deliberate conduct, "was the 'm oving force' behind the injury alleged" – i.e., there must be a "direct caus all link between the municipal action and the [al leged] deprivation of federal rights." Board of County Commissioners v. Brown, 520 U.S. 397, 404 (1997). Specifically, the plaintiff must show a custom or policy of the legislative body or officials acting on behalf of the municipality that results in the alleged constitutional deprivation. *Brown*, at 403-404. A m unicipality cannot be held liable merely because it em plovs an alleged tortfeasor. Brown, at 403.

In the instant case, Plaintiff fails to assert a viable clai m for municipal liability because his constitutional rights have not been deprived and there is no

municipal custom or policy at issue. As clearly explained above, the regulation a t issue was promulgated by the Arab Cham ber. Neither the City Council, the Dearborn Police Department, Chief Had dad, Sgt. Mrowka, or any other individual or body affiliated with the City of Dearborn designed or endorsed the Festival rules or regulations. To the extent the City enforced the regulations, it did so only to pursue the City's legitimate interests in crowd control and public safety.

Far from denying Plaintiff's First Amendment rights, Defendants *supported* Plaintiff's effort to bring his message to the Arab Festiv al. Despite the fact that Plaintiff was late in applying for a booth, Sgt. Mrowka worked with Plaintiff to find a place to set up a table within the Festival. Plaintiff was also allowed to participate in the Festival without paying the application fee. Additionally, the Dearborn Police Department assisted Plaintiff's group throughout the Festival, including fielding concerns that were brought by A CP-affiliated individuals to the officers stationed at the police command post. (Mrowka dep., p. 31.) For the 2010 Festival, the City again offered Plaintiff a prime location within the Artesian Ten t, for no fee. (RE No. 56.)

To the extent that Plaintiff's municipal liability claim implicates allegations of selective enforcement, these likewise fail for the reasons stated in the discussion regarding Plaintiff's as-applied challenge, discussed in Section II-C, *supra*.

Because there was no constitutional violation and no selective enforcement, Plaintiff cannot demonstrate that the City was a "moving force" behind any form of constitutional violation. Defendant Dearborn is not lia ble under 42 U.S.C. §1983, and summary judgment was properly granted in its favor.

### VII. THE DISTRICT COURT PR OPERLY EXERCISED ITS DISCRETION IN DENYING PLAINTIFF INJUNCTIVE RELIEF.

Judge Borman did not abuse his discretion in denying Plaintiff's request for injunctive relief. First and foremost, inasmuch as Plaintiff did not and cannot state a constitutional violation, he has not succeeded on the merits, and his request for injunctive relief necessarily fails. For the reasons stated above, *Heffron* and *Spingola* control the instant case, and Judge Borm an did not com mit error in making his legal conclusions. Additi onally, Plaintiff cannot demonstrate a continuing injury, as the facts have clearly demonstrate that he has been invited to participate in the Festival at a booth like every other individual that seeks to distribute materials at the Festival, and he has am ple alternative channels of communication, including the opportunity to walk around the Festival to interact with Festival attendees.

If an injunction were to be issued, the public interest would be significantly harmed. If Plaintiff was allowed to distribute materials anywhere in the inner or outer perimeter, then it will be necessary to afford all other speakers the same opportunity. This would extend the Festival boundaries, and the City would not be

allowed to maintain a barrier between the Festival and open streets. Moreover, due to the increased congestion, public safety would be at risk. Significantly, allowing speakers carte blanche to dictate the means of their activity would im peril established case law stating that speakers are not entitled to their best means of communication and that governments can establish content-neutral time, place, and manner regulations of speech. Because Plaintiff cannot satisfy any of the elements for an injunction, his request for injunctive relief was properly denied, and summary judgment was properly granted to Defendants. Judge Borman's Opinion and Order should be affirmed.

Case: 10-1746 Document: 006110726290 Filed: 09/07/2010 Page: 63

#### **CONCLUSION & REQUEST FOR RELIEF**

For these reasons, Defendants City of Dearborn and Ronald Haddad respectfully request that this Honorable Court affirm—the District Court's Order dated June 7, 2010 denying Plaintiffs' Motion for Summary Judgment and granting Defendant's Motion for Sum mary Judgment, and dism—iss Plaintiff's appeal, together with costs, attorney fees, and any other relief deemed appropriate.

Respectfully submitted,

\_\_\_\_s/

Attorney 13615 Dearborn, (313) E-m LAURIE M. ELLERBRAKE
LAURIE M. ELLERBRAKE (P38329)
for Defendants-Appellees
Michigan Ave., Ste. 8
MI 48126
943-2035

ail: lellerbrake@ci.dearborn.mi.us

DATED: September 7, 2010

Case: 10-1746 Document: 006110726290 Filed: 09/07/2010 Page: 64

# CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

- 1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:
  - \_X\_ This brief contains 11,622 words and contains 1,123 lines of text excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word's 2003 word processing word count program.
- 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
  - \_X\_ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman type.

Respectfully submitted,

/s/ Laurie M. Ellerbrake
LAURIE M. ELLERBRAKE (P38329)
Attorney for Defendant-Appellant
13615 Michigan Ave.
Dearborn, MI 48126
(313) 943-2035

Date: September 7, 2010

Case: 10-1746 Document: 006110726290 Filed: 09/07/2010 Page: 65

### **CERTIFICATE OF SERVICE**

I hereby certify that on September 7, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

ROBERT J. MUISE (P62849) RICHARD THOMPSON (P21410) Attorneys for Plaintiffs 24 Frank Lloyd Wright Drive P.O. Box 393 Ann Arbor, MI 48106

> /s/Cynthia Metz 13615 Michigan Ave., Ste. 8 Dearborn, MI 48126 (313) 943-2035