**No. 22-3459**

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**UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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**CORY SESSLER, an individual,**

**Plaintiff-Appellant,**

**v.**

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

**Defendants-Appellees.**

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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

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# INITIAL BRIEF OF APPELLANT CORY SESSLER

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## SUMMARY OF THE CASE

This case involves the violation of core First Amendment rights by Appellees City of Davenport and named police officers. They removed Appellant Cory Sessler - under the threat of arrest - from traditional public fora during a festival that was free and open to the public because the festival organizer did not want his speech there. The complaints against Sessler center on the content of his religious message.

Sessler is entitled to nominal damages for the constitutional violations he has suffered and injunctive and declaratory relief to avoid future violations. Both the City and the Officers are responsible for these infringements. However, the district court did not extend relief to Sessler, erroneously granting summary judgment to the City and its Officers.

Sessler now turns to this Court on appeal and requests oral argument. The subject issues involve fundamental constitutional freedoms, underscoring the need for clear precedent in this Circuit, particularly in the area of forum analysis and the proper classification of streets and sidewalks during public events. The district court's ruling, if it stands, will mark a significant departure from long-standing precedent in this and other circuits.

Oral argument should prove helpful to the Court in addressing these important questions. Twenty minutes per side would be sufficient.

## APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

- American Liberties Institute – Trial Counsel for Plaintiff-Appellant
- 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
- Nathan W. Kellum, Esq. – Appellate Counsel for Plaintiff-Appellant
- Lane & Waterman LLP – Trial and Appellate Counsel for Defendants-Appellees City of Davenport, Iowa; Greg Behning; and Jason Smith

- Bush, Motto, Creen, Koury, & Halligan PLC – Trial and Appellate Counsel for Defendant-Appellee J.A. Alcala
- Jason J. O'Rourke, Esq. – Trial and Appellate Counsel for Defendants-Appellees City of Davenport, Iowa; Greg Behning; and Jason Smith
- Alex C. Barnett, Esq. – Trial and Appellate Counsel for Defendants-Appellees City of Davenport, Iowa; Greg Behning; and Jason Smith
- Kevin L. Halligan, Esq. - Trial and Appellate Counsel for Defendant-Appellee J.A. Alcala
- The Honorable Rebecca Goodgame Ebinger – U.S. District Judge
- The Honorable Helen C. Adams – Chief U.S. Magistrate Judge
- Cory Sessler – Plaintiff-Appellant
- City of Davenport, Iowa – Defendant-Appellee
- Greg Behning – Defendant-Appellee
- Jason Smith – Defendant-Appellee
- J.A. Alcala – Defendant-Appellee

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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## JURISDICTIONAL STATEMENT

### Basis for the District Court's Jurisdiction

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

### Basis for this Court's Jurisdiction

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The appeal is from a final decision of the United States District Court.

### Timeliness of the Appeal

The district court entered its Order, from which this appeal is taken, on November 10, 2022. Appellant filed a timely notice of appeal on November 22, 2022.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The predominant question on appeal is whether Appellees are entitled to judgment as a matter of law in light of disputed issues of material fact on Appellant's constitutional claims. Fed. R. Civ. P. 56. For which, the following legal issues are presented for review:

1. Do the City and the Officers violate Sessler's First Amendment rights by facilitating and enforcing Sessler's ouster from public streets and sidewalks during a public festival? *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985).

a. Do streets and sidewalks and other public ways transform from traditional public fora into a limited public forum during a public event? *United States v. Grace*, 461 U.S. 171 (1983); *Johnson v. Minneapolis Park and Recreation Bd.*, 729 F.3d 1094 (8th Cir. 2013); *Parks v. City of Columbus,* 395 F.3d 643 (6th Cir. 2005).

b. Can the exclusion of Sessler from the festival area be a content neutral restriction if premised on listener reaction? *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123 (1992); *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228 (6th Cir. 2015) (en banc); *Parks v. City of Columbus,* 395 F.3d 643 (6th Cir. 2005).

c. Is an exclusion from the festival area premised on listener reaction narrowly drawn to serve a compelling government interest? *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996).

d. Does a purported concern about driving customers away serve as a significant government interest for excluding Sessler from the festival area and

banning all of his speech? *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

e. Is the exclusion of Sessler from the festival area so as to ban all means of his communication within the festival confines and the adjacent sidewalk and street narrowly tailored to meet any conceivable significant government interest? *United States v. Grace*, 461 U.S. 171 (1983); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

f. Does the exclusion of Sessler from the festival confines and adjacent sidewalk and street leave for him open ample alternative channels of communication? *Schneider v. State of New Jersey*, 308 U.S. 147 (1939); *McCurry v. Tesch*, 738 F.2d 271 (8th Cir. 1984); *World Wide Street Preachers' Fellowship v. Reed*, 430 F. Supp. 2d 411 (M.D. Pa. 2006).

2. Is the City responsible for the policy of giving permittees of public property proprietary control over speech in festival confines when the City facilitates the policy in the permitting process and enforces the policy on behalf of permittees? *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *Monell v. N.Y.C. Dept. of Soc. Servs.*, 436 U.S. 658 (1978).

3. Are the Officers entitled to qualified immunity when they violate free speech rights clearly established at the time of violation? *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123 (1992); *Johnson v. Minneapolis Park and*

*Recreation Bd.*, 729 F.3d 1094 (8th Cir. 2013); *Jones v. McNeese*, 675 F.3d 1158 (8th Cir. 2012).

4. Is Sessler entitled to nominal damages for constitutional violations he sustained in the past and injunctive and declaratory relief to preclude constitutional violations from occurring in the future? *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 977 (9th Cir. 2017); *Carey v. Piphus*, 435 U.S. 247 (1978); *Elrod v. Burns*, 427 U.S. 347 (1976).

## STATEMENT OF THE CASE

Plaintiff-Appellant, Cory Sessler ("Sessler"), filed a Verified Complaint (App. 49-69; R. Doc. 1) against Defendants-Appellees, the City of Davenport, Iowa ("Davenport" or "City"), and three of its police officers, in their individual capacities and acting as police officers for the City: Greg Behning ("Behning"), Jason Smith ("Smith"), and J. A. Alcala ("Alcala") (collectively "Officers"). Sessler alleges violations of his First Amendment protections for freedom of speech and free exercise of religion.

Sessler is an earnest individual who wishes to share his religious and political viewpoints in public areas. (App. 52, 90; R. Doc. 1, at 4; R. Doc. 23, at 2). Davenport is a municipality with streets and sidewalks. The City also has a special events permit process whereby the City retains control over its public property while allowing permittees to control speech uttered within the confines of the event - as

though the space transforms into private property. (App. 55-57, 94, 96-99; R. Doc. 1, at 7-9; R. Doc. 23, at 6, 8-11). Pursuant to this process, the Downtown Development Partnership ("DDP") submitted an application to hold the Street Fest festival ("Street Fest" or "festival") from June 27 to 29, 2018, on public streets and sidewalks in downtown Davenport, which the City approved. (App. at 54, 90; R. Doc. 1, at 6; R. Doc. 23, at 2). The event was free and open to the general public and did not require a ticket for entry. (App. at 54, 91; R. Doc. 1, at 6; R. Doc. 23, at 3).

On July 28, 2018, Sessler and a few friends went to Street Fest to share the merits of their Christian faith. (App. 91; R. Doc. 23, at 3). Upon entry, Sessler and company peacefully shared their religious, political, and social message on the City's sidewalks and streets in the festival area. (App. 54; R. Doc. 1, at 6). They initially attempted to speak and distribute literature on the corner of Second Street and Main Street inside the festival area. (App. 92; R. Doc. 23, at 4). Officers Behning, Smith, and Alcala approached Sessler and his associates and told them to move to another location. (App. 92; R. Doc. 23, at 4).

Advising that the property was "under rent," Smith equated the festival area to "private ground." (App. 96, 319; R. Doc. 23, at 8; R. Doc. 96-2, at 2). Sessler reminded the officer of his right to free speech in the festival area, but Behning interjected, and stated that "there's some debate over that." (App. 97, 319; R. Doc.

23, at 9; R. Doc. 96-2, at 2). Referring to DDP's use of the public property, Behning said "they have control over it, they're responsible for it." (App. 97, 319; R. Doc. 23, at 9; R. Doc. 96-2, at 2). Proposing a solution to the dilemma, Smith informed that "the organizer of the event is willing to give you some area back here," indicating an area away from the public sidewalk where Sessler was standing. (App. 97, 320; R. Doc. 23, at 9; R. Doc. 96-2, at 3). Smith warned, though: "The event has leased this property from the City to use this . . . so therefore they have the right to trespass and not trespass and allow who they want to be in here." (App. 97, 320; R. Doc. 23, at 9; R. Doc. 96-2, at 3). Sessler asked what would happen if he refused to leave, and Smith stated: "I would ask you to leave, but at some point you'd be trespassing . . . this is a private event." (App. 98, 320; R. Doc. 23, at 10; R. Doc. 96-2, at 3). Behning stressed "the law says . . . the event coordinator has control of this area." (App. 98, 320; R. Doc. 23, at 10; R. Doc. 96-2, at 3). In an effort to avoid arrest, Sessler and the rest of his group moved away from the sidewalk area. (App. 106, 320; R. Doc. 23, at 18; R. Doc. 96-2, at 3).

They gravitated toward a space near the festival's entrance on Brady Street and Second Street. (App. 294, 320; R. Doc. 96-1, at 15; R. Doc. 96-2, at 3). But after speaking at this location for only a short period of time, Behning abruptly told Sessler that he had to leave the festival area altogether. (App. 321; R. Doc. 96-2, at 4). In specifying reasons for ouster, Behning informed that festival attendees and

vendors had "taken offense" to Sessler's speech, that his speech had "created some conflict," and it resulted in some "aggravated people." (App. 106, 321; R. Doc. 23, at 18; R. Doc. 96-2, at 4). Behning added that the festival organizer did not want Sessler in the festival area because he did not "want that kind of an atmosphere." (App. 98-99, 321; R. Doc. 23, at 10-11; R. Doc. 96-2, at 4). Behning remarked to Sessler that the festival organizer was asking him to "leave their grounds" and did not want him "on their grounds." (App. 99, 321; R. Doc. 23, at 11; R. Doc. 96-2, at 4). He justified Sessler's forced removal on the basis that the festival area was "not public." (App. 99, 321; R. Doc. 23, at 11; R. Doc. 96-2, at 4). Behning concluded: "Because the organizer here has got a permit, he's got it leased, he's responsible for it, he controls it." (App. 99, 322; R. Doc. 23, at 11; R. Doc. 96-2, at 5). And Behning warned Sessler that if he did not leave the festival area, he would be subject to criminal arrest. (App. 322; R. Doc. 96-2, at 5).

The Officers required not only that Sessler leave the festival confines, but that he stay off of the same side of the street as the entry to Street Fest. (App. 324; R. Doc. 96-2, at 7). Sessler was forced to go to the other side of the street, which severely impacted his ability to convey his message to his desired audience, that is, attendees of Street Fest. (App. 332; R. Doc. 96-3 at 4).

Sessler contacted the City Attorney of Davenport to complain about the conduct of Officers Behning, Smith, and Alcala at Street Fest and the impact on his

speech. (App. 93, 323; R. Doc. 23, at 5; R. Doc. 96-2, at 6). But the City Attorney offered Sessler no relief. The City Attorney's office informed that it had reviewed the incident and concluded that Behning's, Smith's, and Alcala's actions were lawful. (App. 93, 323; R. Doc. 23, at 5; R. Doc. 96-2, at 6). For this reason, the City Attorney informed Sessler that downtown public ways become private property when the City rents them to private entities, even when the event is not ticketed. (App. 94, 323; R. Doc. 23, at 6; R. Doc. 96-2, at 6).

Sessler filed a motion for preliminary injunction to secure timely relief (R. Doc. 2), which the district court denied on September 24, 2019. (App. 200-219; R. Doc. 52). This Court affirmed the denial by Opinion dated March 18, 2021, not on the merits, but on the absence of irreparable harm as of that time. (App. 223-233).

Following remand and discovery, on June 30, 2022, Behning and Smith filed a motion for summary judgment (App. at 25-27; R. Doc. 91) supported by, *inter alia*, a joint statement of undisputed material facts (App. 28-45; R. Doc. 91-1) ("Defendants' SOF") and an Appendix (App. 46-274; R. Doc. 91-3) ("Defendants' MSJ App."). On the same day, the City also filed a motion for summary judgment, attaching the same Defendants' SOF and Defendants' MSJ App. (App. 275-277; R. Doc. 92, R. Doc. 92-1, R. Doc. 92-3). And Alcala filed a joinder in Behning's and Smith's motion. (App. 278-279; R. Doc. 93). On August 8, 2022, Sessler filed a Resistance to the City's Motion (R. Doc. 96), supported by a Response to

Defendants' Statement of Material Facts (App. 280-317; R. Doc. 96-1), a Statement of Additional Material Facts (App. 318-328; R. Doc. 96-2), and an Appendix (App. 329-336; R. Doc. 96-3). On August 10, Sessler filed a Resistance to the Officers' Motion (R. Doc. 99), accompanied by the same supporting documents (R. Doc. 99-1, R. Doc. 99-2, R. Doc 99-3). On August 19, 2022, the City, Behning, and Smith filed a Response to Plaintiff's Statement of Additional Material Facts. (App. 337-359; R. Doc. 102-1, R. Doc. 103-1).

On November 10, 2022, the district court granted these motions (App. 360-410; R. Doc. 107), entering judgment on November 14, 2022 (App. 411; R. Doc. 108). Sessler timely filed his notice of appeal on November 22, 2022. (App. 412-414; R. Doc. 109).

## SUMMARY OF THE ARGUMENT

The City and the Officers violated Sessler's First Amendment rights by censoring his message and expelling him from a public event. Street Fest took place on public streets and sidewalks, traditional public fora. The presence of the festival, free and open to the public, does not change the nature of the forum, nor does the fencing around the area convert the space into limited public fora.

Since Sessler's speech took place in traditional public fora, the restriction and policy behind it cannot overcome the applicable scrutiny. Sessler's ouster was not content neutral, as it is premised on the City facilitating and enforcing a heckler's

veto. The City and Officers removed Sessler due to the content of his speech. And the City's policy and the Officers' actions fail strict scrutiny because they were not narrowly drawn to serve a compelling government interest.

Even assuming content-neutral reasons, the ban on Sessler's speech was not narrowly tailored to serve a significant government interest. There is no legitimate government interest in protecting listeners from unwanted or offensive speech at a free festival open to the public. And the act of removing Sessler from the festival entirely, placing him on the other side of the street, was not narrowly tailored to serve any legitimate interest. Moreover, the displacement did not leave open ample alternative channels of communication, depriving Sessler of primary modes of his communication and a significant portion of his target audience.

Both the City and the Officers are liable for this constitutional violation. As part of the special event permit process, the City maintains an exclusion policy that enables permittees to exclude disfavored speech and enforces their exclusionary decisions. This very policy led to Sessler's ouster. The Officers are not entitled to qualified immunity for their role in the enforcement. They knew or should have known they were violating well-established constitutional rights by eliminating protected speech in traditional public fora during a public event. At a bare minimum, there are genuine issues of material fact regarding the City's and the Officers' liability.

To atone for the constitutional violation Sessler sustained, he is entitled to relief, namely, nominal damages along with injunctive and declaratory relief.

## STANDARD OF REVIEW

"This court reviews a grant of summary judgment de novo." *Smith v. Kilgore*, 926 F.3d 479, 483 (8th Cir. 2019). Also, this Court evaluates constitutional claims de novo, contemplating a "fresh examination" of the facts. *Johnson v. Minneapolis Park and Recreation Bd.*, 729 F.3d 1094, 1098 (8th Cir. 2013).

Summary judgment is proper only when there are no genuine disputes as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The facts are viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party receives the benefit of all reasonable inferences. *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999); *Schilf v. Eli Lilly & Co.*, 687 F.3d 947, 948 (8th Cir. 2012).

## ARGUMENT

When Davenport extends a special event permit for use of public property, it gives the permittee full control over the speech expressed in the space. The City presumes the permit converts public property into private property, even if the event is free and open to the general public, enabling the permittee to exclude disfavored speech from the event. It is on this basis that the City authorized and enforced the

DDP's ejection of Sessler from public streets and sidewalks during Street Fest.

This egregious form of censorship violates Sessler's constitutional right to free speech. The public areas where he seeks to speak are traditional public fora and remain that way during public events. Davenport's exclusion policy is thus an invalid content-based restriction, facilitating a heckler's veto, affecting much protected speech. As applied to Sessler, the restriction is not narrowly tailored to serve a significant government interest and fails to leave open ample alternative channels of communication.

Davenport should be held accountable for this untenable policy and practice, as should the police officers who enforced it. Sessler is entitled to nominal damages for the constitutional harm he has sustained and injunctive relief to prevent such harm from happening again.[1]

[1] The district court deduced that Sessler abandoned his claim under the Free Exercise Clause by omitting specific arguments about the claim. (App. 372; R. Doc. 107, at 13). However, "[f]ree exercise claims are often considered in tandem with free speech claims and may rely entirely on the same set of facts." *Bible Believers v. Wayne County*, 805 F.3d 228, 256 (6th Cir. 2015) (en banc) (citing *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)). Because Sessler wishes to exercise his religion through evangelism, *i.e.*, his religious speech, his free exercise claim succeeds on the same basis as his free speech claim. *Bible Believers*, 805 F.3d at 256.

## I. THE CITY'S EXCLUSION POLICY AND ENFORCMENT OF IT IS AN UNCONSTITUTIONAL INFRINGEMENT ON SESSLER'S RIGHT TO FREE SPEECH

The Supreme Court evaluates the propriety of a governmental restriction on expression by determining the type of speech, the extent it deserves constitutional protection, the forum status of the venue where the speaker wants to speak, and the corresponding scrutiny dictated by the speech and the forum. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc*., 473 U.S. 788, 797 (1985). That Sessler's desired speech is protected under the First Amendment is not disputed. *United States v. Grace*, 461 U.S. 171 (1983); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). The issues before the Court concern the forum status of the streets and sidewalks in downtown Davenport and whether the expulsion of Sessler's speech is warranted under the circumstances.

The record before this Court shows the subject streets and sidewalks are traditional public fora where speech is entitled to the upmost protection during a public event. In these places, Davenport's exclusion of Sessler cannot stand.

### A. Public Streets and Sidewalks in Downtown Davenport are Traditional Public Fora During a Public Festival

First Amendment jurisprudence recognizes three types of government property - or fora - where speech can occur: (1) traditional, (2) designated or limited, and (3) nonpublic. *Cornelius*, 473 U.S. at 802. The streets and sidewalks within the boundaries of Street Fest constitute traditional public fora and the presence of the

festival event does not alter this status.

### 1. Public Streets and Sidewalks in the City are Traditional Public Fora

It is well settled that public streets and sidewalks, as well as other public rights-of-way, like those in downtown Davenport, qualify as traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). This Court has acknowledged the suitability of this classification for such areas. *See, e.g., Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 334 (8th Cir. 2011). Since Street Fest takes place on public streets and sidewalks, (App. at 54, 90; R. Doc. 1, at 6; R. Doc. 23, at 2), the event occurs in quintessential traditional public fora.

### 2. Presence of Fencing at a Free and Open Festival Cannot Transform Traditional Public Fora into Something Less

The district court held that the public streets and sidewalks within Street Fest became limited public fora during the public event due to the placement of fencing around the borders. (App. 380-81; R. Doc. 107, at 21-22). But fencing does not have this power. The presence of boundary markers cannot transmute traditional public fora into limited public fora, even temporarily.[2]

[2] The court below initially acknowledged the subject streets and sidewalks within Street Fest as traditional public fora when it ruled on Sessler's motion for preliminary injunction, (App. 212; R. Doc. 52, at 13), but held to the contrary at the summary judgment stage without much explanation for this about-face. (App. 378-382; R. Doc. 107, at 19-23). Though the court referred to "the now-completed

"[A] suburban township [] may not by its own *ipse dixit* destroy the public forum status of streets and parks which have historically been public forums . . . ." *United States Postal Service v. Council of Greenberg Civic Ass'n*, 453 U. S. 114, 133 (1981) (internal quotation marks omitted). *See Grace*, 461 U.S. at 175 (government may not "transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property"). "A limited public forum can only be created 'by intentionally opening a nontraditional forum for public discourse.'" *Nat'l Federation of the Blind of Mo. v. Cross*, 184 F.3d 973, 982 (8th Cir. 1999) (quoting *Cornelius*, 473 U.S. at 802). A limited public forum is established when the government opens a nonpublic forum to speech, not by closing a traditional public forum to it. *See Bowman v. White*, 444 F.3d 967, 975-76 (8th Cir. 2006) (describing a limited public forum as a subset of designated public forum that limits expressive activity to certain kinds of speakers or discussion of certain subjects).

This Court has never held a government entity may destroy a traditional public forum and create a limited public forum in its place through a permit (or otherwise).

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record," it did not point to any new evidence or any new precedent supporting the new conclusion. (App. 378-382; R. Doc. 107, at 19-23). Nor did the court below rely on any new insight in argument from the parties, as no party addressed forum status in summary judgment briefing, all presuming the issue was settled. The district court simply changed its mind after further consideration on the matter. (App. 378-382; R. Doc. 107, at 19-23). As shown herein, the district court would have done well to stick with its first impression.

But assuming such alteration is possible, the City would have to grant exclusive use of the property to the permittee - a condition that is notably missing here.

A handful of cases have indicated that a private permittee can exclude members of the public from a traditional public forum if the permit for use is exclusive, allowing the permittee to limit attendance to invitees only, such as with a family reunion or a wedding. *See, e.g., Sistrunk v. City of Strongsville*, 99 F.3d 194, 196 (6th Cir. 1996). However, appellate courts, including this one, have uniformly held that streets, sidewalks, and parks remain traditional public fora during festivals and events run by private permittees so long as the venue remains free and open to the public. *See Johnson*, 729 F.3d at 1098-99 (noting public park remained a traditional public forum during festival hosted by Twin Cities Pride); *Teesdale v. City of Chicago*, 690 F.3d 829, 834 (7th Cir. 2012) ("The city streets are a traditional public forum, and their character as a public forum is retained even though they are used for a public festival sponsored by a private entity"); *Startzell v. City of Philadelphia*, 533 F.3d 183, 196 (3d Cir. 2008) ("The issuance of a permit to use this public forum does not transform its status as a public forum"); *Gathright v. City of Portland*, 439 F.3d 573, 578-79 (9th Cir. 2006) (holding that issuance of a permit to a private entity did not change public forum status because the event remained open to the public); *Parks v. City of Columbus,* 395 F.3d 643, 652 (6th Cir. 2005) (holding that where a speaker spoke at an arts festival free and open to the public,

"the streets remained a traditional public forum notwithstanding the special permit that was issued to the Arts Council"). Similarly, here, Davenport does not give over exclusive use of the property. Street Fest is free and open to the public.

The district court touts the fencing and select entrances denoting boundaries of Street Fest as proof of limited public forum status (App. 380-81; R. Doc. 107, at 21-22), but perimeter markings do not equate to exclusive use, particularly when the event remains free and open to the public at large. The primary case cited by the court below, *Powell v. Noble*, 798 F.3d 690 (8th Cir. 2015), does not suggest otherwise. That case involved a speech restriction on sidewalks sitting on state fairgrounds, property that was created as limited public fora and never intended to be traditional public fora. *Powell*, 798 F.3d at 694 (Iowa State Fairgrounds are "managed by the Iowa State Fair Board," and "the home of the Iowa State Fair . . . ."). In classifying the fairground sidewalks as limited public fora, this Court observed that the historical and traditional purpose of those sidewalks was not to facilitate general passage like open thoroughfares but to provide egress and ingress for the fair event. *Id.* at 700. The existence of fencing did not weigh in this Court's determination, except to the extent that it, along with fair-related congestion, signage, and police presence, affirmed the purpose the sidewalks serve on fairgrounds property, underscoring its status as limited public fora. *Id.* This Court did not hold that the placement of fences worked to turn traditional public fora into

limited public fora.[3]

The court below also relied on *Ball v. City of Lincoln, Nebraska*, another case examining a space designed as a limited public forum, namely, a plaza area outside a sports arena. 870 F.3d 722, 726 (8th Cir. 2017). The City of Lincoln owned the arena and surrounding spaces and entered into a management agreement with SMG, a private company, giving SMG "the exclusive right to manage, market, promote and operate the Arena and related facilities." *Id*. (internal quotation marks omitted). SMG maintained a policy governing the exterior access and use of the arena and other facilities, which covered the plaza area where the plaintiff wanted to speak. *Id.* at 728. In this context, this Court upheld the restriction under the scrutiny used for limited or nonpublic fora. *Id.* at 731-36. Although the City owned the plaza area, it had ceded control over the area by agreement, from the beginning and

[3] The district court's forum analysis is a novel inversion of free speech jurisprudence. Streets and sidewalks found on the property of a government proprietor (like fairgrounds, courthouse, or public university) that are ordinarily limited public fora can be considered traditional public fora if the areas appear to be municipal property due to their location, appearance, and function. *See, e.g., Grace*, 461 U.S. at 180 (perimeter sidewalks bordering Supreme Court plaza deemed traditional public fora); *McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012) (sidewalks on perimeter of university property considered traditional public fora). This principle derives from the notice owed to those seeking to exercise First Amendment freedoms. *Grace*, 461 U.S. at 179-80. But the reverse is not true. When streets and sidewalks are municipal rights-of-way, their location, appearance, and function cannot act to downgrade them from traditional public fora into something else. *See Frisby*, 487 U.S. at 481 (rejecting the argument that the character of the surroundings of town-owned streets justifies treating them as less than traditional public fora).

permanently, to a private management company. *Id.* at 735. And because the plaza area was not a traditional public forum, but set aside as a limited public forum for ingress and egress, the presence of fencing (or lack thereof) played no role in the decision. *Id.*

In the absence of Davenport extending an exclusive use agreement to DDP giving the private entity complete control over sidewalks and streets during the festival, Sessler should be able to enjoy his First Amendment rights in these public places. They remain traditional public fora during the festival.

This Court, in *Johnson*, struck down a similar speech restriction in a public park serving as the site for the annual Pride Festival hosted by Twin Cities Pride. 729 F.3d at 1096. The permittee maintained select entrances to the event, much like DDP does with Street Fest. *Id.* at 1101. But since the event and use of the park were deemed "nonexclusive, and admission to the park remain[ed] free and open to the public," *id.* at 1096, there was no basis for categorizing the public park as a limited public forum. Noting the universal understanding that the park is a traditional public forum "and that it remains so during the Festival," this Court contrasted the situation with *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640 (1981), dealing with a limited public forum "where attendees paid for admission to state fairgrounds." *Johnson,* 729 F.3d at 1098-99. *See also Parks*, 395 F.3d at 653 (holding that public streets remained traditional public fora where a permit to

conduct a festival was nonexclusive and open to the public). This Court should note the same contrast with the situation before it.

The district court erroneously found *Johnson* inapplicable because the parties in *Johnson* agreed on forum status and because the case predates *Powell* and *Ball*. (App. 381; R. Doc. 107, at 22). These differences are not meaningful. The mutual understanding about forum status reflects well-established precedent on the question. And neither *Powell* nor *Ball* abrogated *Johnson*; the case was simply inapposite, concerning a free festival open to the public and conducted in a traditional public forum, facts not analogous to *Powell* or *Ball* (but analogous to this case).

The district court also discarded *Parks*, surmising that the decision "does not articulate sensitivity to the same factors clearly set forth in *Ball*." (App. 381; R. Doc. 107, at 22). The factors discussed in *Ball*, though, are inapt because the issue in *Parks* was whether public streets remained traditional public fora while the festival was taking place, not whether the forum is a traditional public forum in the first instance, the issue determined in *Ball*. In truth, the analysis *Parks* offers is spot-on, involving a similarly situated plaintiff seeking to share a religious message at a festival hosted by a private entity on public streets that remained free and open to the public. 395 F.3d at 652. The Sixth Circuit held in this context:

> The City cannot, however, claim that one's constitutionally protected rights disappear because a private party is hosting an event that

> remained free and open to the public. Here, Parks attempted to exercise his First Amendment free speech rights at an arts festival open to all that was held on the streets of downtown Columbus. Under these circumstances, the streets remained a traditional public forum notwithstanding the special permit that was issued to the Arts Council.

*Id.*

The Third Circuit, in *Startzell*, referenced *Parks* and drew the same conclusion: "[L]ike the Arts Festival in *Parks*, OutFest took place in the streets and sidewalks of Philadelphia, an undisputed quintessential public forum. The issuance of a permit to use this public forum does not transform its status as a public forum." 533 F.3d at 196. Likewise, the Seventh Circuit, in *Teesdale*, determined that "[t]he city streets are a traditional public forum, and their character as a public forum is retained even though they are used for a public festival sponsored by a private entity." 690 F.3d at 834. And, in the same vein, in *Gathright*, the Ninth Circuit agreed with the holding in *Parks* while addressing a situation akin to the instant case, reasoning that a speaker does not lose his constitutional rights when he seeks to enter an event free and open to the public as opposed to a closed event that is strictly limited to invitees. 439 F.3d at 578-79. *See also McMahon v. City of Panama City Beach*, 180 F. Supp. 3d 1076, 1081, 1097 (N.D. Fla. 2016) (holding that a public park hosting a free and open motorcycle rally persisted as a traditional public forum upon finding the event non-exclusive though it was depicted as exclusive in the permit agreement itself).

The public streets and sidewalks upon which Sessler was engaging in his constitutionally protected expression during Street Fest are traditional public fora and remain so while the festival is happening. Davenport did not grant DDP exclusive control over the property during the festival. The fencing does not signify ceding of city control. To the contrary, the very fact that Davenport requires permittees to maintain fenced boundaries demonstrates the City's unwillingness to relinquish its control. Streets and sidewalks used for Street Fest in downtown Davenport are traditional public fora and the happenstance of having fencing around them does not strip them of this traditional status.

### B. Ban on Sessler from Speaking on Public Streets and Sidewalks in the Festival Area is an Invalid Content-Based Restriction

Restrictions premised on content of speech and that occur in traditional public fora are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). "Content-based discrimination can be justified only if the government demonstrates that its regulation is narrowly drawn and is necessary to effectuate a compelling state interest." *Gay and Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988) (internal citation omitted). As this Court remarked, the standard is "extremely difficult" for a government entity to meet. *Id.* The City must show its regulation is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Davenport cannot carry this burden.

### 1. Davenport's Exclusion Policy and Resultant Ban on Sessler is Content Based

Davenport's exclusion policy, instilled in the special event process, empowers a permittee to exclude disfavored people and speech from the confines of the permitted space. And, in turn, DDP exercised this privilege to expel Sessler due to the content of his message.

A content-neutral restriction must be justified without reference to the content of the expression. *Boos v. Barry*, 485 U.S. 312, 320 (1988). Consequently, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 134 (1992). Davenport facilitates banishments from permitted property based on reaction of listeners – the organizer and whoever complains to it – and with the expulsion of Sessler this dubious prospect became a reality. The City enforced DDP's wishes to exclude Sessler, forcibly escorting him out of Street Fest, simply because DDP did not want him there.

In *Parks*, the plaintiff (Parks), who was wearing a sign and distributing literature at a public festival, was removed from a festival because "the sponsor of the event did not want him there." 395 F.3d at 646. Finding this restriction content based, the appellate court concluded:

> There is no evidence that the Arts Council had a blanket prohibition on the distribution of literature or that others engaging in similar constitutionally protected activity were removed from the permitted

> area. While the district court did not reach the question of whether the removal of Parks was based on the content of his speech, under these circumstances we find it difficult to conceive that Parks's removal was based on something other than the content of his speech.

*Id.* at 647. *See also Bible Believers*, 805 F.3d at 247 (holding ejection of a speaker due to reactions to the speech were "decidedly content based"). The same reasoning applies with equal force here. The City and Officers expelled Sessler solely because of listener reaction, because of content.

The district court found that the removal of Sessler from the festival area was nevertheless content-neutral because of the accusation that Sessler was "driving customers away." (App. 384-85; R. Doc. 107, at 25-26). Referencing a vendor who was upset by Sessler preaching about individuals going to hell, the court characterized the concern as disruptive behavior instead of speech. (App. 384; R. Doc. 107, at 25). But the court glosses over that it was Sessler's unpopular speech that gave offense and allegedly drove customers away.

The explanation given by Officer Behning at the time he removed Sessler was that there were complaints from festival attendees and vendors who had "taken offense" at Sessler's messaging, that his speech had "created some conflict," leading to some "aggravated people." (App. 106, 321; R. Doc. 23, at 18; R. Doc. 96-2, at 4). The DDP director did not want Sessler in the festival area "because he doesn't want that kind of an atmosphere." (App. 98-99, 321; R. Doc. 23, at 10-11; R. Doc. 96-2, at 4). Moreover, video evidence capturing the conversation between Officer

Behning and a vendor who complained that Sessler was telling people they were going to hell confirms that content was the source of the complaint. (App. 270; R. Doc. 92-3, at 226, Bodycam Footage at 1:04-1:08). Hence, an objective review of the evidence before this Court, including the videos, reveals that the thrust of the concerns about Sessler was the content of his message. No one complained about Sessler's volume, no one complained Sessler was blocking or impeding traffic, no one complained Sessler made any physical contact with anyone, no one complained Sessler threatened anyone. The claim that Sessler was allegedly driving customers away was related purely to his speech. At the very least, the evidence raises a disputed issue of fact on whether content played a role in Sessler's ouster.

**2. The City Does not have a Compelling Interest in the Exclusion Policy or Banning Sessler from the Festival Area**

No compelling interest exists for the exclusion policy that allows permittees to exclude disfavored speech or the City's enforcement of the policy to exclude Sessler's speech. Any interest of the City in preventing Sessler's speech from "driving [vendors'] customers away" from Street Fest is not a compelling one. "[T]here is no constitutional right to be free from insult, and shielding [individuals] from it is not a compelling government interest." *Kirkeby v. Furness*, 92 F.3d 655, 660 (8th Cir. 1996) (citing *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) and *Cohen v. California*, 403 U.S. 15, 21 (1971)). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of

an idea simply because society finds the idea itself offensive or disagreeable." *Texas*, 491 U.S. at 414.

Absent a compelling interest, the City's exclusion policy and ejection of Sessler violate the First Amendment.

### C. Ban on Sessler from Speaking on Public Streets and Sidewalks in the Festival Area is not a Reasonable Time, Place, and Manner Restriction

Even a content-neutral restriction must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication to pass constitutional muster. *Grace*, 461 U.S. at 177. The City's exclusion policy and, particularly, its enforcement against Sessler's speech, falls short of these requisites as well.

#### 1. Sessler's Ouster from the Festival Area did not Serve a Significant Government Interest

The only government interest the district court specified for Sessler's removal was that he was "driving [vendors'] customers away" from the festival event. (App. 360, 366, 383-84, 387-88, 390, 398-99, 410; R. Doc. 107, at 1, 7, 24-25, 28-29, 31, 39-40, 51). However, the exclusion policy encompasses much more than this alleged motivation, for under the policy, DDP and other permittees can exclude anyone they wish for any reason, having *carte blanche* authority to do so. Also, the evidence in the record strongly indicates that the City and DDP had more in mind when they ejected Sessler from the festival grounds, showing that disdain for

Sessler's views led to his unceremonious ouster.[4] But, in any event, the purported interest in prohibiting expressive activity that drives customers away is not a significant, or legitimate, interest.

An interest in barring disfavored speech - for whatever reason - is not a significant interest of the government, even if government believes the speech could prompt a disruption.

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

*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508-509 (1969).

[4] When Behning told Sessler why he was being removed, he never mentioned that he was interfering with the economic interests of the vendors, which was a basis for the district court's decision. (App. 398; R. Doc. 107, at 39). The reasons Behning gave for Sessler's removal were that festival attendees and vendors had "taken offense" to Sessler's speech and that his speech had "created some conflict" resulting in some "aggravated people." (App. 106, 321; R. Doc. 23, at 18; R. Doc. 96-2, at 4). Behning told Sessler the festival organizer did not want him in the festival area because he did not "want that kind of an atmosphere" associated with Sessler's speech. (App. 98-99, 321; R. Doc. 23, at 10-11; R. Doc. 96-2, at 4). Behning informed Sessler that DDP was asking him to "leave their grounds" and did not want him "on their grounds." (App. 99, 321; R. Doc. 23, at 11; R. Doc. 96-2, at 4).

In the face of precedent, the district court held otherwise. (App. 397-98; R. Doc. 107, at 38-39). Relying on its reading of *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 686 (8th Cir. 2012), the court inferred that the government could appropriately restrict disruptive and unwelcome speech to protect unwilling listeners. (App. 397; R. Doc. 107, at 38). However, *City of Manchester* is readily distinguishable, dealing with speech aimed at mourners at a funeral. As this Court noted, the obvious privacy interests and expectations of mourners at a funeral, similar to individuals in their home or patients at a medical facility, are remarkably different from those attending a public festival. *Id.* at 692. Festivalgoers who do not wish to hear particular speech are able to avoid it, by simply moving to another part of the festival. *Cf. City of Manchester*, 697 F.3d at 692 (recognizing that homeowners and mourners at a funeral cannot avoid unwanted speech because "they must . . . be in a certain place at a certain time . . .").

The district court also rested on a principle of competing speech pronounced in *Startzell*, 533 F.3d at 201, which "recogniz[ed] the City of Philadelphia's legitimate interest in 'ensur[ing] that OutFest's permit to engage in its speech activities is respected.'" (App. 397; R. Doc. 107, at 38). Yet, the City here does not share the same concerns in this matter. In *Startzell*, the religious speakers were "attempt[ing] to drown out the platform speakers and then, most significantly, congregated in the middle of the walkway." 533 F.3d at 199. Conversely, Sessler

voluntarily moved away from the main stage to a place where he could not interfere with onstage activity. Nor is there any evidence that Sessler congregated in the middle of any walkway, or otherwise obstructed it. The loose charge that Sessler's speech caused some customers to move away from a few vendor booths at the festival[5] is not remotely close to the interest at stake in *Startzell*. Neither the restriction on Sessler nor the underlying policy have any bearing on preserving DDP's speech; indeed, record evidence shows that DDP had no particularized message at Street Fest. At bottom, the City squelched Sessler's views because the permittee did not care for them.

The City has no significant interest in silencing unpopular speech.

**2. Sessler's Ouster from the Festival Area was Not Narrowly Tailored to Serve any Conceivable Significant Interest**

Further, removing Sessler from the festival area, effectively barring him from engaging in any form of speech in the festival area, including literature distribution and friendly conversation, was not narrowly tailored to serve any legitimate government interest, significant or otherwise.

Tailoring is deemed sufficiently narrow if the speech restriction refrains from "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). A

[5] Contrary to the assertion, real-time video shows customers still patronizing vendor booths in the area. (App. 270; R. Doc. 92-3, at 225, Video 4 at 0:00-30:03).

valid restriction targets the precise concern it advances as a basis. *Knowles v. City of Waco*, 462 F.3d 430, 434 (5th Cir. 2006). The City's exclusion policy and its complete ban on all forms of Sessler's speech is far too broad a restriction – no matter what interest the City wants to assign to it. The censorship was wholly unnecessary for any reasonable attempt to deal with congestion, obstruction, unreasonably loud noise, or any other legitimate interest the City could possibly have.

The Supreme Court, in *Grace*, invalidated an analogous restriction barring expressive activity on sidewalks surrounding its grounds due to "an insufficient nexus with any of the public interests that may be thought to undergird [it]." 461 U.S. at 181. Observing that expressive activities cannot obstruct sidewalks or access to the Supreme Court building, or otherwise threaten injury or interference, the Court concluded that a "total ban on [expressive] conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city." *Id.* at 182. The City here similarly enforces a total ban without having justification for it.

In another instructive decision, *McCullen*, the Supreme Court held a statute that created buffer zones around abortion clinics from which "protesters" were not permitted to penetrate burdened substantially more speech than necessary. 134 S. Ct. at 2535-2541 (2014). So holding, the Court identified several less burdensome

options the Commonwealth of Massachusetts could have taken to address its interest, including more specific measures to ensure safety and prevent harassment, intimidation, and obstruction around abortion clinics. *Id.* at 2537. While the Commonwealth raised a concern about the safety risk created when protestors obstructed driveways leading to clinics, the Court observed that the situation could have been addressed by existing ordinances. *Id.* at 2538. In short, the Supreme Court held that the Commonwealth had "available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." *Id.* at 2539. The same could be said for the City here, which ignored reasonable measures in favor of the most extreme one.

Akin to the situation addressed by the Supreme Court in *McCullen*, the City's and the Officers' removal of Sessler burdened substantially more speech than necessary. The City should have addressed its interests with more specific restrictions. If the City's interest was congestion, the Officers could have moved Sessler and his associates to a location where they were not causing congestion, yet, in the end, they forced him to leave the entire festival area. If the City's interest was preventing excessive noise, the Officers could have directed Sessler to turn down his amplification or eliminate amplification altogether. By completely removing Sessler, not just from the festival area, but from the entire side of the street, the City burdened far more speech than necessary to serve any conceivable legitimate

interest.

The district court compared Sessler's ejection to the speech restriction upheld in *Startzell* (App. 397-98; R. Doc. 107, at 38-39), but, notably, the restriction in *Startzell* is far more reasonable than a complete removal, allowing religious speakers to move to another portion of the permitted area. 533 F.3d at 191. The City and Officers did not allow Sessler this option, eliminating all his speech within festival confines. The restriction is not narrowly tailored.

### 3. Ousting Sessler from the Festival Area did not Leave Open Ample Alternative Channels of Communication for his Message

In addition to narrow tailoring, a restriction on protected speech in a traditional public forum must also leave open ample alternative channels of communication to survive First Amendment scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The City and the Officers cannot satisfy this requirement either.

Excluding Sessler from the festival area as well as the side of the street of its entrance, the City and the Officers precluded Sessler from sharing his Christian faith with his intended audience. The only alternative they left for Sessler was to take his message elsewhere.

Any option that contemplates a forced departure from a traditional public forum is not constitutional. "[O]ne is not to have the exercise of his liberty of

expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939); *see McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984) (same). Location of speech is critical for the efficacy of speech since "it cannot rightly be said that all [] forums are equal." *Mahoney v. Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997). Any viable alternative must give the speaker an opportunity to reach the intended audience. *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 866 (9th Cir. 2001). The City and the Officers fall short of this requisite.

Sessler's desired audience consists of individuals attending Street Fest (or other festivals occurring downtown). To reach these individuals, he needs a location that gives him a real "opportunity to win their attention," *Heffron,* 452 U.S. at 655 (citation omitted), most notably, inside the festival where Street Fest takes place. Any of the public streets and sidewalks within festival confines can serve this purpose. But in removing Sessler from the festival confines, as well as the public way adjacent to it, requiring him to go to the opposite side of the street, the City and the Officers placed a wedge between Sessler and his audience.

The district court curiously analyzed whether there was "'fair notice' Sessler's removal would not block 'ample alternative channels for speech[.]'" (App. 398; R. Doc. 107, at 39). The court was supposed to determine if there is a disputed issue of fact on whether Sessler's banishment left him with ample alternative channels of

communication. The court did not, and could not, make this finding.

The lower court cited *Phelps-Roper v. Ricketts*, 867 F.3d 883, 895 (8th Cir. 2017) in support of a 500-foot buffer zone, but that case has no bearing on the restriction at hand. Like *City of Manchester*, the *Ricketts* case concerned privacy interests found at a funeral, not that found at a public festival.

The district court further opined that the designated location across the street is an ample alternative for Sessler because he could still reach "the public attending Street Fest." (App. 399; R. Doc. 107, at 40). However, the locale of a message can be just as important as the message itself. *See City of Ladue*, 512 U.S. at 56. That Sessler could attract a small fraction of the people he would have reached inside the festival does not make the alternative ample or constitutionally acceptable. Also, the forced location limited Sessler's means of communication, obliging him to use amplification and abandon all other methods, including his literature distribution. For these reasons, "a location across the street is not an ample alternative channel of communication when [a person] could have been standing in the park." *World Wide Street Preachers' Fellowship v. Reed*, 430 F. Supp. 2d 411, 415 (M.D. Pa. 2006).

## III. THE EXCLUSION POLICY AND ITS ENFORCEMENT ON SESSLER'S SPEECH IS ATTRIBUTABLE TO THE CITY

The City, as owner, has jurisdiction over its downtown streets and sidewalks. But through an exclusion policy associated with its special event permitting process, the City hands gives permittees proprietary control over expressive activities that

take place in public areas that fall within permitted space. Moreover, the City enforces the permittee's exclusionary decisions, as it did for DDP in this instance, removing Sessler and his speech from the event.

Government entities are liable under 42 U.S.C. § 1983 when their own policies and actions lead to constitutional violations. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-80 (1986). Short of an explicit policy, municipalities are also responsible for widespread and persistent practices of its agents. *Monell v. N.Y.C. Dept. of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Because City policy facilitated and actively brought about the infringement on Sessler's constitutional rights, the City is liable for it.

City police officers informed Sessler on multiple occasions that the festival organizer had control over speech in the permitted property. Smith described the festival area as "private ground." (App. 96, 319; R. Doc. 23, at 8; R. Doc. 96-2, at 2). The officer advised Sessler "the organizer of the event is willing to give you some area back here," revealing the power of the permittee to determine his location. (App. 97, 320; R. Doc. 23, at 9; R. Doc. 96-2, at 3). Smith elaborated on this arrangement, saying: "the event has leased this property from the City to use this . . . so therefore they have the right to trespass and not trespass and allow who they want to be in here." (App. 97, 320; R. Doc. 23, at 9; R. Doc. 96-2, at 3). And when Sessler asked what would happen to him if he refused to leave, Smith warned: "I

would ask you to leave, but at some point you'd be trespassing . . . this is a private event." (App. 98, 320; R. Doc. 23, at 10; R. Doc. 96-2, at 3).

Behning echoed this same sentiment. Referring to DDP's use of the public property, the officer told Sessler that "they have control over it, they're responsible for it." (App. 97, 319; R. Doc. 23, at 9; R. Doc. 96-2, at 2). Behning stated "the law says . . . the event coordinator has control of this area." (App. 98, 320; R. Doc. 23, at 10; R. Doc. 96-2, at 3). Behning also informed Sessler that the festival organizer was asking him to "leave their grounds" and did not want him "on their grounds." (App. 99, 321; R. Doc. 23, at 11; R. Doc. 96-2, at 4). Further, Behning justified Sessler's removal on the basis that the permitted area was "not public." (App. 99, 321; R. Doc. 23, at 11; R. Doc. 96-2, at 4). Behning concluded: "Because the organizer here has got a permit, he's got it leased, he's responsible for it, he controls it." (App. 99, 322; R. Doc. 23, at 11; R. Doc. 96-2, at 5).

These police officers did not rely on their own judgment, but City policy. The City Attorney articulated this precise policy as reason for Sessler's ouster, advising Sessler that a city street becomes private property when the City leases it to a permittee, even if the event is not ticketed. (App. 94, 323; R. Doc. 23, at 6; R. Doc. 96-2, at 6). Speaking on behalf of the City, the City Attorney's office further confirmed that the City stood behind the actions of its police officers, Behning, Smith, and Alcala, in removing Sessler on this specific basis. (App. 93, 323; R. Doc.

23, at 5; R. Doc. 96-2, at 6).

The district court acknowledged that "the Officers correctly relied on parts of the Special Events Policy when they decided to remove Sessler," by telling Sessler that DDP had control over the area. (App. 402; R. Doc. 107, at 43). But the court went awry in requiring that the City Attorney specifically instruct the police officers to remove Sessler from the festival to hold the City responsible. (App. 404-05; R. Doc. 107, at 45-46). It is sufficient that the City's exclusion policy, as articulated by the City Attorney, was employed by the police officers to effectuate the removal. That the Officers did not seek contemporaneous advice from the City Attorney (App. 404; R. Doc. 107, at 45) has nothing to do with whether the Officers were acting pursuant to City policy. Already familiar with the policy, the Officers had no reason to seek contemporaneous direction.

The harmonious articulations of City policy, coming from multiple police officers as well as the City Attorney, present clear evidence of its existence. The City (as well as its Officers) are liable for the constitutional violations that resulted from the City's policy.[6]

[6] The Special Events Policy itself is City policy as well. (App. 16, 41; R. Doc. 17, at 4; R. Doc. 92-1, at 14). It is the Special Events Policy that authorized the permit issued to DDP for Street Fest. (App. 42-43; R. Doc. 92-1, at 15-16). And it is pursuant to the permit that the City gave control over speech in the festival area to Street Fest. (App. 94, R. Doc. 23, at 6). Thus, the exclusion of Sessler also was authorized by the Special Events Policy. While the district court noted that the Special Events Policy does not explicitly address exclusion from special events

## IV. THE OFFICERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The Officers seek qualified immunity for their actions in shutting down Sessler's speech. Qualified immunity will not apply if "(1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Jones v. McNeese*, 675 F.3d 1158, 1161 (8th Cir. 2012). The first prong is met. To be sure, the question of whether Sessler's constitutional rights were violated creates at least a genuine issue of disputed fact.

Sessler also satisfies the second prong of the qualified immunity analysis. His rights were clearly established, as held by this Court in binding precedent of *Johnson*. The underlying facts of that case are strikingly similar, concerning an individual who was excluded from evangelizing in a traditional public forum during a festival that was free and open to the public. *Id.* at 1098. And therein, this Court held the speaker had the right to engage in his religious speech in that space and at that time. *Id.* at 1100-01. The Officers should have honored this established principle.

The district court's attempts to distinguish *Johnson* are unavailing. Like

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(App. 402; R. Doc. 107, at 43), the Special Events Policy supplies the authority for such exclusions. For this separate reason, the exclusion of Sessler from the festival is attributable to the City.

*Johnson*, Sessler wants to engage in literature distribution. And the constitutional freedoms also apply to the other means of Sessler's communication. While the "clearly established" prong does not "require a case directly on point," *White v. Pauly*, 137 S. Ct. 548, 552 (2017), *Johnson* is squarely on point. This case confirms Sessler's fundamental right to evangelize in a traditional public forum at a free, public festival.

Also, it is clearly established that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 505 U.S. at 1346. As the Supreme Court held, a "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas*, 491 U.S. at 414.

The district court confused and conflated the two prongs used for evaluating qualified immunity, incorrectly analyzing whether it was "clearly established that Sessler's removal was content-based" (App. 389-394; R. Doc. 107, at 30-35), whether it was "clearly established Sessler's removal was not narrowly tailored to a significant government interest" (App. 394-398; R. Doc. 107, at 35-39), and whether there was "'fair notice' Sessler's removal would not block 'ample alternative channels for speech'" (App. 398-400; R. Doc. 107, at 39-41). These considerations delve into whether a constitutional right was violated. They are not relevant for

determining whether Sessler's constitutional right is clearly established.[7]

Additionally, the district court stated it would assume that the festival area was a traditional public forum – but did so only for purposes of the second prong of the qualified immunity analysis, the "clearly established" prong. (App. 385-400; R. Doc. 107, at 26-41). For purposes of the first prong, whether Sessler's rights were violated, the court applied the limited public forum standard. Thus, the lower court applied two different standards in its analysis of the two qualified immunity prongs. And, while the court noted that it had changed its conclusion on the forum based on "the now-completed record," Sessler was unable to address the forum issue, though dispositive of his claims, based on "the now-completed record." The entirety of Sessler's summary judgment briefing justifiably relied upon the district court's prior ruling on the forum. The court below changed its ruling based upon "the now-

[7] Moreover, the doctrine of qualified immunity does not apply to claims for injunctive or declaratory relief, just claims for damages. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 394, n.1 (2007) (holding qualified immunity did not apply to claims for equitable relief); *Wood v. Strickland*, 420 U.S. 308, 314, n. 6 (1975) (holding qualified immunity shields public officials from money damages only); *Mead v. Palmer*, 794 F.3d 932, 937 (8th Cir. 2015) ("'We note that the doctrine of qualified immunity does not apply to [Mead's] claim[ ] for . . . injunctive relief'" (quoting *Curtiss v. Benson*, 584 Fed. Appx. 598, 599 (8th Cir. 2014) (alterations in original)); *Burnham v. Ianni*, 119 F.3d 668, 673 n.7 (8th Cir. 1997) (qualified immunity implicates only liability for money damages). Sessler has a valid claim for declaratory and injunctive relief against the Officers. Consequently, even if qualified immunity were appropriate (which, as set forth above, it is not), it would only bar Sessler's claim for damages, not his claim for injunctive or declaratory relief.

completed record," without giving Sessler an opportunity to address the issue under the summary judgment standard.

## V. SESSLER IS ENTITLED TO INJUNCTIVE AND DECLARATORY RELIEF

Sessler is entitled to permanent injunctive and declaratory relief to prevent the City and the Officers from enforcing the unconstitutional policy against him in the future.[8] Permanent injunctive relief should be granted when a plaintiff's claim is merited and shows:

> (1) that [he] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 141 (2010); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 977 (9th Cir. 2017) (citation omitted). Sessler satisfies these factors.

Sessler has sustained an irreparable injury. The loss of free speech rights "for

[8] Sessler is also entitled to receive nominal damages. The City's and the Officers' enforcement of policy - ousting Sessler from Street Fest - violated his constitutional rights. Where plaintiff's constitutional rights have been violated, an award of nominal damages is mandatory without proof of actual injury. *Carey*, 435 U.S. at 266; *Gerritsen v. City of Los Angeles*, 66 F.3d 335 (9th Cir. 1995). Though the sum is small in amount, the award "acknowledge[s] the 'importance to organized society that [the] right[] be scrupulously observed." *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 426 (9th Cir. 2008); *Carey*, 435 U.S. at 266.

even minimal periods of time[] unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). He is chilled from speaking at future events. (App. 58-59, 335; R. Doc. 1, at 10-11, R. Doc. 96-3, at 7). *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (past conduct is sufficient to show injury in fact if accompanied by "a sufficient likelihood that [the plaintiff] will again be wronged in a similar way"). Damages and other remedies at law cannot address this irreparable harm. Also, the balance of hardships and public interest favors permanent injunctive relief. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). Sessler's requested injunction will merely require the City and its police officers to comport with constitutional law and acknowledge constitutional rights.

In the court below, the City argued Sessler's prospective relief is moot because the permittee says it no longer wants to host the event. The district court did not address this contention (App. 406; R. Doc. 107, at 47), and properly so. It is doubtful on its face, as Sessler's claim for prospective relief is significantly broader than DDP's participation in it. He seeks relief against an ongoing policy that will not only arise with other hosts of Street Fest, but with other future events occurring downtown.

The district court erroneously held Sessler has no standing to pursue injunctive and declaratory relief. This conclusion is based on the merits of the case, with the court reasoning that Sessler has not established a threatened violation of

constitutional rights. (App. 408-09; R. Doc. 107, at 49-50). But for the same reasons the court is mistaken about retrospective relief and Sessler's claim for nominal damages, it is also mistaken about Sessler' s pursuit of prospective relief. Sessler retains standing for - and is entitled to receive - injunctive and declaratory relief.

## CONCLUSION

For the foregoing reasons, Sessler requests this Court reverse the erroneous decision below granting Davenport's motion for summary judgment and remand the case for further proceedings. At the very least, there is a genuine issue of material fact on whether the City and the Officers violated Sessler's First Amendment rights. Reversal is merited.

Respectfully submitted this 2nd day of February, 2023.

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## STATEMENT REGARDING VIRUSES

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

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 2, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

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