IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

CORY SESSLER, Plaintiff, v. CITY OF DAVENPORT, IOWA; GREG BEHNING, in his individual capacity and acting as a law enforcement officer with the Davenport Police Department; JASON SMITH, in his individual capacity and acting as a law enforcement officer with the Davenport Police Department; and J.A. ALCALA, in his individual capacity and acting as a law enforcement officer with the Davenport Police Department, Defendants.	**No. 3:19-cv-00011-RGE-HCA** **ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiff Cory Sessler expressed his views about his Christian faith during a privately run festival on a public street in Davenport, Iowa. After receiving complaints from festival-goers and vendors, Defendants City of Davenport police officers Greg Behning, Jason Smith, and J.A. Alcala told Sessler to move to an area adjacent to the festival's gates to engage in street preaching. Sessler alleges Defendants Behning, Smith, Alcala, and the City of Davenport violated his constitutional right to free speech guaranteed by the First Amendment and moves to preliminarily enjoin Defendants from unconstitutionally removing him from public festivals in the future.

The Court concludes Sessler has not met his burden to show he is entitled to a preliminary injunction. The street festival took place in a traditional public forum. The officers' actions were content-neutral, narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication for Sessler to exercise his free speech. Applying the

Dataphase factors, Sessler is not likely to succeed on the merits of his claim. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). The Court denies Sessler's motion for a preliminary injunction.

II. BACKGROUND

The limited purpose of a preliminary injunction is "to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Accordingly, the Court's findings of fact and conclusions of law in this order are not binding at trial. *See id.*

A. Procedural Posture

Sessler filed his complaint and demand for a jury trial under 42 U.S.C. § 1983 against Defendants Behning, Smith, and Alcala, and Defendant City of Davenport, seeking damages and injunctive and declaratory relief. *See* Compl., ECF No. 1. Sessler alleges Defendants impeded his freedom of speech (Count 1) and his free exercise of religion (Count 2), both guaranteed by the First Amendment to the United States Constitution. *Id.* ¶¶ 101–12, ¶¶ 113–27.

Sessler now moves to preliminarily enjoin Defendants from "restricting and limiting his rights to peacefully share his message of faith." Pl.'s Mot. Prelim. Inj. 2, ECF No. 2; *see also* Pl.'s Br. Supp. Mot. Prelim. Inj., ECF No. 2-1. Defendants resist, contending a preliminary injunction is unwarranted because Sessler is unlikely to succeed on the merits at trial. Defs.' Resist. Pl.'s Mot. Prelim. Inj. 13–31, ECF No. 26. Although Sessler notes in his motion that he has brought claims against Defendants for abridging his freedom of speech and his free exercise of religion, his legal argument focuses solely on his freedom of speech claim. *See* ECF No. 2 at 2; *see generally* ECF No. 2-1. At oral argument on his motion, Sessler only addressed his freedom of speech claim. In light of the substance of Sessler's filings and

representations, the Court will only consider Sessler's motion for a preliminary injunction in relation to his claims in Count 1.

Prior to the hearing on Sessler's motion, the parties submitted a joint statement stipulating to some facts and noting other facts as disputed. Joint Statement Stipulated Facts, Disputed Facts & Issues of Law, ECF No. 23. The parties later filed a statement indicating they agreed the facts of this matter were undisputed and they only disagreed on the significance of certain facts and on the application of the law to the facts. Joint Notice Regarding Withdrawal Evidentiary Hr'g ¶¶ 7–8, ECF No. 35. The parties thus withdrew their request for an evidentiary hearing. *Id.* ¶ 10. They agreed the Court could rely on the exhibits submitted by both parties in resolving Sessler's motion. *Id.*; *see* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2949 (3d ed. 2002 & Supp. 2019) ("It seems quite sensible to decide a preliminary-injunction motion on written evidence when no conflict about the facts requires illumination by live testimony.").

The hearing—consisting of oral argument and receipt of exhibits only—took place on July 16, 2019. Prelim. Inj. Hr'g Mins., ECF No. 39. Attorneys David Markese and Jeffrey Janssen represented Sessler. *Id.* Attorneys Jason O'Rourke and Alexander Barnett represented Defendants. *Id.* The Court received exhibits from both parties, including video from the officers' body cameras and from Sessler's wife depicting Sessler's interaction with the officers and his street preaching activities throughout the day. *See* Prelim. Inj. Hr'g Ex. List, ECF No. 39-1; Pl.'s Exs. 4–6, ECF Nos. 51-4, 51-5, 51-6 (videos recorded by Sessler's wife); Defs.' Ex. A, ECF No. 40 (Behning's body camera recording); Defs.' Ex. B, ECF No. 42 (videos recorded by Sessler's wife).

The issue before the Court is whether Sessler has met his burden to show the necessity of a preliminary injunction.

B. Stipulated Facts

The following is a summary of the facts stipulated by the parties and depicted in the videos received into evidence. On July 28, 2018, Sessler attended the Street Fest festival in Davenport, Iowa to engage in street preaching. ECF No. 23 ¶¶ 16, 18. Sessler was accompanied by his wife, three other adults, and two children—none of whom are named in the record. *Id.* ¶ 18. Sessler believes he has a mandate to spread his religious, political, and social beliefs. *Id.* ¶¶ 1–2. In general, Sessler shares his beliefs by distributing literature, carrying portable signs, engaging others in discussions about Jesus Christ and the Christian faith, and preaching in public with a portable microphone. *Id.* ¶ 15.

Davenport has a Special Events Policy (the "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 the participants in mind, the protection of public property considered, and the impact of the event on non-participating citizens minimized." *Id.* ¶ 4; *see also* Defs.' Ex. D at 3, ECF No. 44. Under the Policy, Davenport "shall be charged with the responsibility of determining whether a particular sponsor shall be entitled to conduct an outdoor special event." ECF No. 23 ¶ 6; Defs.' Ex. D at 5, ECF No. 44. Potential special event sponsors must submit an online application for Davenport's approval. ECF No. 23 ¶ 7; Defs.' Ex. D at 6, ECF No. 44.

In 2018, Davenport approved the Downtown Development Partnership's application to sponsor Street Fest. ECF No. 23 ¶¶ 8–9; *see also* Defs.' Ex. C, ECF No. 43 (Davenport City Council resolution approving the Downtown Development Partnership's application to hold Street Fest). Street Fest took place on designated public streets and sidewalks in downtown Davenport from July 27 to July 29, 2018. ECF No. 23 ¶¶ 8, 16; *see* Defs.' Ex. E, ECF No. 45 (map of Street Fest area). Temporary chain-link fences marked Street Fest's boundaries and the streets within the boundaries were closed to vehicular traffic. ECF No. 23 ¶ 10; Defs.' Ex. E, ECF No. 45.

The Downtown Development Partnership required permits for Street Fest vendors to sell food, beverages, and other items during Street Fest. ECF No. 23 ¶ 11; *see also* Defs.' Exs. F & G, ECF Nos. 46, 47 (vendor contracts). The Downtown Development Partnership did not charge admission for entry into Street Fest, which was open to the public. ECF No. 23 ¶ 17.

Sessler did not obtain a vendor permit from the Downtown Development Partnership to engage in street preaching at Street Fest. ECF No. 23 ¶ 12. Sessler's wife recorded most of Sessler and his group's street preaching. *Id.* ¶ 21; *see* Pl.'s Exs. 4–6, ECF Nos. 51-4, 51-5, 51-6; Defs.' Ex. B, ECF No. 42. The parties agree the video recordings accurately depict Sessler's street preaching and his interaction with law enforcement. *Id.* ¶ 22.

Sessler and his group initially engaged in street preaching on the corner of Second Street and Main Street inside Street Fest's boundaries—a spot assigned to a permitted juggling and magic vendor. *Id.* ¶¶ 23, 24. Sessler and his group held signs on extendable poles with messages including: "Hell is enlarged for adulterers . . . homosexuals . . . abortionists[;]" "Fake Christians . . . don't . . . smoke, vape, and get high . . . and think they're saved[;]" and "Warning: if you are involved in . . . sex out of marriage[,] homosexuality[,] drunkenness[,] night clubbing . . . you are destined for a burning hell[.]" *Id.* ¶ 19; Def.'s Ex. B, Pl.'s Video 1 at 3:13, ECF No. 42. Sessler and the members of his group also wore t-shirts, pins, and hats displaying their messages. Def.'s Ex. B, Pl.'s Video 1 at 3:13, ECF No. 42 (video depicting members of Sessler's group). For example, one member wore a t-shirt with the message: "Your sin will find you[.]" *Id.* Sessler used a portable microphone and speaker to amplify his voice as he preached. ECF No. 23 ¶ 20; Defs.' Ex. B, Pl.'s Video 1 at 3:55–4:00, ECF No. 42.

A vendor complained to Behning that Sessler was telling her customers they were going to hell. *Id.* ¶ 53. Behning's body camera recording depicts several individuals complaining to him

that the activities of Sessler and his group were disturbing festival-goers. Defs.' Ex. A, Behning Body Camera Recording at 0:49–1:14, ECF No. 40.

After Behning discussed the complaints against Sessler with the individuals, Behning, Smith, and Alcala approached Sessler and asked him to move to another location. ECF No. 23 ¶ 25. Alcala accompanied Sessler and his group to another location on Second Street—within Street Fest's boundaries—where they continued their street preaching. *Id.* ¶¶ 27, 28. Sessler found this second location unacceptable because it was behind a vendor tent. *Id.* ¶ 30. Sessler requested to move to a different location so that he could interact with more festival-goers. *Id.* ¶ 31. Alcala then directed Sessler and his group to a third location—still within Street Fest's boundaries—near Street Fest's entrance on Brady Street and Second Street. *Id.* ¶ 32.

Sessler and his group preached at the third location for about thirty minutes, until Behning told them to leave the festival. *Id.* ¶¶ 33–34. Behning told Sessler and his group they would be subject to arrest if they did not leave the festival area. *Id.* ¶ 35. The officers understood the Downtown Development Partnership "controlled the festival property and had the authority to trespass individuals" at Street Fest. *Id.* ¶¶ 48–50.

Behning told Sessler he could continue his street preaching directly adjacent to the festival's boundaries. *Id.* ¶ 38. Sessler remained at this fourth location—adjacent to the festival's gates—for two to three hours. *Id.* ¶ 39. Sessler and his group interacted with people on their way in and out of the festival. *See., e.g.*, Ex. B, Pl.'s Video 5 at 15:28–17:17, ECF No. 42 (video depicting Sessler's group interacting with individuals leaving the festival). Law enforcement did not ask Sessler to move again. ECF No. 23 ¶ 40.

Two weeks later, Sessler called the Davenport Office of the City Attorney to discuss the incident. *Id.* ¶ 41. Assistant City Attorney Mallory Hoyt told Sessler "that when [Davenport] rents out a [Davenport] street to an event, the street becomes private property, even if the event is not

ticketed." *Id.* ¶ 43. Hoyt told Sessler the actions of the Davenport officers were lawful. *See id.* ¶ 44.

III. LEGAL STANDARD

Sessler seeks an injunction under Federal Rule of Civil Procedure 65. *See* ECF No. 2 at 1. "The party seeking a preliminary injunction bears the burden of establishing the necessity of this equitable remedy." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). In deciding if the movant satisfies this burden, a court considers the four *Dataphase* factors: "(1) the threat of irreparable harm to the moving party; (2) the weight of this harm as compared to any injury an injunction would inflict on other interested parties; (3) the probability that the moving party will succeed on the merits; and (4) the public interest." *Id.* (citing *Dataphase*, 640 F.2d at 113).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "[T]he burden on the movant is heavy, in particular where . . . 'granting the preliminary injunction will give [the movant] substantially the relief it would obtain after a trial on the merits.'" *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (last alteration in original) (quoting *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993)). Ultimately, a court "has broad discretion when ruling on requests for preliminary injunctions." *Id.*

IV. DISCUSSION

Application of the *Dataphase* factors is not a "rigid formula." *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999). "No single factor in itself is dispositive; in each case all the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503

(8th Cir. 1987). Nevertheless, likelihood of success on the merits is the most significant factor. *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013).

The Court first considers whether a preliminary injunction is an appropriate remedy. The Court then considers each *Dataphase* factor—starting with the most significator factor (Sessler's probability of success on the merits of his claim)—and concludes each factor weighs in favor of denying his motion for a preliminary injunction.

A. Relief Sought

As a threshold issue, the Court must determine whether a preliminary injunction is appropriate for the relief Sessler seeks. Notably, Sessler does not seek to enjoin a policy, ordinance, or unwritten rule that regulates protected speech. *See, e.g.*, *Powell v. Noble*, 798 F.3d 690 (8th Cir. 2015) (affirming in part and remanding in part a district court's grant of a preliminary injunction against unwritten rules regulating signs); *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094 (8th Cir. 2013) (reversing a district court's denial of a preliminary injunction against a literature distribution ordinance). Construed most narrowly, Sessler seeks an injunction to prevent Defendants from enforcing the Policy to exclude people from a public event based on the content of their speech in violation of the First Amendment. *See* ECF No. 2; Pl.'s Reply Defs.' Resist. Mot. Prelim. Inj. 8, ECF No. 27. But the Policy regulates the process for groups and individuals to hold events in Davenport—it does not speak to the First Amendment rights of those who attend the events. *See* Defs.' Ex. D, ECF No. 44. Thus, Sessler does not challenge the Policy on its face, but instead claims that the defendant officers—and Davenport through its support of the officers' actions—applied the Policy in a way that violated his First Amendment rights. ECF No. 2 at 1.

A plaintiff may bring an action against an individual officer under § 1983 for a First Amendment violation based on the officer's enforcement of a policy—even if the policy itself

does not regulate speech. *See Miller v. City of St. Paul*, 823 F.3d 503, 507 (8th Cir. 2016). In *Miller*, the Eighth Circuit held a plaintiff had standing to bring a claim against an officer in her personal capacity after the officer would not let the plaintiff enter a privately run fair on public property to express his religious views. *Id.* Although standing is not at issue in this case, *Miller* is instructive as to whether a preliminary injunction is appropriate here. Like these defendant officers, the officer in *Miller* relied on a permit policy to justify prohibiting the plaintiff from entering a fair even though the policy "neither g[a]ve permit holders control over speech content nor threaten[ed] criminal penalties against those engaging in religious speech in permitted areas." *Id.* at 506–07. The Eighth Circuit held, however, that the plaintiff did not have standing to sue the officer in her official capacity or the City of St. Paul because the city's "laws or policies" did not support the officer's actions. *Id.* at 507–08. Here, in contrast, the City Attorney confirmed the defendant officers acted lawfully in applying the Policy to regulate Sessler's actions. ECF No. 23 ¶¶ 43–44.

Thus, considering the reasoning in *Miller*, even though the Policy does not regulate speech, the Court can consider Sessler's motion for a preliminary injunction as an as-applied challenge to the Policy. The defendant officers relied on it when interacting with Sessler and the City of Davenport subsequently approved the officers' actions.

B. Likelihood of Success on the Merits

To determine the likelihood of success on the merits—the third *Dataphase* factor—a court assesses whether the plaintiff has a "substantial likelihood" or "fair chance" of prevailing. *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 731–32 (8th Cir. 2008) (en banc). In doing so, "a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo." *United Indus.*, 140 F.3d at 1179 (quoting *Calvin Klein Cosmetics*, 815 F.2d at 503).

The three-prong test set forth in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* will determine whether Sessler is likely to prevail on his claim that Defendants violated his right to free speech. 473 U.S. 788 (1985). First, the Court must determine whether Sessler's speech is protected under the First Amendment. *Id.* at 797. Second, the Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Finally, the Court must determine whether Defendants' reasons for requiring Sessler to leave the festival boundaries will likely satisfy the appropriate forum-based analysis. *Id.*

1. Protected speech

The First Amendment to the United States Constitution mandates no law shall "abridg[e] the freedom of speech." U.S. Const. amend. I. "[O]ral and written dissemination of . . . religious views and doctrines is protected by the First Amendment." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The parties do not dispute that Sessler engaged in protected speech during Street Fest. ECF No. 2-1 at 7–8; ECF No. 26 at 14. The Court thus finds Sessler's street preaching, displaying signs with religious messages, and engaging others in conversation about religion is protected speech under the First Amendment. Sessler's assertion as to the first prong of the *Cornelius* test is likely to prevail.

2. The nature of the forum

The Court next determines where—or more specifically, in what kind of forum—Sessler exercised his protected speech. "[T]he government, 'no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" *United States v. Grace*, 461 U.S. 171, 178 (1983) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)). The extent of the government's control turns on the nature of property—or the kind of forum—involved. *See Ball v. City of Lincoln*, 870 F.3d 722, 729 (8th Cir. 2017). Traditional

public fora are "public areas such as streets and parks that, since 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 334 (8th Cir. 2011) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). A designated public forum is a public area "which the State has opened for use by the public as a place for expressive activity." *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 45). "Limited public forums (sometimes called nonpublic forums) include public properties that are not by tradition or designation public forums but have been opened by the government for limited purposes, communicative or otherwise." *Powell*, 798 F.3d at 699.

Sessler asserts the streets and sidewalks in downtown Davenport where he engaged in his street preaching are a traditional public forum. ECF No. 2-1 at 9; ECF No. 27 at 1–5. Defendants disagree, arguing that even though Street Fest took place on public streets, the physical characteristics of the area—such as the fact "the festival streets are closed to vehicles and crowded with pedestrians"—make the area a limited public forum. ECF No. 26 at 14–20.

It is well-established that public streets and sidewalks are generally considered traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Ball*, 870 F.3d at 730 ("The 'quintessential' examples of such traditional public forums are streets, sidewalks, and public parks." (quoting *Perry Educ. Ass'n*, 460 U.S. at 45)). However, "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Grace*, 461 U.S. at 177. Sometimes, public streets or sidewalks are not considered traditional public fora because of the property's physical characteristics, how the property is used, or the government's intent as to the purpose of the

property. *Ball*, 870 F.3d at 731. Defendants argue these exceptions apply to the streets in downtown Davenport during Street Fest. ECF No. 26 at 14–20. The Court finds they do not.

Defendants argue the Street Fest area is similar to public sidewalks or streets that serve as a perimeter to a private area or as a public entryway to a private event—both of which are examples of public property the Eighth Circuit has determined to be limited public fora. ECF No. 26 at 18–20 (citing *Ball*, 870 F.3d at 733–35 and *Powell*, 798 F.3d at 700).

In *Ball*, the Eighth Circuit held a plaza surrounding a private arena was a limited public forum because its physical characteristics distinguished it from the public sidewalks nearby. *Ball*, 870 F.3d at 731–33. The plaza was not used as a public thoroughfare but instead to facilitate access to the arena. *Id.* at 733–35. The government never intended the plaza to be open for public activities. *Id.* at 735. In *Powell*, the Eighth Circuit held the public sidewalks surrounding the Iowa State Fairgrounds were a limited public forum during the ten days of the Iowa State Fair because they were not used as unrestricted thoroughfares but instead were strictly intended to provide passage into the State Fairgrounds. *Powell*, 798 F.3d at 700.

Defendants argue the public streets during Street Fest similarly have the specific purpose of facilitating access to Street Fest and thus should be treated as a limited public forum like the plaza in *Ball* and the sidewalks surrounding the State Fairgrounds in *Powell*. ECF No. 26 at 18–20. This interpretation would expand the holdings of *Ball* and *Powell*. The Street Fest area was not a limited entryway leading to private property or a private event. Rather, it consisted of several public thoroughfares closed to vehicular traffic but open to all pedestrians. *See* Defs.' Ex. E, ECF No. 45 (map of Street Fest area). Despite any crowds or congestion, the public streets did not lose their character as traditional, public-gathering places during Street Fest. *Cf. Powell*, 798 F.3d at 700 ("The sidewalks on which [plaintiff] wants to stand are not open, unrestricted thoroughfares for general public passage but rather are situated near

entrance gates on the fairgrounds and serve as a congested conduit for ingress and egress."). Davenport's decision to allow the Downtown Development Partnership to erect fences to designate Street Fest's boundaries was not an intentional action to change the public purpose of the streets and sidewalks—especially when the fences did not prevent the public from entering the festival area. *Cf. Ball*, 870 F.3d at 735 ("[T]here is no evidence that the City ever intended that the Plaza Area be open to the public for expressive activities or that the Plaza Area has ever been regularly used for such activities.")

The Court finds *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005), persuasive. In *Parks*, the Sixth Circuit held the streets in downtown Columbus remained a traditional public forum during a festival open to the public—even though private sponsors had entered into an agreement with the city to organize the festival and the streets were set off with fences to prevent cars from entering the festival area. 395 F.3d at 651–52. The Sixth Circuit noted Columbus could not "claim that one's constitutionally protected rights disappear because a private party is hosting an event that remained free and open to the public." *Id.* at 652; *cf. Johnson*, 729 F.3d at 1098–99 (noting parties' agreement that a public park in Minneapolis remained a public park during a privately run festival).

In summary, the Court finds the public streets where Street Fest took place were not altered from their historic designation as a traditional public forum to a limited public forum. Sessler engaged in protected speech in a traditional public forum when preaching at Street Fest. Sessler's assertion as to the second prong of the *Cornelius* test is likely to succeed.

3. Defendants' restriction on Sessler's speech

Even in a traditional public forum, the government can impose reasonable time, place, and manner restrictions on speech. *Grace*, 461 U.S. at 177. As long as the restrictions are content-neutral, the government can restrict speech in a traditional public forum when the

regulation serves a significant government interest, is narrowly tailored to serve that interest, and there are ample alternative channels for speech. *Id.* Here, the Court finds Defendants' regulation of Sessler's speech was likely content-neutral and narrowly tailored to serve a significant government interest. And the fact that Sessler was able to continue his street preaching and interaction with festival-goers throughout the day shows Defendants' regulation of Sessler's speech left open ample alternative channels of communication. Sessler's assertion as to the final prong of the *Cornelius* test is thus unlikely to prevail.

a. Defendants' action was likely content-neutral

The parties dispute whether the defendant officers' decision to remove Sessler from the festival area was based on the content of his speech. *See* ECF No. 2-1 at 11; ECF No. 26 at 26–28. Government regulations of speech are content-neutral if they are "justified without reference to the content [or viewpoint] of the regulated speech." *Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 696 (2010) (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Restrictions of speech based on the secondary effects of the speech are sometimes permissible. *Lewis v. Wilson*, 253 F.3d 1077, 1081 (8th Cir. 2001).

Defendants contend there is no evidence Sessler was asked to leave the festival boundaries because the defendant officers disagreed with his message. ECF No. 26 at 26. Defendants argue they enforced "viewpoint neutral policies to facilitate safe and efficient access to Street Fest and

to prevent interference with the permitted event's activities caused by Plaintiff's actions and loud speech." *Id.* at 26–27. Sessler contends the defendant officers' decision to remove him was not content-neutral because they told him he was being removed due to the reaction some festival-goers had to Sessler's message. ECF No. 2-1 at 11.

The Court finds defendant officers' decision to ask Sessler to leave the festival area was likely based on content-neutral justifications. The 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. The video Sessler's wife recorded of his street preaching throughout the day depicts these disruptive interactions. *See* Def.'s Ex. B, ECF No. 42. The videos objectively depict individuals reacting negatively to Sessler interfering with their participation in Street Fest. To 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. Based on the record before the Court at this preliminary injunction stage, the Court finds the defendant officers' decision to remove Sessler was likely based on content-neutral justifications. There is no evidence in the record that defendant officers allowed other equally disruptive festival-goers to remain. Sessler is unlikely to prevail on this aspect of his claim.

b. The defendant officers' actions were likely narrowly tailored to serve a significant government interest

To justify their content-neutral restriction on the time, place, and manner of Sessler's protected speech in a public forum, Defendants must next show that the restriction was narrowly tailored to serve a significant governmental interest. "This narrow tailoring requirement means not only that the regulation must promote[ ] a substantial government interest that would be achieved less effectively absent the regulation, but also that the factual situation demonstrates a real need

for the government to act to protect its interests." *Johnson*, 729 F.3d at 1099 (alteration in original) (internal citations and quotation marks omitted).

The Court first considers the interests Defendants intended to promote by removing Sessler. Defendants contend the decision to remove Sessler from Street Fest promoted their interests in limiting congestion and disruption during the festival. ECF No. 26 at 22. In general, a government's interest in the safety and convenience of persons using a public forum is a valid governmental objective. *Heffron*, 452 U.S. at 650. "The government may restrict disruptive and unwelcome speech to protect unwilling listeners when there are other important interests at stake." *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 686 (8th Cir. 2012); *see also Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("If overamplified loudspeakers assault the citizenry, government may turn them down.").

The record demonstrates Sessler disrupted Street Fest by speaking loudly into his microphone and engaging in heated verbal exchanges with festival-goers. *See generally* Defs.' Ex. B, ECF No. 42. At Sessler's first street-preaching location, he disturbed vendors and performers and interfered with the experience of festival-goers walking near him. *See* Defs.' Ex. A, Behning Body Camera Recording at 0:49–1:14, ECF No. 40. Vendors reported to the defendant officers that they could not sell their goods or perform because of Sessler's interference. *Id.* Based on this record, the Court finds defendant officers' decision to relocate Sessler outside Street Fest's boundaries likely promoted the significant governmental interest of limiting interference with a permitted event. *Cf. Parks*, 395 F.3d at 653–54 (concluding defendant city's removal of plaintiff from a privately run street festival was unconstitutional because plaintiff "was acting in a peaceful manner" and the city failed to offer an interest that would be promoted by plaintiff's removal).

The Court next considers whether Defendants' action was narrowly tailored to achieve this interest. "Although a valid time, place, or manner regulation need not be the least restrictive or least intrusive means of serving the government's interest, it may not restrict substantially more speech than is necessary." *City of Manchester*, 697 F.3d at 693 (internal quotation marks omitted).

The Court finds the defendant officers' decision to move Sessler to a different location (first within Street Fest's boundaries and then directly adjacent to the festival) likely did not restrict his speech more than was necessary to achieve Defendants' significant interest in limiting disruption to a permitted event. There is no evidence in the record the defendant officers asked Sessler to end his street preaching or to change his message. Instead, the defendant officers asked Sessler to move to a different location where his interference with the festival-goers' participation in Street Fest would be limited. When the first suggested location was not acceptable to Sessler, the defendant officers provided him with another option and later directed him to engage in his street preaching adjacent to Street Fest's boundaries. *See* ECF No. 23 ¶¶ 29–40.

c. Ample alternative channels of communication

Finally, a content-neutral time, place, and manner restriction must leave open ample alternative channels for communication. *Phelps-Roper v. Ricketts*, 867 F.3d 883, 891 (8th Cir. 2017). The Court finds the defendant officers' decision to ask Sessler to move to different location left open ample, alternative channels for Sessler to engage in protected speech. Sessler was able to continue interacting with festival-goers adjacent to the boundaries of Street Fest. *See* ECF No. 23 ¶ 39. Sessler preached directly adjacent to the festival's boundaries for approximately two to three hours. *Id.* As depicted in the videos recorded by Sessler's wife, Sessler and his group continued to interact with festival-goers as they entered and exited Street Fest. *See, e.g.*, Defs.' Ex. B, Pl.'s Video 5, at 15:28–17:17, ECF No. 42. Sessler wanted to engage in street preaching where he could interact with festival-goers.

See ECF No. 23 ¶ 30. He was able to do so. *See Ricketts*, 867 F.3d at 895–96 (holding government left ample alternative channels of communication open when the government restricted protesters from engaging in protected speech at funerals but allowed them to engage in protected speech in other parts of the city).

d. Conclusion

At this preliminary stage, the Court finds Sessler cannot demonstrate Defendants violated his First Amendment rights when they imposed time, place, and manner restrictions on his speech to achieve a significant governmental interest. Accordingly, the Court concludes Sessler does not have a substantial likelihood of success on the merits of his § 1983 claim against Defendants for abridging his right to free speech under the First Amendment. This *Dataphase* factor weighs in favor of Defendants.

C. Threat of Irreparable Harm

In regard to the first *Dataphase* factor, Sessler contends Defendants have caused him irreparable harm by threatening to arrest him if he engages in street preaching at future events organized under the Policy. ECF No. 2-1 at 15–16. Sessler asserts he has specific and concrete plans to engage in similar protected speech on Davenport's public streets and sidewalks. *Id.* at 15.

"To succeed in demonstrating a threat of irreparable harm, 'a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.'" *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (quoting *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996)). "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Rogers Grp., Inc. v. City of Fayetteville*, 629 F.3d 784, 789 (8th Cir. 2010) (quoting *Gen. Motors Corp.*, 563 F.3d at 319).

"[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). But because the Court has concluded Sessler is not substantially likely to prevail on the merits of his claim, he is unable to show a threat of irreparable harm warrants preliminary injunctive relief. *See Powell*, 798 F.3d at 702. Further, as demonstrated in the record, Sessler was able to engage in street preaching on Davenport streets adjacent to Street Fest's boundaries. This *Dataphase* factor weighs in favor of Defendants.

D. Balance of Harms

The Court next considers the second *Dataphase* factor: "the balance between th[e] harm [to the movant] and the injury that the injunction's issuance would inflict on other interested parties." *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (8th Cir. 1994). This factor requires examining the harm granting or denying the injunction poses to all parties to the dispute, as well as other interested parties. *See Dataphase*, 640 F.2d at 113–14; *accord Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994).

As noted above, Sessler would not be harmed by the denial of the injunction. Sessler was able to continue engaging in protected speech on Davenport's public streets. By 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. This *Dataphase* factor also weighs in favor of Defendants.

E. Public Interest

Finally, the Court considers the fourth *Dataphase* factor: whether a preliminary injunction would serve the public interest. *Dataphase*, 640 F.2d at 113. The public interest can include, for example: promoting the national defense, *Winter*, 555 U.S. at 24; protecting constitutional rights, *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by*

Phelps-Roper v. City of Manchester, 697 F.3d 678 (8th Cir. 2012) (en banc); or having governmental agencies fulfill their obligations, *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997–98 (8th Cir. 2011).

The Court has concluded Sessler has not shown a substantial likelihood of success on the merits of his First Amendment claim. The public interest would not be served if the Court granted a preliminary injunction when there was likely no constitutional violation. The final *Dataphase* factor weighs in Defendants' favor.

V. CONCLUSION

Considering the factors addressed above, the Court **DENIES** Sessler's Motion for a Preliminary Injunction, ECF No. 2. Sessler has not shown any of the *Dataphase* factors weigh in his favor. Specifically, Sessler has not shown the substantial likelihood of success of his First Amendment claim against Defendants. Based on the evidence in the record at this preliminary stage, the Court finds Defendants likely did not construe or enforce the Policy in an unconstitutional manner. Instead, Defendants imposed reasonable time, place, and manner restrictions on Sessler's protected speech by directing him to move to an area adjacent to Street Fest's boundaries. Defendants' actions were narrowly tailored to the significant government interest of limiting interference with a permitted event. Defendants' actions left Sessler ample alternative channels of communication. For these reasons and the reasons discussed above, the Court denies Sessler's motion for a preliminary injunction.

IT IS SO ORDERED.

Dated this 24th day of September, 2019.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE