No. 19-3290, 19-3310

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CORY SESSLER, an individual,

Plaintiff-Appellant/Cross-Appellee,

v.

CITY OF DAVENPORT, IOWA; GREG BEHNING, in his individual capacity acting as a police officer for the CITY OF DAVENPORT, IOWA; JASON SMITH, in his individual capacity acting as a police officer for the CITY OF DAVENPORT, IOWA; and J. A. ALCALA, in his individual capacity acting as a police officer for the CITY OF DAVENPORT, IOWA,

Defendants-Appellees/Cross-Appellants.

On appeal from the United States District Court
For the Southern District of Iowa
Order of U.S. District Judge Rebecca Goodgame Ebinger
Case No. 3:19-cv-00011-RGE-HCA

INITIAL BRIEF OF APPELLANT CORY SESSLER

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SUMMARY OF THE CASE

Plaintiff-Appellant, Cory Sessler, filed a Verified Complaint (Aplt. App. 9-29) against Defendants-Appellees, the City of Davenport, Iowa, and three of its police officers, alleging violations of his First Amendment rights to the freedom of speech and the free exercise of religion. Specifically, on July 28, 2018, Defendants-Appellees enforced the City's Special Events Policy by removing Sessler from a street festival that was open to the public and was located on public streets and sidewalks, while Sessler was attempting to exercise his First Amendment rights. On January 31, 2019, Sessler filed a Motion for Preliminary Injunction, which the District Court denied on September 24, 2019. This appeal is from that Order. The District Court erroneously found that Sessler failed to show (1) a likelihood of success on the merits of his claims, (2) that he had suffered irreparable harm, (3) that the balance of harms weighed in his favor, and (3) that a preliminary injunction was in the public interest. In so finding, the District Court rested its conclusions on erroneous legal conclusions and clearly-erroneous factual findings.

Sessler requests oral argument in this case. This appeal involves fundamental constitutional rights, the application of which may create important precedent in this Circuit. Oral argument will assist this Court in considering and addressing the arguments set forth by the parties. Sessler believes that 20 minutes per side would be sufficient to present oral argument.

APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. The names of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action, including subsidiaries, conglomerates, affiliates, parent corporation, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in this case:

- American Liberties Institute – Trial Counsel for Plaintiff-Appellant/Cross-Appellee
- Janssen Law, PLC – Local Counsel for Plaintiff-Appellant/Cross-Appellee
- The Law Offices of David J. Markese, P.A. – Appellate Counsel for Plaintiff-Appellant/Cross-Appellee
- Frederick H. Nelson, Esq. – Trial Counsel for Plaintiff-Appellant/Cross-Appellee
- David J. Markese, Esq. – Trial Counsel for Plaintiff-Appellant/Cross-Appellee
- Jeffrey M. Janssen, Esq. – Trial Counsel for Plaintiff-Appellant/Cross-Appellee

- Lane & Waterman LLP – Trial Counsel for Defendant-Appellees/Cross-Appellants
- Jason J. O'Rourke, Esq. – Trial Counsel for Defendant-Appellees/Cross-Appellants
- Alex C. Barnett, Esq. – Trial Counsel for Defendant-Appellees/Cross-Appellants
- Ebinger, The Honorable Rebecca Goodgame – U.S. District Judge
- Adams, The Honorable Helen C. – Chief U.S. Magistrate Judge
- Cory Sessler – Plaintiff-Appellant/Cross-Appellee
- City of Davenport, Iowa – Defendant-Appellee/Cross-Appellant
- Greg Behning – Defendant-Appellee/Cross-Appellant
- Jason Smith – Defendant-Appellee/Cross-Appellant
- J.A. Alcala – Defendant-Appellee/Cross-Appellant

2. The name of every other entity whose publicly-traded stock, equity or debt may be substantially affected by the outcome of the proceedings.

- None.

3. The name of every other entity which is likely to be an active participant in the proceedings, including the debtor and members of the creditors' committee (or twenty largest unsecured creditors) in bankruptcy cases:

- None.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTION

JURISDICTIONAL STATEMENT

Basis for the District Court's Jurisdiction

The District Court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1343(a)(3) and 1343(a)(4), which provide for original jurisdiction in the United States District Court over all suits brought pursuant to 42 U.S.C. § 1983. Jurisdiction was also conferred on the District Court by 28 U.S.C. § 1331 because the causes of action arise under the Constitution and laws of the United States.

Basis for this Court's Jurisdiction

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1). The Order appealed from is an interlocutory order of the United States District Court refusing an injunction.

Timeliness of the Appeal

The Order appealed from was entered on September 24, 2019. Pursuant to Fed. R. App. P. 4(a)(1)(A), Appellant's Notice of Appeal was due within 30 days, or no later than October 24, 2019. Appellant's Notice of Appeal was filed on October 22, 2019. Thus, this appeal is timely.

Assertion of this Court's Jurisdiction

This appeal is from an interlocutory Order of the United States District Court refusing an injunction. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issue presented for review in this appeal is whether the District Court rested its conclusions on erroneous legal conclusions and clearly erroneous factual findings in denying Appellant Sessler's Motion for Preliminary Injunction. (*See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981)). Specifically at issue is whether the District Court erred by finding that Sessler failed to show a likelihood of success on the merits of his First Amendment claims. (*See* U.S. Const. Am. I; *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985)). This issue requires this Court to resolve whether the Appellee City's and Officers' restrictions on Sessler's speech (1) were content-neutral (*see Peterson v. City of Florence, Minn.*, 727 F.3d 839 (8th Cir. 2013); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Boos v. Barry*, 485 U.S. 312 (1988)), (2) served a compelling government interest (*see Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996); *Texas v. Johnson*, 491 U.S. 397 (1989); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)), and (3) were narrowly tailored to serve such interest (*see Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094 (8th Cir. 2013); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014)).

If this Court holds that the City's and the Officers' restrictions on Sessler's speech were content neutral, it must resolve whether such restrictions (4) served a significant government interest (*see Tinker*, 393 U.S. 503), (5) were narrowly

tailored to serve such interest (*see Minneapolis Park & Recreation Bd.*, 729 F.3d 1094; *McCullen*, 134 S. Ct. 2518), and (6) left open ample alternative channels of communication (*see City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Schneider v. State of New Jersey*, 308 U.S. 147 (1939); *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984)).

Further at issue is whether the District Court rested its conclusions on erroneous legal conclusions and clearly erroneous factual findings in finding that Sessler failed to show (7) irreparable harm (*see Elrod v. Burns*, 427 U.S. 347 (1976); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *New York Times Co. v. United States*, 403 U.S. 713 (1971)), (8) that the balance of harms weighed in his favor, and (9) that a preliminary injunction would serve the public interest (*see Elrod*, 427 U.S. 347; *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008)).

STATEMENT OF THE CASE

Plaintiff-Appellant, Cory Sessler ("Sessler"), filed a Verified Complaint (Aplt. App. 9-29) against Defendants-Appellees, the City of Davenport, Iowa (the "City"), and three of its police officers, in their individual capacities and acting as police officers for the City: Greg Behning ("Behning"), Jason Smith ("Smith"), and J. A. Alcala ("Alcala") (collectively the "Officers"). Sessler alleged violations of his First Amendment rights to the Freedom of Speech and the Free Exercise of Religion.

Sessler is an individual acting to spread awareness of his views regarding religious, political, and social topics. (Aplt. App. at 12, 46). Among Sessler's purposes is the belief in a mandate to exercise his rights to freedom of speech and to further his religious, political, and social beliefs. (Aplt. App. at 12, 46). The City adopted the Special Events Policy (the "Policy"), which states in part: "It is the purpose of this policy to regulate special outdoor events conducted in the City of Davenport so that such events can be held with the safety and health of participants in mind, the protection of public property considered, and the impact of the event on non-participating citizens minimized." (Aplt. App. at 12, 46). The Downtown Development Partnership ("DDP") submitted an application to hold the Street Fest festival (the "Festival") from June 27-29, 2018 in downtown Davenport, which the City approved. (Aplt. App. at 46).

On July 28, 2018, the Festival was located on the City's sidewalks and streets,

and did not require the general public to purchase tickets to enter the Festival area. (Aplt. App. at 14, 47). Sessler and his associates attended the Festival for the purpose of preaching. (Aplt. App. at 47). During his time at the Festival, Sessler peacefully shared his religious, political, and social message on the City's sidewalks and streets in the Festival area. (Aplt. App. at 14). Sessler's wife video recorded most, if not all, of Sessler's preaching activities at the Festival, and such video footage accurately depicts, to the extent captured therein: (1) Sessler's and his associates' preaching activities, and (2) any and all interactions Sessler and/or his associates had with law enforcement. (Aplt. App. at 47-48).

Sessler and his associates initially attempted to preach at the corner of Second Street and Main Street inside the Festival area. (Aplt. App. at 48). This location was assigned by DDP to a juggling and magic vendor. (Aplt. App. at 48). Behning, Smith, and Alcala approached Sessler and his associates and told them to move to another location. (Aplt. App. at 48). Smith stated that the Festival area was "private ground," and that it was "under rent." (Aplt. App. at 15). When Sessler stated that he had the right to free speech in the Festival area, Behning stated "there's some debate over that." (Aplt. App. at 15). Behning, referring to DDP's use of the public property, stated "they have control over it, they're responsible for it." (Aplt. App. at 15). Smith stated "the organizer of the event is willing to give you some area back here," indicating an area away from the public sidewalk where Sessler was standing.

(Aplt. App. at 15). Smith stated "the event has leased this property from the City to use this . . . so therefore they have the right to trespass and not trespass and allow who they want to be in here." (Aplt. App. at 15). When Sessler asked what would happen if he refused to leave, Smith stated "I would ask you to leave, but at some point you'd be trespassing . . . this is a private event." (Aplt. App. at 15). Behning stated "the law says . . . the event coordinator has control of this area." (Aplt. App. at 15). In order to avoid arrest, Sessler and his group moved from the sidewalk area. (Aplt. App. at 15).

Sessler and his group moved to an area near the Festival's entrance on Brady Street and Second Street. (Aplt. App. at 49). After preaching at this location for a short time, Behning told Sessler he had to leave the Festival area. (Aplt. App. at 16, 49). The reasons Behning gave for Sessler's removal were that Festival attendees and vendors had "taken offense" to Sessler's speech, and that his speech had "created some conflict" and had resulted in some "aggravated people." (Aplt. App. at 16). Behning told Sessler that the Festival organizer did not want him in the Festival area because he did not "want that kind of an atmosphere." (Aplt. App. at 16). Behning told Sessler that the Festival organizer was asking him to "leave their grounds" and did not want him "on their grounds." (Aplt. App. at 16). Behning justified Sessler's removal by stating that the Festival area was "not public." (Aplt. App. at 16). Behning stated: "because the organizer here has got a permit, he's got it leased, he's

responsible for it, he controls it." (Aplt. App. at 16). Behning told Sessler that if he did not leave the Festival area, he would be subject to arrest. (Aplt. App. at 49, 63).

On August 15, 2018, Sessler contacted the office of the City Attorney to discuss the conduct of Behning, Smith, and Alcala on July 28, 2018 at the Festival. (Aplt. App. at 17). The office of the City Attorney responded that it had reviewed the incident, and that Behning's, Smith's, and Alcala's actions were lawful. (Aplt. App. at 17). The City Attorney's office told Sessler that when the City rents out a City street to an event, the street becomes private property, even if the event is not ticketed. (Aplt. App. at 17). The City Attorney's office told Sessler that the City stood by the conduct of its officers, Behning, Smith, and Alcala. (Aplt. App. at 17).

Sessler filed a Motion for Preliminary Injunction, asking the District Court to enjoin the City and the Officers "from enforcing the Policy against hi[m] to ban, censor, prohibit, or prevent him from exercising his constitutionally-protected rights within the public spaces of the City, or from citing or arresting him for doing so . . . ." (Aplt. App. at 31-32). On September 24, 2019, the District Court denied the motion, finding that Sessler had not satisfied any of the preliminary injunction factors set forth in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981). (Aplt. App. at 99-118). On October 22, 2019, Sessler timely filed his Notice of Appeal. (Aplt. App. at 119-121).

SUMMARY OF THE ARGUMENT

In denying Sessler's Motion for Preliminary Injunction, the District Court rested its conclusions on erroneous legal conclusions and clearly erroneous factual findings. Specifically, the District Court erred in finding that Sessler failed to show a likelihood of success on the merits of his constitutional claims. The District Court erred in finding that the City's and the Officers' removal of Sessler from the Festival likely was content-neutral. The complaints received by the Officers, and the only reasons given by Officer Behning for removing Sessler, were based on the content of Sessler's speech.

Because the restrictions on Sessler's speech were content-specific, they must satisfy strict scrutiny. They do not. Removing Sessler from the Festival because of complaints related to the content of his message did not serve a compelling government interest.

Even if this Court holds that the City's and the Officers' removal of Sessler from the Festival was not based on the content of his speech, it was not a reasonable time, place, and manner restriction. Removing Sessler from the Festival did not serve a significant government interest. The interests found by the District Court, preventing congestion and disruption, are not supported by the record. Sessler did not cause congestion or disruption (other than offense taken at the content of his message), and such reasons were never given for his removal. Further, Sessler's

removal was underinclusive, because others that were causing congestion and disruption were not removed.

Removing Sessler from the Festival was not narrowly-tailored to serve any government interest. Moving him across the street from the Festival burdened more speech than necessary. If the issue was congestion, the Officers could have moved Sessler to a location where he would not be causing congestion, or directed him not to cause congestion. If the issue was volume, the Officers could have directed Sessler to turn down the volume of his amplifier; they did not, and in fact, never mentioned volume. Moving Sessler to the other side of the street served no interest other than protecting Festival-goers from the content of his message, which is not a significant government interest. Finally, the location across the street was not an ample alternative channel of communication because it effectively removed Sessler, unnecessarily, from his target audience.

The District Court rested its conclusions on clearly erroneous factual findings. The District Court erroneously found that "[t]he record demonstrates Sessler disrupted Street Fest by speaking loudly into his microphone and engaging in heated verbal exchanges with festival-goers." In fact, none of this alleged conduct caused disruption of the Festival. The District Court's findings that Behning's bodycam video demonstrates that Sessler disturbed vendors and performers and interfered with Festival-goers at his first location is clearly erroneous, as the bodycam video

was not taken until after Sessler was at his third location. The District Court's findings that vendors reported that they could not sell their goods or perform because of Sessler, and that Sessler was ultimately moved to a location adjacent to the Festival, are clearly refuted by the record.

Sessler suffered irreparable harm as the result of the City and the Officers removing him from the Festival. The loss of First Amendment freedoms for any length of time constitutes irreparable injury. The balance of harms weighs in favor of Sessler since, unlike the irreparable harm suffered by Sessler, the grant of a preliminary injunction will cause the City and the Officers no harm. Finally, the upholding of constitutional rights is always in the public interest.

For these reasons, the District Court rested its denial of Sessler's Motion for Preliminary Injunction on erroneous legal conclusions and clearly erroneous factual findings, and this Court should reverse.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews "'the denial of a preliminary injunction for an abuse of discretion, which occurs when "the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions."'" *S.J.W. v. Lee's Summit R-7 School District*, 696 F.3d 771, 776 (8th Cir. 2012) (quoting *Phelps–Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011) (quoting *Planned Parenthood v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (en banc))). This Court reviews "'the district court's legal conclusions de novo.'" *Id.* (quoting *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1000 (8th Cir. 2012)). "This court reviews First Amendment claims de novo and 'make[s] a fresh examination of crucial facts.'" *Willson v. City of Bel-Nor*, 924 F.3d 995, 999 (8th Cir. 2019) (quoting *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1098, 1101–02 (8th Cir. 2013)). In this case, the District Court rested its denial of Sessler's Motion for Preliminary Injunction on erroneous legal conclusions and clearly erroneous factual findings.

II. THE DISTRICT COURT MADE ERRONEOUS LEGAL CONCLUSIONS IN FINDING THAT SESSLER FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CLAIMS

In determining entitlement to a preliminary injunction, courts apply a four-part analysis:

> (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

S.J.W., 696 F.3d at 776 (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)). The District Court found that Sessler failed to show a likelihood of success on the merits. (Aplt. App. at 116). The District Court applied the three-pronged analysis set forth by the Supreme Court for evaluating free speech cases, which requires a court to: (1) determine if the speech in question is protected under the First Amendment; (2) identify the nature of the forum in which the speech would take place; and (3) assess whether the government's exclusion of the speech from the forum is justified by the requisite standard. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 797 (1985). (Aplt. App. at 108).

The District Court found that Sessler satisfied the first two prongs, but failed the third prong because the challenged restriction was content-neutral, narrowly-tailored to serve a significant government interest, and left open ample alternative channels of communication. (Aplt. App. at 111-116). In short, the District Court found that the City's and the Officers' exclusion of Sessler from the Festival was a reasonable time, place, and manner restriction. For the reasons that follow, the District Court's findings as to the third prong of the *Cornelius* test constitute erroneous legal conclusions.

A. The Removal of Sessler from the Festival Area was not Content-Neutral

In order for a time, place, and manner restriction on expressive activity in a traditional public forum to pass constitutional muster, the restriction must: (1) be content-neutral; (2) serve a significant governmental interest; (3) be narrowly tailored to serve that interest; and (4) leave open ample alternative channels of communication. *See United States v. Grace*, 461 U.S. 171, 177 (1983). The District Court found that the City's and the Officers' removal of Sessler from the Festival area likely was content-neutral because "[t]he record reveals defendant officers asked Sessler to move not because they disagreed with his religious message, but because they received complaints from festival organizers that Sessler was interfering with the experience of festival-goers." (Aplt. App. at 113). However, the question of content-neutrality does not turn on whether the officers disagreed with the message. "A content-based regulation restricts speech **because of** its expressive content." *Peterson v. City of Florence, Minn.*, 727 F.3d 839, 842 (8th Cir. 2013) (emphasis added). Conversely, "[a] content-neutral regulation is 'justified without reference to the content of the regulated speech.'" *Id.* (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, (1986)).

The point missed by the District Court is that, while the officers themselves may or may not have disagreed with Sessler's message (there is no evidence in the record one way or the other), Sessler was, in fact, removed from the Festival area

because of the content of his speech. While the District Court described Sessler's removal as being prompted by complaints that he was "interfering with the experience of festival-goers," what the Court left out was that those complaints were based upon **the content of Sessler's message.** This is made clear by the very explanation given by Behning at the time he removed Sessler: there were complaints from Festival attendees and vendors who had "taken offense" to Sessler's speech; his speech had "created some conflict," and had resulted in some "aggravated people"; and the Festival organizer did not want Plaintiff in the Festival area "because he doesn't want that kind of an atmosphere." (Aplt. App. at 16).[1] Further, Behning's bodycam video captured a conversation between Behning and a vendor who complained that Sessler was telling people they were going to hell.[2] (Aplt. App.

[1] While the City and the Officers refused to stipulate to these statements being made by Behning, they admit that they were "uttered," and contend only that all statements on video "must be viewed and analyzed within the full context of each interaction." (Aplt. App. at 52, 54-55). A thorough viewing and analysis of the video, in context, uncovers no different meaning of Behning's statements than that attributed to them by Sessler herein: Sessler was being removed because people took issue with the content of his speech.

[2] The City and the Officers refused to stipulate to the following assertion by Sessler based on this exchange: "according to Behning, the DDP's decision to remove Plaintiff from the Street Fest festival was based, in part, on the complaint that Plaintiff was telling people that they were going to hell." (Aplt. App. at 59). However, the City's and the Officers' response, in refusing to stipulate, was "Behning testified that his decision to honor the DDP's request to remove Plaintiff from Street Fest was based, in part, on a complaint from a vendor that Plaintiff was telling her customers they were going to hell." (Aplt. App. at 59). This hyper-technical distinction in no way alters the First Amendment analysis.

98, Bodycam Footage at 1:04-1:08). That clearly is a direct reference to the content of Sessler's speech. In fact, a review of the entire conversation reveals that content was the vendor's only complaint against Sessler.

Notably, a thorough review of the evidence of record, including the videos, reveals that the thrust of the complaints against Sessler was the content of his message. No one complained about the volume, no one complained that Sessler was blocking or impeding traffic, no one complained that Sessler made any physical contact with anyone, no one complained that Sessler threatened anyone. Thus, Sessler allegedly "interfer[ed] with the experience of festival-goers" by the allegedly offensive content of his speech.

It is noteworthy that Behning himself told the Festival organizer, after fielding the vendors' complaints, that he was going to remove Sessler and his group, but that "the problem" was that they were simply going to go on the other side of the fence, where they would be beyond law enforcement's "control." (Aplt. App. at 98, Bodycam Footage at 1:47ff). If congestion were the real issue, which none of the vendors in the bodycam video mentioned, then placing Sessler and his group on the other side of the fence would not be a "problem." Clearly, the "problem" was that their message could still be heard. This again underscores the fact that the City and the Officers removed Sessler from the Festival area because of the content of his message.

It matters not that it was not the government's reaction to Sessler's speech that motivated the restriction. The Supreme Court has made clear that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 134 (1992) (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'CONNOR, J.), *id.* at 334 (opinion of BRENNAN, J.); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943)). In *Boos*, the government argued that "the statute is not content based because the government is not itself selecting between viewpoints . . . ." 485 U.S. at 319. The Court rejected that contention. *Id.* The Court described """content-neutral" speech restrictions as those that "are justified without reference to the content of the regulated speech."""" *Id.* at 320 (quoting *City of Renton*, 475 U.S. at 48 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))) (internal emphasis omitted). Like here, the government in *Boos* did "not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect" security. *Id.* at 321. Instead, the government relied "on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses only on the content of the speech and the direct impact that speech has on its listeners." *Id.* Accordingly, the Court concluded that the regulation was content-based. *Id.*

In *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 247 (6th Cir. 2015), the Court held:

> 'Listeners' reaction to speech is not a content-neutral basis for regulation,' *Forsyth Cty.* [505 U.S. at 134], or for taking an enforcement action against a peaceful speaker. *See Brown v. Louisiana*, 383 U.S. 131, 133 n.1, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) ('Participants in an orderly demonstration in a public place are not chargeable with the danger . . . that their critics might react with disorder or violence.'); *Glasson* [*v. City of Louisville*, 518 F.2d 899, 905 (6th Cir. 1975)].

Based on this holding, the Court found that "**Wayne County's actions were decidedly content-based.**" *Id.* (emphasis added). The Court pointed out that "[t]he sum of Wayne County's counter-argument to the charge that the Bible Believers' expulsion was motivated by the views they espoused is merely that the WCSO Operations Plan was content-neutral, and that the WCSO's only consideration was maintaining the public safety." *Id.* However, the Court held that

> This contention fails in the face of abundant evidence that the police have effectuated a heckler's veto. It is irrelevant whether the Operations Plan is content-neutral because the officers enforcing it are ordained with broad discretion to determine, based on listener reaction, that a particular expressive activity is creating a public danger. *Cf. Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 97, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) ('[B]ecause of their potential use as instruments for selectively suppressing some points of view, this Court has condemned licensing schemes that lodge broad discretion in a public official to permit speech-related activity.'); *see also Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep't*, 533 F.3d 780, 787 (9th Cir. 2008) ('If the statute, as read by the police officers on the scene, would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the "heckler's veto."' (citing *Bachellar v. Maryland*, 397

U.S. 564, 567, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970))).

Id.

In *Parks v. City of Columbus*, 395 F.3d 643, 646 (6th Cir. 2005), the plaintiff, who was distributing literature at a public festival, was removed from the festival because "the sponsor of the event did not want him there." In finding this restriction content based, the Court held:

> There is no evidence that the Arts Council had a blanket prohibition on the distribution of literature **or that others engaging in similar constitutionally protected activity were removed from the permitted area.** While the district court did not reach the question of whether the removal of Parks was based on the content of his speech, **under these circumstances we find it difficult to conceive that Parks's removal was based on something other than the content of his speech.** We therefore must determine whether the City's action regulating Parks's speech was 'necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'

Id. at 647 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)) (emphasis added).

Here, the Officers removed Sessler from the Festival because listeners took issue with the content of his speech. As in *Bible Believers*, the Officers enforced a heckler's veto. As in *Parks*, Sessler was removed because the Festival organizer did not want him there. Also as in *Parks*, and as discussed more fully below, no one else engaging in expressive activity was removed from the Festival, including individuals that actually were causing congestion and disturbing others. Thus, the restriction on Sessler's speech was content-based, and cannot be a reasonable time, place, and

manner restriction.

The District Court erred in finding that the restriction on Sessler's speech was content-neutral. The District Court found that, "[t]o the extent the festival-goers and vendors also took offense to Sessler's message, there is no evidence the defendant officers factored the content of Sessler's speech into their decision to remove him." (Aplt. App. at 113). However, the offense people took to Sessler's message **was based upon** its content. The evidence cited above indicates as much. This is underscored by the fact that, in removing Sessler from the Festival area, Behning mentioned no complaints about volume, threats, blocking ingress or egress, or any other content-neutral aspect of Sessler's preaching. In short, Sessler was removed from the Festival because of the content of his speech. The District Court erred in finding that the City's and the Officers' restriction on Sessler's speech was content-neutral.

B. The City's and the Officers' Content-Based Removal of Sessler from the Festival Area did not Satisfy Strict Scrutiny

Because the City's and the Officers' restriction on Sessler's speech was content-based, it is subject to strict scrutiny. "A content-based regulation must satisfy strict scrutiny, and is presumptively invalid." *Peterson*, 727 F.3d at 842 (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000), *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). "Content-based discrimination can be justified only if the government demonstrates that its regulation is narrowly drawn

and is necessary to effectuate a compelling state interest." *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988) (citing *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)). This Court noted that "[t]his is an extremely difficult standard for government to meet." *Id.*

1. The City and the Officers had No Compelling Interest in Removing Sessler from the Festival Area

The City and the Officers had no compelling interest in removing Sessler from the Festival area based on the content of his speech. This Court has held that "there is no constitutional right to be free from insult, and shielding [individuals] from it is not a compelling government interest." *Kirkeby v. Furness*, 92 F.3d 655, 660 (8th Cir. 1996) (citing *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) and *Cohen v. California*, 403 U.S. 15, 21 (1971)). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. at 414. Indeed, the Supreme Court held that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Boos*, 485 U.S. at 322 (quoting *Hustler*, 485 U.S. at 56).

Any interest in preventing the content of Sessler's speech from "interfering with the experience of festival-goers" is not compelling. In *Texas v. Johnson*, the Supreme Court rejected the "claim that an audience that takes serious offense at

particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis." 491 U.S. at 408. The Court noted that its precedents "recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Id.* at 408-09 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4, (1949); citing *Cox v. Louisiana*, 379 U.S. 536, 551 (1965), *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508-509 (1969), *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971), and *Hustler*, 485 U.S. at 55-56). Nor is the mere threat of disturbance a compelling interest. The Supreme Court recognized long ago:

> [U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-509. Because the City's and the Officers' removal of Sessler from the Festival area was based upon the content of his speech and served no compelling government interest, it did not satisfy strict scrutiny, and thus violated

the First Amendment.

2. The Removal of Sessler from the Festival Area was not Narrowly-Tailored to Serve any Government Interest

As discussed below, the removal of Sessler from the Festival area was not narrowly-tailored to serve a significant government interest. Clearly, then, it was not narrowly-tailored to serve a compelling government interest, and cannot satisfy strict scrutiny.

C. Even if this Court Holds that the Removal of Sessler from the Festival Area was Content-Neutral, it was not a Reasonable Time, Place, and Manner Restriction

Even if this Court holds that the restriction on Sessler's speech was content-neutral, it was not a reasonable time, place, and manner restriction. A content-neutral restriction must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Grace*, 461 U.S. at 177.

1. The Removal of Sessler from the Festival Area did not Serve a Significant Government Interest

The District Court found that the interest allegedly served by removing Sessler was "limiting congestion and disruption during the festival." (Aplt. App. at 114). First, there is no evidence of Sessler causing congestion. As the videos show, at the time Sessler was removed, he and his group were in a corner of the Festival area, flanked by a building on one side and the outer fence on another side. (Aplt. App. at 98, Plaintiff's Video 4 at 0:00-33:10; Plaintiff's Video 5 at 0:00-1:55). They were

next to an entrance, but the videos show people coming and going with no interference from Sessler or his associates. (Aplt. App. at 98, Bodycam Footage at 0:32-4:53; Plaintiff's Video 4 at 0:00-33:10; Plaintiff's Video 5 at 0:00-1:55). Perhaps more importantly, there is no evidence that anyone complained about congestion caused by Sessler, and when Behning explained to Sessler the reasons for removing him, he never mentioned congestion.

As for any purported evidence of disruption, as set forth above, it is primarily related to the content of Sessler's speech. A speech-related restriction cannot be a reasonable time, place, and manner restriction, and is subject to strict scrutiny, discussed above. Additionally, as noted above,

> [U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-509.

While one vendor stated that Sessler's group was getting in people's faces and "screaming" at them (Aplt. App. at 98, Bodycam Footage at 0:47-0:51), no officer ever told Sessler that he was screaming at people, and never told him to stop

screaming at people. Notably, while the parties below agreed that the video taken by Sessler's wife records most, if not all, of Sessler's preaching activities (Aplt. App. at 47-48), none of the video shows Sessler screaming at anyone or getting in anyone's face. Even if Sessler did scream at people, the alleged government interest involved is preventing disturbance of the Festival. As set forth by the Supreme Court in *Tinker*, causing "trouble" and "a disturbance," and even fear, is not enough to overcome the right to freedom of speech. 393 U.S. at 508-09.

The District Court relied upon *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 686 (8th Cir. 2012) for the proposition that "[t]he government may restrict disruptive and unwelcome speech to protect unwilling listeners when there are other important interests at stake." (Aplt. App. at 114). However, that case is clearly distinguishable. In *City of Manchester*, this Court addressed *Frisby v. Schultz*, 487 U.S. 484 (1988), which addressed picketing outside private residences, and *Hill v. Colorado*, 530 U.S. 703 (2000) and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), which dealt with patients entering medical facilities. This Court

> conclude[d] that mourners attending a funeral or burial share a privacy interest analogous to those which the Supreme Court has recognized for individuals in their homes, *Frisby*, 487 U.S. at 484–85, 108 S.Ct. 2495, and for patients entering a medical facility, *Hill*, 530 U.S. at 717, 120 S.Ct. 2480; *Madsen*, 512 U.S. at 767–68, 114 S.Ct. 2516.

697 F.3d at 692. This Court held: "Mourners have a similarly 'significant and legitimate' interest in avoiding 'potential trauma' when attending a funeral or

burial." *Id.* (quoting *Hill*, 530 U.S. at 725, 715). "A significant governmental interest exists in protecting their privacy because mourners are in a vulnerable emotional condition and in need of 'unimpeded access' to a funeral or burial, quite like the patients entering medical facilities protected in *Hill*, 530 U.S. at 715, 729, 120 S.Ct. 2480." *Id.* This Court noted that "[t]he social and cultural significance of funerals and burial rites was recognized by the Supreme Court in *Nat'l Archives & Records Administration v. Favish*, 541 U.S. 157, 167–68, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004)." *Id.* In *Favish*, the Supreme Court held: "'[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.'" *Id.* (quoting *Favish*, 541 U.S. at 168).

The obvious privacy interests of individuals in their home, patients at a medical facility, and mourners at a funeral are simply not enjoyed by attendees of a public festival. This is especially so when the festival area is large enough for festival-goers who do not want to hear particular speech to simply move on, an opportunity not enjoyed by residents in a home, patients in a medical facility, or mourners at a funeral. *See City of Manchester*, 697 F.3d at 692 (noting that homeowners and mourners at a funeral cannot avoid unwanted speech because "they must . . . be in a certain place at a certain time . . ."). *City of Manchester* simply is

inapposite, and the District Court erred by relying upon it.

2. The Removal of Sessler from the Festival Area was not Narrowly Tailored to Serve any Government Interest

Further, removing Sessler from the Festival area was not narrowly tailored to serve any government interest, significant or otherwise. Narrow tailoring requires "that 'the factual situation demonstrates a real need for the government to act to protect its interests.' In other words, it is not enough for the [government] to recite an interest that is significant in the abstract; there must be a genuine nexus between the regulation and the interest it seeks to serve." *Minneapolis Park and Rec.*, 729 F.3d at 1099 (quoting *Ass'n of Cmty. Orgs. for Reform Now v. St. Louis Cnty.*, 930 F.2d 591, 595 (8th Cir. 1991)). In *Minneapolis Park and Rec.*, this Court noted that, "[i]n the abstract, controlling crowds can constitute a significant governmental interest that bears directly on public safety." *Id.* at 1100. This Court nonetheless found that the government had failed to show that the regulation at issue was narrowly tailored to serve that interest. *Id.*

Similarly, here, while preventing congestion and disruption may be legitimate government interests in the abstract, there is no evidence that Sessler caused congestion or disruption that necessitated removing him from the Festival. As discussed above, the main thrust of the complaints against Sessler was based on the content of his speech. To the extent one vendor complained about Sessler's group getting in people's faces and screaming at them, again, no officer ever told Sessler

he was screaming at people and, more importantly, no officer ever told him, or gave him an opportunity, to stop screaming at people. Even if preventing Sessler from screaming at people was a significant government interest, a narrowly-tailored response would be to direct him to stop screaming at people; not to remove him entirely from the Festival area with no opportunity to comply with any legitimate regulation.[3]

This Court, in *Minneapolis Park and Rec.*, also noted the problem of underinclusiveness. "Where a regulation restricts a medium of speech in the name of a particular interest but leaves unfettered other modes of expression that implicate the same interest, the regulation's underinclusiveness may 'diminish the credibility of the government's rationale for restricting speech in the first place.'" *Id.* (quoting *City of Ladue*, 512 U.S. at 52). This Court continued: "In other words, '[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Id.* (quoting *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 802 (2011)).

Even if "congestion" and "disturbance" unrelated to content were the real

[3] It should also be noted that a review of the entire statement of the vendor that alleged "screaming" indicates that his primary complaint was that, while he had paid for his space and was abiding by the rules imposed upon vendors, Sessler and his group, whom he said were "basically vendors" (which they were not), did not pay and were not obeying the rules. (Aplt. App. at 98, Bodycam Footage at 0:47-1:04, 1:32-1:43). His complaint was essentially "unfair competition." That does not at all accord with the findings of the District Court.

interests served by removing Sessler (which Sessler disputes), the restriction on Sessler's speech was underinclusive. There is no evidence that anyone else was removed from the Festival for causing "congestion" or "disturbance," despite the fact that others did, in fact, cause congestion and/or disturbance. It is clear from the record that there was at least one street performer that was allowed to set up and perform near where Sessler first attempted to preach. (Aplt. App. at 48). Because of this street performer, Sessler was not even allowed to stand on the other side of the street. (Aplt. App. at 51). Sessler was not allowed to relocate to another spot he suggested because of the presence of a musical performer. (Aplt. App. at 51). These street performers were not only allowed to perform, but were protected by the City and its Officers. Behning's bodycam video reflects a man with two hoops performing directly in front of Sessler and, notably, directly in front of the entrance to the Festival. (Aplt. App. 98, Bodycam Footage at 1:43-2:04). Yet, he was not removed.

This Court addressed a remarkably similar situation in *Minneapolis Park and Rec.*: "Johnson produced evidence that the Board permitted at least one street performer on the pathways in Loring Park during the 2011 Festival." 729 F.3d at 1100. The district court in that case justified street performers being allowed in the festival because they were less likely to cause congestion than the literature distributing plaintiffs. *Id.* at 1100-01. This Court disagreed: "We think it obvious,

however, that a street performer's very purpose is to draw a crowd. Buskers like mimes, musicians, and living statues aim to attract an audience, and passersby must stop to listen or observe." *Id.* at 1101. The instant case involves an identical situation. Street performers, who caused congestion and likely distracted Festival-goers away from vendors and other Festival activities, were permitted to remain, while only Sessler and his associates were forced to leave. The City's and the Officers' restriction on speech was underinclusive, and was not narrowly tailored to serve any significant governmental interest.

The District Court found that removing Sessler from the Festival area was likely narrowly-tailored because it "likely did not restrict his speech more than was necessary to achieve Defendants' significant interest in limiting disruption to a permitted event." (Aplt. App. at 115). The Court found no evidence that the officers "asked Sessler to end his street preaching or to change his message." (*Id.*). However, the standard for narrow tailoring is not whether the speech was not completely shut down; a narrowly-tailored restriction must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Contrary to the District Court's finding, the Officers did not move Sessler to a spot "adjacent to" the Festival; they moved him to the other side of a three-lane street. In this way, Sessler was completely removed from his target audience, which was Festival-goers. That burdened far more

speech than necessary to further any government interest.

In *McCullen v. Coakley*, 134 S. Ct. 2518, 2535-2541 (2014), the Supreme Court held that a statute that created buffer zones around abortion clinics which "protesters" were not permitted to penetrate burdened substantially more speech than necessary. The Court identified several less burdensome options the Commonwealth of Massachusetts could have taken to address its interest. The Court noted that the Commonwealth could have enacted a law similar to the federal Freedom of Access to Clinic Entrances Act, which used more specific measures to ensure safety and prevent harassment, intimidation, and obstruction around abortion clinics. *Id.* at 2537. The Court held that, to prevent harassment, the Commonwealth could enact legislation that criminalized following and harassing anyone within 15 feet of a clinic. *Id.* at 2538. While the Commonwealth raised a concern about the safety risk created when protestors obstructed driveways leading to clinics, the Court noted that the situation could have been addressed by existing ordinances. *Id.* In short, the Court held that the Commonwealth had "available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." *Id.* at 2539.

The fact that a government's chosen restriction is "easier" to enforce than alternatives does not satisfy the Constitution. The *McCullen* Court held that "[t]o meet the requirement of narrow tailoring, the government must demonstrate that

alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency." *Id.* at 2540. The Court concluded that the Commonwealth had pursued its interests "by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment." *Id.* at 2541.

In the instant case, Defendants did not, like the statute in *McCullen*, ban expressive activity in designated zones; they banned Sessler's expressive activity **anywhere in the entire public venue**. Similar to the situation addressed by the Supreme Court in *McCullen*, the City's and the Officers' enforcement of the Policy against Sessler burdened substantially more speech than necessary. The City should have followed the Court's lead in *McCullen* by addressing its interests with more specific restrictions. If the City's interest truly was congestion, as the District Court found, the Officers could have moved Sessler and his associates to a location where they were not causing congestion. In fact, they did, as there is no evidence that Sessler was causing any congestion at his third location. Yet, they forced him to leave the entire Festival area. If the City's interest was preventing disturbance by

loud preaching, as the District Court suggested, the Officers could have directed Sessler to turn down his amplification. Notably, at no point did any officer tell Sessler to turn down his amplification. If the problem was Sessler getting in people's faces and screaming at them (which is not reflected in any video), the Officers could have directed Sessler to stop doing so. They never even mentioned such conduct to Sessler. By completely removing Sessler, not just from the Festival area, but from that entire side of the street, the City burdened far more speech than necessary to serve its stated interests.

3. The Removal of Sessler from the Festival Area did not Leave Open Ample Alternative Channels of Communication

The District Court erroneously found that removing Sessler from the Festival area left open ample alternative channels of communication. (Aplt. App. at 115-16). As noted above, the Officers did not move Sessler "adjacent to" the Festival area, but across a three-lane road. This not only removed Sessler from the Festival attendees inside the Festival, but Sessler's distance from the Festival area reduced the number of people who could hear his message.

The District Court found that the new location was an ample alternative because Sessler could still engage Festival-goers on their way to or from the Festival. (Aplt. App. at 115-16). However, the fact that Sessler could still reach some people does not make the alternative location constitutionally acceptable. The Commonwealth in *McCullen* attempted to justify its buffer zones by arguing that

protestors could still protest outside the buffer zones. The Supreme Court was not persuaded, noting that the plaintiffs gave evidence that their conversations with women outside the clinics "have been far less frequent and far less successful since the buffer zones were instituted." 134 S. Ct. at 2436-37. A specific place where a message is communicated may be just as important as the message itself. *See City of Ladue*, 512 U.S. at 56. Thus, "a location across the street is not an ample alternative channel of communication when [a person] could have been standing in the park." *World Wide Street Preachers' Fellowship v. Reed*, 430 F. Supp. 2d 411, 415 (M.D. Pa. 2006). In other words, "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. State of New Jersey*, 308 U.S. 147, 163 (1939); *see also McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984) (same).

Outside the venue, Sessler could only reach a far smaller number of people. Moving outside the Festival area to share his message defeated the whole purpose of bringing his message to the Festival. As the Court found in *McCullen*, this was not an ample alternative channel of communication.

III. THE DISTRICT COURT MADE CLEARLY ERRONEOUS FACTUAL FINDINGS

The District Court also rested its conclusions upon clearly erroneous factual findings. First, the Court made the conclusory finding that "[t]he record demonstrates Sessler disrupted Street Fest by speaking loudly into his microphone

and engaging in heated verbal exchanges with festival-goers." (Aplt. App. at 114). First, speaking loudly into a microphone at a loud, outdoor festival with ambient noise everywhere is not evidence of disruption. Again, no one complained about the volume or noise level, and Behning did not mention volume or noise when he told Sessler why he was being removed. Additionally, the videos show that any heated exchanges between Festival-goers and Sessler were initiated by the Festival-goers themselves. (*See generally* Aplt. App. at 98). Unless Sessler was approached by someone, he stood in one place and preached. The videos also clearly show that Festival-goers who chose to ignore Sessler were able to do so. (*See generally* Aplt. App. at 98). It does not follow that, because Sessler engaged in heated exchanges with people that chose to engage him, he was automatically disrupting the Festival.

The District Court made other clearly erroneous factual findings. The Court found that "[a]t Sessler's first street-preaching location, he disturbed vendors and performers and interfered with the experience of festival-goers walking near him," citing Behning's Bodycam Footage at 0:49-1:14. (Aplt. App. at 114). However, at the time of the bodycam video, Sessler was already at his third location. The conversation with vendors captured on the bodycam video had nothing to do with what happened at Sessler's first location.

The District Court then found that "[v]endors reported to the defendant officers that they could not sell their goods or perform because of Sessler's

interference," citing the same portion of bodycam video. (Aplt. App. at 114). However, a review of the entire conversation with the vendors reveals no such "reports." (Aplt. App. at 98, Bodycam Footage at 0:36-1:44). One vendor complained about a man in green getting in people's faces; the video reflects that Sessler, the only plaintiff below, was wearing a blue shirt. (Aplt. App. at 98, Bodycam Footage at 1:09-1:26). Thus, this complaint did not apply to Sessler. Another vendor was complaining that the Festival area was "private property," that they had paid to be there, and that Sessler was violating the rules against vendors playing music and using loudspeakers. (Aplt. App. at 98, Bodycam Footage at 0:47-1:04, 1:32-1:43). This complaint did not constitute a report that vendors "could not sell their goods or perform because of Sessler's interference." Notably, as the District Court correctly concluded, the Festival area is not private property, as the vendor claimed, but is a traditional public forum. (Aplt. App. at 111). Further, the rules governing vendors did not apply to Sessler, who was not a vendor. It should be noted that the vendors chose to obtain permits and licenses, and to pay for their space, and to be governed by the rules. (*See* Aplt. App. at 79, 81). However, vendors cannot contract away the constitutional rights of a third party, attending a free festival in a traditional public forum, who is not a party to that contract.

The above-mentioned vendor also claimed that Sessler and his group were getting in people's faces and "screaming" at them. (Aplt. App. at 98, Bodycam

Footage at 0:47-0:51). First, again, though the parties stipulated that the videos captured most, if not all, of Sessler's preaching, there is no video that shows him getting in someone's face or screaming. Notably, during the entire conversation captured on the bodycam video, Sessler can be heard in the background peacefully sharing his message without screaming and without disturbing anyone. (Aplt. App. at 98, Bodycam Footage at 0:36-1:44). Again, the vendor never said he could not sell his goods or perform, as erroneously found by the District Court.

The third vendor who participated in the conversation with Behning talked about Sessler's group telling people they are going to hell. (Aplt. App. 98, Bodycam Footage at 1:04-1:08). Again, this vendor did not say she could not sell her goods or perform. Further, as discussed above, that is content-specific; to the extent that was the reason for removing Sessler, the removal must satisfy strict scrutiny. It does not.

Additionally, as noted above, the District Court found that the Officers moved Sessler to a location "adjacent to" the Festival. This was clearly erroneous, as shown in the video. The Officers moved Sessler to the far side of a three-lane road. (*See* Aplt. App. 98, Plaintiff's Video 5 at 9:59-33:10). Because the District Court relied, at least in part, on the proximity of Sessler's final location in finding that it was an ample alternative channel of communication, the District Court rested its conclusion on a clearly erroneous finding of fact.

IV. SESSLER WAS IRREPARABLY HARMED BY THE VIOLATION OF HIS CONSTITUTIONAL RIGHTS

As to the remaining preliminary injunction factors, the District Court's findings are essentially reliant upon its finding that Sessler is unlikely to prevail on the merits. The District Court found that Sessler did not show a threat of irreparable harm because he did not show a likelihood of success on the merits, and because he was able to preach elsewhere. (Aplt. App. at 117). For the reasons stated above, those findings were erroneous.

The Supreme Court has repeatedly held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Wallace v. Jaffree*, 472 U.S. 38, 44 n.22 (1985); *New York Times Co. v. United States*, 403 U.S. 713 (1971). The deprivation of such protected rights constitutes, *a priori*, irreparable harm and injury. Sessler's loss covers much more than a minimal period: it is perpetual. Obviously, the Policy applies indefinitely. Based on Sessler's experiences of July 28, 2018, he can expect the Policy to be applied to his future constitutionally-protected activities. As alleged in the Complaint, on upcoming days – including through December 2022 – Sessler has concrete plans to engage in constitutionally-protected activities by peacefully expressing religious, political, and social speech within the City's Public Spaces, including the City's public streets and sidewalks. (Aplt. App. at 13-14). However, because of the unconstitutional application of the

Policy at the Street Fest festival, Sessler is unable to exercise his constitutional rights in the City without fear of arrest, citation, or removal. This constitutes irreparable harm.

V. THE BALANCE OF HARMS WEIGHS IN FAVOR OF SESSLER

The District Court found that the balance of harms favored the City and the Officers. (Aplt. App. at 117). The District Court found that Sessler was not harmed by the denial of the injunction because he was still able to preach. (Aplt. App. at 117). As discussed above, that finding was erroneous. The Court found that, "[b]y contrast, if the preliminary injunction were granted, Defendants would not be able to impose content-neutral time, place, and manner restrictions to achieve their significant governmental interest of limiting interference with a permitted event." (Aplt. App. at 117). This is essentially a reiteration of the Court's finding on the likelihood of success prong, and is erroneous for the reasons stated above. Because the City's and the Officers' conduct was unconstitutional, an injunction protecting the exercise of constitutionally-protected speech will not harm the City or the Officers. By contrast, as stated above, Sessler will suffer irreparable harm. The third prong of the preliminary injunction analysis is firmly in Sessler's favor.

VI. A PRELIMINARY INJUNCTION WOULD SERVE THE PUBLIC INTEREST

Finally, the District Court found that a preliminary injunction would not serve the public interest, again relying on its findings on the first prong. (Aplt. App. at

118). The District Court found: "The public interest would not be served if the Court granted a preliminary injunction when there was likely no constitutional violation." (Aplt. App. at 117). As discussed above, there was a constitutional violation; thus, the basis for the District Court's finding is erroneous.

In fact, granting a preliminary injunction and prohibiting the unconstitutional enforcement of the Policy clearly is in the public interest. The protection of constitutional rights is of the highest public interest. *See Elrod*, 427 U.S. at 373. In fact, "it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (overruled on other grounds by *City of Manchester*, 697 F.3d at 692). In a constitutional system, the public interest is served when constitutional freedoms are supported by the courts. The fundamental public policy of the Free Speech and Free Exercise Clauses of the First Amendment is based on the realization that free speech and the free exercise of religion are in the public interest. Accordingly, Sessler satisfied the final prong of the preliminary injunction analysis, and the District Court's finding otherwise was erroneous.

CONCLUSION

For the foregoing reasons, the District Court relied upon erroneous legal conclusions and clearly erroneous factual findings in denying Sessler's Motion for Preliminary Injunction. The District Court erred in finding that Sessler failed to show a likelihood of success on the merits. The City's and the Officers' removal of Sessler from the Festival was content-based, and did not satisfy strict scrutiny because it was not narrowly-tailored to serve a compelling government interest. Even if the City's and the Officers' restriction on Sessler's speech is held to be content-neutral, it was not a reasonable time, place, and manner restriction because it was not narrowly-tailored to serve a significant government interest, and did not leave open ample alternative channels of communication.

In addition, the District Court erred in finding that the City's and the Officers' restriction of Sessler's speech caused him no irreparable harm, that the balance of harms favored the City and the Officers, and that a preliminary injunction would not serve the public interest. For these reasons, this Court should reverse the District Court's Order denying Sessler's Motion for Preliminary Injunction.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (but including the Statement Regarding Viruses and its signature block):

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STATEMENT REGARDING VIRUSES

Pursuant to Local Rule 28A(h), I hereby certify that this Brief and the Addendum have been scanned for viruses, and contain no viruses.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 6, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

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