No. 22-3459

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CORY SESSLER, an individual
Plaintiff-Appellant

vs.

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

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

DEFENDANTS-APPELLEES' THE CITY OF DAVENPORT, GREG BEHNING, AND JASON SMITH'S PRINCIPAL BRIEF

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RESPONSIVE SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case arises out of Cory Sessler and his colleagues' street preaching activities at an annual festival known as Street Fest in Davenport, Iowa on July 28, 2018. On that date, the Defendant police officers, who were off duty but working as Street Fest security, and the festival organizer attempted to accommodate Sessler and his colleagues' means of speech, but Sessler and his group ultimately created adverse effects on vendor business, impeded crowd movement, and subjected festival attendees to an unwanted intrusion in a time-limited event. Sessler and his colleagues were, therefore, asked to move outside of the Street Fest fenced area and across the street to prevent them from interfering with vendors and festivalgoers and otherwise disrupting Street Fest. The District Court correctly granted the Defendants summary judgment because the Defendants' conduct was a constitutionally permissible means of achieving the legitimate interest of preventing any individual or group from interfering with the safety of festival attendees or otherwise disrupting the permit-authorized event.

In granting Defendants summary judgment, the District Court also correctly applied Eighth Circuit precedent and concluded the sidewalks and streets where Street Fest occurred were a limited public forum. Defendants request oral argument with the same amount of time allotted to Sessler.

DEFENDANTS-APPELLEES' 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

Janssen Law, PLC – Local Counsel for Plaintiff-Appellant

The Law Offices of David J. Markese, P.A. – Appellate Counsel for Plaintiff-Appellant

Center for Religious Expression – Appellate Counsel for Plaintiff-Appellant

Frederick H. Nelson, Esq. – Trial Counsel for Plaintiff-Appellant

David J. Markese, Esq. – Trial and Appellate Counsel for Plaintiff-Appellant

Dallas J. Janssen, Esq. – Trial Counsel for Plaintiff-Appellant

Lane & Waterman LLP – Trial and Appellate Counsel for Defendant-Appellees the City of Davenport, Greg Behning, and Jason Smith.

Jason J. O'Rourke, Esq. – Trial and Appellate Counsel for Defendant-Appellees the City of Davenport, Greg Behning, and Jason Smith.

Alexander C. Barnett, Esq. – Trial and Appellate Counsel for Defendant-Appellees the City of Davenport, Greg Behning, and Jason Smith.

Bush, Motto, Creen, Koury & Halligan – Trial and Appellate Counsel for Defendant-Appellee J.A. Alcala

Kevin L. Halligan – Trial and Appellate Counsel for Defendant-Appellee J.A. Alcala

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.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The District Court granted Defendants Greg Behning, Jason Smith, and J.A. Alcala (collectively referred to hereinafter as "Defendant Officers") summary judgment on Sessler's claim for monetary damages under the doctrine of qualified immunity. As a result, the issues on appeal are properly characterized as follows:

1. Did the District Court correctly determine the Defendant Officers are protected from civil liability because they are entitled to qualified immunity?

- *Wallingford v. Olson*, 592 F.3d 888 (8th Cir. 2010)

  a. Did the District Court properly conclude the sidewalks and streets comprising the City of Davenport's 2018 Street Fest constituted a limited public forum?

    - *Powell v. Noble*, 798 F.3d 690 (8th Cir. 2015)
    - *Ball v. City of Lincoln, Nebraska*, 870 F.3d 722 (8th Cir. 2017).
    - *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640 (1981)
    - *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294 (S.D.N.Y. 2000)

b. If so, did the District Court correctly determine the decision to remove Sessler and his colleagues from Street Fest was reasonable and viewpoint-neutral, thereby entitling the Defendant Officers to qualified immunity?

- *Powell v. Noble*, 798 F.3d 690 (8th Cir. 2015)

c. Even if the sidewalks and streets comprising the City of Davenport's 2018 Street Fest constituted a traditional public forum, did the District Court properly conclude Sessler failed to carry his burden showing the Defendant Officers violated a clearly established right?

- *Davis v. Hall*, 375 F.3d 703 (8th Cir. 2004)
- *Marcavage v. City of Philadelphia*, 778 F.Supp.2d 556 (E.D. Pa. 2011)

i. Did the District Court properly determine a reasonable officer could conclude the removal of Sessler and his colleague's from Street Fest was content-neutral?

- *Sessler v. City of Davenport, Iowa*, 990 F. 1150 (8th Cir. 2021)
- *Startzell v. City of Philadelphia, Pennsylvania,* 533 F.3d 183 (3rd Cir. 2008)

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- *Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012)
- *Phelps-Roper v. Ricketts*, 867 F.3d 883 (8th Cir. 2017)

iii. Did the District Court properly determine a reasonable officer could conclude allowing Sessler and his colleagues to continue their proselytizing across the street from Street Fest left open ample alternative channels of communication?

- *Powell v. Noble*, 798 F.3d 690 (8th Cir. 2015)
- *Phelps-Roper v. Ricketts*, 867 F.3d 883 (8th Cir. 2017)

2. Did the District Court properly conclude Sessler's cause of action premised on Section 1983 against the City fail as a matter of law because the City is immune from liability?

- *Monell v. Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978)
- *Miller v. City of St. Paul*, 823 F.3d 503 (8th Cir. 2016)

3. Did the District Court properly conclude Sessler lacks standing to obtain his requested injunctive and declaratory relief?

- *O'Shea v. Littleton*, 414 U.S. 488 (1974)
- *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)

STATEMENT OF THE CASE

I. Procedural Background

On January 30, 2019, Sessler filed a Complaint against Defendants the City of Davenport, Greg Behning, Jason Smith, and J.A. Alcala (collectively referred to hereinafter as "the City"), alleging the City abridged his rights to free speech (Count I) and free exercise of religion (Count II) when the City asked Sessler and his colleagues to move outside of Street Fest and to continue their street preaching activities across the street from the festival on July 28, 2018. (App. 49-69; R. Doc 1). Sessler is suing the Defendant Officers in their individual capacities only. (App. 50; R. Doc 1).

Sessler filed a Motion for Preliminary Injunction contemporaneously with his Complaint. (App. 70; R. Doc 2). The Court allowed the City to conduct discovery before responding to the Motion for Preliminary Injunction. (App. 87; R. Doc 21). The City filed a Resistance to Sessler's Motion for Preliminary Injunction supported

by an affidavit and deposition testimony. (App. 112-146; App. 147-152; App. 153-160; App. 161-168; App. 169-173; R. Doc 24 through R. Doc. 24-5).

Thereafter, the parties agreed that the facts were undisputed and Sessler's Motion for Preliminary Injunction was submitted on stipulated facts for purposes of the injunction hearing. (App. 89-111; R. Doc. 23; App. 196-198; R. Doc. 35). The parties also submitted video footage that depicts virtually all of Sessler's street preaching activities on July 28, 2018, including his encounters with law enforcement. (App. 196-198; R. Doc. 35).

The District Court, after reviewing the parties' stipulated facts and video footage showing virtually all of Sessler's street preaching activities, including his interactions with law enforcement on July 28, 2018, ruled each *Dataphase* factor weighed in favor of denying Sessler's Motion for Preliminary Injunction, and that the City's regulation of Sessler's speech was likely content-neutral and narrowly tailored to serve a significant government interest. (App. 200-219; R. Doc. 52). In reaching this conclusion, the Court correctly determined the probability of success on the merits weighed in favor of denying Sessler's Motion for Preliminary Injunction. (*Id.*).

This Court affirmed the District Court's denial of Sessler's request for a preliminary injunction, holding Sessler could not establish he will suffer irreparable harm "in the face of the City's Policy without the court's intervention[,]" that "it is

too speculative as to whether any location on which Sessler preaches in the future would be subject to the City's Special Events Policy[,]" and Sessler's proposed injunction would not meet the requirements of Federal Rule of Civil Procedure 65(d). (App. 223-233).

After this Court affirmed the District Court's denial of Sessler's Motion for Preliminary Injunction Defendants moved for summary judgment on all of Sessler's claims. (App. 225-369; R. Doc. 91; R. Doc. 92). The District Court granted the Defendant Officers and the City's Motions for Summary Judgment in their entirety. (App. 360-410; R. Doc. 107).

II. Factual Background

A. The Street Fest Festival

The Downtown Davenport Partnership ("DDP"), a division of the Quad Cities Chamber of Commerce, produced and hosted Street Fest, a two-day, family-oriented festival that occurred yearly in connection with the Quad City Times Bix 7 weekend festivities. (App. 147-148). To host this event, DDP applied for a special event permit with the City of Davenport. (App. 148). Because the event brought approximately 20,000 people to the downtown area, and because vendors set up to sell food, beverages and other products, the City closed Second Street between Ripley and Brady Streets, Main Street from the alley south of Third Street to the

alley north of River Drive and Harrison Street from the alley south of Third Street to the entrance of the Ground Transportation Center. (App. 148).

While Street Fest was open to the general public, the City required DDP to secure the perimeter of Street Fest with fencing that established defined entrances and exit areas for control purposes. (App. 149). DDP secured the perimeter of Street Fest with a six-foot-high chain-link fence, and Street Fest personnel monitored the entrance and exit areas. (*Id.*). The City also required DDP to hire off-duty police officers to provide security for the event. (*Id.*).

DDP produced Street Fest to showcase downtown Davenport and to encourage festivalgoers to return to the downtown area to explore local businesses. (*Id.*). Street Fest also generated revenue for DDP, which DDP reinvested into the local community and used to help fund downtown revitalization. (*Id.*). To generate revenue, DDP issued licenses to fee-paying, approved vendors who sold food, beverages and a variety of products. (*Id.*). DDP prohibited vendors from playing music at their booths. (*Id.*). In addition, vendors had to acquire: (1) preapproval from the Street Festival Committee to distribute literature; and (2) roaming vendor licenses to extend their activities beyond the confines of their booths. (*Id.*).

B. Sessler And His Colleagues' Conduct At Street Fest on July 28, 2018

On July 28, 2018, Sessler, his wife, three other adults and two minor children attended Street Fest for the purpose of engaging in "street preaching." (App. 52; R. Doc. 1, p. 4). Throughout that day, Street Fest had between 10,000 and 12,000 attendees. (App. 150). Sessler and his colleagues situated themselves at certain areas in the Festival and began expressing their message using a megaphone, displaying their messages with large elevated signs, and distributing literature. (App. 52; R. Doc. 1; App. 156-57).

Sessler and his group initially congregated at the corner of Second Street and Main Street. (App. 92, 150). This location, however, had been assigned to a juggling and magic vendor, who complained that Sessler and his colleagues were being disruptive and in his space. (App. 53; R. Doc. 1, p. 5; App. 150). DDP personnel approached Sessler and his colleagues and asked them to move to another location that would not disrupt the vendor. (App. 150). Sessler initially refused to move, and DDP's Director of Events, Jason Gilliland, located Officer Jason Smith, and informed Officer Smith that Sessler and his colleagues refused to relocate and were disrupting vendors. (*Id.*).

Officers Behning, Smith, and Alcala eventually approached Sessler and his colleagues and asked them to move to another location. (App. 53; R. Doc. 1, p. 5). Initially, Sessler and the Officers could not agree on an alternative location within

Street Fest to continue his street preaching activities. (*Id.*). Officer Smith told Sessler he would not allow Sessler and his colleagues to relocate directly across the street because they would still be interfering with or disrupting the juggling and magic vendor. (App. 56; R. Doc. 1, p. 6; App. 270 (Video 3, Times: 0:52-1:08, 4:03-4:30)). Officer Smith further told Sessler he would not allow him to relocate to an alternate location suggested by Sessler that was in the vicinity of musical performers because that area was a "choke point," and Sessler's preaching activities would impede the flow of festival attendees. (App. 56; R. Doc. 1, p. 8; App. 270 (Video 3, Time: 5:05-5:32)). Officer Smith further cautioned Sessler that his street preaching activities could not create adverse effects on concessionaire business. (App. 56; R. Doc. 1, p. 8; App. 270 (Video 3, Time: 8:30-8:51)).

Officer Smith eventually proposed, and Sessler agreed, to investigate whether the RME Courtyard located in front of the Skybridge entrance on Second Street and between Woodfire Grill and Phoenix restaurants was a satisfactory location for his preaching activities. (App. 53; R. Doc. 1, p. 5; App. 270 (Video 3, Time: 4:40-5:05)). DDP and the off-duty police officers attempted to accommodate Sessler by asking him and his colleagues to move to the RME Courtyard. (App. 167-168; App. 172-173; App. 150).

Officer Alcala accompanied Sessler and his colleagues to the RME Courtyard. (App. 53; R. Doc. 1, p. 5). While there, Sessler and Officer Alcala could not agree

on a location within or near the RME Courtyard for Sessler to engage in street preaching activities. (*Id.*). Officer Alcala cautioned Sessler that his street preaching activities could not interfere with or disrupt the vendors within or near the RME Courtyard. (App. 270 (Video 3, Time: 11:59-13:14)). Sessler asked to move to a different location in Street Fest to reach a wider audience. (App. 53; R. Doc. 1, p. 5). Sessler and his group then moved to an area near Street Fest's entrance on Brady Street and Second Street. (*Id.*). This area was near vendors and congested with pedestrians. (App. 151; App. 158; App. 270 (Video 4)).

Sessler and his colleagues were allowed to preach near Street Fest's entrance on Brady Street and Second Street for approximately thirty minutes. (App. 93; R. Doc. 23, p. 5). During this time, Sessler attracted festival attendees, vendors, and DDP security personnel who congregated near his group and/or in the middle of the street. (App. 270 (*see, e.g.,* Video 4 Times: 14:24-14:51, 17:16-17:30, 24:30-25:00, 25:24-25:53, 25:57-26:34, 28:25-28:417, 29:05-29:45)). Sessler's activities also attracted a woman and a man who congregated around Sessler and his colleagues for essentially the entire time Sessler preached at this location, and who at times attempted to disrupt Sessler's children from handing leaflets to other children. (App. 157).

Festival attendees were forced to walk around the preachers, protestors, supporters and DDP security that congregated in the middle of the street because of

Sessler's street preaching activities. (App. 270 (*see, e.g.,* Video 4, Times: 14:24-14:51, 17:23-17:47, 24:30-25:00, 25:57-26:34, 27:29-27:40, 28:25-28:47, 29:05-29:45)). The vendors near this location had no means to escape the sound of Sessler and his colleagues' voices amplified by a megaphone. (App. 158).

Nearby vendors complained that Sessler's street preaching activities were adversely impacting their business. (App. 270 (Video 4, Time: 17:16-17:30); App. 271 (Behning Body Cam Footage, Time: 1:00-1:18); App. 164-165; App. 176-177; App. 183-185; App. 186-187; App. 188; App. 191-192; App. 194-195). In Sessler's video footage, a festival attendee is seen plugging his ears as he walks past Sessler and requesting Sessler "to stop." (App. 270 (Video 4, Time: 23:01-23:17)). That same festival attendee is later seen plugging his ears in front of a nearby vendor. (App. 270 (*see, e.g.,* Video 4, Time: 23:17-24:02)).

Sessler and his group's conduct at this location ultimately created adverse effects on vendor business, impeded crowd movement, and subjected festival attendees to unwanted intrusion. (App. 270 (*see, e.g.,* Video 4, Time: 17:16-17:30); App. 271 (Behning Body Cam Footage, Time: 1:00-1:18); App. 226; App. 164-165; App. 176-177; App. 183-185; App. 186-187; App. 188; App. 191-192; App. 194-195).

Sessler's conduct near the Brady Street and Second Street entrance resulted in complaints from vendors and festival attendees. (App. 166; App. 176-177; App.

183-185; App. 186-187; App. 188; App. 191-192; App. 194-195). Sessler and his colleagues were asked to move outside of the Street Fest fenced area and across the street to prevent Sessler and his group from interfering significantly with vendors and festivalgoers, and otherwise disrupting Street Fest. (App. 166; App. 176-177; App. 183-185; App. 186-187; App. 188; App. 191-192; App. 194-195). While located across the street, Sessler acknowledges his megaphone was loud enough that festival attendees across the street, where Street Fest was taking place, could still hear his and his colleagues' preaching. (App. 160).

Officer Behning informed Sessler that the decision to remove him and his colleagues had nothing to do with the content of their message. (App. 270 (Video 5, Time: 5:30-5:52)). Before Sessler left the Street Fest fenced area, Officer Behning assured Sessler that the City would provide Sessler and his colleagues police protection if a crime was perpetrated against them while they preached across the street. (App. 270 (Video 5, Times: 3:42-4:08, 7:15-7:25); App. 159). Officer Behning never told Sessler that he would be charged with criminal trespass if he returned to Street Fest for any reason or purpose the following day or year. Instead, Officer Behning told Sessler: "for now, today, outside of the festival grounds." (App. 270 (Video 5, Time: 7:10-7:15)). No other individuals or entities engaged in conduct like Sessler and his colleagues. (App. 160). If they had, the same actions would have been taken to address their conduct. (App. 194-195).

Sessler and his group moved across Brady Street, where they continued to express their message with a megaphone for two to three hours on the City's sidewalks. (App. 54; R. Doc 1, p. 6; App. 160). Sessler was not asked to move from this final location and had no further interaction with the City's law enforcement. (App. 54; R. Doc 1, p. 6). Sessler acknowledges his amplified voice was loud enough to carry across Brady Street to the west side of the street. (App. 160). While preaching at this final location, a passerby asked Sessler's colleague, who was using the megaphone at that time, "why do you have to be so loud?" (App. 270 (Video 5, Time: 16:05-16:15)). Sessler's colleague responded: "there's hundreds of people listening, you're not the only person here." (*Id.*).

Sessler, while using the amplification equipment, informed another passerby that his comments were not specifically directed towards her because he was "talking to everyone within the sound of [his] voice" while preaching at this location. (App. 270 (Video 6, Time: 22:13-22:35)). Another one of Sessler's colleagues acknowledged that festival attendees filtering towards Street Fest could "still hear the message." (App. 270 (Video 9, Time: 22:04-22:10)). While at this location, Sessler and his colleagues were able to engage with a dozen or more attendees or supporters of Street Fest at given times, not to mention the plenty of others who must have heard the amplified message across the street or through the chain-link fence. (App. 270 (*see, e.g.,* Video 5, Time: 27:45-28:24)). Overall, this final location

satisfied the criteria Sessler articulated to Officer Smith earlier in the day: "the criteria we have to have…is that there has to be people, and people have to hear our voice….we don't want to be two blocks outside or somewhere where people aren't going to hear." (App. 270 (Video 3, Time: 1:38-1:54)).

Sessler implicitly concedes that when he and his colleagues were preaching inside the fenced area of Street Fest, unwilling listeners had to forego nearby vendors to avoid exposure to his message. For instance, while preaching across the street from Street Fest Sessler informed a passerby that he can continue on his way if he is offended. (App. 270 (Video 8, Time: 23:11-23:42)). Likewise, Sessler's wife told a passerby: "if you don't want to hear what we have to say, then you can move on." (App. 270 (Video 6, Time: 8:35-8:45)).

C. Additional Discovery Following Sessler's Appeal

After this Court affirmed the District Court's Ruling denying Sessler's Motion for Preliminary Injunction, Sessler served a subpoena on the DDP and took the deposition of Jason Gilliland, the DDP Director of Events. (App. 234; R. Doc. 84). Except for serving a subpoena on DDP and taking Jason Gilliland's deposition, no other discovery was performed following the District Court's Ruling denying Sessler's Motion for Preliminary Injunction. (*See generally* App. 234-235; R. Doc. 84).

Jason Gilliland, during his deposition, testified DDP no longer hosts events with fee-paying vendors, and DDP does not expect to produce Street Fest again. (App. 192-193). The final year DDP produced Street Fest was in 2019. (App. 175).

Jason Gilliland testified that over the course of producing Street Fest from 2012 through 2019, DDP never removed an individual from Street Fest based on a particular message the individual was expressing or complaints relating to the contents of an individual's speech. (App. 191). Indeed, prior to 2018, there was a street preacher who attended Street Fest with amplification equipment, and that individual was not asked to leave Street Fest. (App. 180-182). Once Jason Gilliland was aware of the street preacher who attended Street Fest prior to 2018, he investigated the situation and ultimately determined that particular preacher "was not an issue," and the DDP received no complaints, from vendors or otherwise, regarding that particular street preacher. (App. 180-182). With respect to Sessler and his colleagues, however, Jason Gilliland received numerous complaints from vendors that the manner in which Sessler and his colleagues were preaching was disrupting the festival and adversely impacting their business. (App. 176-177; App. 183-195).

The DDP's decision to request Davenport Police Officers to remove Sessler and his colleagues from Street Fest in 2018 had nothing to do with the content of their speech, and DDP would have made the same decision with people showing up

and engaging in similar behavior to glorify a local little league team, or to say anything else loud and disruptive for an ongoing period of time. (App. 194-195). Ultimately, the decision to remove Sessler and his colleagues from Street Fest was jointly made between the DDP and the Defendant Officers. (App. 194).

During his deposition, Jason Gilliland acknowledged he could not arbitrarily remove individuals from Street Fest, and there "would have to be a good reason" to remove an individual from Street Fest. (App. 180-182). If Jason Gilliland was unsure whether an individual's behavior warranted removal from Street Fest, he would "defer to the Davenport Police Department onsite." (App. 180-182).

D. The City's Special Events Policy

Davenport has a Special Events 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." (App. 90; App. 238). Under the Special Events Policy, the City "shall be charged with the responsibility of determining whether a particular sponsor shall be entitled to conduct an outdoor special event." (App. 90; App. 240).

Under the Policy, a "Special Event" is defined as "outdoor events that include, but are not limited to, the following: fair, carnival, circus, parade, concert, walk or run, graduation, block sponsor or other festival, ceremony, rally, procession, or mass

gathering or any other gathering deemed a special event by the City Council." (App. 239 (emphasis added)). Potential Special Event permittees are directed to obtain approval from the Davenport City Council to obtain a permit to host a Special Event. (App. 250 ("The sponsor shall request the proposed streets to be closed for the special event. Streets in the proposed plan shall be closed once approval has been made by the City Council based on the recommendations of the Special Events Committee." (emphasis added)).

The Davenport City Council adopted and enacted the Special Events Policy in February 2017. (App. 251). Potential Special Event permittees are directed to submit an online application for the City of Davenport's approval. (App. 90; App. 241).

By its plain and unambiguous terms, the Special Events Policy neither regulates speech nor the conduct of attendees at Street Fest. (App. 207; R. Doc. 52, p. 8 ("Notably, Sessler does not seek to enjoin a policy, ordinance, or unwritten rule that regulates protected speech.")). Similarly, the City's Special Events Policy does not restrict a special event permittee's right to exclude persons from the permitted area. (*Id.*). Instead, the Special Events Policy simply establishes the mechanism and requirements for obtaining a permit to temporarily use public property for the permittee's purposes. (App. 203).

The Davenport City Council approved the DDP's application to host Street Fest in the summer of 2018. (App. 266). The City of Davenport enacted the Special Events Policy on February 8, 2017. (App. 189-190). Jason Gilliland testified the City of Davenport enacting the Special Events Policy in 2017 did not substantively alter the way DDP hosted Street Fest. (*Id.*). The crux of Sessler's claim is that the City's Special Events Policy, as applied to him on July 28, 2018, purportedly infringed his constitutional rights. (App. 54, 57-61, 63; R. Doc 1 pp. 6, 9-13, 15).

SUMMARY OF THE ARGUMENT

The District Court correctly held the Defendant Officers are entitled to qualified immunity. In reaching this conclusion, the District Court correctly determined the sidewalks and streets comprising Street Fest in 2018 constituted a limited public forum during the two days the festival was ongoing. Sessler's argument otherwise begins and ends with the mistaken premise that the City cannot temporarily create a limited public forum by reserving a portion of its property to raise revenue or conduct a temporary event to benefit the general public. The First Amendment does not command such a limited view of the City's authority to control its public property, and the District Court correctly reconsidered this issue and determined Street Fest constituted a limited public forum under existing precedent from this Court. Because the sidewalks and streets comprising Street Fest in 2018 constituted a limited public forum, and Sessler's removal from Street Fest on July

28, 2018 was reasonable and viewpoint-neutral, the District Court correctly determined the Defendant Officers are entitled to qualified immunity.

Alternatively, even if the streets and sidewalks comprising Street Fest retained their traditional public forum status, the District Court correctly determined the Defendant Officers are entitled to qualified immunity. In arguing otherwise, Sessler misconstrues the issue before the Court, relies on speculative assumptions, and draws disingenuous analogies to cases that have no bearing on the specific and undisputed facts of this case. Sessler's general strategy is to try to convince the Court there is a *potential* fact issue on whether he is likely to succeed on the merits.

However, it is immaterial whether there is *possibly* a fact issue on any of the constitutional factors the District Court previously considered when it determined Sessler is unlikely to prevail on the merits. The Defendant Officers requested and obtained summary judgment based on qualified immunity. Therefore, the issue before the Court is whether "it would be clear to a reasonable officer," and "beyond debate," that the time, place, and manner restrictions Officers Behning and Smith placed on Sessler's speech activities at Street Fest on July 28, 2018 violated Sessler's constitutional rights. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011) (citation omitted). Far from presenting a "robust consensus of persuasive authority" showing it is "beyond debate" and "clear" that the Defendant Officers violated Sessler's First Amendment rights, the cases Sessler has cited are readily distinguishable and have

no bearing on the particular and undisputed facts of this case. The Defendant Officers did not violate a clearly established constitutional right which a reasonable officer would have known. Indeed, the District Court—after reviewing the parties' stipulated facts and video footage depicting virtually all of Sessler's street preaching activities, including his interactions with law enforcement on July 28, 2018—determined the City's regulation of Sessler's speech was likely content-neutral and narrowly tailored to serve a significant governmental interest. (App. 200-219; R. Doc. 52; App. 360-410; R. Doc. 107). Accordingly, the Defendant Officers are entitled to qualified immunity.

Like the Defendant Officers, the District Court correctly determined the City is immune from liability and entitled to summary judgment on Sessler's claim for monetary damages. Sessler's request for monetary damages against the City under 42 U.S.C § 1983 fails because Sessler cannot hold the City vicariously liable for the actions of its employees, and Sessler cannot otherwise impose municipal liability under the facts and circumstances of this case. The fact that a Davenport City Attorney told Sessler, more than two weeks after he was removed from Street Fest, that the Defendant Officers did not violate his constitutional rights is insufficient to constitute an official city policy or to otherwise waive the City's immunity. There is no evidence the City Attorney directed the Defendant Officers to take any action against Sessler and his colleagues; the City Attorney simply denied wrongdoing after

the festival. Like the City Attorney, the District Court also determined the Defendant Officers' actions were likely constitutional when it denied Sessler's Motion for Preliminary Injunction, and determined Sessler is unlikely to prevail on the merits because the City's regulation of Sessler's speech was likely content-neutral and narrowly tailored to serve a significant government interest. (App. 200-219; R. Doc. 52; App. 360-410; R. Doc. 107).

The District Court also correctly determined Sessler lacks standing for declaratory and injunctive relief. Sessler cannot show any concrete injury fairly traceable to the City's Special Events Policy itself, which only authorizes temporary use of public space, and nothing else. Sessler's request for declaratory and injunctive relief is moored to the Defendants' specific actions on July 28, 2018, *and* the unique circumstances and physical characteristics of Street Fest—a festival the DDP has no intent to host again. As a result, any potential future injury to Sessler is overly speculative, and he cannot allege a cognizable injury in fact to obtain equitable relief.

ARGUMENT

I. Standard of review

This Court reviews a District Court's decision to grant summary judgment de novo. *Zokaites v. City of Sioux Falls*, 848 F. App'x 224, 225 (8th Cir. 2021). Summary judgment is appropriately entered against a party who "fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). General allegations and denials are insufficient to withstand summary judgment. *See* Fed. R. Civ. P. 56(e). The moving party need not disprove matters on which the opponent has the burden of proof at trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

When the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." *Celotex*, 477 U.S. at 322. Pursuant to Rule 56(e), "conclusive assertions of ultimate facts are entitled to little weight when determining whether a non-movant has shown a genuine issue of fact sufficient to overcome a summary judgment motion supported by affidavits." *Miller v. Solem*, 728 F.2d 1020, 1024 (8th Cir. 1984), *cert denied*, 469 U.S. 841 (1984). When the summary judgment record contains video evidence depicting the facts in dispute, the facts are viewed "in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007).

II. The District Court Properly Granted The Defendant Officers Summary Judgment On Sessler's Request For Monetary Damages Under The Doctrine Of Qualified Immunity

Sessler alleges the Defendant Officers enforced, interpreted, and applied the City's Special Events Policy when they told Sessler he had to leave the gated area of Street Fest. Nothing, however, in the City's Special Events Policy infringes

Sessler's constitutional rights. Instead, the Special Events Policy simply establishes the mechanism and requirements for obtaining a permit to temporarily use public property for the permittee's purposes. The Special Events Policy does not include any restrictions on the right of the permittee to exclude persons from the permitted area.

In view of the Special Events Policy and the District Court's prior ruling denying Sessler's Motion for Preliminary Injunction, the Defendant Officers are entitled to qualified immunity. This Court has summarized the qualified immunity analysis as follows:

> In determining whether an officer is entitled to qualified immunity, we ask (1) whether, taking the facts in the light most favorable to the injured party, the alleged facts demonstrate that the official's conduct violated a constitutional right and (2) whether the asserted constitutional right is clearly established. We may address either question first. *If either question is answered in the negative, the public official is entitled to qualified immunity*. To determine whether a right is clearly established we ask whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Wallingford v. Olson, 592 F.3d 888, 892 (8th Cir. 2010) (emphasis added) (internal quotations and citations omitted).

Under the first prong, "[i]f no constitutional right would have been violated were the [plaintiff's] allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier v. Katz*, 533 U.S. 194, 201

(2001). Here, the question is whether placing a roadway distance between Sessler and Street Fest on July 28, 2018 violated Sessler's First Amendment rights.

As to the "clearly established law" prong, "[t]hat inquiry must be undertaken in light of the specific context of the case so that the rule of qualified immunity does not become a rule of virtually unqualified liability simply by plaintiffs alleging violations of extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Under this standard, there is "ample room for mistaken judgments," and "all but the plainly incompetent or those who knowingly violate the law" are protected by qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quotation marks and citation omitted). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004).

The authorities cited in the City's Resistance to Sessler's Motion for Preliminary Injunction, and relied upon by the District Court to deny Sessler's Motion for Preliminary Injunction, establish organizers of a permitted event, such as Street Fest, are entitled to exclude persons from an event to avoid unwanted disruption of the permitted event. This conclusion is reinforced by the District Court determining the streets and sidewalks comprising Street Fest in 2018 constituted a limited public forum while the festival was underway.

A. The District Court Correctly Determined The Streets And Sidewalks Of Street Fest Constituted A Limited Public Forum

It bears emphasis at the outset that this case is not about Sessler's ability to exercise First Amendment activities on the City's public streets and sidewalks. It never has been. The City removed Sessler and his colleagues from the gated area of Street Fest, but allowed Sessler and his group to stand on a busy corner just across the street from Street Fest, where they expressed their message via a megaphone for approximately three hours. The City's actions show Sessler is allowed to express his religious views on public sidewalks and other public forums in the City of Davenport.

In view of the City's conduct, Sessler does not seek general access to the City's public streets and sidewalks, which he already has. Instead, he seeks specific access to Street Fest, a festival the DDP no longer hosts and has no intention of hosting again. Although Street Fest no longer exists, when Sessler initiated this lawsuit he sought access to an annual event of very limited duration that attracted tens of thousands of attendees in a footprint of three city blocks. In his opening brief, Sessler attempts to disregard the physical characteristics and function of Street Fest and contends his conduct at issue was justified because Street Fest happens to take place on the City's streets and sidewalks.

In doing so, Sessler greatly oversimplifies the forum analysis and overlooks "the special characteristics regarding the environment in which those areas exist."

Powell v. Noble, 798 F.3d 690, 700 (8th Cir. 2015) (quoting *Bowman v. White*, 444 F.3d 967, 974 (8th Cir. 2006)); *United States v. Kokinda*¸ 497 U.S. 720 (1990) (plurality opinion) ("[T]he location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum."). The fact that Sessler and his colleagues' expressive activities occurred on a street or sidewalk within the fenced area of Street Fest does not define the festival's forum. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("forum analysis is not completed merely by identifying the government property at issue."); *Powell v. Noble*, 36 F.Supp.3d 818, 833 (S.D. Iowa 2014) ("'The characterization of a place as physically a street, sidewalk, or park, without more, is not adequate to define a traditional public forum.'" (citation omitted); *Kokinda*, 497 U.S. at 727 ("The mere physical characteristics of the property cannot dictate forum analysis"). "Rather, in defining the forum [Courts] have focused on the access sought by the speaker." *Cornelius*, 473 U.S. at 800 (1985).

Here, the relevant forum is Street Fest, including its physical characteristics, limited duration, and the fact that it exists in part to provide a means for a great number of vendors to temporarily present their food, beverages, and products to a large number of people in an orderly, safe and efficient fashion. Sessler assumes Street Fest is a traditional public forum based on generic holdings that public streets and sidewalks are traditionally considered public fora. He fails to recognize,

however, that the status of any street or sidewalk depends upon its location and, in particular, any special characteristics that differentiate the area from regular public streets and sidewalks. *Bowman*, 444 F.3d at 978; *Powell*, 798 F.3d at 700.

With respect to the physical characteristics of Street Fest, this Court held in *Powell* that "congestion, signage, police presence, and fencing" are "special characteristics" that differentiate streets and sidewalks from those that are generally considered traditional public fora. *Powell*, 798 F.3d at 700. Similarly, the Supreme Court has observed the Minnesota State Fair is a temporary event attracting large crowds, and constitutes "a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion." *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 655 (1981)

In making this determination in *Heffron*, the Supreme Court held the "significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Id.* at 650-51. The Supreme Court noted "there are significant differences between a street and the fairgrounds." *Id.* at 651. While a street is "continually open, often uncongested" and "a relaxed environment," the "flow of the crowd and demands of safety are far more pressing in the context of the Fair." *Id.*

In *Powell*, the United States Court for the Southern District of Iowa concluded the Iowa State "Fairgrounds in their entirety are a limited public forum, at least during the eleven days per year the Fair is ongoing." 36 F. Supp. 3d at 833. In making this determination, the district court considered a number of factors: "including the presence of a fence around most of the fairgrounds, marking it as separate and distinct from other public streets and sidewalks; the presence of fair personnel and law enforcement around the fairgrounds; and the fact that the areas in question are not continually open, uncongested thoroughfares used to travel from one public point to another but rather, at least during the fair, are busy and subject to significant congestion as thousands of people use them for ingress and egress to the fair." *Powell*, 798 F.3d at 697 (affirming trial court's forum analysis). This Court agreed with the district court in *Powell* and held the logic of *Heffron* and its progeny applied to the paved sidewalks outside the Iowa State Fair's paid-admission boundary because the plaintiff was within the outer perimeter of the fairground's fence and the area was a congested conduit to the fair. *Id.*

The same is true of Street Fest, which attracts a large number of people in a limited amount of time and space, and where the festival streets are closed to vehicles and crowded with pedestrians. On July 28, 2018, during Street Fest, crowds measured about 10,000 to 12,000 persons throughout the day within a Festival footprint of three city blocks in the heart of the downtown Davenport. (App. 148,

150). The property at issue is generally enclosed by a six-foot-high chain-link fence, which differentiates the festival streets and sidewalks from the surrounding areas and provides a visible indication that the Festival was intended to be in a special, limited area. (App. 149). Street Fest personnel monitor the entrances to the festival and the Davenport Police Department provides security by off-duty law enforcement officers. (*Id*). Street Fest is of limited duration and exists in part to provide a means for a great number of vendors to temporarily present their food, beverages, and products to a large number of people in an orderly, safe, secure and efficient fashion. (App. 148). To host this event the City closed its streets to allow a private organizer to invite groups to come in, lease booth space, and attract thousands of festivalgoers, making it a limited public forum. (App. 148-49). Sessler does not attempt to distinguish the characteristics and function of Street Fest from the Fairs in *Powell* and *Heffron*. Nor can he. The streets and sidewalks comprising Street Fest differ significantly from the surrounding public streets and sidewalks.

Just as in *Ball v. City of Lincoln, Nebraska*, the sidewalks and streets within Street Fest do not serve primarily as public thoroughfares during the time of the event. 870 F.3d 722, 734 (8th Cir. 2017). "Rather, [they] function[] as a venue for commercial use by [vendors], as a means to facilitate safe and orderly access to the [festival] for its patrons, as a security screening area, and as a gathering place and entryway for [the festival's] patrons." *Id.* Here, like the plaza area in *Ball*, the

sidewalks and streets comprising Street Fest, during the two days per year the festival is ongoing, serve primarily as a venue for vendors and as a means to facilitate the safe and efficient movement of thousands of festivalgoers. *Id.* at 734-35. In addition, unlike the Plaza Area in *Ball*, the Street Fest area does not blend in with the surrounding sidewalks and streets. *See id.* The six-foot-high chain-link fence enclosing Street Fest vividly distinguishes the festival area from the adjacent public sidewalks and streets, and festivalgoers must enter the festival at designated areas where they are monitored by Street Fest personnel.

In attempt to avoid the conclusion Street Fest is a limited public forum, Sessler argues the government cannot, under any circumstances, alter the status of public streets and sidewalks even under temporary or limited circumstances. This Court in *Powell*, however, observed a government can periodically designate traditional public forum property for a specific use that is incompatible with its public forum status such that the property is temporarily converted into a limited public forum.

Specifically, in *Powell*, this Court held public sidewalks and streets generally open to the public during the Iowa State Fair off-season constitute a limited public forum during the eleven days per year the fair is ongoing. *Powell*, 36 F.Supp.3d at 825 ("During the off-season, [the public] can proceed down Grand Avenue through the Fairgrounds, but during the Fair, Grand Avenue is blocked just east of East 30th Street with a gate commonly referred to as Gate 11."). While Grand Avenue and its

accompanying sidewalks are generally accessible to the public during the off-season, they are congested and significantly different than ordinary public streets and sidewalks when the Fair is ongoing. *Id.* This Court, recognizing the physical characteristics of the streets and sidewalks in and near a fair entryway change when the State Fair is ongoing, held the portion of Grandview and its nearby sidewalks beyond the paid-admission portion of the Fair are a limited public forum "*at least during the eleven days per year the Fair is ongoing*." *Id.* at 833 (emphasis added); *Powell*, 798 F.3d at 700 (affirming the property in question is a limited public forum "at least during the 11 days each year when the Iowa State Fair is underway."). By limiting the forum analysis in *Powell* to the eleven days per year the State Fair is held, this Court astutely observed that a time-limited special event can present special circumstances and safety concerns that temporarily alter the nature of the forum occupied by the event. *Bowman*, 444 F.3d at 978 (determining forum type requires consideration of "any special characteristics regarding the environment in which those areas exist.").

This Court correctly concluded in *Powell* that the government may, by changing the physical nature or principal use of its property, alter it to such an extent that it no longer retains its public forum status. As stated by Justice Kennedy in his *Lee* concurrence:

> In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or

> changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require….[The government] must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status.

International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring). Here, the City did not simply declare the streets and sidewalks comprising Street Fest to be a limited public forum; it required the DDP to make obvious and substantial physical alterations by enclosing the perimeter of Street Fest with fencing to establish defined entrances and exit areas to allow for crowd management and to provide an area for security screening. Like the sidewalks outside the paid admission boundary of the Iowa State Fair, the physical nature and principal use of the streets and sidewalks comprising Street Fest are sufficiently altered during the two days per year the festival is ongoing thereby removing their status as a traditional public forum. *See Powell*, 798 F.3d at 700.

The District Court's forum analysis is further supported by *People for the Ethical Treatment of Animals v. Giuliani*, 105 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd* 18 Fed. Appx. 35 (2nd Cir. 2001). There, the *Giuliani* court analyzed the scope of the government's authority to temporarily reserve and transform a portion of traditional public property. *Id.* at 311. After a lengthy discussion of Supreme Court jurisprudence, the *Giuliani* court held "a natural concomitant of a state's proprietary role in managing internal operations is the ability to use public property not only for

expressive purposes, *but to achieve other legitimate purposes such as those at issue here: to raise revenue, provide entertainment and promote tourism."* *Id.* at 315 (emphasis added). The *Giuliani* court held further that the government can temporarily restrict access to traditional public fora and limit the expressive activities of certain speakers or subjects therein to serve "legitimate governmental objectives[,]" which include promoting "artistic expression with commercialism, boosterism, civic pride and public celebration." *Id.* at 314, 322. The *Giuliani* court recognized these are legitimate purposes by which the City, through its inherent right of ownership, can temporarily reserve a portion of its streets and sidewalks for a specific use incompatible with their traditional public function. *Id.* at 315-16. To hold otherwise would curtail the expressive rights of the many in the name of the few. *Id.* at 315-16.

The authorities Sessler cites in his Initial Brief are inapposite and do not warrant a different conclusion. First, *Nat'l Federation of the Blind of Mo. v. Cross*, 184 F.3d 973 (8th Cir. 1999) and *Bowman*, 444 F.3d at 978 have no bearing on whether the City can temporarily restrict access to property that would generally be considered a traditional public forum. The issue in those cases was whether the government had created a limited public forum by opening a non-traditional forum for limited public discourse. Here, this Court is presented with the materially different question of whether the City can create a limited public forum by

temporarily reserving a portion of what is a traditional public forum to raise revenue or promote events in which the general public has an interest.

Sessler's reliance on *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094 (8th Cir. 2013) is also misplaced. The parties in *Johnson* agreed Loring Park remains a traditional public forum during the two-day Twin Cities Pride Festival, and for good reason. *Id.* at 1099. The Twin Cities Pride Festival occupied a portion of a 42-acre public park. *Id.* at 1098 (observing a map of the festival delineated select portions of Loring Park dedicated to the festival). The general public had to refer to a map to identify portions of the park dedicated to Pride Festival because there was no visible indication that set the festival area off from the surrounding park, such as fencing. *Id.* The plaintiff in *Johnson* simply sought to leave literature in an unattended "material drop area" designated as a free speech area within the 42-acre park, as opposed to disrupting the entire festival. *Id.* at 1098. The Minneapolis Park and Recreation Board granted Twin Cities Pride a permit to occupy Loring Park to promote a particular message, as opposed to raising revenue for the city, providing entertainment or promoting tourism. *Id.* at 1096. Unlike the plaintiff in *Johnson*, Sessler and his colleagues sought to disrupt an event for the public at large as opposed to occupying a traditional public forum to protest a permit-holder's message.

Sessler's reliance on *McMahon v. City of Panama City Beach*, 180 F. Supp.3d 1076 (N.D. Fla. 2016) is also misplaced. In *McMahon*, the court held a privately sponsored event, the Thunder Beach Motorcycle Rally, which was hosted in a traditional public park forum, was free and open to the public whereas the Gulf Coast Jam, which was a ticketed event hosted in the identical part of the same public park, was not. Notwithstanding, the *McMahon* court observed:

> Thunder Beach *could* have taken steps to designate either the Site or the Thunder Beach event as a more limited forum. ... Thunder Beach could have barricaded the event and charged admission. Even if it did not charge admission, and merely roped or otherwise demarcated the event as a purely private event (even to which all members of the public were invited), the event might be a limited forum.

Id. at 1099 (emphasis in original). The *McMahon* court observed further: "*Facts matter*. It's not about what permit holders *can* do, it's about what they *do* do." *Id.* at 1099 (emphasis in original). "In order to transform a traditional forum into a more limited one, there must be some sort of visible, meaningful distinction setting the event apart from the venue on which it is held. There must be a change in the 'nature,' 'use,' 'characteristics,' 'purpose,' or 'function' of the forum." *Id.* at 1099-1100 (citations omitted). The *McMahon* court suggested the following means could alter the status of a traditional public forum property: barricades, barriers, attendants at entryways limiting egress and ingress, and signage conveying the area was separate and apart from the surrounding public fora. *Id.* at 1096. In short, a person should not be able to "choose to walk into the event just as one could choose to walk

to the same location on a given weekend when an event is not being held." *McMahon*, 180 F.Supp.3d at 1096. Here, unlike *McMahon*, there was visible and meaningful distinction setting Street Fest apart from the surrounding streets and sidewalks, such that an individual would not accidentally or unknowingly enter the gated entrances monitored by volunteer DDP security.

Sessler's remaining cases fare no better and share the same fatal flaw. To wit, there is no indication in *Parks*, *Teesdale*, *Gathright*, or *Startzell* that the same or similar factual circumstances of Street Fest, including fencing and security, were present. (*See* Sessler's Initial Brief, pp. 14-22). As noted in *McMahon*, "facts matter," and the cases Sessler relies upon do "not articulate sensitivity to the same factors clearly set forth in *Ball*." (App. 381; R. Doc. 107, p. 22).

Altogether, this case is about Sessler's access to Street Fest, a permit-authorized, time-limited and crowded event that happens to take place on the City's property. Street Fest shares the physical characteristics of the fairgrounds at issue in *Powell* and *Heffron*. The City took affirmative steps to temporarily alter the streets and sidewalks comprising Street Fest in 2018 to serve legitimate purposes such that their status was temporarily altered to a limited public forum for the two days of the festival. The City may, and did, alter its property to serve legitimate purposes such as raising revenue or to provide the general public with entertainment.

The District Court correctly determined the streets and sidewalks comprising Street Fest are a limited public forum during the two days per year the festival is ongoing.

B. The Defendant Officers Have Qualified Immunity Because The Restrictions On Sessler's Conduct Were Constitutional

Because the property in question during the festival constitutes a limited public forum, the appropriate standard is whether the restrictions on Plaintiff's speech were reasonable and viewpoint neutral. *Powell*, 798 F.3d at 700. The District Court correctly held the decision to remove Sessler and his colleagues was reasonable and viewpoint-neutral. Indeed, given the extent of Sessler's and his colleagues' conduct, the City's actions were constitutional even if Street Fest constitutes a traditional public forum, and a reasonable officer would reach the same conclusion. Accordingly, the District Court correctly determined the Defendant Officers are entitled to qualified immunity even if Street Fest was a traditional public forum.

C. The Defendant Officers Are Entitled To Qualified Immunity Even If Street Fest Is A Traditional Public Forum

The Defendant Officers did not violate a clearly established constitutional right of which a reasonable officer would have known. In fact, the District Court—based on the same record before this Court—determined the Defendant Officers did not violate Sessler's First Amendment rights. (App. 406; R. Doc. 107, p. 47 ("With regard to declaratory relief, the Court has already stated neither the Officers nor the

City violated Sessler's constitutional rights on July 28, 2018."); *see also Marcavage v. City of Philadelphia*, 778 F. Supp. 2d 556 (E.D. Pa. 2011), *aff'd sub nom. Marcavage v. City of Philadelphia, Pa.*, 481 F. App'x 742 (3d Cir. 2012) (granting the City of Philadelphia and individual police officers summary judgment on plaintiff's free speech and exercise of religion claims in closely analogous fact pattern).

i. The City Enforced Viewpoint Neutral Policies To Limit Adverse Secondary Effects On A Time-Limited Permitted Event Created By Sessler's Disruptive Behavior

The Supreme Court has rejected the notion that people who want to exercise their First Amendment rights have an unfettered "constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 48 (1966) As the Third Circuit noted in *Startzell v. City of Philadelphia, Pennsylvania,* "[t]he right of free speech does not encompass the right to cause disruption, and that is particularly true when those claiming protection of the First Amendment cause actual disruption of an event covered by a permit." 533 F.3d 183 (3rd Cir. 2008); *Sessler v. City of Davenport, Iowa*, 990 F.3d 1150, 1155 (8th Cir. 2021) ("Although Sessler possesses a First Amendment right to communicate his messages in a public forum, he does not have the wholesale right to disrupt an event covered by a permit.").

The City also has a significant government interest in minimizing crowd congestion during a time-limited event. *Heffron*, 452 U.S. at 651 (holding a rule restricting certain speech activities to rented booths was justified as both a "substantial consideration" and a "valid governmental objective" in light of the asserted justification by the Minnesota State Fair of the "need to maintain the orderly movement of the crowd given the large number of exhibitors and person attending the Fair." Observing further that potential interferences with government objectives must be considered in the aggregate because the government must neutrally apply time, manner, and place restrictions).

Without any evidence the Defendant Officers wished to disfavor Sessler's message, Sessler draws disingenuous analogies to cases involving: (i) content-based regulations; (ii) a heckler's veto; and (iii) a permit-holder with unfettered discretion to exclude someone exercising constitutionally protected rights. The cases Sessler cites have no bearing on the specific and undisputed facts of this case.

In *Boos v. Barry*, 485 U.S. 312 (1988) the statute at issue involved a content-based restriction on speech that choked off *all* picketing critical of a foreign government within 500 feet of its embassies. *Id.* at 315. The instant case does not involve a total ban on speech. To the contrary, the Special Events Policy contains no ban on speech and is indisputably content-neutral.

Sessler's citation to *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228 (6th Cir. 2015) (en banc) is equally misplaced. *Bible Believers* involved a heckler's veto. Sessler and his colleagues were not asked to leave Street Fest to calm a violent or hostile crowd. Festival attendees did not heckle Sessler or his colleagues with threats of violence or by throwing trash and bottles. Sessler and his colleagues preached in downtown Davenport for approximately four hours, and Officer Behning expressly assured Sessler that the City would provide Sessler and his colleagues police protection if a crime was perpetrated against them.

Sessler tries to emphasize a vendor informed Officer Behning that Sessler was "telling people they were going to hell." (Sessler's Initial Brief, pp. 37-38). In doing so, however, Sessler glosses over the fact the vendor actually told Officer Behning that Sessler was: "telling *our customers* they're going to hell." (App. 271 (Behning Body Cam Footage, Time: 1:03 – 1:06 (emphasis added))). Sessler also disregards the fact that this was the same vendor who shook her hands in frustration and yelled "I'm losing business" at Sessler earlier in the day. (App. 270 (Video 4, Time: 17:27 – 17:30)). The vendor's actual statements reveal her complaints related to the adverse secondary effects Sessler and his colleagues had created as opposed to the content of his speech.

Sessler's reliance on *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005) is also misguided. Unlike Sessler, the plaintiff in *Parks* did not interfere with a

permit-authorized event or congregate near a main entrance and vendors using amplification equipment with numerous colleagues to express his religious views. Instead, Parks simply walked through the arts festival one time "wearing a sign bearing religious inscriptions[,] distributing religious literature to anyone who would accept it and preaching to anyone who would listen." *Id.* at 647. When Parks attempted to walk back down the arts festival, he was approached by an off-duty officer working as security who informed Parks "that the sponsor of the event did not want him there" and Parks was instructed to leave under the threat of arrest. *Id.* at 646. When questioned in *Parks*, the defendant city could offer "no explanation as to why the sponsor wanted [Parks] removed." *Id.* at 654. Under these facts, the Sixth Circuit found "it difficult to conceive that Parks' removal was based on something other than the content of his speech." *Id*. Accordingly, the Sixth Circuit applied strict scrutiny to a content-based restriction. *Id.*

Here, unlike *Parks*, Sessler and his group used amplification equipment and large elevated signs to express their religious views while congregating near a main entrance and vendors for approximately thirty minutes. The Defendant Officers and festival organizer made multiple attempts to accommodate Sessler and his colleagues' means of speech, but Sessler and his group ultimately created adverse effects on vendor business, impeded crowd movement, and subjected festival attendees to unwanted intrusion in a time-limited event. The Defendant Officers

expressly warned Sessler at his first location that these types of disruptions, individually and collectively, would not be tolerated. After attempting to accommodate Sessler and his colleagues for approximately one hour and viewing the adverse secondary effects Sessler and his colleagues had created within that time period, the City directed Sessler and his colleagues to cross the street. This is precisely the type of individualized inquiry this Court has required for content-neutral time, manner and place restrictions. *See Robb v. Hungerbeeler*, 370 F.3d 735, 741 (8th Cir. 2004). Despite Sessler's speculative claims that the Officers' conduct was based on his religious message, there is no evidence Sessler and his colleagues were asked to move outside the fenced area of Street Fest and across the street because the City disagreed with or wished to disfavor their message.

ii. The City's Conduct Was Narrowly Tailored And Served Legitimate And Significant Goals

Even in a traditional public forum, the government may impose content-neutral time, place, or manner restrictions provided that the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation and internal quotations omitted). Limiting congestion and minimizing disruption in a time-limited permitted event are

significant and legitimate governmental goals. *Heffron* 452, U.S. at 651-53; *Startzell*, 533 F.3d at 198-99; *Sessler*, 990 F.3d at 1155

Sessler concedes individuals who did not want to hear the content of his preaching had to forego nearby fee-paying vendors. (Sessler Initial Brief, p. 28 ("Festivalgoers who do not want to hear particular speech are able to avoid it, by simply moving to another part of the festival."); *compare Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("one of the reasons we tolerate a protestor's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can effectively avoid further bombardment of their sensibilities simply by averting their eyes." (cleaned up)) *with Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (holding the "unwilling listener" to an amplified broadcast "[i]n his home *or on the street*…is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality." (emphasis added)); *see also Phelps-Roper v. City of Manchester*, 697 F.3d 678, 686 (8th Cir. 2012) ("[t]he government may restrict disruptive and unwelcome speech to protect unwilling listeners when there are other important interests at stake."). Simply put, the City "is not obligated to try to force others to listen to [Sessler's] message—its obligation is to protect [Sessler's] right to the *opportunity* to reach *willing* listeners." *Phelps-Roper v. Ricketts*, 867 F.3d 883, 900 (8th Cir. 2017) (emphasis in original); *see also City of Manchester*, 867 F.3d at 686 ("Where there

are competing interests and values, courts must find an 'acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners.'" (citations omitted)).

Sessler's reliance on *McCullen v. Coakley*, 573 U.S. 464 (2014) to argue the City's conduct was not narrowly tailored is misplaced. There, the Supreme Court struck down a Massachusetts law that prohibited activists from standing within thirty-five feet of the driveway or entrance of a reproductive health care facility. *Id.* at 469, 497. The Supreme Court for a number of reasons held that the restriction was not narrowly tailored to the government's interest in preventing obstructions and congestion outside of abortion clinics. *Id.* at 490-497. The Court explained that the Massachusetts law "unnecessarily swe[pt] in innocent individuals and their speech" by "categorically exclude[ing] non-exempt individuals from the buffer zone." *Id.* 492-93. The Court found the law "extreme," and "truly exceptional." *Id.* at 497, 490. Although congestion occurred at one clinic in one city once a week, the law applied statewide to all reproductive health facilities and, with few exceptions, prohibited any person from even "standing" in the zone. *Id.* at 480. To justify this "significant…burden" on speech, the Court held the government must "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it," such as arrests, prosecutions, or targeted injunctions. *Id.* at 489, 494.

These considerations cut the other way in this case. Instead of casting a wide net that captures innocent speech, the City focused its actions at Sessler and his colleagues who were continuously disruptive speakers during a time-limited permitted event. The City's conduct in no way prevents Sessler and his colleagues from accessing special events within the City or preaching on the City's public sidewalks. Sessler and his colleagues simply cannot interfere with the orderly flow of attendees at the City's special events or otherwise disrupt the City's special events.

iii. The City Provided Sessler Ample Alternative Channels Of Communication

Although Sessler and his colleagues were allowed to situate themselves on a busy corner just across the street from Street Fest, where they continued to proselytize for approximately three hours, Sessler suggests this case should be likened to *Worldwide Street Preachers' Fellowship, et. al. v. Reed*, 430 F. Supp. 2d 411 (M.D. Pa. 2006). This suggestion is disingenuous. Once Sessler and his group moved across Brady Street, they were not asked to move from this final location, and had no further interaction with the City's law enforcement. Further, as set forth above, the video evidence establishes Sessler and his colleagues acknowledge festivalgoers could still hear their message from this final location, based on the means and volume of their speech. In addition, Sessler's final location satisfied the criteria he articulated to Officer Smith earlier in the day: "the criteria we have to

have…is that there has to be people, and people have to hear our voice….we don't want to be two blocks outside or somewhere where people aren't going to hear." (App. 270 (Video 3, Time: 1:38-1:54)).

The Supreme Court has rejected Sessler's argument that his message could not be heard as well from across the street. *Ward*, 491 U.S. at 802 ("That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate."). The fact that Sessler desired a larger channel of communication does not mean he was denied constitutionally adequate channels of communication. *Powell*, 36 F.Supp. 3d at 838; *Ricketts*, 867 F.3d at 895) (prohibiting picketing within 500 feet of funerals left open ample alternative channels for speech because it permitted the speakers "to lawfully picket and protest throughout the remainder of the city" including "right up to the 500-foot line."). Based upon these authorities, the District Court correctly determined "a reasonable officer could have concluded Sessler's final location beyond the boundaries of Street Fest was an adequate alternative channel for speech" thereby entitling the Defendant Officers to qualified immunity. (App. 399; R. Doc. 107 p. 40).

III. The District Court Properly Concluded The City Is Entitled To Immunity On Sessler's Request For Monetary Damages.

The District Court correctly determined the City is immune to monetary damages under § 1983 because, first and foremost, "Sessler's removal from Street Fest did not violate his constitutional rights." (App. 401; R. Doc. p. 42). Further, "[e]ven if the Officers had violated Sessler's rights through their decision to remove him from Street Fest, this violation would not create liability for the City under *Monell* or § 1983 because the removal action did not carry out an 'official policy' of the City." (App. 401-02; R. Doc. pp. 42-43).

A city "may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658, 694 (1978). When a municipal custom or policy causes the deprivation of a constitutional right, the municipality may be held liable. *Id.* at 690-91. However, "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original).

"To prevail on any of his § 1983 claims against the City, Sessler must show that the alleged constitutional violation resulted from (1) an official 'policy,' (2) an unofficial 'custom,' or (3) a deliberately indifferent failure to train or supervise." *Mullen v. City of St. Louis*, No. 4:20-cv-862-CDP, 2021 WL 5865374, at *3 (E.D. Mo. Dec. 10, 2021) (citing *Corwin v. City of Independence, Mo.*, 829 F.3d 695, 699 (8th Cir. 2016) (dismissing substantively identical claims against police officers sued in their individual capacities only and § 1983 claims against the City of St. Louis filed by the very same counsel Sessler has in this case at the motion to dismiss stage under Federal Rule of Civil Procedure 12(b)(6)).

Sessler stakes his entire argument that the City is not entitled to immunity on the fact a City Attorney told him, more than two weeks after he was removed from Street Fest, that the Defendant Officers did not violate his constitutional rights. Neither the City Attorney nor the Defendant Officers, however, have final policymaking authority with respect to permits issued under the City's Special Events Policy. The Special Events Policy specifically delegates policymaking authority regarding special events to the Mayor and the Davenport City Council. Sessler does not allege, and has no proof, that the City delegated final policymaking authority regarding special events to the City Attorney or the Defendant Officers. Similarly, Sessler does not allege and cannot prove the City's special event

policymaking officials had notice of or authorized the City Attorney or the Defendant Officers' actions in this case.

Instead, Sessler speculates the Defendant Officers may have relied on prior advice from the City Attorney because the City Attorney subsequently denied wrongdoing on behalf of the Defendant Officers in a telephone call wherein Sessler alleges the City Attorney told him a street used by a permitted event becomes "private property." (App. 323). This argument is unconvincing. In *Miller v. City of St. Paul*, this Court held the city's subsequent denial of any wrongdoing when corresponding with the plaintiff street preacher's attorney was insufficient to waive the municipality's immunity. 823 F.3d 503, 508 (8th Cir. 2016) ("The city's denial of wrongdoing was in response to correspondence from [plaintiff']s attorney, and its 'litigating position, with nothing more, is insufficient to constitute an official policy' allowing [plaintiff's] claims against the city to proceed." (quoting *Teesdale v. City of Chicago*, 690 F.3d 829, 836 (7th Cir. 2012)). The same conclusion in *Miller* is warranted here—the City Attorney's subsequent denial of wrongdoing in response to correspondence from Sessler "'is insufficient to constitute an official policy' allowing [Sessler's] claims against the [C]ity to proceed." *Id.* Sessler has not alleged any facts that the City Attorney was responsible for establishing final government policy respecting the City's Special events Policy—nor can he. Further, the City Attorney did not provide the Defendant Officers contemporaneous advice

and was not involved in the decision to remove Sessler and his colleagues from Street Fest. The District Court correctly held further that even if the City Attorney instructed the Defendant Officers to view the streets of Street Fest as "private property," there is no evidence the City Attorney specified the conditions under which a street preacher could or should be removed upon request from the permit-holder. (App. 404, R. Doc. 107 p. 45).

Under these facts, *Bible Believers* reinforces the conclusion that the City is entitled to immunity. The following facts of *Bible Believers* bear emphasis:

- Corporation Counsel, in *Bible Believers*, sent letters outlining the City's decision to enact a heckler's veto ***before*** the Bible Believers attended the festival, and advised the Bible Believers that officers were not required to defend them from hostile crowds, and would swiftly remove them from the festival instead if the crowd became hostile. *Id.* at 236-37.

- More specifically, "Corporation Counsel informed the Bible Believers by way of letter that 'under state law and local ordinances, individuals can be held criminally accountable for conduct which has a tendency to incite riotous behavior or otherwise disturb the peace.'" *Id.* at 237, 260.

- "Then the Deputy Chiefs consulted Corporation Counsel at the Festival to confirm that they could threaten the Bible Believers with arrest for disorderly conduct because the Bible Believers speech had attracted an unruly crowd of teenagers." *Id.* at 260. Corporation Counsel independently authorized the removal of the Bible Believers under threat of arrest.

- Under these facts, the Sixth Circuit concluded: "Corporation Counsel's **misstatement of the law in a letter may not constitute an official policy**, but her direction and authorization for the Deputy Chiefs to threaten the Bible Believers with arrest based on the prevailing circumstances is certainly an action for which she possesse[d] final authority to establish municipal policy"

> *Id.* *See* **Wayne Cty. Muni. Code §4.312 (Corporation Counsel is the chief legal advisor the County CEO and "all County Agencies" including the sheriff's office).**" *Id.* at 260 (emphasis added).

This case falls under the contours of *Miller*, not *Bible Believers.* Here, the City Attorney did not direct the Defendant Officers to take any action against Sessler and his colleagues, she simply denied wrongdoing after the festival. Notably, the District Court, after reviewing the record before this Court, also determined the Defendant Officers did not violate Sessler's First Amendment rights. (App. 406; R. Doc. 107, p. 47).

IV. Sessler Lacks Standing For Declaratory And Injunctive Relief

Sessler has the burden of demonstrating he has standing. *See Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009). To do so, Sessler must provide "competent proof" in support of his allegations, meaning that Sessler must show "by a preponderance of the evidence," that standing exists. *Vorachek v. United States*, 337 F.2d 797, 799 (8th Cir. 1964). At the summary judgment stage, Sessler can no longer rest on mere allegations to establish standing. *Young Am.'s Found. v. Kaler*, 14 F.4th 879, 888 (8th Cir. 2021) (citation omitted). Similarly, "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992) (emphasis in original).

Standing for injunctive relief requires Sessler to demonstrate he "'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (citation omitted) (finding no standing to sue for injunctive relief where the plaintiff suffered an unconstitutional chokehold during a traffic stop, feared that he would endure a chokehold again, but did not allege that *every* police officer in Los Angeles *always* applied chokeholds or that the City itself ordered chokeholds as protocol); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (finding no standing to sue for injunctive relief where plaintiffs alleged discriminatory law enforcement actions and inferred future harm based on a pattern of past violative conduct, but not the enforcement of a statute). Like Sessler's request for injunctive relief, he also requires standing to obtain relief under the Declaratory Judgment Act. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (U.S. 1937).

The same logic in *Lyons* and *O'Shea* applies to this case because Sessler seeks prospective relief based on the alleged unlawful application of the Special Events Policy—during an isolated incident on July 28, 2018—as opposed to challenging the facial validity of the Special Events Policy itself. Where a plaintiff alleges a statute, on its face, unconstitutionally proscribes expressive activities under the First

Amendment in which the plaintiff wishes to engage, then the mere "existence of the statute constitutes the government's commitment to prosecute in accordance with it and, thus, a concrete prospect of future harm for one who would flout it." *Bell v. Keating*, 697 F.3d 445, 451 (7th Cir. 2012). On the other hand, where a plaintiff simply seeks relief from an isolated instance of alleged police misconduct under a valid statute or policy, then "the putative injury typically proves too remote or attenuated to sustain…jurisdiction under Article III." *Id.* (citing *Lyons*, 461 U.S. at 105-106).

Here, the Special Events Policy is content neutral and there is no evidence it is routinely applied to automatically exclude street preaching activities from Special Events occurring in the City. To the contrary, prior to 2018, there was a street preacher who attended Street Fest with amplification equipment, and the DDP did not ask that individual to leave Street Fest. The DDP observed that particular preacher's activities, and ultimately determined he "was not an issue." (App. 180-82). By the same token, the DDP attempted to accommodate Sessler and his colleagues for approximately one hour in the fenced area of Street Fest, and only after having viewed the adverse secondary effects Sessler and his colleagues had created within that time period, did the City direct Sessler and his colleagues to cross the street.

Sessler blindly ignores the fact that his request for equitable relief is inextricably intertwined with the Defendants' specific actions on July 28, 2018, *and* the unique circumstances and physical characteristics of Street Fest. These specific circumstances cannot and will not exist again because the DDP has no intention to host Street Fest again, or any other special event with fee-paying vendors in the foreseeable future.

Further, Sessler loses sight of the fact that the City does not host Special Events. Instead, the City issues permits to private entities and individuals to host special events within the City. Therefore, each special event is unique, including the permit holder, the special event's size, purpose, location, physical characteristics, and the composition between participants, vendors and attendees. Similarly, the manner and location in which Sessler may want to preach at any potential future special event is unique. Sessler's request for injunctive and declaratory relief does not provide any limitation on the universe of possibilities of when or where or how his future speech might occur, or how his means of speech may impact a special event in the future.

Sessler cannot establish standing for equitable relief because the "analysis depends so critically on the location and circumstances of" Sessler's future street preaching activities within the City that any harm is overly speculative. *Elend v. Basham*, 471 F.3d 1199, 1211 (11th Cir. 2006) (finding no standing where plaintiffs

could only superficially allege "when, where, or how…a protest might occur."). As the Eleventh Circuit succinctly summarized in *Elend*:

> When a case involving prospective relief provides a court with no factual assurance that future injury is likely and no clues about its contours should such an injury arise, we are left with only the faintest picture of a possible constitutional transgression occurring someday, somewhere in this country. Such a claim is not fit for adjudication by this Court.

471 F.3d at 1211-12.

Overall, this is a case where the threat of prosecution hinges on a highly attenuated claim of speculative future events and unknowable details about the manner in which Sessler intends to preach, and the particular circumstances or characteristics of any future special event where he decides to preach. Thus, Sessler cannot allege a cognizable injury in fact for equitable relief. Accordingly, Defendants are entitled to summary judgment on Sessler's request for declaratory and injunctive relief on Counts I and II because Sessler lacks standing.

CONCLUSION

The Defendants respectfully request this Court to affirm the District Court's Order Granting Defendants' Motions for Summary Judgment in its entirety.

Dated this 5th day of April, 2023.

Respectfully submitted,

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I hereby certify that on April 5, 2023, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit at Thomas F. Eagleton Courthouse, Rm 24.329, 111 South 10th Street, St. Louis, MO 63102, by electronic filing with the CM/ECF system.

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