

I. History of the Fremont Street Experience Project

Submitted At Meeting

Date Item

8/3/10

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- 
- Conceived in the early 1990s as a way to draw more people to the ailing downtown gambling area.
 - Fremont Street was closed permanently to vehicular traffic in 1994.
 - Construction began in 1994 and the Fremont Street Experience (FSE) opened in 1995.
 - The FSE is a cooperative venture, owned and operated by a group of downtown hotel/casino companies, with the ongoing involvement of the City of Las Vegas.

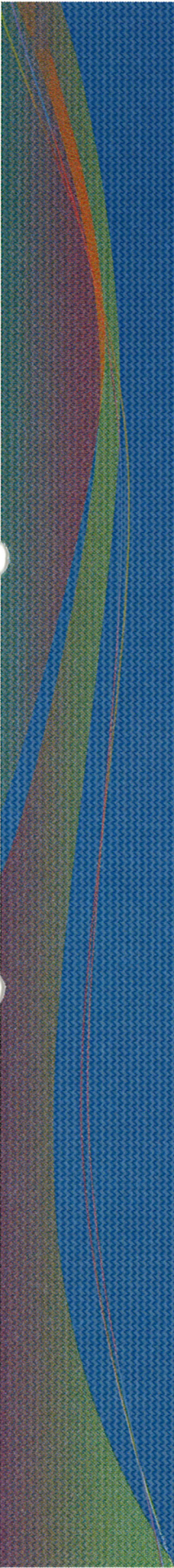
• The elements of the project were:

- Fremont Street Experience canopy.
- Removal of streets and sidewalks to be replaced by pedestrian mall.
- Construction of parking garage at the Fremont Street Experience between 4th Street and Las Vegas Blvd.
- Before the project, the sidewalks had always been open to speech.
- The former Fremont Street had been reserved for vehicular traffic and not open to free speech.

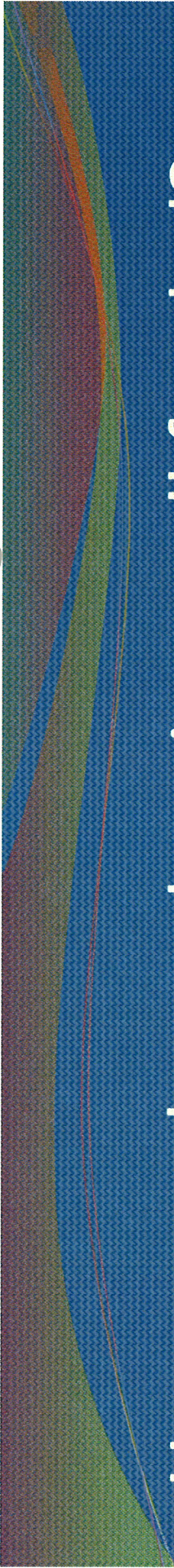
A. Development Agreement

- October 1993-A four party Development Agreement to construct the FSE is executed between:

- City of Las Vegas
- City of Las Vegas Redevelopment Agency
- Fremont Street Experience LLC
- Fremont Street Experience Parking Garage LLC

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- September 1995-Four party Development Agreement is amended and restated to reflect the final version of the Fremont Street Experience Project and parking garage.

- FSE LLC is responsible for operation and maintenance of the FSE including, but not limited to, operation and maintenance of the pedestrian mall and operation and maintenance of the canopy and light show.
- FSE Parking Garage LLC is responsible for repaying taxpayers for cost overruns in acquiring property for parking garage.
- FSE LLC derives all profits from commercial use of pedestrian mall to offset costs of operation and maintenance including, the leasing of retail space in the mall, special events and any other commercial use permitted by the development agreement.



How was the pedestrian mall funded?

- Room tax bond
- Tax increment bond
- Contribution from Fremont Street Experience LLC
- Six million dollar grant from LVCVA



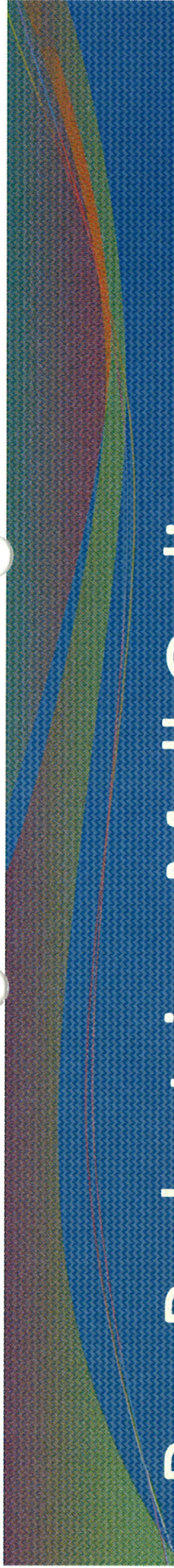
Who owns the pedestrian mall?

- NRS 268.812(5) allowed the conversion of right of way to pedestrian mall without government losing its interest in controlling the underlying real property.



Is Fremont Street Experience funded using park money and is it a park?

- LVCVA is organized under NRS 244A.599(The County Fair and Recreation Boards).
- Unclear if LVCVA could fund a pedestrian mall under NRS 244A.599.
- NRS 268.816 (3) was amended in 1993 to make clear that a pedestrian mall is a recreational facility eligible for funding under NRS 244A.599.
- No park money was used to construct the Fremont Street Experience nor has FSE been a park.



B. Pedestrian Mall Ordinance

- October 1993-City adopts Ordinance 3747 establishing the FSE pedestrian mall, setting its boundaries, charges FSE LLC with managing and operating the mall. (LVMC 11.68)

C. Solicitation Ordinance

- January 1995-City adopts Ordinance 3862 creating new definitions of solicitation and coercion, limiting the places a person can solicit and prohibiting solicitation in the pedestrian mall. (LVMC 10.44)

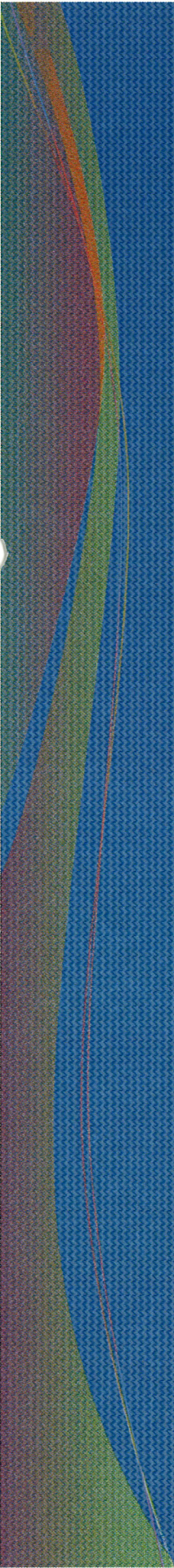


Fremont Street Experience Today

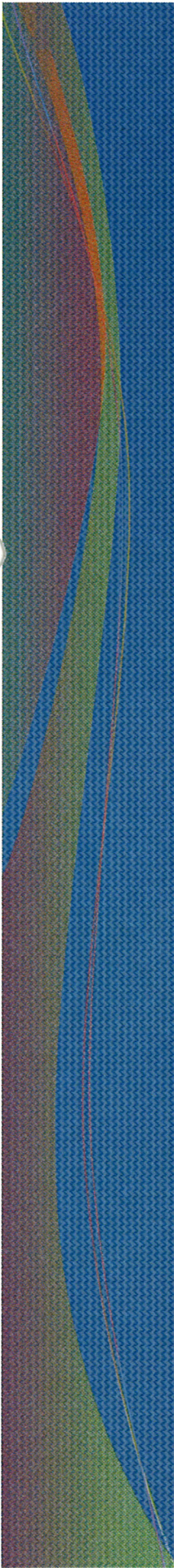
- Currently a pedestrian mall and a major tourist attraction in Downtown Las Vegas.
- Occupies the westernmost five blocks of Fremont Street.
- Main attraction is a barrel vault canopy 90 ft. high and four blocks (app. 1,500 feet) in length.
- More than 12 million LED lamps illuminate the overhead canopy.
- Primary focus is to create an environment of entertainment, retail, and outdoor dining opportunities.
- FSE is also home to the Neon Museum which displays historic neon signs.

Conclusion

- FSE was conceived as a privately operated and managed public attraction.
- Revenue derived from the commercial operation of the mall would be used to operate the light show and maintain the mall.
- No tax payer money would ever be used to operate and maintain FSE.



II. History of Litigation

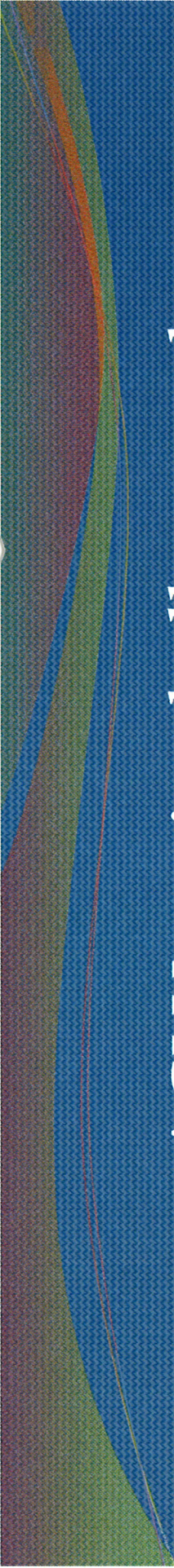


ACLU v. City of Las Vegas

U.S. District Court
Case No. 97-01419

I. ACLU filed first lawsuit in 1997.

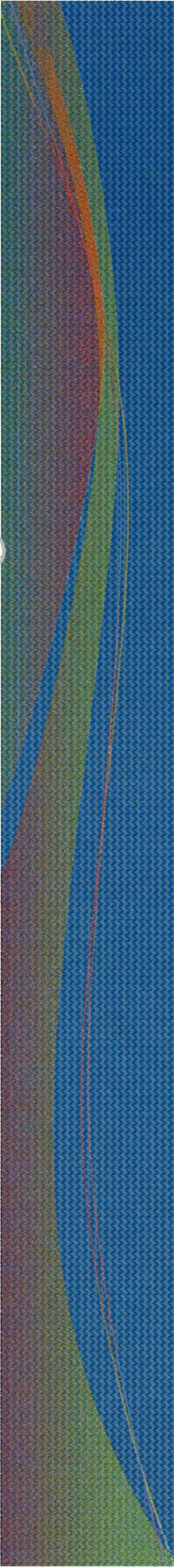
- ACLU alleged that the solicitation and pedestrian mall ordinances were unconstitutional by prohibiting solicitation, leafleting, unauthorized vending, and the unauthorized erection of tables and structures in the Mall.
- Federal District Court upheld the solicitation ban and tabling restriction, but enjoined enforcement of the leafleting and vending restrictions. Each side appealed the decision, but the 9th Circuit dismissed these appeals.
- April 2001- Federal District Court granted summary judgment for the City with regard to the solicitation and tabling ordinances and summary judgment for the ACLU with regard to their challenge to the leafleting and vending ordinances.

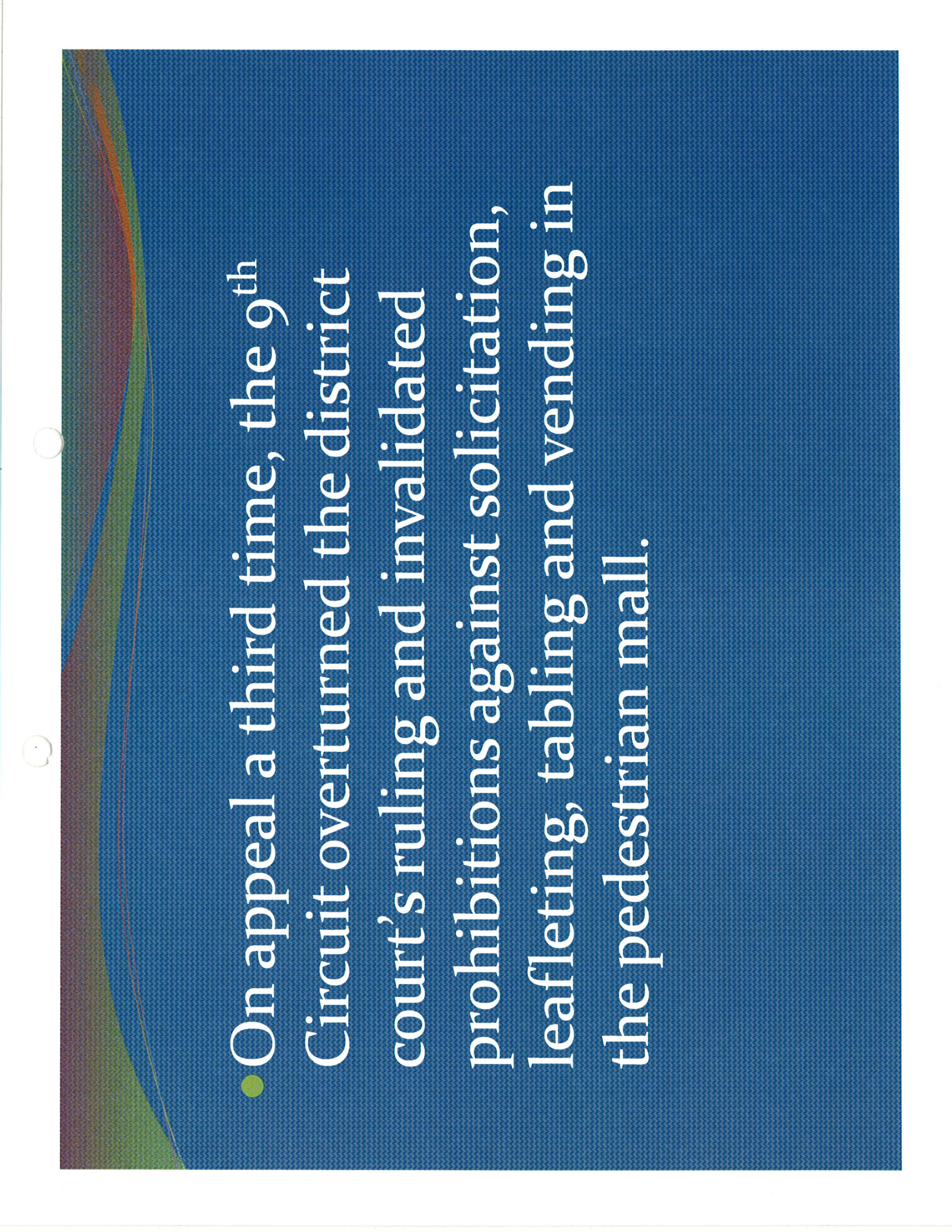


II. 2001-ACLU again challenges the constitutionality of provisions of the pedestrian mall ordinance relating to prohibitions involving free speech.

- Federal District Court of Nevada upholds most provisions of the ordinance. Federal District Court finds FSE is not a public forum.
- ACLU appeals to the 9th Circuit.

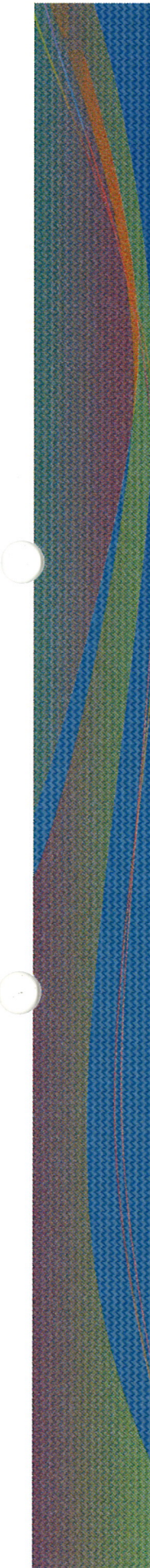
- 9th Circuit determined that the Pedestrian Mall should be classified as a traditional public forum for the purposes of a First Amendment analysis.
- Evaluating the ordinances under the more demanding standard applicable in a traditional public forum, the 9th Circuit upheld the injunction against the leafletting and vending ordinances and remanded the case to determine whether the solicitation ban and tabling restriction were narrowly tailored to serve significant government interest.
- The 9th Circuit recognized that all of the ordinances, including the vending restriction, were content-neutral time, place or manner restrictions.

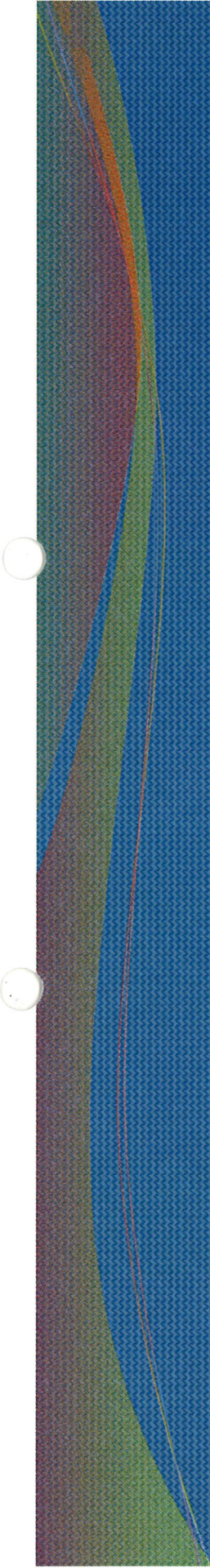
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- Back again in Federal District Court, the case re-analyzed the solicitation and tabling ordinances and upheld the solicitation ban as a valid content-neutral time, place and manner restriction, even as a public forum.
 - Additionally, the Court granted summary judgment for the ACLU on its claim against the tabling ordinance.

- 
- On appeal a third time, the 9th Circuit overturned the district court's ruling and invalidated prohibitions against solicitation, leafleting, tabling and vending in the pedestrian mall.

New Legislation

- To comply with the decision of the 9th Circuit, the City eliminated the ban on leafletting found at LVMC §11.68.100(1) and removed the exception for labor-related activities from the tabling restriction codified at LVMC §11.68.100(H).
- The City also adjusted the definition of solicitation.
- ACLU files a challenge to the new pedestrian mall ordinance.

- 
- A Federal District Court judge grants summary judgment in March 2009.
 - Result:
 - The definition of solicitation was declared unconstitutional.
 - The prohibitions against mall vending, advertising and entertainment were declared unconstitutional.
 - The prohibition against erection of tables and other structures was declared unconstitutional.
 - The prohibition against solicitation was declared unconstitutional.



III. Why are regulations necessary?

- 
- No regulation means ...
 - 1. No viable commercial opportunity can exist.
 - 2. Unregulated speech competes with primary purpose of pedestrian mall.
 - Light show
 - Stage shows
 - Special events
 - Retail kiosks
 - Outdoor cafes

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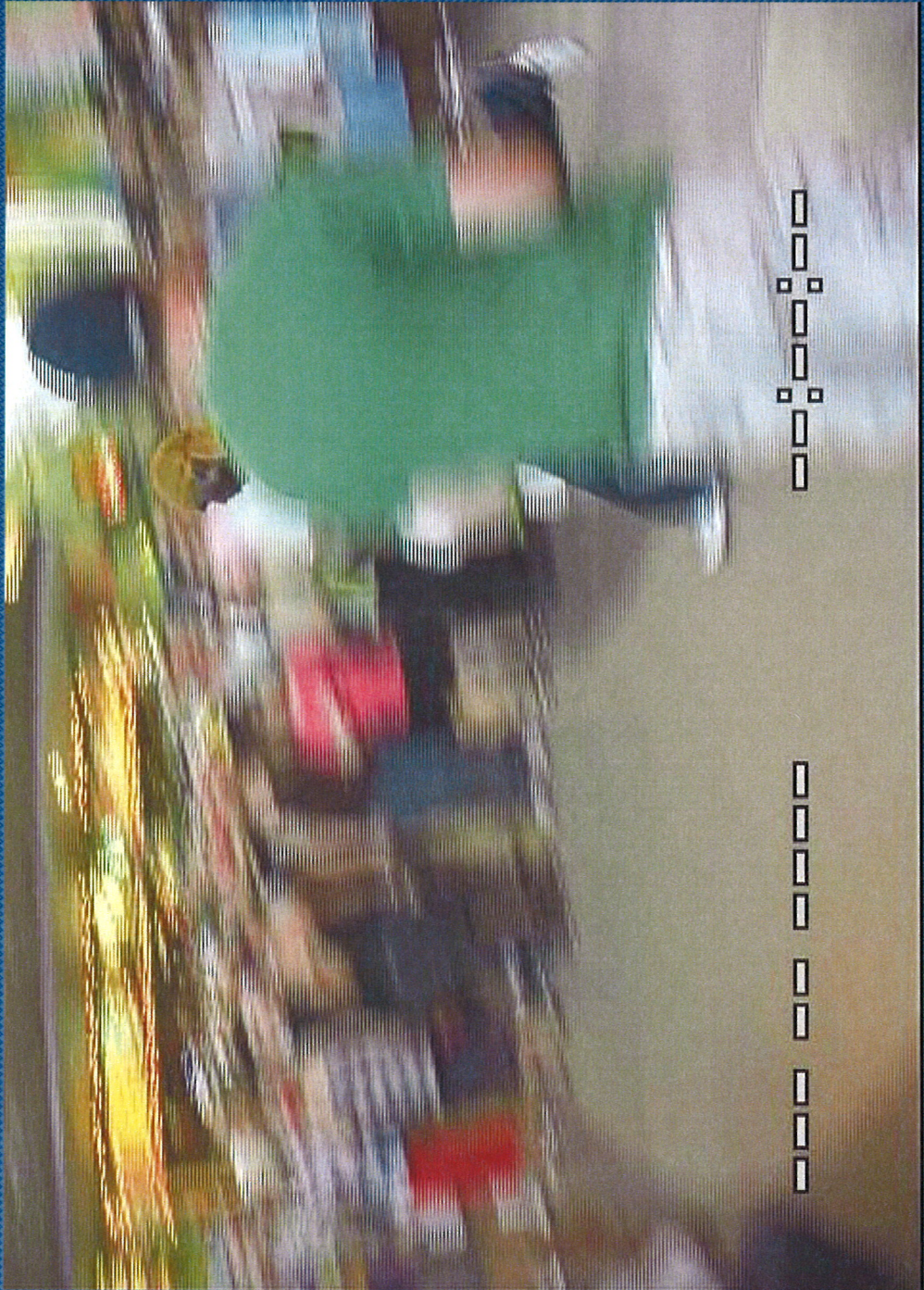
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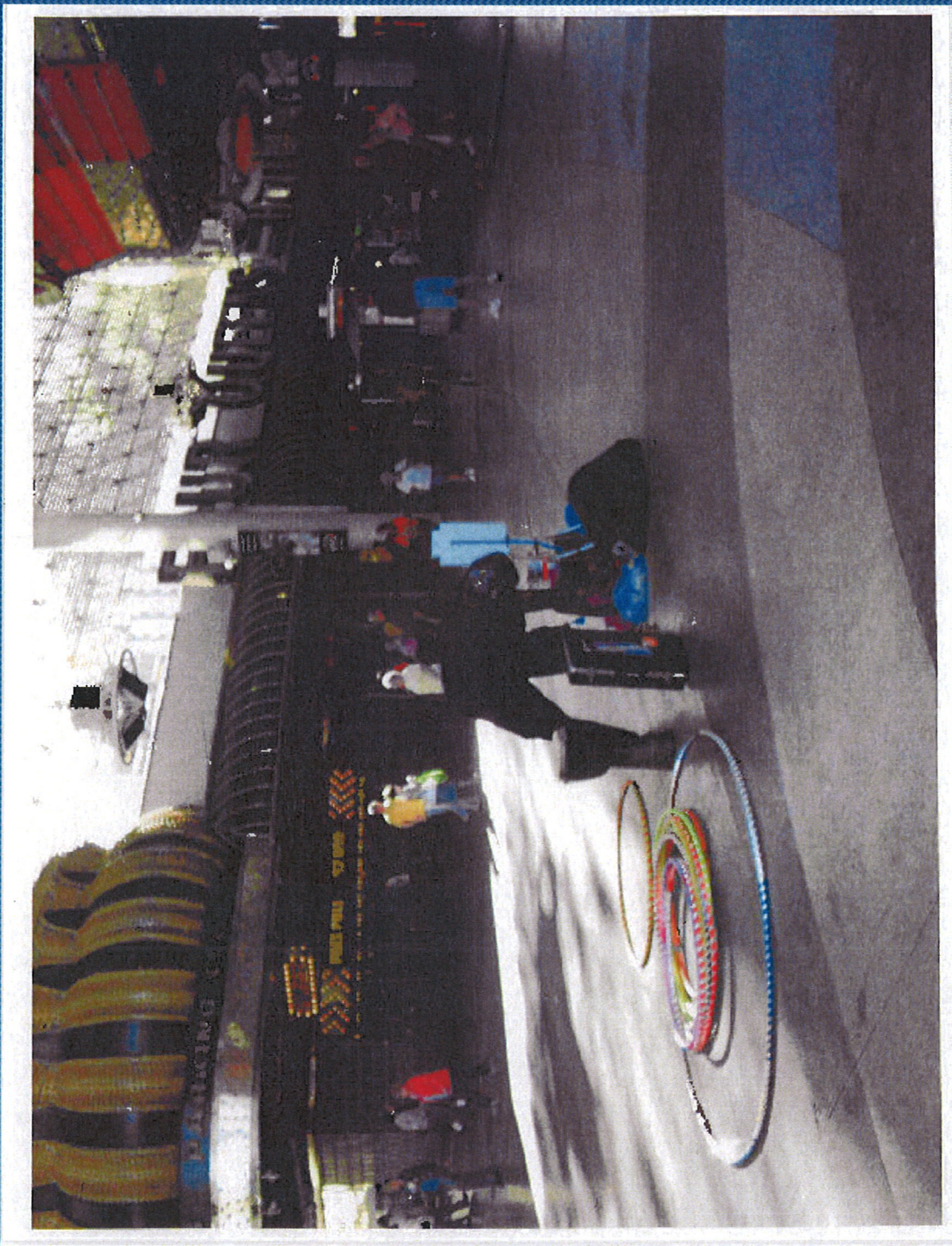


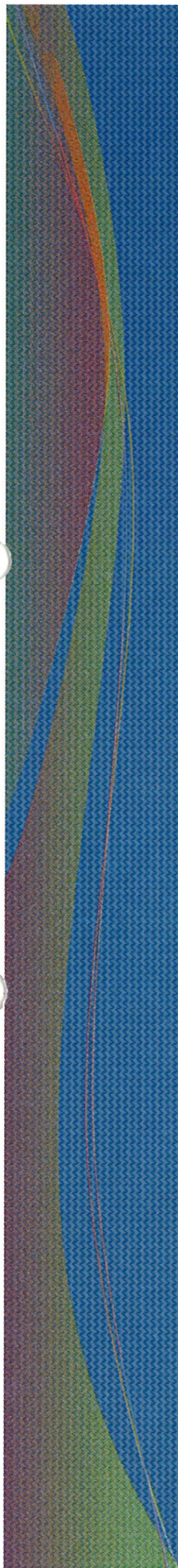




























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REPORTING OFFICER'S SIGNATURE

Corporal D. Wade

PRINT NAME

YouTube - Thriller Downtown - Las Vegas - Windows Internet Explorer

File Edit View Favorites Tools Help

Address: http://www.youtube.com/watch?v=...
 Search: [Search] Save history Smiley Camera Carto Movie My Favorites

YouTube - Thriller Downtown - Las Vegas

YouTube Michael Jackson

Thriller Downtown - Las Vegas

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 downtown happenings - Las Vegas Music from Mr. Michael Jackson - R.I.P. As
 Michael Jackson - Thriller Lyrics: AmazonMP3

Download - Thriller Dis... added - 1 min.

1TH PLAZA CASINO IN DOWNTOWN LAS VEGAS 3,000 views 7:40

Warning up @ Go den Nugget's aqua jro pool and ... 425 views 2:21

Chiquito Las Vegas, NV 89427 Free Consultation 39 views 2:21

Book Town 02 New Orleans, Cancun, Orlando, Las ... 303 views 3:03

Kid's no Luncane - Vegas Showgirl (It's frightful) ... 844 views 6:58

Freeman Street Las Vegas Film Festival 987 views 2:54

Has the Strip become too commercial? Dec 2010 m... 14,100% 1:46

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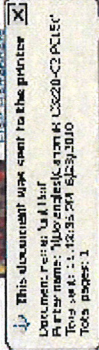
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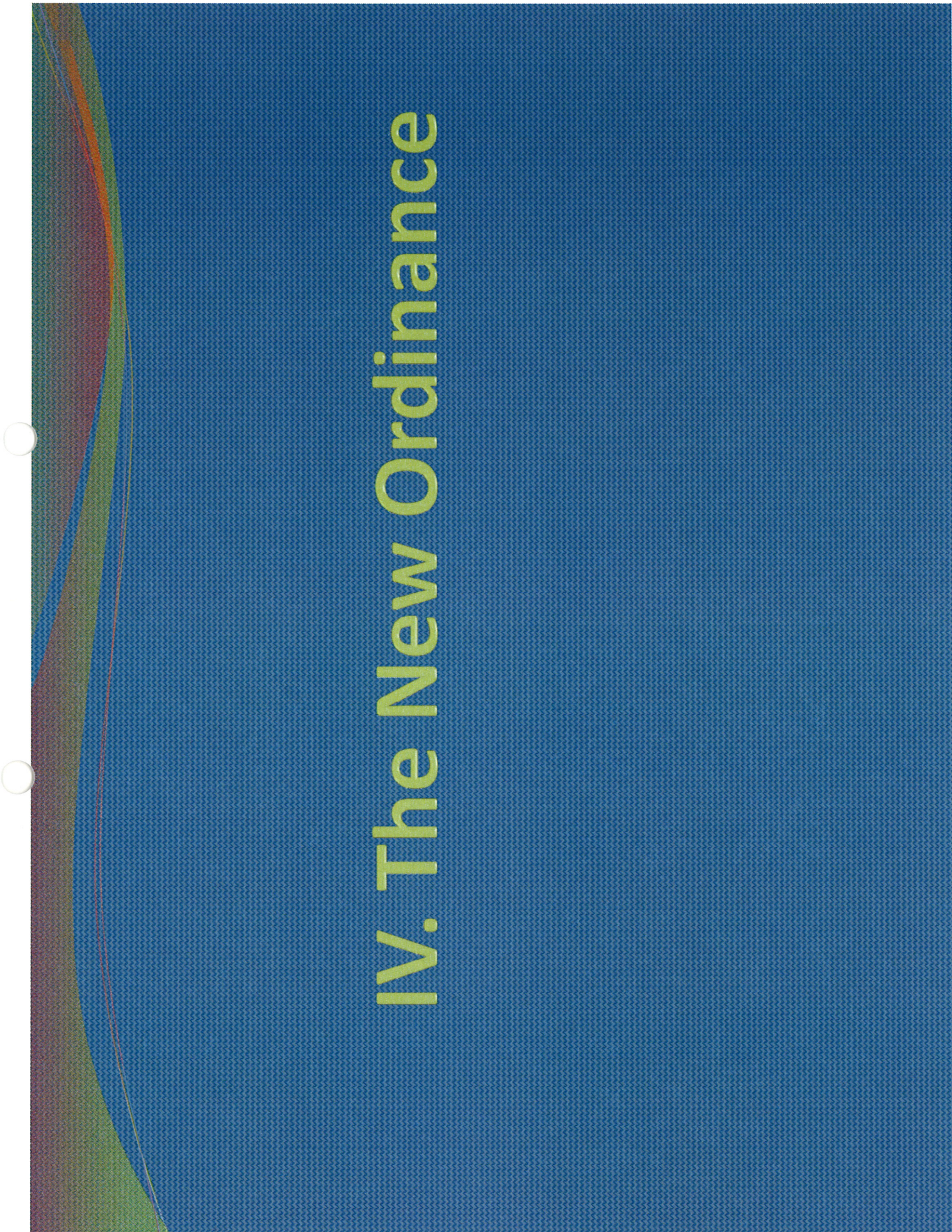
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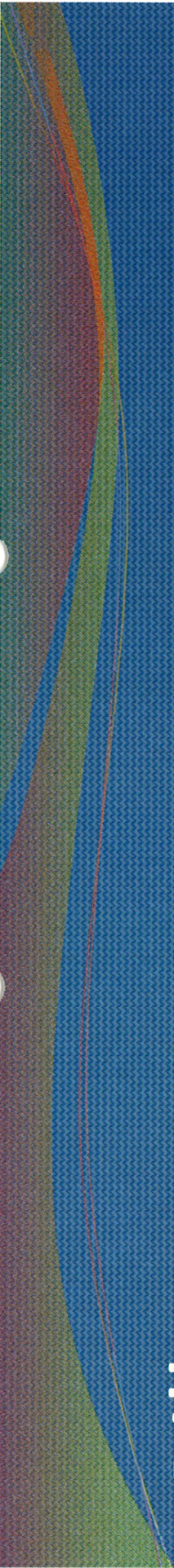
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IV. The New Ordinance



Bill No. 2010-31

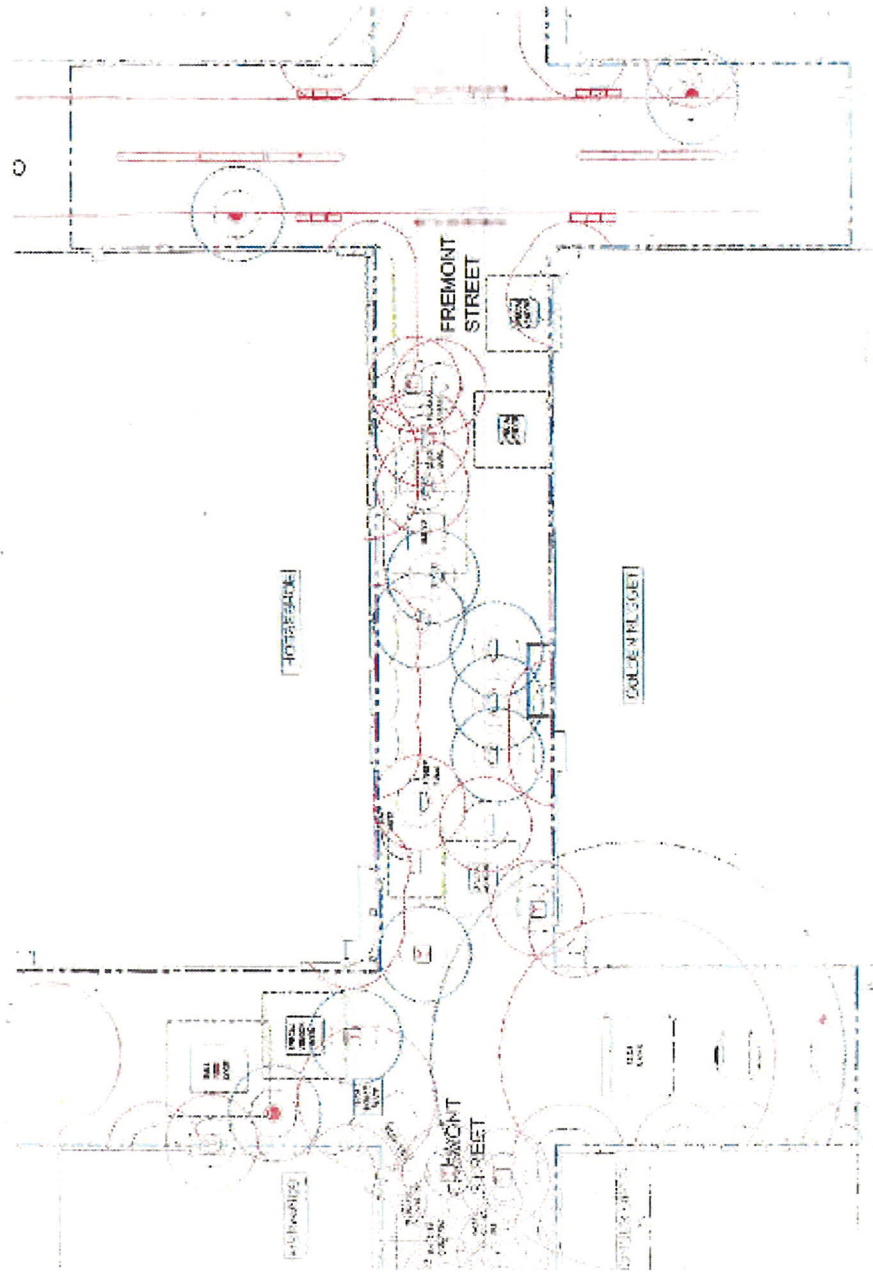
- Bill recognizes that the pedestrian mall is a traditional public forum subject to reasonable time, place and manner restrictions.
- Government must demonstrate a significant interest in such regulation.
- Restrictions must be narrowly tailored leaving alternatives available.

What can be prohibited as a matter of law

- Coercive solicitation-blocking, threatening, compelling or forcing
- Solicitation within 20 feet of an ATM or 10 feet of the entrance of a commercial building. LVMC 10.44.030 (see map)
- Solicitation in convention centers during trade shows (*Hampton International Comm. v. LVCVA*)
- Convention protesters (*Menotti v. City of Seattle*)
- Solicitors at public fairground (*Heffron v. Inter. Soc. For Krishna Consciousness*)
- Beach vendors (*One Word One Family Now v. City and County of Honolulu*)

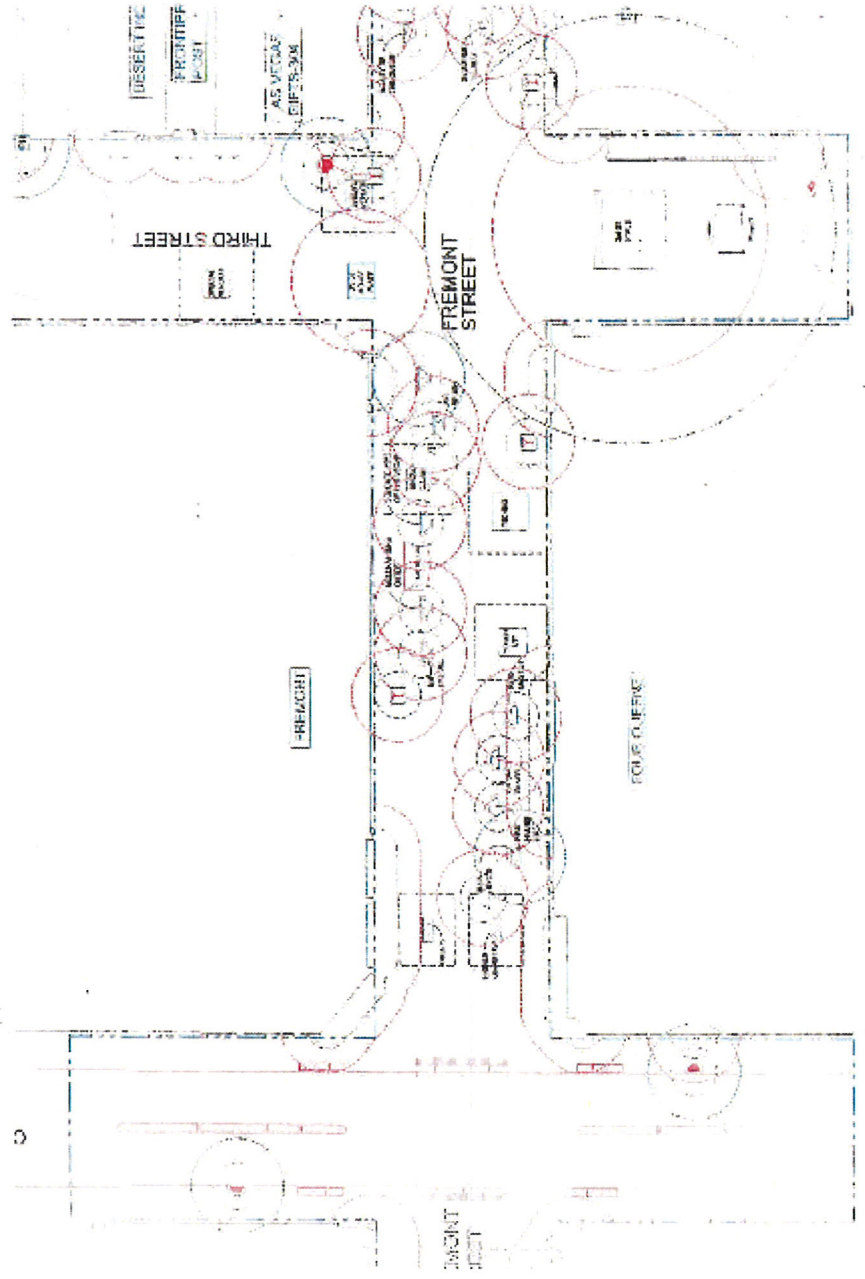
SECTION 2

SCALE: 1" = 40'

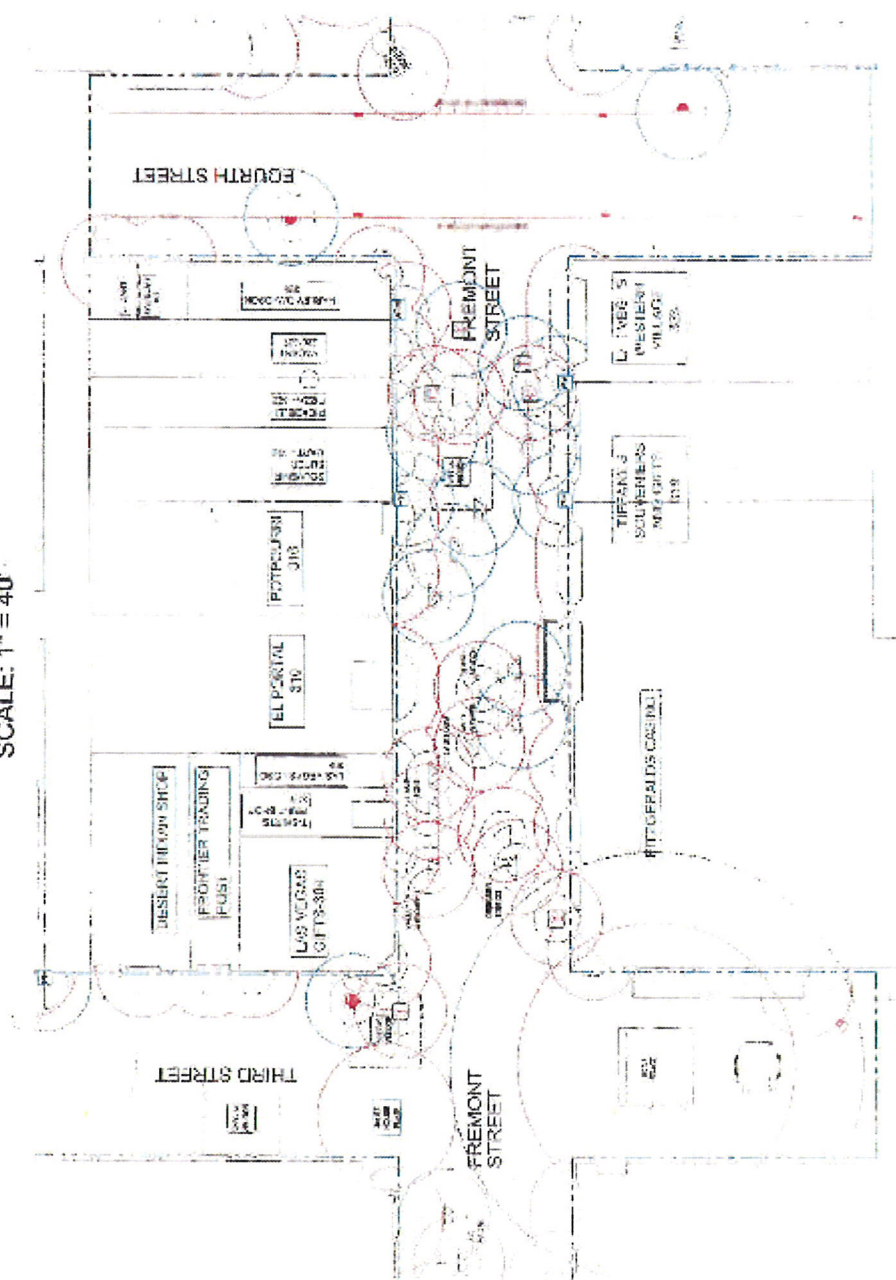


SECTION 3

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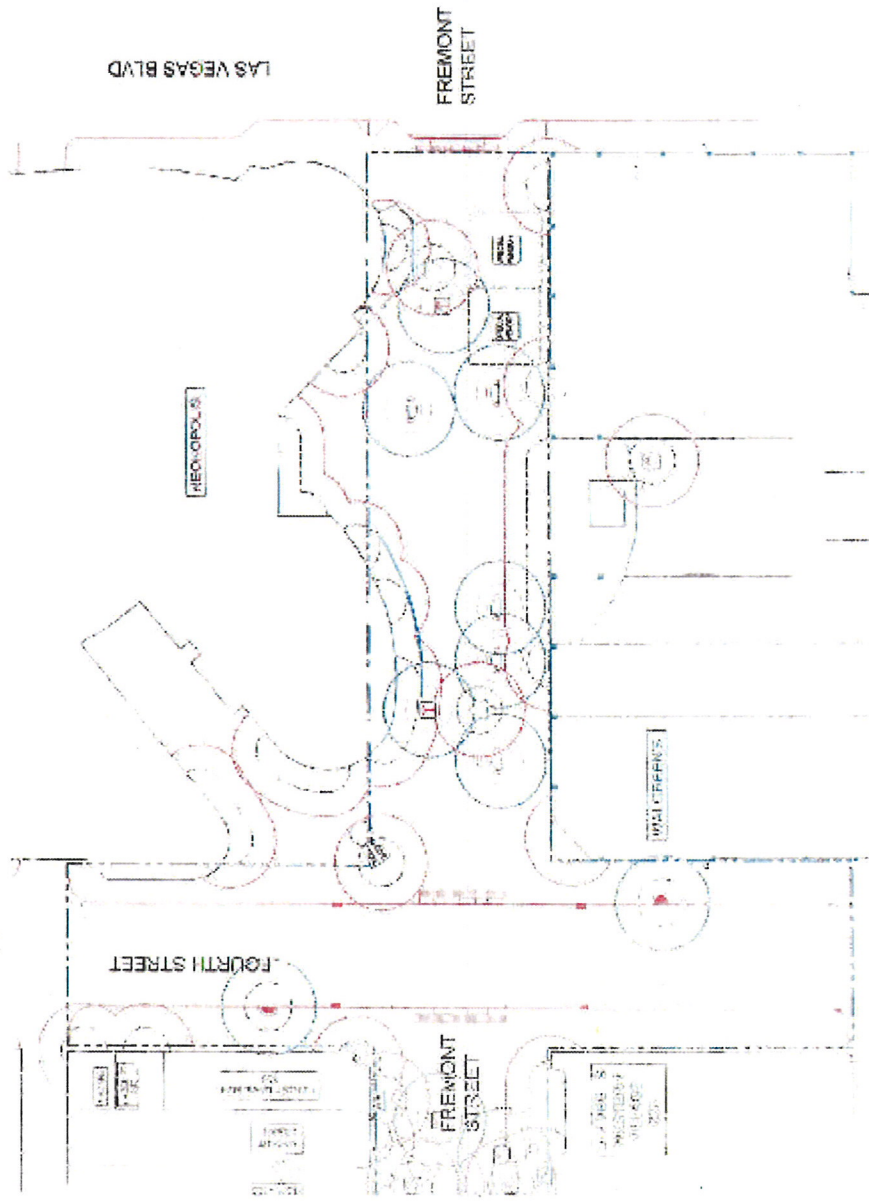


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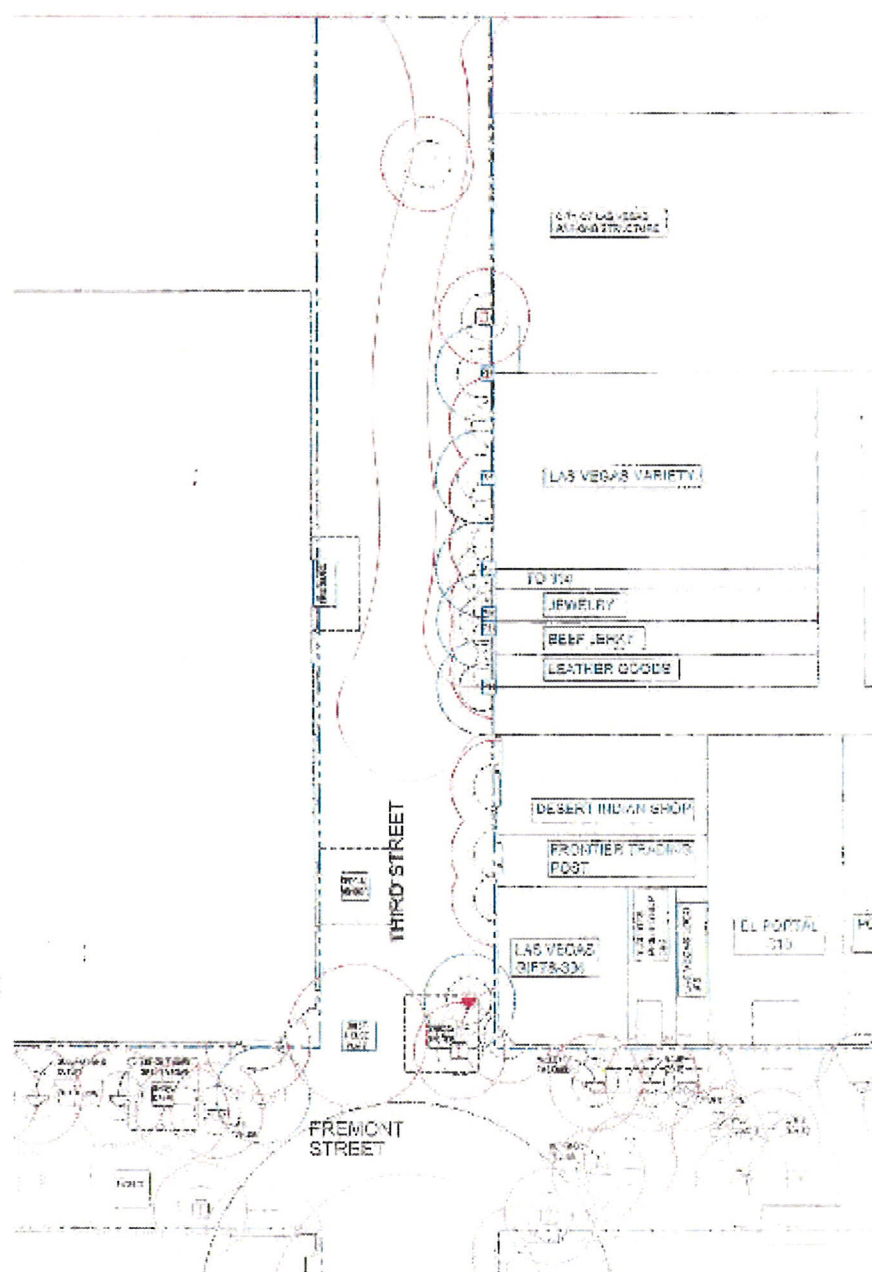


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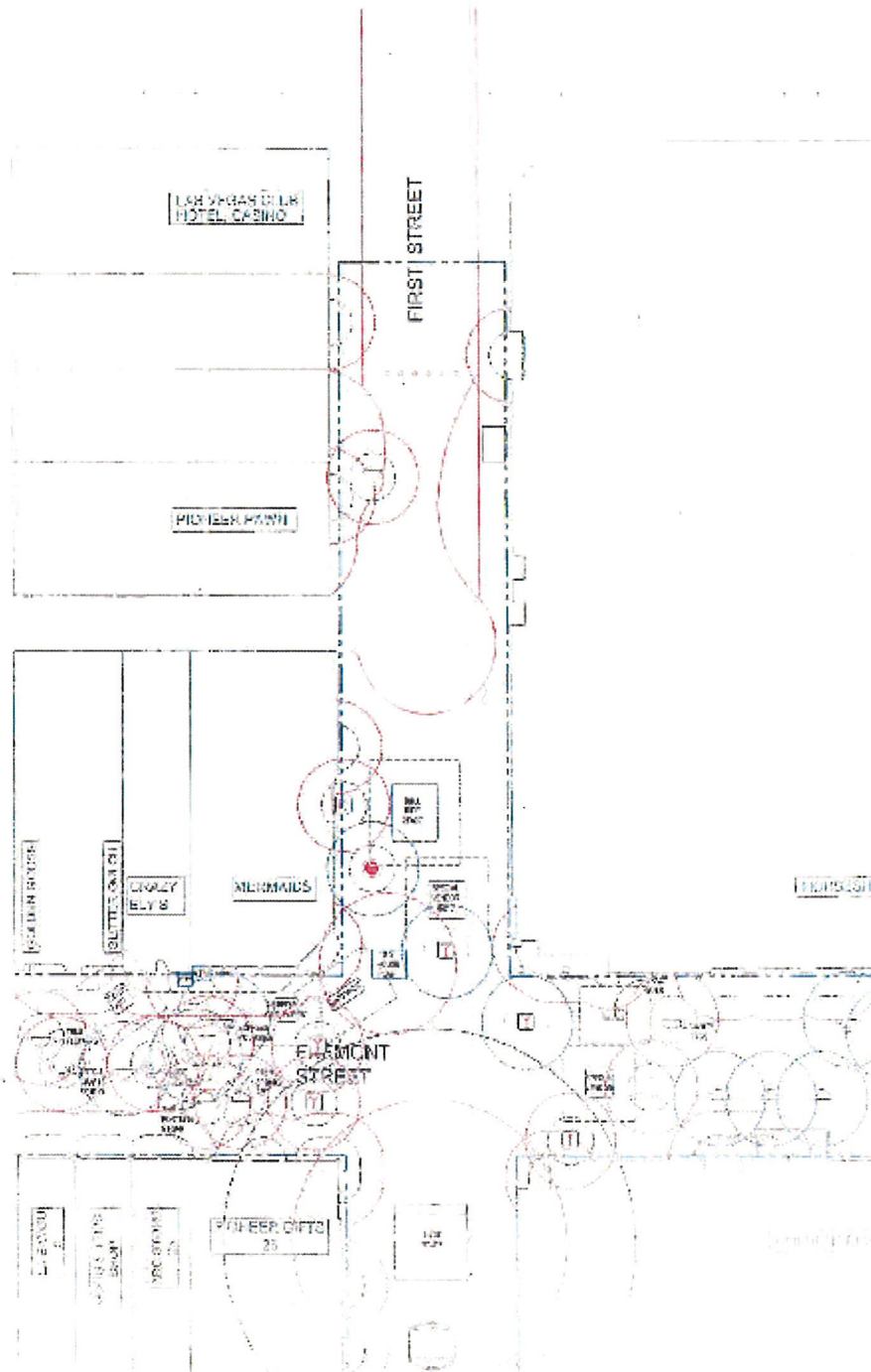


SCALE: 1" = 40'



SECTION 7

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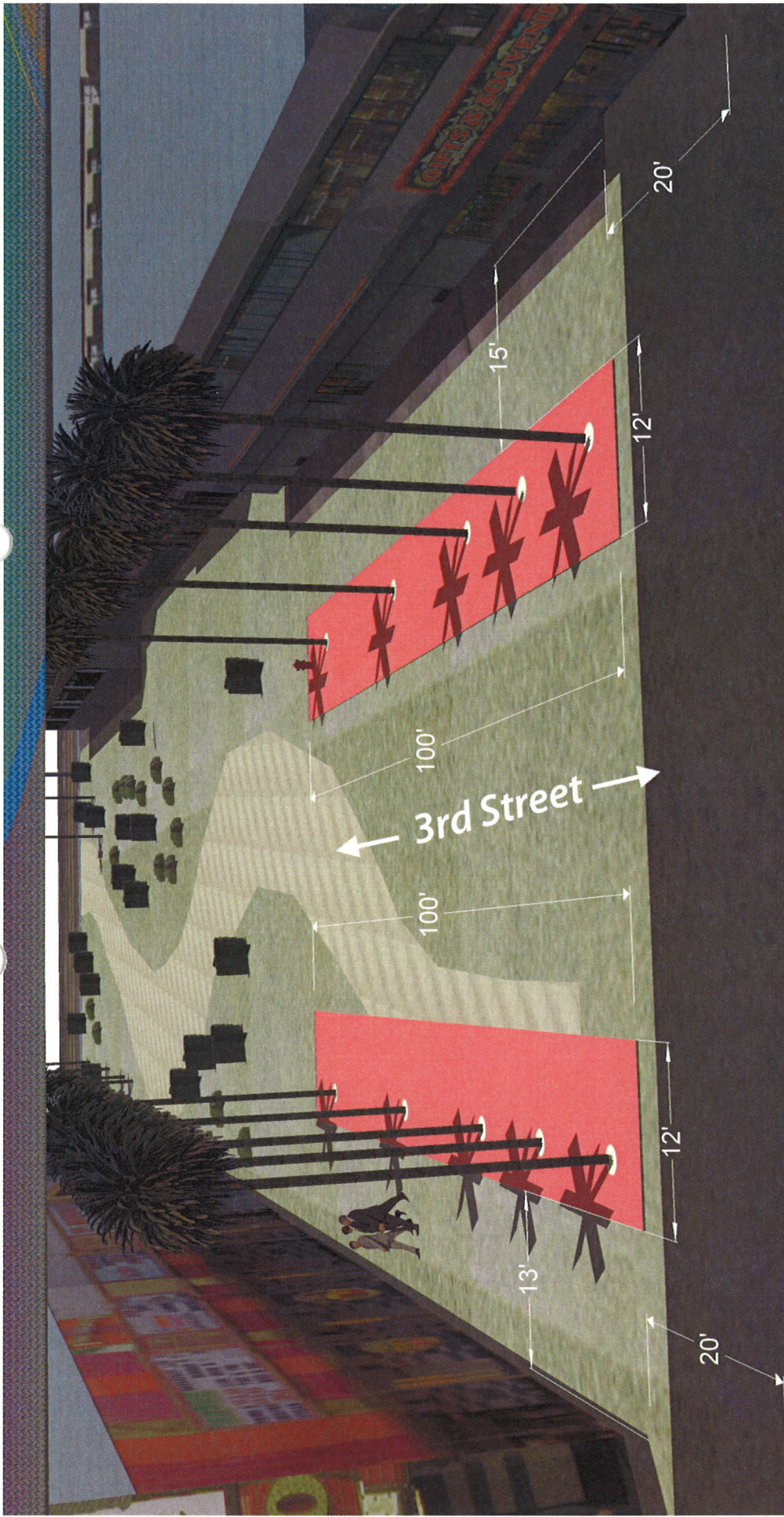


- Court decisions concerning the FSE have recognized:

- Restrictions upon the act of solicitation are content neutral.
- The City and FSE LLC have a significant interest in assuring safe, efficient, and orderly movement of pedestrians.
- The City and FSE LLC have a significant interest in protecting the local merchant economy from unfair competition.
- The City and FSE LLC have a significant interest in protecting visitors from solicitors in an environment where freedom of movement is restricted.
- The City and FSE LLC have a significant interest in preventing the disruption of Mall entertainment and in disrupting visitors' enjoyment of the Mall experience.
- The City and FSE LLC have a significant interest in protecting the aesthetic appearance of the Mall by eliminating visual blight caused by an unsightly vendor.

Free Expression Zones





← Fremont Street →

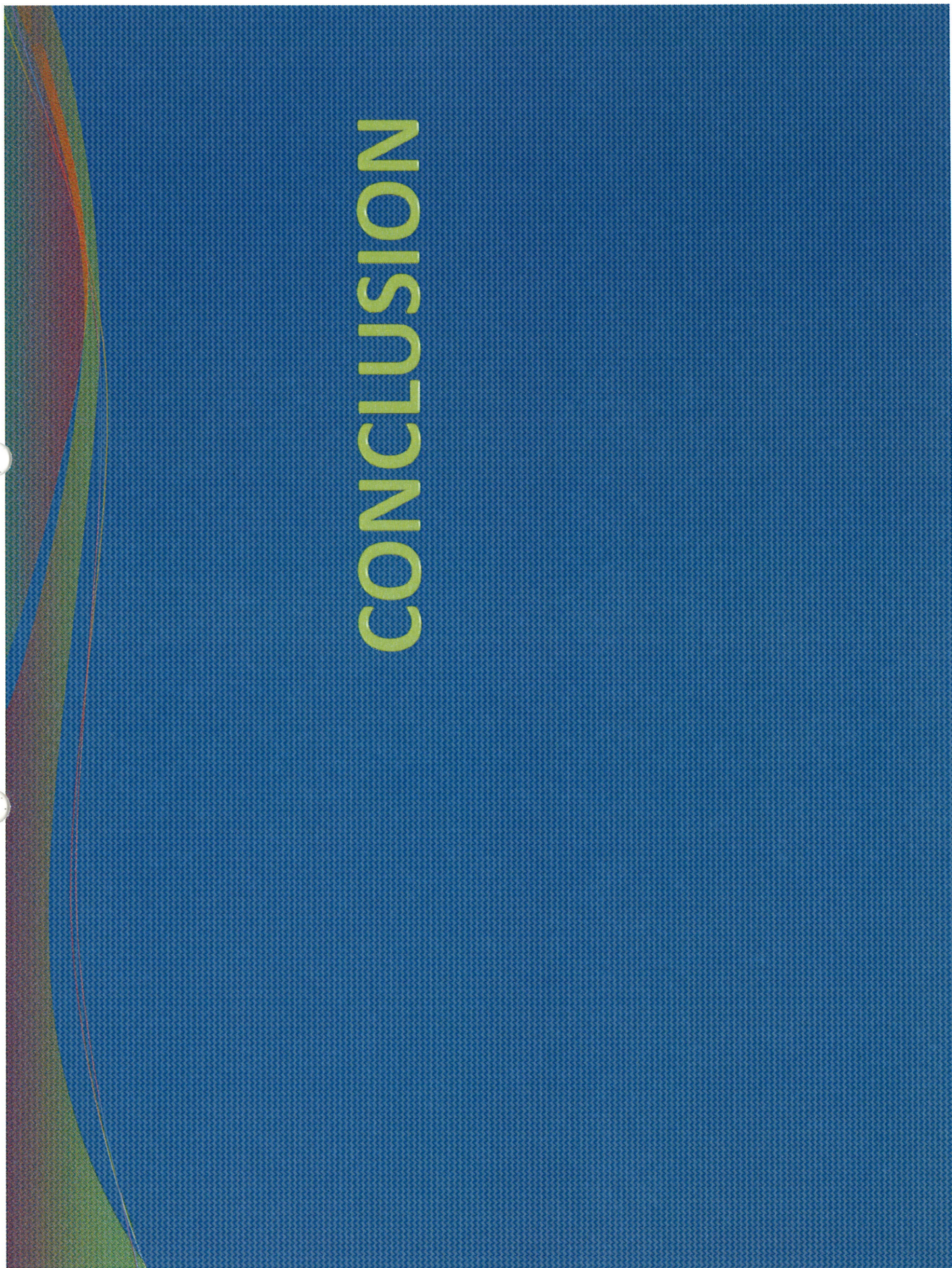
View looking North

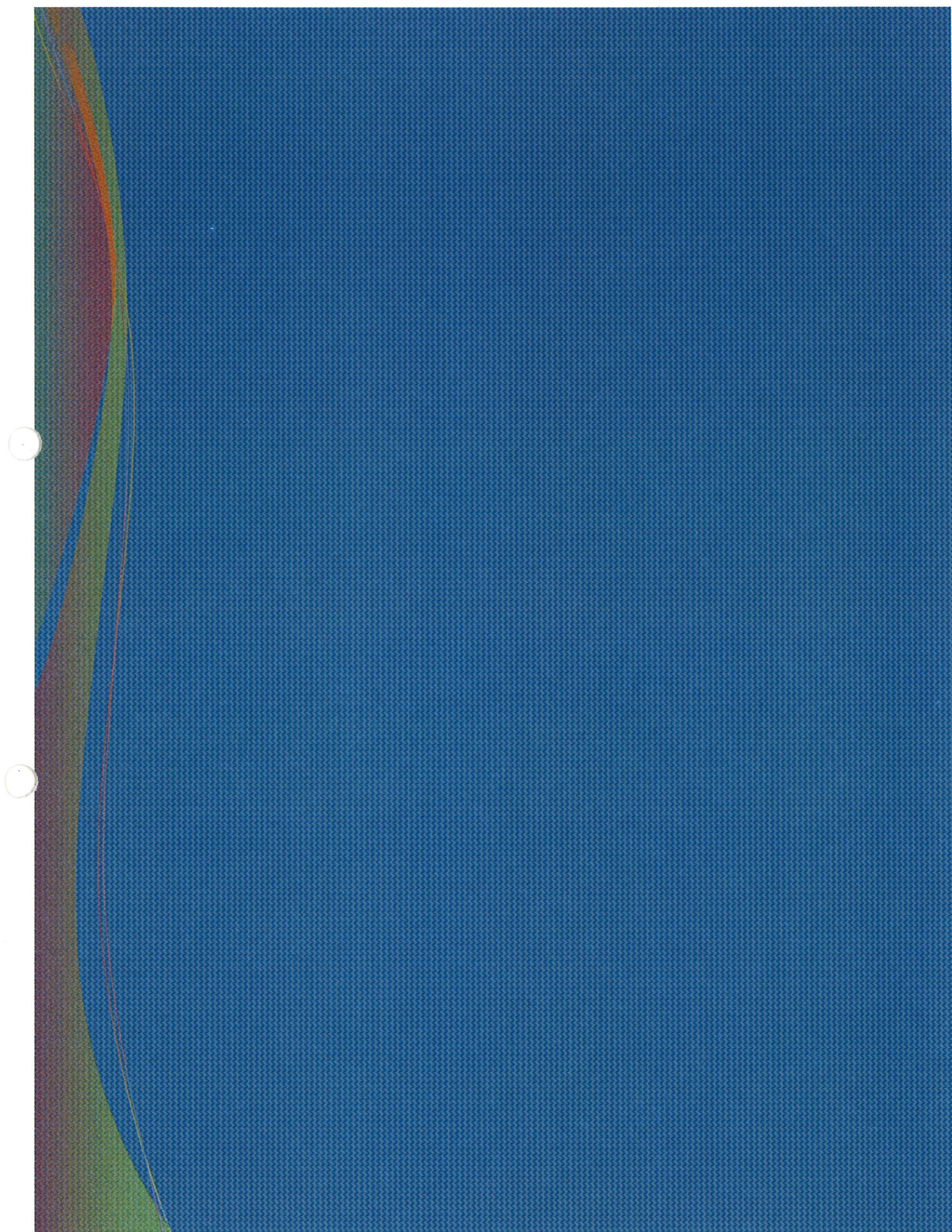


View looking South



CONCLUSION



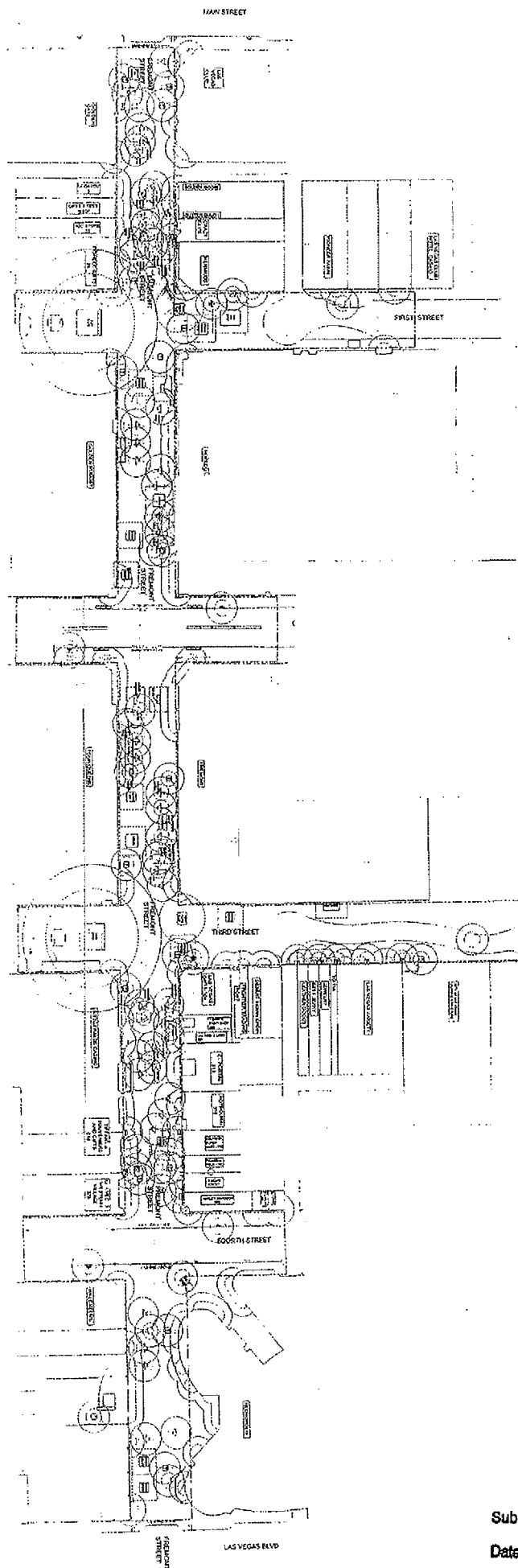


Recommending Committee Meeting of August 3, 2010

**CD SUBMITTED AS
BACKUP FOR ITEM
3 – FILED WITHIN
MINUTE BINDER**

Submitted At Meeting

Date 8/3/10 Item 3



Submitted At Meeting

Date 8/2/10 Item 3

Exhibit 1

Westlaw

Page 1

913 F.Supp. 1402
(Cite as: 913 F.Supp. 1402)

C

United States District Court,
D. Nevada.

HAMPTON INTERNATIONAL COMMUNICA-
TIONS, INC., Plaintiff,

v.

LAS VEGAS CONVENTION AND VISITORS
AUTHORITY, Defendant.

No. CV-S-93-1110-HDM(RJJ).

Jan. 17, 1996.

Publisher brought suits seeking permanent injunction allowing it to distribute its "show dailies" on walkways leading to city's convention center, and actions were consolidated. On motion by convention and visitors authority for summary judgment, the District Court, McKibben, J., adopted report and recommendation of Johnston, United States Magistrate Judge, holding that: (1) tradeshow promoters, as lessees of convention center, were engaged in "state action" in prohibiting publisher's attempt to distribute its "show dailies"; but (2) walkway areas were not a public forum; (3) "show dailies" were not noncommercial speech; and (4) restrictions directly advanced substantial governmental interest.

Motion granted.

West Headnotes

[1] Federal Courts 170B ⚡ 13

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk12 Case or Controversy Requirement

170Bk13 k. Particular Cases or Questions, Justiciable Controversy. Most Cited Cases
Publisher's settlement with lessee of convention center mooted its case as to alleged interference by

lessee which prevented publisher from distributing its materials at convention center.

[2] Constitutional Law 92 ⚡ 1494

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1494 k. Applicability to Governmental or Private Action; State Action. Most Cited Cases

(Formerly 92k90(1))

First Amendment guarantee of free speech guards against undue governmental encroachment and erects no shield against merely private conduct. U.S.C.A. Const.Amend. 1.

[3] Civil Rights 78 ⚡ 1324

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1324 k. In General. Most Cited Cases

(Formerly 78k196.1)

Civil Rights 78 ⚡ 1326(4)

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(3) Private Persons or Corporations, in General

78k1326(4) k. In General. Most Cited Cases

(Formerly 78k196.1)

Section 1983 permits liability actions where party is injured by person who, under color of state law, deprives party of any right, privilege or immunity secured by the Constitution; that is, persons violating this statute must be engaged in activity deemed to be acts of the state and not just acts of private persons or entities. 42 U.S.C.A. § 1983.

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(Cite as: 913 F.Supp. 1402)

[4] Civil Rights 78 ⚡ 1343

78 Civil Rights

78III Federal Remedies in General

78k1342 Liability of Municipalities and Other Governmental Bodies

78k1343 k. In General. Most Cited Cases

(Formerly 78k206(1))

Municipal corporation is "person," subject to § 1983 actions. 42 U.S.C.A. § 1983.

[5] Civil Rights 78 ⚡ 1325

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1325 k. State or Territorial Action, or Individual or Private Action, in General. Most Cited Cases

(Formerly 78k197)

In determining whether state action exists, as required to support § 1983 claim, ultimate issue is whether alleged infringement of federal rights is fairly attributable to state; claimed constitutional deprivation must result from exercise of right or privilege having its source in state authority, and party charged with the deprivation must be person who fairly may be said to be a state actor. 42 U.S.C.A. § 1983.

[6] Civil Rights 78 ⚡ 1326(1)

78 Civil Rights

78III Federal Remedies in General

78k1323 Color of Law

78k1326 Particular Cases and Contexts

78k1326(1) k. In General. Most Cited Cases

(Formerly 78k198(1))

Trade show promoters, as lessees of convention center, were engaged in "state action," within meaning of § 1983, in prohibiting publisher's attempts to distribute its "show dailies" in walkways leading to convention center; promoters leased convention center from city and promoters were effectuating government policy as set forth in their

leases. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

[7] Constitutional Law 92 ⚡ 1507

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1507 k. Viewpoint or Idea Discrimination. Most Cited Cases

(Formerly 92k90(1))

Constitutional Law 92 ⚡ 1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited Cases

(Formerly 92k90(1))

Generally, First Amendment prohibits governmental restrictions on expression due to ideas, subject matter, or content of that message. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚡ 1512

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or Restrictions

92k1512 k. In General. Most Cited Cases

(Formerly 92k90(3))

Government may impose upon speech and conduct associated with speech reasonable time, place and manner restrictions which are content neutral.

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U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ⚡ 1730

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1730 k. In General. Most Cited Cases

(Formerly 92k90(3))

Particular standard by which federal courts determine reasonableness of government restriction on speech is determined by forum wherein speech occurs. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚡ 1739

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1736 Traditional Public Forum in General

92k1739 k. Justification for Exclusion or Limitation. Most Cited Cases

(Formerly 92k90.1(4))

Governmental restrictions on speech in traditional public forum must be content neutral, narrowly tailored to serve compelling interests, and leave open alternative channels of communication. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⚡ 1735

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1732 Public Forum in General

92k1735 k. Justification for Exclusion or Limitation. Most Cited Cases

(Formerly 92k90.1(4))

Constitution forbids state to enforce certain exclusions from forum generally open to the public even if it was not required to create the forum in the first place, and as long as state retains open character of the facility, it is bound by same standards that apply to traditional public forum. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⚡ 1751

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1748 Non-Public Forum in General

92k1751 k. Justification for Exclusion or Limitation. Most Cited Cases

(Formerly 92k90.1(4))

Upon non-public forum consisting of public property which is not by tradition or designation a forum for public communication, state may, similar to other private property owners, reserve forum to its intended purposes and impose regulations that are viewpoint neutral and reasonably related to legitimate state interest. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ⚡ 1760

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1760 k. Sidewalks. Most Cited Cases

(Formerly 92k90.1(4))

Ingress and egress walkways immediately adjacent to city's convention center were not a "public forum," for purposes of First Amendment analysis of handbilling restrictions; although walkway areas

913 F.Supp. 1402
(Cite as: 913 F.Supp. 1402)

were open to the public at large and seemed, in all other physical regards, like a traditional public forum, walkways were created solely to manage heavy pedestrian traffic which generally accompanied large, privately-organized events for which convention center was built. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 ⚡ 1734

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1732 Public Forum in General

92k1734 k. Nature and Requisites.

Most Cited Cases

(Formerly 92k90.1(4))

Government does not create public forum, for first-amendment purposes, whenever members of public are permitted freely to visit place owned or operated by the Government. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 ⚡ 1760

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1760 k. Sidewalks. Most Cited

Cases

(Formerly 92k90.1(4))

Sidewalks which merely lead to entry of public, government-owned facility are not necessarily traditional public forum for First Amendment purposes. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ⚡ 1730

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1730 k. In General. Most Cited

Cases

(Formerly 92k90.1(4))

As general free speech principal, physical appearance alone does not dictate outcome of forum analysis; rather, it is combination of that appearance with consideration of property's fundamental purpose that controls. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 92 ⚡ 1537

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1537 k. Difference in Protection

Given to Other Speech. Most Cited Cases

(Formerly 92k90.2)

Even though commercial speech is usually afforded First Amendment protection equal to that of other forums of speech due to consumer's interest in free flow of commercial information, certain types of restrictions may be tolerated. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 92 ⚡ 1541

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1541 k. Reasonableness; Relation-

ship to Governmental Interest. Most Cited Cases

(Formerly 92k90.2)

In commercial speech cases, government regulation may be permitted if: speech concerns lawful activity and is not misleading; asserted governmental interest is substantial; regulation directly advances governmental interest asserted; and regulation is not more extensive than necessary to serve the in-

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(Cite as: 913 F.Supp. 1402)

terest. U.S.C.A. Const.Amend. 1.

[19] Constitutional Law 92 1640

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(E) Advertising and Signs

92XVIII(E)2 Advertising

92k1640 k. In General. Most Cited

Cases

(Formerly 92k90.3)

Speech which contains advertisements, refers to specific product, or which is distributed with economic motivation evidences its commercial nature, for First Amendment purposes. U.S.C.A. Const.Amend. 1.

[20] Constitutional Law 92 1555

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1555 k. Matters of Public Concern.

Most Cited Cases

(Formerly 92k90.2)

Constitutional Law 92 1640

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(E) Advertising and Signs

92XVIII(E)2 Advertising

92k1640 k. In General. Most Cited

Cases

(Formerly 92k90.3, 92k90.2)

Communication can constitute commercial speech within meaning of First Amendment notwithstanding fact that it contains discussions of important issues; thus, advertising which links product to current debate is not thereby entitled to constitutional protection afforded noncommercial speech.

U.S.C.A. Const.Amend. 1.

[21] Constitutional Law 92 1536

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1536 k. What Is "Commercial Speech". Most Cited Cases

(Formerly 92k90.2)

Constitutional Law 92 1640

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(E) Advertising and Signs

92XVIII(E)2 Advertising

92k1640 k. In General. Most Cited

Cases

(Formerly 92k90.3)

Constitutional Law 92 2079

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(U) Press in General

92k2079 k. Distribution of Materials in Public Places. Most Cited Cases

(Formerly 92k90.2)

"Show dailies" which publisher sought to distribute on grounds of convention center were not "noncommercial speech," for First Amendment purposes; publication contained mostly advertisements and editorials for products of advertisers, and publisher's desire to distribute it at tradeshow was motivated solely and undoubtedly by economic factors. U.S.C.A. Const.Amend. 1.

[22] Constitutional Law 92 1541

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and

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Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1541 k. Reasonableness; Relationship to Governmental Interest. Most Cited Cases
(Formerly 92k90.2)

Constitutional Law 92 ↪ 2079

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(U) Press in General

92k2079 k. Distribution of Materials in Public Places. Most Cited Cases
(Formerly 92k90.2)

Prohibition against publisher's attempts to distribute its "show dailies" on walkways leading to city's convention center constituted valid regulation of commercial speech to protect city's substantial government interest in facilitating unencumbered entry and exit of visitors to the facility; moreover, regulation directly advanced governmental interest and regulation was no more extensive than necessary. U.S.C.A. Const.Amend. 1.

[23] Constitutional Law 92 ↪ 1541

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1541 k. Reasonableness; Relationship to Governmental Interest. Most Cited Cases
(Formerly 92k90.2)

When determining whether regulation on commercial speech is more extensive than necessary, "least-restrictive means" need not be used; rather, there must be only a reasonable fit between state's purpose and means chosen to achieve desired end. U.S.C.A. Const.Amend. 1.

*1405 Neil Beller, Las Vegas, NV, for plaintiff.

Luke Puschnig, Dickerson, Dickerson, Liberman & Consul, Las Vegas, NV, Paul E. Larsen, Lionel Sawyer & Collins, Las Vegas, NV, for defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

McKIBBEN, District Judge.

The court has considered the report and recommendation of the United States Magistrate Judge (# 136) filed on December 22, 1995, wherein the magistrate judge recommends that the court enter its order granting defendant's motion for summary judgment (# 115) in that the restriction on plaintiff's commercial speech does not violate the First Amendment and no genuine issue of material fact remain. No objections to the report and recommendation have been filed and the clerk of the court has been advised that objections will not be filed. The court has considered the pleadings and memoranda of the parties and other relevant matters of record and has made a review and determination in accordance with the requirements of 28 U.S.C. § 636 and applicable case law, and good cause appearing, the court hereby

ADOPTS AND ACCEPTS the report and recommendation of the United States Magistrate Judge. It is, therefore, ORDERED that defendant's motion for summary judgment (# 115) is granted and judgment shall be entered in favor of the Las Vegas Convention and Visitors Authority and against Hampton International Communications, Inc. The trial set for January 25, 1996 is vacated.

REPORT & RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

[December 22, 1995]

JOHNSTON, United States Magistrate Judge.

This matter was submitted to the undersigned Ma-

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gistrate Judge on Defendant Las Vegas Convention and Visitors Authority's Motion for Summary Judgment (# 115). The Court has reviewed the Motion for Summary Judgment (# 115), the Plaintiff's Opposition to the Defendant's Motion for Summary Judgment (# 116), and the Las Vegas Convention and Visitors Authority's Reply to Plaintiff's Opposition to Motion for Summary Judgment (# 118) and corresponding Supplements (# 121, # 129, # 130).

BACKGROUND

On or about October 18, 1993, the Las Vegas Convention and Visitors Authority ("LVCVA") leased the Las Vegas Convention Center to Interface Group-Nevada, Inc. ("Interface") for its annual "COMDEX" tradeshow. COMDEX promoters acquired a leasehold interest in the entire Convention Center facility, including the building, front entry, walkways leading to the Convention Center, and all parking lots in front of the facility. On or about November 8, 1993, the LVCVA leased the Las Vegas Convention Center to Electronic Industries Association ("CES") for its annual Consumer Electronics tradeshow. CES acquired a leasehold interest in essentially the identical areas of the Las Vegas Convention Center as the COMDEX promoters.

During these tradeshows, Plaintiff Hampton International Communications ("Hampton"), a for profit business which publishes various newspapers and commercial tabloids relevant to the computer industry, attempted to distribute its "show dailies" on the walkways leading to the Convention Center. *1406 Tradeshow promoters prohibited Hampton's conduct since the distribution of commercial materials or "official dailies" ^{FN1} on Convention Center property was limited to designated areas and to only those organizations which had given consideration for the exclusive right to distribute commercial materials on the Las Vegas Convention Center grounds. Convention Center grounds include the ingress and egress walkways leading to the building where Plaintiff attempted to distribute its materials.

No provision prohibits any person from distributing material on the municipal sidewalks which surround the Convention Center grounds.

FN1. A convention "daily" is a profit-oriented publication which lists tradeshow events along with various paid commercial advertisements, articles, and editorials. Publishers of "official dailies" generally acquire such recognition, including the right to distribute its materials on convention premises, in exchange for a promotional fee.

On November 10, 1993, Hampton alleged a deprivation of its First Amendment right and sought a temporary restraining order and permanent injunction allowing it to distribute its commercial publication on Convention Center ingress and egress walkway areas during the COMDEX tradeshow. See, Compl. (# 1), Case No. CV-S-1110-LDG-(RLH). The injunctive request was denied. Less than two months later, on January 3, 1994, Hampton filed another Complaint for Injunctive Relief against LVCVA seeking to distribute its dailies at the CES tradeshow. Case No. CV-S-94-008-LDG-(RLH). Prior to the latter legal action, Hampton had contracted with CES to sublease a booth at the CES show in order to distribute its own materials on the Convention Center grounds. Tradeshow regulations, however, precluded Hampton both from distributing advertisements anywhere outside of its booth and from displaying or distributing its "dailies" on the Convention Center premises without the express permission of CES. Because Hampton believed such regulations were unduly restrictive, it filed the injunctive relief request before the CES tradeshow began. When the temporary restraining order was again denied, Hampton demanded a jury trial on the issue of damages. The district court subsequently consolidated the second case with the first. Order (# 22).

On November 24, 1993, Hampton filed its First Amended Complaint (# 14) alleging, *inter alia*, that (1) a prior Judgment by Consent entered into by

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LVCVA on June 30, 1993, permits a lessee to exclude only "protest or demonstration activities" from Civic Center premises and not other expressive activity, (2) Hampton was entitled to injunctive and declarative relief in that Defendant's restriction on the distribution of expressive material at the Las Vegas Convention Center violated its First and Fourteenth Amendment rights, and (3) Hampton incurred damages from Defendant's actions.

After nearly two years of pre-litigation maneuvering by the two private parties in this case, Hampton and Interface Group-Nevada, Inc. settled their dispute.^{FN2} Pursuant to the Pretrial Order (# 124) and the Motion for Summary Judgment (# 115), the court must now determine whether any genuine issue of material fact exists requiring submission of the case against LVCVA to a jury.

FN2. The controversy between Hampton and Interface became quite involved; however those matters were only peripheral to the pertinent First Amendment issues of this case. Specifically, on December 15, 1993, Interface filed its Answer and Counterclaim (# 19) against Hampton. In the counterclaim, Interface alleged, *inter alia*, that Hampton had used, without Interface's authority, the "COMDEX" service mark in soliciting advertisers for Hampton's show dailies, and on the front cover of its show dailies during the 1993 Fall COMDEX trade show. Consequently, Interface sought injunctive relief and damages for service mark infringement, unfair trade practices, and deceptive trade practices. Twice the Defendant disregarded Motions to Compel Discovery and twice the court imposed sanctions against it. See Orders (# 68) and (# 80). Then on June 28, 1995, a Stipulation and Order (# 117) was filed wherein the Complaint and Counterclaims between Hampton and Interface were dismissed.

DISCUSSION

I. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

"Summary judgment may be granted when, viewing the evidence in the light most favorable to the non-moving party, no genuine¹⁴⁰⁷ issues of fact remain and the movant is entitled to judgment as a matter of law." *Cleary v. News Corporation*, 30 F.3d 1255, 1259 (9th Cir.1994), citing Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986). A court must grant a summary judgment motion 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, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Evidence is sufficient to establish an essential element of a party's case if that evidence "is such that a reasonable jury could return a verdict" for that party. *Hopkins v. Dow Corning Corporation*, 33 F.3d 1116, 1121 (9th Cir.1994), citing *Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. at 2510. However, "the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment[.]" *Anderson*, 477 U.S. at 247-48, 106 S.Ct. at 2509-10. Any showing of fact made by a party will be examined through the prism of the substantive evidentiary standards that apply to the particular case. *Id.* at 254-55, 106 S.Ct. at 2513-14.

II. MOOTNESS

[1] A federal court may have jurisdiction to decide a dispute provided that a case or controversy exists as set forth in U.S. Constitution, art. III, § 2. Because Plaintiff has stipulated to a settlement with Interface, its case is moot as to the alleged interference by Interface which prevented Hampton from distributing its materials at the Convention Center. The LVCVA is the only remaining defendant against which Hampton seeks redress. Hampton maintains a damages claim pursuant to 42 U.S.C. §

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1983 for the deprivation by a state agent of rights constitutionally guaranteed by the First and Fourteenth Amendments. But for this alleged state action to deprive a constitutional right, Plaintiff's continuing request that this court determine whether the disputed walkways located on the Las Vegas Convention Center are public fora would constitute merely an advisory opinion and lie beyond the jurisdiction of a federal court.^{FN3} Plaintiff's case is justiciable by a federal court, therefore, only if their civil rights damages claim legitimately involves unconstitutional state action against private conduct.

FN3. Had Plaintiff not sought damages, Plaintiff likely could have still had his case heard and avoid mootness concerns since the case appears to be one "capable of repetition, yet evading review," where the challenged action is in its duration too short to be fully litigated prior to its cessation and a reasonable expectation exists that the Plaintiff would be subject to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975).

III. STATE ACTION

[2][3][4] The First Amendment guarantee of free speech guards against undue governmental encroachment and erects no shield against merely private conduct. *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). Hence, Section 1983 of 42 U.S.C. permits liability actions wherein a party is injured by a person, *who under color of state law*, deprives the party of any right, privilege, or immunity secured by the Constitution. That is, persons violating this statute must be engaged in activity deemed to be acts of the state and not just acts of private persons or entities. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837, 102 S.Ct. 2764, 2769, 73 L.Ed.2d 418 (1982). Additionally, municipal corporations are "persons" subject to Section 1983 actions. *Monell v. Dep't Social Services of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d

611 (1978).

[5][6] In determining whether state action exists in this context, the ultimate issue is whether the alleged infringement of federal rights is "fairly attributable to the State." *Rendell-Baker*, 457 U.S. at 838, 102 S.Ct. at 2769, citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). The Supreme Court has adopted a two-part approach to this question of "fair attribution." First, the claimed constitutional deprivation must result from the exercise of a right or privilege having its source in state authority. Second, the party charged with the deprivation must be a person who fairly may be said to be a state actor. *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754. In this case, where the authority of a private entity to act stems from a direct agreement with the state, the central inquiry focuses on the second factor of whether a party can be described "in all fairness" as a state actor.^{FN4} *Id.*; see also, *Edmondson v. Leesville Concrete Co. Inc.*, 500 U.S. 614, 619, 111 S.Ct. 2077, 2082, 114 L.Ed.2d 660 (1991).

FN4. The constitutional deprivation alleged by Plaintiff in this case is a direct result of Interface and CES exercising their leasehold agreement for exclusive use of the Las Vegas Convention Center as set forth and granted in the lease entered into by Interface and CES with the LVCVA.

Determining what may be fairly considered governmental action is generally a fact-bound inquiry. However, Supreme Court precedents serve as guideposts in the analysis.^{FN5} To be sure, the Supreme Court rarely finds undertakings to be within the narrow category of functions exercised traditionally and exclusively by the government. See generally, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). The Court has stated that "while many functions have been traditionally performed by governments, very few have

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been 'exclusively reserved to the State.' " *Flagg*, 436 U.S. at 158, 98 S.Ct. at 1734. At the same time, however, where a private party and its conduct are closely associated with the state, it may be fair to treat the private action as state conduct. *See, NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988).

FN5. Several principles apply in a state action analysis: (1) a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. *Blum v. Yaretsky*, 457 U.S. 991, 1003, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972) (the state compulsion test); (2) where a private group is serving a public function, federal courts must examine whether that function performed has been "traditionally the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 455, 42 L.Ed.2d 477 (1974) (the public function test); and (3) a sufficiently close nexus between the state and the challenged action of the private party should exist so as to fairly treat the private conduct as state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449, 455, 42 L.Ed.2d 477 (1974); *see also, Stypmann v. City of San Francisco*, 557 F.2d 1338, 1342 (9th Cir.1977); *NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988) (the nexus or joint action test).

The state action issue is pertinent to the instant case since no facts allege that LVCVA actually prohibited Hampton from distributing information. Rather, tradeshow promoters as lessees of the Convention Center implemented what was a perceived right to unconditionally prohibit unauthorized hand-

billing on leased Convention Center premises acquired under the leasehold agreement with the LVCVA. Neither party addressed this issue in its original brief. ^{FN6} Only in its Supplement (# 121) did Defendant raise the state action issue by noting a recent Fourth Circuit case which held that the private organizer of a municipal festival on city grounds did not constitute state action since the organization, management, and promotion of a community entertainment event is not a function traditionally and exclusively exercised by the government. *See, United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902 (4th Cir.1995).

FN6. Both parties were directed by the Court to brief the state action issue subsequent to the hearing on Defendant's Motion for Summary Judgment. *See Order* (# 128).

The LVCVA argues that, similar to the actions by the plaintiff in *Gaston*, organizing a tradeshow event and exercising effective managerial control over a convention center do not fall within the domain of functions exercised traditionally and exclusively by the government.^{FN7} However, the court finds that this case is more analogous to the state activity and reasoning undergirding the decision in *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) and similar cases in which a sufficiently close nexus exists*1409 between the state and the challenged action so as to fairly treat the private conduct as state action. *See, Jackson*, 419 U.S. at 351, 95 S.Ct. at 454; *NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988).

FN7. Defendant also contends that the actual exclusion of Plaintiff's information from Convention Center premises cannot be fairly attributed to the State since it acted only as a lessor or "owner out of occupancy" and did not actually restrict speech through any means. Second Supplement (# 130).

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In *Newton*, the management activity carried on by private trustees over a municipal park was determined to be state action, not merely because the park traditionally served the public, but rather due to the state's entwined role in the management and control of the premises in question. Likewise, in the case at hand, a government entity retains ownership, maintenance, and daily control over the Convention Center.^{FN8} In fact, the LVCVA's role as the traditional municipal authority over the premises is firmly established not only by corporeal conduct and control, but also by the Las Vegas Convention Center lease agreement to which tradeshow promoters must adhere.

FN8. The LVCVA is a governmental agency founded by Clark County pursuant to N.R.S. 244A.597. Therefore, the Court considers this municipal entity an agent and actor for the government, and for purposes of a First Amendment analysis, its actions constitute state actions.

The lease agreement in this case is a distinguishing factor from those cases in which state action was not found because the State acted only as a lessor of its own property without enforcing restrictive policies or otherwise interfering with lessee activities.^{FN9} According to the lease here, the lessee "shall not ... distribute or circulate or permit to be circulated or distributed, any advertising matter or program in or about the Las Vegas Convention Center public area." See Lease, attached to (# 33) as Exhibit 1, Paragraph 24. Although the Defendant did not actually prohibit the Plaintiff from hand-billing on Convention Center premises, it was by the LVCVA's express authority as set forth in its lease and as proprietor of the Convention Center that tradeshow promoters acted. Interface and CES enforced the "no unauthorized handbilling" policy as required by the lease and with the authority granted by that lease. It is this close nexus between compelled government policy and the putative unconstitutional interference with speech that evidences state action. The policy of the LVCVA was

so interdependent and indistinguishable from that of tradeshow promoters that it was, in effect, a joint participant with the tradeshow organizers in the effectuation of that policy. See, *Jackson*, 419 U.S. at 357-58, 95 S.Ct. at 457-58.

FN9. Only where the State grants absolute autonomy to its lessees will its ownership of a facility be insufficient to constitute state action. See, *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902 (4th Cir.1995); *Gannett Satellite Info. Network Inc. v. Berger*, 894 F.2d 61 (3rd Cir.1990); *NBC v. Communications Workers of America*, 860 F.2d 1022 (11th Cir.1988).

Because of this "symbiotic relationship" whereby the government advanced its policy through the acts of tradeshow promoters throughout its lease, and due to the fact that the government has remained so inexorably involved with the daily oversight and administration of the Las Vegas Convention Center, the tradeshow promoters' actions under their respective lease agreements with the LVCVA can in all fairness be described as state action. Consequently, any action taken by a private lessee of the Las Vegas Convention Center which comports to the LVCVA's lease agreement and which improperly deprives another of a constitutionally protected right constitutes state action for purposes of Section 1983 liability.

IV. FORUM DOCTRINE

[7][8][9][10] The constitutional standards which proscribe the amount of governmental restriction that can be placed on speech are well established. As a general rule, the First Amendment prohibits governmental restrictions on expression due to the ideas, subject matter, or content of that message. See, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972). Government may impose upon speech and the conduct associated with speech, reasonable time, place, and manner restrictions which are con-

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tent-neutral. The particular standard by which federal courts determine the reasonableness of a governmental restriction is determined by the forum wherein the speech occurs. "At one end of the spectrum are streets and parks which *1410 'have immemorially been held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " *Perry Ed. Ass'n v. Perry Local Ed. Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939)). Governmental restrictions upon these locales must be content neutral, narrowly tailored to serve a compelling state interest, and leave open alternative channels of communication. *Id.*

[11] Continuing down the spectrum from the traditional public forum is the designated public forum, opened by the state for limited or unlimited use by the public as a place for expressive activity. "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place," and as long as the State retains the open character of the facility, it is bound by the same standards that apply to a traditional public forum. *Perry Ed. Ass'n*, 460 U.S. at 45-46, 103 S.Ct. at 955-56.

[12] Finally, the non-public forum consists of public property which is not by tradition or designation a forum for public communication. *Id.* at 46, 103 S.Ct. at 955. This forum is governed by a different standard from the previous two. Upon this forum, similar to other private property owners, the State may reserve the forum to its intended purposes and impose regulations that are viewpoint neutral and reasonably related to a legitimate state interest. *Id.*

[13][14][15][16] The distinctions between a designated public forum and a non-public forum are at times fine and difficult to determine. Turning to the case at hand, the ingress-egress walkways in dispute appear to more closely resemble those public

areas immemorially held in trust for the use of the public and for purposes of assembly and communicating thought. The walkway areas are open to the public at large and seem, in all other physical regards, like a traditional public forum. On the other hand, some aspects of the Las Vegas Convention Center, which was built for the primary purpose of attracting large conventions and increasing the economic activity of Las Vegas and Clark County, are non-public in nature. The Court notes that the government does not create a public forum "whenever members of the public are permitted freely to visit a place owned or operated by the Government." *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976). Moreover, sidewalks which merely lead to the entry of a public, government-owned facility are not necessarily a traditional public forum. *Jacobsen v. U.S. Postal Service*, 993 F.2d 649 (9th Cir.1992, Amended April 30, 1993). As a general free speech principle, physical appearance alone does not dictate the outcome of a forum analysis; rather it is the combination of that appearance with considerations of the property's fundamental purpose that controls. *See, United States v. Kokinda*, 497 U.S. 720, 727, 110 S.Ct. 3115, 3120, 111 L.Ed.2d 571 (1990).

The ingress and egress walkways at issue here have the appearance and clear purpose to assist Convention Center patrons in traveling between the privately-leased Convention Center and public areas. They do not constitute a public thoroughfare. They were created solely to manage the heavy pedestrian traffic which generally accompanies large, privately-organized events for which the Convention Center was built. Accordingly, the ingress and egress walkways associated with the Las Vegas Convention Center are not the traditional public forum sidewalk referred to in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Court recognizes that the entrance to a Convention Center may be more conducive to distributing speech than, for example, a post office or federal building. However, Plaintiff has not proffered sufficient facts

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to show that the walkway areas here are a public forum.^{FN10} *1411 Moreover, as will be shown, even if the area in dispute had been a limited-public or public forum, the speech restriction here was a valid regulation of commercial speech to protect a substantial government interest.

FN10. Plaintiff mentions in its brief only five specific "disputed material facts" accompanied by an argument that its speech is not purely commercial and is entitled to protection since its handbilling is not "incompatible" with the walkways in question. See, Opposition to Motion for Summary Judgment (# 116). The facts proffered by Plaintiff are generally either non-disputed or non-material: The first two "disputed facts" deal with the exact composition of Plaintiff's show dailies and are irrelevant to this analysis. The third is a correct statement inasmuch as it states that the LVCVA requires permission to distribute materials from *leased* areas. Statement four alleges that Plaintiff's show dailies are given free and that another distributor once handbilled promotional materials from the walkways here. These facts are not disputed nor relevant. Finally, statement five asserts that Convention Center sidewalks are indistinguishable from public sidewalks. This conclusion is unsupported and encompassed in the court's legal analysis.

V. COMMERCIAL SPEECH

[17] Although the First Amendment guarantees freedom from government restrictions on all speech, there exists a sensible distinction between speech proposing a commercial transaction, which often arises in areas traditionally subject to government regulation, and other varieties of speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56, 98 S.Ct. 1912, 1918-19, 56 L.Ed.2d 444 (1978). Accordingly, even though commercial speech is usually afforded First Amendment protec-

tion equal to that of other forms of speech due to the "consumer's interest in the free flow of commercial information," certain types of restriction may be tolerated. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, ---, 115 S.Ct. 1585, 1589, 131 L.Ed.2d 532, 538 (1995) (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765, 96 S.Ct. 1817, 1827, 48 L.Ed.2d 346 (1976)).

[18] In commercial speech cases, government regulation may be permitted depending on the outcome of the applicable four-part analysis: (1) the speech must concern lawful activity and not be misleading, (2) the asserted governmental interest must be substantial, (3) the regulation must directly advance the governmental interest asserted, and (4) the regulation must not be more extensive than is necessary to serve the interest. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). State restrictions of commercial speech that do not comport with this test are unconstitutional.

[19][20] The foregoing analysis is applicable to government restrictions on speech which does nothing more than propose a commercial transaction. *Virginia State Board of Pharmacy*, 425 U.S. at 762, 96 S.Ct. at 1826. Speech which contains advertisements, refers to a specific product, or which is distributed with an economic motivation evidences its commercial nature. See, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67, 103 S.Ct. 2875, 2880-81, 77 L.Ed.2d 469 (1983). Importantly, communication can constitute commercial speech "notwithstanding the fact that [it] contain[s] discussions of important public issues." *Bolger*, 463 U.S. at 67, 103 S.Ct. at 2880 (quoting *Central Hudson Gas*, 447 U.S. at 563, 100 S.Ct. at 2350). Thus "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.*

[21] In the case at hand, Plaintiff Hampton produced and sought to distribute on the grounds of the

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Las Vegas Convention Center a "show daily" containing mostly advertisements and editorials for products of advertisers. ^{FN11} Hampton's desire to distribute its publication at computer tradeshows is motivated exclusively and undoubtedly by economic factors. It was the prospect of commercial gain that motivated the concept, creation, development, and production of the material. Indeed, it is financial interests that undergird this very litigation. Hampton's arguments that its "show daily" was noncommercial speech is without merit.

FN11. The daily is approximately 75 percent advertisements. Two-Thirds of the remaining 25 percent comprises editorial material supporting products or services or personnel of advertisers in the publication. Pretrial Order (# 124) at 3.

A. Central Hudson Gas Analysis

[22] The commercial speech analysis of the Plaintiff's materials is more definitively *1412 demonstrates, regardless of the forum, that LVCVA's conduct comported with First Amendment guarantees of free speech. Because neither party contends that Plaintiff's speech is misleading, the first test of the *Central Hudson Gas* analysis need not be addressed. Thus Plaintiff's speech may be restricted, despite the forum in which it is disseminated, provided the LVCVA's interest is substantial and the regulation it imposes directly advances the government's interest in a way that is not overly restrictive.

1. Substantial Government Interest

The LVCVA has a substantial government interest in restricting commercial speech because the Las Vegas Convention Center is a commercial venture by Clark County and the City of Las Vegas for improving economic activity in southern Nevada. This convention-leasing enterprise generates economic development throughout southern Nevada. Accordingly, the government's desire to maintain this eco-

nomic activity is a substantial one. See, *Lehman v. City Shaker Heights*, 418 U.S. 298, 303, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974) (a state agency engaged in a permitted commercial activity has a substantial interest entitled to deference).

Additionally, the government has a substantial public policy interest. The ingress-egress walkways were designed to facilitate the unencumbered entry and exit of visitors to the Las Vegas convention facility. The unregulated activity of innumerable commercial venturers vying for favorable locales from which to distribute their sundry commercial materials would unduly congest the walkways and not only interfere with the ability of tradeshow promoters to control its crowds, but also with the ability of attendees to freely enter and exit the very event they traveled to attend. The LVCVA has an substantial interest in avoiding this adverse situation.

2. Regulation Must Directly Advance that Interest

The government "has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer*, 424 U.S. at 836, 96 S.Ct. at 1216 (1976). Hampton seeks to publish commercial materials that would compete with the financial interests of the lessees the LVCVA desires to serve. Permitting competing commercial entities to distribute materials without acquiring consent from leasing tradeshow promoters would undermine the LVCVA's fundamental purpose to lure, facilitate, and ultimately, lease space to large business conventions and commercial events in the Las Vegas Convention Center. A convention center lessees' ability to control and sell the exclusive rights to access convention patrons is the quintessence of the tradeshow enterprise. The integrity of that ability attracts future tradeshow promoters, conventions, visitors, and indirectly generates significant economic activity within the area served by the LVCVA. By regulating the distribution of competing commercial materials, the LVCVA preserves the competitiveness of the Las Vegas Convention

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Center and directly advances its substantial economic interest. Additionally, the prohibition of unauthorized distributors from the ingress-egress walkway areas maintains that areas for its intended purpose of safe and convenient entrance and exit for convention center visitors. *See, Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51, 101 S.Ct. 2559, 2565-66, 69 L.Ed.2d 298 (1981) (activities incompatible with the normal character and function of the government property may be regulated).

3. Regulation No More Extensive than Necessary

[23] When determining whether a regulation on commercial speech is more extensive than necessary, the "least-restrictive means" need not be used. Rather, there must only be a reasonable fit between the state's purpose and the means chosen to achieve the desired end. *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). LVCVA policy meets this burden. Hampton argues that Defendant's means are not reasonable because a previous June 30, 1993, judgment *1413 by consent specifies the restrictions that Defendant is authorized to place upon speech. However, commercial speech was not at issue in that case. Here, where plaintiff's motivation to distribute materials is financial gain, a different standard applies. Accordingly, by prohibiting the unauthorized distribution of materials on leased convention center premises the LVCVA employs a reasonable means to preserve its substantial economic interest.

CONCLUSION

Because of the integral role the LVCVA plays in daily management and control of the Las Vegas Convention center and considering the nature of the LVCVA's lease whereby a policy of excluding non-authorized commercial activity is expressly maintained therein, state action exists for purposes of Section 1983 claims. However, the regulations im-

posed by the LVCVA as lessor of the Las Vegas Convention Center are reasonable since (1) the ingress-egress areas are non-public forums, and (2) the restrictions directly advance a substantial government interest. Specifically, the LVCVA may preserve the marketability of its tradeshow-industry enterprise and the significant economic development that venture generates by prohibiting commercial entities from distributing unauthorized materials on all Convention Center premises.

RECOMMENDATION

Based on the foregoing, and good cause appearing therefore,

IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that Defendant's Motion for Summary Judgement (# 115) be GRANTED in that the restriction on Plaintiff's commercial speech does not violate the First Amendment and no genuine issue of material fact remain.

D.Nev.,1996.

Hampton Intern. Communications, Inc. v. Las Vegas Convention and Visitors Authority
913 F.Supp. 1402

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C Hampton Intern. Communications, Inc. v. Las Vegas Convention and Visitors Authority, 913 F.Supp. 1402 (D.Nev. Jan 17, 1996) (NO. CV-S-93-1110-HDM RJJ)

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- C** 2 Albrecht v. Metropolitan Pier and Exposition Authority, 338 F.Supp.2d 914, 924 (N.D.Ill. Oct 01, 2004) (NO. 03 C 6472)

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- 3 Advertising & Comm. Speech: A First Amend. Guide s 14:37, Solicitation of Business or Funds (2008) **HN: 22 (F.Supp.)**
- C** 4 SIDEWALK DEMOCRACY: FREE SPEECH, PUBLIC SPACE AND THE CONSTITUTION, 8-MAY Nev. Law. 18, 20 (2000) **HN: 13 (F.Supp.)**
- 5 BRIEF FOR THE PETITIONER, 15 J. Marshall J. Computer & Info. L. 609, 631 (1997)
- 6 ADVERTISING AND COMMERCIAL SPEECH, 680 Practising Law Institute Patents, Copyrights, Trademarks, & Literary Property 199 (2001) **HN: 21 (F.Supp.)**
- 7 ADVERTISING AND COMMERCIAL SPEECH, 626 Practising Law Institute Patents, Copyrights, Trademarks, & Literary Property 31 (2000) **HN: 21 (F.Supp.)**
- 8 ADVERTISING AND COMMERCIAL SPEECH, 582 Practising Law Institute Patents, Copyrights, Trademarks, & Literary Property 715 (1999) **HN: 21 (F.Supp.)**
- 9 ADVERTISING AND COMMERCIAL SPEECH, 538 Practising Law Institute Patents, Copyrights, Trademarks, & Literary Property 59 (1998) **HN: 21 (F.Supp.)**
- 10 ADVERTISING AND COMMERCIAL SPEECH, 499 Practising Law Institute Patents, Copyrights, Trademarks, & Literary Property 655 (1997) **HN: 21 (F.Supp.)**
- 11 ADVERTISING AND COMMERCIAL SPEECH, 462 Practising Law Institute Patents, Copyrights, Trademarks, & Literary Property 371 (1996) **HN: 21 (F.Supp.)**

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- 12 NORTHERN INDIANA GUN & OUTDOOR SHOWS, INC., Appellant (Plaintiff Below), v.

- CITY OF SOUTH BEND, Stephen J. Luecke, as Mayor of the City of South Bend, Brian R. Hedman, Individually and as Executive Director of Century Center, and Karl King, as Chairman of the Civic Center Board of Managers, Appellees (Defendants Below), 1996 WL 33415565, *33415565+ (Appellate Brief) (7th Cir. May 22, 1996) **Brief of Appellees** (NO. 98-1636) * * HN: 6 (F.Supp.)
- 13 George VILLEGAS, Bob Poelker, Marcelo Orta, and Don Derosiers, Plaintiffs and Appellants, v. CITY OF GILROY, Gilroy Garlic Festival Association, Inc., Defendants and Appellees., 2005 WL 3577727, *3577727+ (Appellate Brief) (9th Cir. Oct 03, 2005) **Brief Of Appellee Gilroy Garlic Festival Association, Inc.** (NO. 05-15725) * * * HN: 6 (F.Supp.)
- 14 George VILLEGAS, et al., Plaintiffs-Appellants, v. CITY OF GILROY, et al., Defendants-Appellees., 2005 WL 3128160, *3128160+ (Appellate Brief) (9th Cir. Aug 17, 2005) **Appellants' Opening Brief** (NO. 05-15725) " * * HN: 6 (F.Supp.)
- 15 SOC, INC., Richard Soranno, Hillsboro Enterprises, Inc., and the American Civil Liberties Union of Nevada, Appellants, v. COUNTY OF CLARK, State of Nevada, Las Vegas Metropolitan Police Department, Lorraine Hunt, Myrna Williams, Erin Kenny, Bruce Woodbury, Yvonne Atkinson Gates, Lance Malone, Mary Kincaid, Nevada Resort Association, Flamingo Hilton Corp., Mirage Casino-Hotel, Circus-Circus Enterprises, Inc., Las Vegas Convention and Visitors' Authority., 1998 WL 34104147, *34104147+ (Appellate Brief) (9th Cir. Jan 29, 1998) **Joint Answering Brief of Appellees** (NO. 97-15912) " * * HN: 22 (F.Supp.)
- 16 S.O.C., INC.; Hillsboro Enterprises, Inc.; Hillsboro Enterprises, Ltd.; Appellants, v. The Mirage CASINO-HOTEL, a Nevada Corporation; and Treasure Island Corp., a Nevada Corporation, Respondents., 2000 WL 35587060, *35587060+ (Appellate Brief) (Nev. Aug 31, 2000) **Appellant Hillsboro's Reply Brief** (NO. 34563) * * HN: 13 (F.Supp.)
- 17 S.O.C., INC.; Hillsboro Enterprises, Inc.; Hillsboro Enterprises, Ltd.; Appellants, v. The Mirage CASINO-HOTEL, a Nevada Corporation; and Treasure Island Corp., a Nevada Corporation, Respondents., 2000 WL 35587056, *35587056+ (Appellate Brief) (Nev. May 03, 2000) **Amicus Curie Brief of the American Civil Liberties Union of Nevada** (NO. 34563) * * HN: 13 (F.Supp.)

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- 18 FLORIDA ALLIANCE FOR RETIRED AMERICANS, et al., Plaintiffs, v. CITY OF FORT LAUDERDALE, et al., Defendants., 2005 WL 1501889, *1501889 (Trial Motion, Memorandum and Affidavit) (S.D.Fla. 2005) **Defendant. Broward County'S. Memorandum of Law Opposing Motion for Temporary Restraining Order or Preliminary Injunction** (NO. 05-60813-CIV-MOORE) * *
- 19 RGW COMMUNICATIONS, INC., d/b/a Watson Cable Company, Plaintiff, v. UNITED STATES OF AMERICA, DEPARTMENT OF THE AIR FORCE, et al., Defendants., 2001 WL 35677213, *35677213+ (Trial Motion, Memorandum and Affidavit) (M.D.Ga. Dec 24, 2001) **Defendants Hunt Building Corporation and WRAF Housing, LLC's Reply Brief in Support of Motion for Summary Judgment** (NO. 501-CV-302-4, DF) * *
- 20 Katherine ALBRECHT and Quentin Young, on behalf of themselves and all persons similarly

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- 21 Katherine ALBRECHT, plaintiff, v. METROPOLITAN PIER AND EXPOSITION AUTHORITY and Leticia Peralta Davis, in her official capacity as Ceo of the MPEA, defendants., 2003 WL 23799211, *23799211+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 15, 2003) **The Authority's Verified Memorandum in Opposition to Plaintiff's Motion for A Temporary Restraining Order** (NO. 03C6472) * *
- 22 Katherine ALBRECHT, plaintiff, v. METROPOLITAN PIER AND EXPOSITION AUTHORITY and Leticia Peralta Davis, in her official capacity as Ceo of the MPEA, defendants., 2003 WL 23799265, *23799265+ (Trial Motion, Memorandum and Affidavit) (N.D.Ill. Sep 15, 2003) **The Authority's Verified Memorandum in Opposition to Plaintiff's Motion for A Temporary Restraining Order** (NO. 03C6472) * *
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- 24 CHRISTIAN RIGHTS MINISTRIES, a Virginia non-profit corporation; and Steve Taylor, an individual, Plaintiffs, v. CITY OF CHESAPEAKE; South Norfolk Borough Civic League; Robert Clifton, in his official capacity as Director of Parks and Recreation; Donna Hill, individually and in her official capacity as Recreation Superintendent; Brenda Johnson, individually and in her capacity as a member of the South Norfolk Borough Civic League and Chairperson for, 2008 WL 7315890, *7315890 (Trial Motion, Memorandum and Affidavit) (E.D.Va. Jun 26, 2008) **Response to Rule 12(b)(6) Motions to Dismiss of Defendants South Norfolk Borough Civic League and Brenda Johnson** (NO. 208-CV-154) " * * HN: 6 (F.Supp.)
- 25 CHRISTIAN RIGHTS MINISTRIES, a Virginia non-profit corporation; and Steve Taylor, an individual, Plaintiffs, v. CITY OF CHESAPEAKE; Robert Clifton, in his official capacity as Director of Parks and Recreation; Donna Hill, individually and in her official capacity as Recreation Superintendent; Brenda Johnson, individually and in her official capacity as Chairperson for the Chesapeake Fourth of July Celebration, Defendants., 2008 WL 7315885, *7315885 (Trial Motion, Memorandum and Affidavit) (E.D.Va. May 12, 2008) **Reply Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction** (NO. 208-CV-154) " * * HN: 6 (F.Supp.)

P

Supreme Court of the United States
Michael HEFFRON, Secretary and Manager of the
Minnesota State Agricultural Society Board of
Managers, et al., Petitioners,

v.

INTERNATIONAL SOCIETY FOR KRISHNA
CONSCIOUSNESS, INC., et al.

No. 80-795.

Argued April 20, 1981.

Decided June 22, 1981.

Members of religious sect, one whose doctrines require its members to go out into public places to distribute or sell religious literature and to solicit donations, brought action for judgment declaring that enforcement against them of state fair rule, prohibiting sale or distribution on fair grounds of any merchandise including printed or written material except from fixed location, would violate First Amendment. The District Court, Ramsey County, J. Jerome Plunkett, J., granted summary judgment in favor of governing body of state fair, and religious sect appealed. The Minnesota Supreme Court, 299 N.W.2d 79, reversed and remanded. Certiorari was granted. The Supreme Court, Justice White, held that rule did not violate free exercise clause of First Amendment as applied to members of religious sect.

Reversed and remanded.

Justice Brennan, with whom Justice Marshall and Justice Stevens joined, filed an opinion concurring in part and dissenting in part.

Justice Blackmun, filed an opinion concurring in part and dissenting in part.

Opinion on remand, 311 N.W.2d 843.

West Headnotes

[1] Constitutional Law 92 1498

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1498 k. Absolute Nature of Right.

Most Cited Cases

(Formerly 92k90(3))

The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. U.S.C.A.Const. Amend. 1.

[2] Constitutional Law 92 1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited

Cases

(Formerly 92k90(3))

A major criterion for a valid time, place, and manner restriction on First Amendment rights is that restriction may not be based upon either content or subject matter of speech. U.S.C.A.Const. Amend. 1.

[3] Agriculture 23 5

23 Agriculture

23k5 k. Agricultural Exhibitions and Fairs. Most Cited Cases

(Formerly 92k90.1(4))

Constitutional Law 92 1764

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and
Events

92k1764 k. Fairs, Festivals, Exhibi-
tions, and Conventions. Most Cited Cases
(Formerly 92k90.1(4))

Constitutional Law 92 1879

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(M) Soliciting, Canvassing, Pamph-
letting, Leafletting, and Fundraising

92k1879 k. Charities or Religious Organ-
izations. Most Cited Cases
(Formerly 92k90.1(4))

Minnesota state fair rule requiring that the sale and distribution of any merchandise, including printed or written material, be from a duly licensed location on fair grounds did not violate free exercise clause of First Amendment as applied to members of the Hari Krishna sect, although sect claimed that rule suppressed practice of religious ritual enjoining its members to go into public places to distribute or sell religious literature and to solicit donations, where rule was applied even-handedly, and state's interest in maintaining orderly movement of crowd at fair was sufficient to justify the requirement that at time, place, or manner of restriction must serve significant governmental interest. U.S.C.A.Const. Amend. 1.

****2560 *640 Syllabus** ^{FN*}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

A rule (Rule 6.05) of the Minnesota Agricultural Society (Society), a Minnesota public corporation that operates the annual state fair, provides that sale or distribution of any merchandise, including printed or written material, except from a duly licensed

location on the fairgrounds shall be a misdemeanor. As Rule 6.05 is construed and applied by the Society, all persons, groups, or firms desiring to sell, exhibit, or distribute materials during the fair must do so only from fixed locations. However, the Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the organization's views to fair patrons in face-to-face discussions. Space in the fairgrounds is rented in a nondiscriminatory fashion on a first-come, first-served basis, and Rule 6.05 applies alike to nonprofit, charitable, and commercial enterprises. Respondents, International Society for Krishna Consciousness, Inc. (ISKCON), an organization espousing the views of the Krishna religion, and the head of one of its temples, filed suit in a Minnesota state court against state officials, seeking declaratory and injunctive relief on the ground that Rule 6.05, on its face and as applied, violated their First Amendment rights. ISKCON asserted that the Rule suppressed the practice of Sankirtan, a religious ritual that enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. The trial court upheld the constitutionality of Rule 6.05, but the Minnesota Supreme Court reversed.

Held: Rule 6.05, requiring members of ISKCON who desire to practice Sankirtan at the state fair to confine their distribution, sales, and solicitation activities to a fixed location, is a permissible restriction on the place and manner of communicating the views of the Krishna religion. Pp. 2563-2568.

(a) Rule 6.05 is not based upon the content or subject matter of speech, since it applies evenhandedly to all persons or organizations, *641 whether commercial or charitable, who wish to distribute and sell written materials or to solicit funds. Nor is the Rule—which involves a method of allocating space on a first-come, first-served basis—open to the kind of arbitrary application that is inherently inconsistent with a valid time, place, and manner regulation as having the potential for becoming a means of

suppressing a particular point of view. Pp. 2564-2565.

(b) The State's interest in maintaining the orderly movement of the crowd at fair is sufficient to satisfy the requirement that a time, place, or manner restriction must serve a significant governmental interest. The significance of that interest must be assessed in light of the characteristic nature and function of the particular forum involved. Because the fairgrounds comprise a relatively small area where an enormous variety of goods, services, entertainment, and other matters of interest are exhibited to large crowds on a temporary basis, the State's interest in the orderly movement and control of such an assembly is a substantial consideration. Pp. 2565-2566.

****2561** (c) The justification for Rule 6.05 cannot be measured solely on the basis of the disorder that would result from granting members of ISKCON an exemption from the Rule. Inclusion of peripatetic solicitation as part of a church ritual does not entitle church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. And if Rule 6.05 is an invalid restriction on ISKCON's activities, it is no more valid with respect to other social, political, or charitable organizations seeking to distribute information, sell wares, or solicit funds at the fair. Pp. 2566-2567.

(d) Similarly, Rule 6.05 cannot be viewed as an unnecessary regulation on the ground that the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder, limiting the number of solicitors, or imposing more narrowly drawn restrictions on the location and movement of ISKCON's representatives. Since the inquiry must involve all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to ISKCON, it is improbable that such alternative means would deal adequately with the problems posed by the large number of distributors

and solicitors that would be present on the fairgrounds. P. 2567.

(e) Alternative forums for the expression of respondents' protected speech exist despite the effects of Rule 6.05. The Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds, nor does it exclude ISKCON from the fairgrounds. Its members may mingle with the crowd and orally propagate their views, and ISKCON ***642** may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds. Pp. 2567-2568.

299 N.W.2d 79, reversed and remanded.
Kent G. Harbison, St. Paul, Minn., for petitioners.

Laurence H. Tribe, Cambridge, Mass., for respondents.

JUSTICE WHITE delivered the opinion of the Court.

The question presented for review is whether a State, consistent with the First and Fourteenth Amendments, may require a religious organization desiring to distribute and sell religious literature and to solicit donations at a state fair to conduct those activities only at an assigned location within the fairgrounds even though application of the rule limits the religious practices of the organization.

***643 I**

Each year, the Minnesota Agricultural Society (Society), a public corporation organized under the laws of Minnesota, see Minn.Stat. § 37.01 (1980), operates a State Fair on a 125-acre state-owned tract located in St. Paul, Minn.^{FNI} The Fair is conducted for the purpose of "exhibiting ... the agricultural, stock-breeding, horticultural, mining, mechanical, industrial, and other products and resources of the state, including proper exhibits and expositions of the arts, human skills, and sciences." *Ibid*. The Fair is a major public event and attracts visitors

from all over Minnesota as well as from other parts of the country. During the past five years, the average total attendance for the 12-day Fair has been 1,320,000 persons. The average daily attendance on weekdays has been 115,000 persons and on Saturdays and Sundays 160,000.

FN1. The facts are taken primarily from the parties' stipulation of facts filed with the Minnesota District Court on July 31, 1978, and reprinted in the joint appendix. App. A-30 through A-36.

The Society is authorized to make all "bylaws, ordinances, and rules, not inconsistent with law, which it may deem necessary or proper for the government of the fair grounds..." **2562 Minn.Stat. § 37.16 (1980). Under this authority, the Society promulgated Minnesota State Fair Rule 6.05 which provides in relevant part that

"[s]ale or distribution of any merchandise, including printed or written material except under license issued [by] the Society and/or from a duly-licensed location shall be a misdemeanor."

As Rule 6.05 is construed and applied by the Society, "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds." FN2 Although the Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the organization's*644 views with fair patrons in face-to-face discussions, FN3 it does require that any exhibitor conduct its sales, distribution, and fund solicitation operations from a booth rented from the Society. Space in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth. FN4 The Rule applies alike to nonprofit, charitable, and commercial enterprises. FN5

FN2. Stipulation of Fact # 16.

FN3. Fair officials did not "intend to restrict [respondents] from peaceably walking around the fairgrounds and discussing their political, religious or other views with Fair patrons." Affidavit of Michael Heffron, App. A-28. See also Tr. of Oral Arg. 5-7. The trial court expressly permitted such oral proselytizing, see *infra*, at 2563, and that part of the order was not challenged or appealed.

FN4. Over 1,400 exhibitors and concessionaires rented booth space during the 1977 and 1978 Fairs, with several hundred potential exhibitors denied rental space solely because of the limited amount of area available. The propriety of the fee is not an issue in the present case. Cf. *Cox v. New Hampshire*, 312 U.S. 569, 576-577, 61 S.Ct. 762, 766, 85 L.Ed. 1049 (1941).

FN5. The following represent some of the charitable, religious, and other non-commercial organizations that rented booth space at the 1978 Minnesota State Fair: Abortion Rights Council of Minnesota, American Association of Retired Persons, American Heart Association, American Party of Minnesota, Christian Business Men's Association, Church of Christ, D.F.L. State Central Committee, Faith Broadcasting Network, Inc., Independent Republicans of Minnesota, Minnesota Foster Parents Association, Twin Cities Baptist Messianic Witness, World Home Bible League, Christian Educational Service, Lutheran Colportage Service, Minnesota Citizens Concerned for Life, Save Our Unwanted Life, Inc., and United States-China Peoples Friendship Association.

One day prior to the opening of the 1977 Minnesota State Fair, respondents International Society for Krishna Consciousness, Inc. (ISKCON), an international religious society espousing the views of the

Krishna religion, and Joseph Beca, head of the Minneapolis ISKCON temple, filed suit against numerous state officials seeking a declaration that Rule 6.05, both on its face and as applied, violated respondents' rights under the First Amendment, and seeking injunctive relief *645 prohibiting enforcement of the Rule against ISKCON and its members. Specifically, ISKCON asserted that the Rule would suppress the practice of Sankirtan, one of its religious rituals, which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion.^{FN6} The trial court entered temporary orders to govern the conduct of the parties during the 1977 Fair.^{FN7} When **2563 that event concluded and after a hearing, the trial court granted the state officials' motion for summary judgment, upholding the constitutionality of Rule 6.05. Relying on the reasoning in *International Society for Krishna Consciousness, Inc. v. Evans*, 440 F.Supp. 414 (SD Ohio 1977), the court found that the State's interest "in providing all fair goers and concessionaries with adequate and equal access to each other and in providing a minimum of *646 congestion on the fairgrounds" was sufficient to sustain Rule 6.05's limitations as applied to respondents.^{FN8} The court, however, provided that respondents were free to "[r]oam throughout those areas of the fairgrounds generally open to the public for the purpose of discussing with others their religious beliefs."

FN6. In performing Sankirtan, ISKCON members "often greet members of the public by giving them flowers or small American flags...." Stipulation of Fact # 11. For the purpose of this lawsuit, respondents did not assert any right to seek contributions in return for these "greeting gifts," nor did they seek to dance, chant, or engage in any other activities besides the distribution and sale of literature and the solicitation of donations. *Ibid*.

FN7. The trial court temporarily restrained

the officials from "arresting, participating in the arrest of, excluding from the Fairgrounds, or preventing activities of [respondents], such as, espousing their religious beliefs, proselytizing others to those beliefs, distributing religious literature or soliciting donations for religious purposes in any portion of the Minnesota Fair Grounds generally open to the public during the 1977 Minnesota State Fair." The court enjoined respondents from "selling or inducing others to purchase, religious literature, items or artifacts, except at a space rented for that purpose on the grounds of the Minnesota Agricultural Society in compliance with the applicable regulations of said Society." Respondents took part in the 1977 Fair pursuant to the terms of the court order. The State submitted various affidavits stating that respondents violated the terms of the order by misrepresenting their cause in seeking solicitations, and by making similar fraudulent statements. These charges are disputed by respondents.

FN8. Given the great number of exhibitors at the State Fair, the trial court was of the view that "[s]ome form of time, place and manner restriction is clearly required if the free speech rights of each of these exhibitors are to be protected." Accordingly, the court ordered that respondents be prohibited from distributing materials such as books, flowers, flags, incense, or artifacts and from engaging in sales or solicitation for monetary donations throughout the fairgrounds except from a booth rented from the Society.

On appeal, the Minnesota Supreme Court reversed, holding that Rule 6.05, as applied to respondents, unconstitutionally restricted the Krishnas' religious practice of Sankirtan. 299 N.W.2d 79 (1980). The court rejected the Society's proffered justifications

for the Rule as inadequate to warrant the restriction. Furthermore, the application of Rule 6.05 to ISKCON was not essential to the furtherance of the State's interests in that those interests could be served by means less restrictive of respondents' First Amendment rights. We granted the state officials' petition for writ of certiorari in light of the important constitutional issues presented and the conflicting results reached in similar cases in various lower courts.^{FN9} 449 U.S. 1109, 101 S.Ct. 917, 66 L.Ed.2d 838.

FN9. Compare *International Society for Krishna Consciousness, Inc. v. Barber*, 506 F.Supp. 147 (NDNY, 1980), rev'd, 650 F.2d 430 (CA2 1981) (invalidating "booth" rule); *Edwards v. Maryland State Fair and Agricultural Society, Inc.*, 628 F.2d 282 (CA4 1980) (same); *International Society for Krishna Consciousness, Inc. v. Bowen*, 600 F.2d 667 (CA7) (same), cert. denied, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979); *International Society for Krishna Consciousness, Inc. v. Colorado State Fair and Industrial Exposition Comm'n*, 199 Colo. 265, 610 P.2d 486 (Colo.1980) (same) with *Hynes v. Metropolitan Government of Nashville*, 478 F.Supp. 9 (MD Tenn.1979) (upholding "booth" rule); *International Society for Krishna Consciousness, Inc. v. Evans*, 440 F.Supp. 414 (SD Ohio 1977) (same). Related issues have been raised concerning religious groups' access to other types of public facilities. See *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (CA5 1979) (airports); *International Society for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263 (CA7 1978) (same); *International Society for Krishna Consciousness, Inc. v. McAvey*, 450 F.Supp. 1265 (SDNY 1978) (World Trade Center); *International Society for Krishna Consciousness, Inc. v. Hays*, 438 F.Supp. 1077 (SD Fla.1977)

(highway rest stops); *United States v. Boesewetter*, 463 F.Supp. 370 (DC 1978) (performing arts center).

*647 II

The State does not dispute that the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment. See *Schneider v. State*, 308 U.S. 147, 160, 162-164, 60 S.Ct. 146, 150, 151-152, 84 L.Ed. 155 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938). Nor does it claim that this protection is lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith. Our cases indicate as much. *Murdock v. Pennsylvania*, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943); ***2564** *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). See *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

[1] It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. *Adderley v. Florida*, 385 U.S. 39, 47-48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966); *Poulos v. New Hampshire*, 345 U.S. 395, 405, 73 S.Ct. 760, 766, 97 L.Ed. 1105 (1953); see *Cox v. Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965). As the Minnesota Supreme Court recognized, the activities of ISKCON, like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Adderley v. Florida*, *supra*; *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).^{FN10} "We have often approved*648 restrictions of that kind provided that they are justified without reference to

the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.” *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976); see also *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2331, 65 L.Ed.2d 319 (1980). The issue here, as it was below, is whether Rule 6.05 is a permissible restriction on the place and manner of communicating the views of the Krishna religion, more specifically, whether the Society may require the members of ISKCON who desire to practice Sankirtan at the State Fair to confine their distribution, sales, and solicitation activities to a fixed location.

FN10. In *Cox v. New Hampshire*, a religious group challenged a local ordinance forbidding street parades without a license. The Court held the requirement constitutional as a reasonable time, place, and manner regulation: “Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection.” 312 U.S., at 574, 61 S.Ct., at 765. *Kovacs v. Cooper* upheld as applied to a sound truck a content-neutral and nondiscriminatory local ordinance against the emission of loud and raucous noises on the public streets. In *Adlerley v. Florida*, no constitutional violation was discerned in applying a local trespass ordinance to persons demonstrating on the grounds of a city jail. We rejected the argument “that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please” and held that the “State, no less than a private owner of property, has power to preserve

the property under its control for the use to which it is lawfully dedicated.” 385 U.S., at 47-48, 87 S.Ct., at 247. *Grayned v. City of Rockford* sustained as a reasonable time, place, and manner regulation a local ordinance forbidding disturbing noises in the vicinity of a building in which a school is in session.

[2] A major criterion for a valid time, place and manner restriction is that the restriction “may not be based upon either the content or subject matter of speech.” *Consolidated Edison Co. v. Public Service Comm’n*, *supra*, at 536, 100 S.Ct., at 2332. FN11 Rule 6.05 *649 qualifies in this respect, since as the Supreme Court of Minnesota observed, the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes. FN12

FN11. See *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976); *Linnmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93-94, 97 S.Ct. 1614, 1618-1619, 52 L.Ed.2d 155 (1977); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Papish v. University of Minnesota Curators*, 410 U.S. 667, 670, 93 S.Ct. 1197, 1199, 35 L.Ed.2d 618 (1973).

FN12. Respondents do argue that because the Rule requires ISKCON to await expressions of interest from fair patrons before it may distribute, sell, or solicit funds, the regulation is not content-neutral in that it prefers listener-initiated exchanges to those originating with the speaker. The argument is interesting but has little force. This aspect of the Rule is inherent in the determination to confine exhibitors to fixed locations, it applies to all exhibitors

alike, and it does not invalidate the Rule as a reasonable time, place, and manner regulation.

****2565** Nor does Rule 6.05 suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space is a straightforward first-come, first-served system. The Rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-153, 89 S.Ct. 935, 938-940, 22 L.Ed.2d 162 (1969); *Cox v. Louisiana*, *supra*, at 555-558, 85 S.Ct., at 464-466; *Staub v. City of Baxley*, 355 U.S. 313, 321-325, 78 S.Ct. 277, 281-284, 2 L.Ed.2d 302 (1958); *Largent v. Texas*, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873 (1943); *Cantwell v. Connecticut*, *supra*, at 304, 60 S.Ct., at 903; *Schneider v. State*, 308 U.S., at 164, 60 S.Ct., at 152; *Hague v. CIO*, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939).

A valid time, place, and manner regulation must also "serve a significant governmental interest." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, *supra*, at 771, 96 S.Ct., at 1830. See *Grayned v. City of Rockford*, *supra*, at 108, 92 S.Ct., at 2298. Here, the principal justification asserted by the State in support of Rule 6.05 is the need to maintain the orderly movement of ***650** the crowd given the large number of exhibitors and persons attending the Fair.^{FN13}

FN13. Petitioners assert two other state interests in support of the Rule. First, petitioners claim that the Rule forwards the State's valid interest in protecting its citizens from fraudulent solicitations, deceptive or false speech, and undue annoyance. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980); *Cantwell v. Con-*

necticut, 310 U.S. 296, 306-307, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940). Petitioners also forward the State's interest in protecting the fairgoers from being harassed or otherwise bothered, on the grounds that they are a captive audience. In light of our holding that the Rule is justified solely in terms of the State's interest in managing the flow of the crowd, we do not reach whether these other two purposes are constitutionally sufficient to support the imposition of the Rule.

The fairgrounds comprise a relatively small area of 125 acres, the bulk of which is covered by permanent buildings, temporary structures, parking lots, and connecting thoroughfares. There were some 1,400 exhibitors and concessionaires renting space for the 1977 and 1978 Fairs, chiefly in permanent and temporary buildings. The Fair is designed to exhibit to the public an enormous variety of goods, services, entertainment, and other matters of interest. This is accomplished by confining individual exhibitors to fixed locations, with the public moving to and among the booths or other attractions, using streets and open spaces provided for that purpose. Because the Fair attracts large crowds, see *supra*, at 2561, it is apparent that the State's interest in the orderly movement and control of such an assembly of persons is a substantial consideration.

As a general matter, it is clear that a State's interest in protecting the "safety and convenience" of persons using a public forum is a valid governmental objective. See *Grayned v. City of Rockford*, 408 U.S., at 115, 92 S.Ct., at 2302; *Cox v. New Hampshire*, 312 U.S., at 574, 61 S.Ct., at 765. Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental ***651** interest must be assessed in light of the characteristic nature and function of the particular forum involved. See, e. g., *Grayned v. City of Rockford*, *supra*, at 116-117, 92 S.Ct., at 2303; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-303, 94

S.Ct. 2714, 2716-2717, 41 L.Ed.2d 770 (1974). This observation bears particular import in the present case since respondents make a number of analogies between the fairgrounds and city **2566 streets which have "immemorially been held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, *supra*, at 515, 59 S.Ct., at 963. See *Kimz v. New York*, 340 U.S. 290, 293, 71 S.Ct. 312, 314, 95 L.Ed. 280 (1951). But it is clear that there are significant differences between a street and the fairgrounds. A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment. The Minnesota Fair, as described above, is a temporary event attracting great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions at the Fair. The flow of the crowd and demands of safety are more pressing in the context of the Fair. As such, any comparisons to public streets are necessarily inexact.

The Minnesota Supreme Court recognized that the State's interest in the orderly movement of a large crowd and in avoiding congestion was substantial and that Rule 6.05 furthered that interest significantly.^{FN14} Nevertheless, the Minnesota Supreme Court declared that the case did not turn on the "importance of the state's undeniable interest in preventing*652 the widespread disorder that would surely exist if no regulation such as Rule 6.05 were in effect" but upon the significance of the State's interest in avoiding whatever disorder would likely result from granting members of ISKCON an exemption from the Rule. 299 N.W.2d, at 83. Approaching the case in this way, the court concluded that although some disruption would occur from such an exemption, it was not of sufficient concern to warrant confining the Krishnas to a booth. The court also concluded that, in any event, the Rule was not essential to the furtherance of the State's in-

terest in crowd control, which could adequately be served by less intrusive means.

FN14. The court stated that the facts suggested "a situation in which the state's interest in maintaining order is substantial. We have no doubt that Rule 6.05's requirement that all vendors, exhibitors, and concessionaires perform their functions at fixed locations furthers that interest significantly." 299 N.W.2d, at 83.

As we see it, the Minnesota Supreme Court took too narrow a view of the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. That organization and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds.^{FN15} None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to *653 proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.

FN15. Respondents do not defend the limited approach of the Minnesota Supreme Court. They concede that whatever exemption they were entitled to under the First Amendment would apply to other organizations seeking similar rights to take part in certain protected activities in the public

areas of the fairgrounds. See Brief for Respondents 8; Tr. of Oral Arg. 25-26.

If Rule 6.05 is an invalid restriction on the activities of ISKCON, it is no more valid with respect to the other social, political, or charitable organizations that have ****2567** rented booths at the Fair and confined their distribution, sale, and fund solicitation to those locations. Nor would it be valid with respect to other organizations that did not rent booths, either because they were unavailable due to a lack of space or because they chose to avoid the expense involved, but that would in all probability appear in the fairgrounds to distribute, sell, and solicit if they could freely do so. The question would also inevitably arise as to what extent the First Amendment also gives commercial organizations a right to move among the crowd to distribute information about or to sell their wares as respondents claim they may do.

ISKCON desires to proselytize at the fair because it believes it can successfully communicate and raise funds. In its view, this can be done only by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature. This consequence would be multiplied many times over if Rule 6.05 could not be applied to confine such transactions by ISKCON and others to fixed locations. Indeed, the court below agreed that without Rule 6.05 there would be widespread disorder at the fairgrounds. The court also recognized that some disorder would inevitably result from exempting the Krishnas from the Rule. Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will.

[3] ***654** Given these considerations, we hold that the State's interest in confining distribution, selling, and fund solicitation activities to fixed locations is sufficient to satisfy the requirement that a place or

manner restriction must serve a substantial state interest. By focusing on the incidental effect of providing an exemption from Rule 6.05 to ISKCON, the Minnesota Supreme Court did not take into account the fact that any such exemption cannot be meaningfully limited to ISKCON, and as applied to similarly situated groups would prevent the State from furthering its important concern with managing the flow of the crowd. In our view, the Society may apply its Rule and confine the type of transactions at issue to designated locations without violating the First Amendment.

For similar reasons, we cannot agree with the Minnesota Supreme Court that Rule 6.05 is an unnecessary regulation because the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of ISKCON's representatives. As we have indicated, the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to ISKCON. Looked at in this way, it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.

For Rule 6.05 to be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the Rule. Rule 6.05 is not vulnerable on this ground. First, the Rule does not prevent ISKCON from ***655** practicing Sankirtan anywhere outside the fairgrounds. More importantly, the Rule has not been shown to deny access within the forum in question. Here, the Rule does not exclude ISKCON from the fairgrounds, nor does it deny that organization the right to conduct any desired activity at

some point within the forum. Its members may mingle with the crowd and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself. The Minnesota State Fair is a limited public forum in ****2568** 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. Considering the limited functions of the Fair and the combined area within which it operates, we are unwilling to say that Rule 6.05 does not provide ISKCON and other organizations with an adequate means to sell and solicit on the fairgrounds. The First Amendment protects the right of every citizen to "reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Kovacs v. Cooper*, 336 U.S. 77, 87, 69 S.Ct. 448, 453, 93 L.Ed. 513 (1949). Rule 6.05 does not unnecessarily limit that right within the fairgrounds.^{FN16}

FN16. Given this understanding of the nature of the Fair, we reject respondents' claim that Rule 6.05 effects a total ban on protected First Amendment activities in the open areas of the fairgrounds. In effect, respondents seek to separate, for constitutional purposes, the open areas of the fairgrounds from that part of the fairgrounds where the booths are located. For the reasons stated in text, we believe respondents' characterization of the Rule is plainly incorrect. The booths are not secreted away in some nonaccessible location, but are located within the area of the fairgrounds where visitors are expected, and indeed encouraged, to pass. Since respondents are permitted to solicit funds and distribute and sell literature from within the fairgrounds, albeit from a fixed location, it is inaccurate to say that Rule 6.05 constitutes a ban on such protected activity in the relevant public forum. Accordingly, the only

question is the Rule's validity as a time, place, and manner restriction.

***656** The judgment of the Supreme Court of Minnesota is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

Justice BRENNAN, with whom Justice MARSHALL and Justice STEVENS join, concurring in part and dissenting in part.

As the Court recognizes, the issue in this case is whether Minnesota State Fair Rule 6.05 constitutes a reasonable time, place, and manner restriction on respondents' exercise of protected First Amendment rights. See *Schad v. Mount Ephraim*, 452 U.S. 61, 74-76, 101 S.Ct. 2176, 2186, 68 L.Ed.2d 671; *Grayned v. City of Rockford*, 408 U.S. 104, 115-116, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). In deciding this issue, the Court considers, *inter alia*, whether the regulation serves a significant governmental interest and whether that interest can be served by a less intrusive restriction. See *ante*, at 2565, 2567. The Court errs, however, in failing to apply its analysis separately to each of the protected First Amendment activities restricted by Rule 6.05. Thus, the Court fails to recognize that some of the State's restrictions may be reasonable while others may not.

Rule 6.05 restricts three types of protected First Amendment activity: distribution of literature, sale of literature, and solicitation of funds. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 633, 100 S.Ct. 826, 833, 834, 63 L.Ed.2d 73 (1980); *Murdock v. Pennsylvania*, 319 U.S. 105, 108, 63 S.Ct. 870, 872, 87 L.Ed. 1292 (1943); *Jamison v. Texas*, 318 U.S. 413, 416, 63 S.Ct. 669, 671, 87 L.Ed. 869 (1943); *Schneider v. State*, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155 (1939); *Lovell v. Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938). No individual or group is permitted to engage in these activities at the Minnesota State Fair except from preassigned, rented booth locations. Violation of this Rule constitutes a misdemeanor, and violators are subject to arrest and

expulsion from the fairgrounds.

The State advances three justifications for its booth Rule. The justification relied upon by the Court today is the State's *657 interest in maintaining the orderly movement of the crowds at the fair. *Ante*, at 2565. The second justification, relied upon by the dissenting justices below, 299 N.W.2d 79, 87 (Minn.1980), is the State's interest in protecting its fairgoers from fraudulent, deceptive, and misleading solicitation practices. The third justification, based on the "captive audience" doctrine, is the State's interest in protecting its fairgoers from annoyance and harassment.

****2569** I quite agree with the Court that the State has a significant interest in maintaining crowd control on its fairgrounds. See *Grayned v. City of Rockford*, *supra*, 408 U.S., at 115-116, 92 S.Ct., at 2302-2303; *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941). I also have no doubt that the State has a significant interest in protecting its fairgoers from fraudulent or deceptive solicitation practices. See *Schaumburg v. Citizens for a Better Environment*, *supra*, 444 U.S., at 636, 100 S.Ct., at 836; *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772, 96 S.Ct. 1817, 1830-1831, 48 L.Ed.2d 346 (1976). Indeed, because I believe on this record that this latter interest is substantially furthered by a Rule that restricts sales and solicitation activities to fixed booth locations, where the State will have the greatest opportunity to police and prevent possible deceptive practices, I would hold that Rule 6.05's restriction on those particular forms of First Amendment expression is justified as an antifraud measure. Accordingly, I join the judgment of the Court insofar as it upholds Rule 6.05's restriction on sales and solicitations. However, because I believe that the booth Rule is an overly intrusive means of achieving the State's interest in crowd control, and because I cannot accept the validity of the State's third asserted justification.^{FN1} I dissent from the Court's approval of Rule 6.05's restriction on the distribution of literature.

FN1. Because fairgoers are fully capable of saying "no" to persons seeking their attention and then walking away, they are not members of a captive audience. They have no general right to be free from being approached. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-639, 100 S.Ct. 826, 837, 63 L.Ed.2d 73 (1980); *Martin v. Struthers*, 319 U.S. 141, 143-144, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943).

*658 As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives. See, e. g., *Schneider v. State*, *supra*. The challenged "regulation must be narrowly tailored to further the State's legitimate interest." *Grayned v. City of Rockford*, *supra*, 408 U.S., at 116-117, 92 S.Ct., at 2303. Minnesota's Rule 6.05 does not meet this test.

The Minnesota State Fair is an annual 12-day festival of people and ideas. Located on permanent fairgrounds comprising approximately 125 acres, the fair attracts an average of 115,000 visitors on weekdays and 160,000 on Saturdays and Sundays. Once the fairgoers pay their admission fees, they are permitted to roam the fairgrounds at will, visiting booths, meeting friends, or just milling about. Significantly, each and every fairgoer, whether political candidate, concerned citizen, or member of a religious group, is free to give speeches, engage in face-to-face advocacy, campaign, or proselytize. No restrictions are placed on any fairgoer's right to speak at any time, at any place, or to any person.^{FN2}

Thus, if on a given day 5,000 members of ISKCON came to the fair and paid their admission fees, all 5,000 would be permitted to wander throughout the fairgrounds, delivering speeches to *659 whomever they wanted, about whatever they wanted. Moreover, because **2570 this right does not rest on Sankirtan or any other religious principle,^{FN3} it can be exercised by every political

candidate, partisan advocate, and common citizen who has paid the price of admission. All share the identical *660 right to move peripatetically and speak freely throughout the fairgrounds.

FN2. A state fair is truly a marketplace of ideas and a public forum for the communication of ideas and information. As one court has stated, a "fair is almost by definition a congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, esthetic, and intellectual." *International Society for Krishna Consciousness v. State Fair of Texas*, 461 F.Supp. 719, 721 (ND Tex.1978). See also *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 444, n.21 (CA2 1981). Despite the Court's suggestion to the contrary, *ante*, at 2565-2566, a fair is surely a "natural and proper plac[e] for the dissemination of information and opinion." *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939). In no way could I agree that respondents' desired "'manner of expression is basically incompatible with the normal activity'" of the fair. See *Schad v. Mount Ephraim*, 452 U.S., at 75, 101 S.Ct., at 2186, quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972).

FN3. I am somewhat puzzled by the Court's treatment of the Sankirtan issue. Respondents' complaint, based on 42 U.S.C. § 1983, alleges that Rule 6.05, on its face and as applied, violates both the Free Exercise and the Free Speech Clauses. In their brief and in oral argument, however, respondents emphasize that they do not claim any special treatment because of Sankirtan, but are willing to rest their challenge wholly upon their general right to free speech, which they concede is identical to the right enjoyed by

every other religious, political, or charitable group. Tr. of Oral Arg. 26; Brief for Respondents 19-20, 47-48. There is therefore no need for the Court to discuss Sankirtan.

Having chosen to discuss it, however, the Court does so in a manner that is seemingly inconsistent with prior case law. The parties have stipulated that members of ISKCON have a unique "duty to perform a religious ritual known as *Sankirtan*, which consists of going out into public places, to disseminate or sell religious literature and to solicit contributions to support the publishing, religious, and educational functions of Krishna Consciousness." App. A-32. The Court, however, disparages the significance of this ritual, stating without explanation or supporting authority:

"[ISKCON] and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process." *Ante*, at 2566 (footnote omitted).

Our cases are clear that governmental regulations which interfere with the exercise of specific religious beliefs or principles should be scrutinized with particular care. See, e. g., *Sherbert v. Verner*, 374 U.S. 398, 402-403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). As we stated in *Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S.Ct. 1526, 1535, 32 L.Ed.2d 15 (1972), "there are areas of

conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." I read the Court as accepting these precedents, and merely holding that even if Sankirtan is "conduct protected by the Free Exercise Clause," it is entitled to no greater protection than other forms of expression protected by the First Amendment that are burdened to the same extent by Rule 6.05.

Because of Rule 6.05, however, as soon as a proselytizing member of ISKCON hands out a free copy of the Bhagavad-Gita to an interested listener, or a political candidate distributes his campaign brochure to a potential voter, he becomes subject to arrest and removal from the fairgrounds. This constitutes a significant restriction on First Amendment rights. By prohibiting distribution of literature outside the booths, the fair officials sharply limit the number of fairgoers to whom the proselytizers and candidates can communicate their messages. Only if a fairgoer affirmatively seeks out such information by approaching a booth does Rule 6.05 fully permit potential communicators to exercise their First Amendment rights.

In support of the crowd control justification,^{FN4} petitioners contend that if fairgoers are permitted to distribute literature, large crowds will gather, blocking traffic lanes and causing safety problems. As counsel for petitioners asserted at oral argument:

FN4. Other than the "captive audience" justification, see n.1, *supra*, the only interest seriously asserted by petitioners in support of the restriction on distribution of literature is the State's interest in crowd control. At oral argument, counsel for petitioners expressly declined to advance an antilittering objective, Tr. of Oral Arg. 16, and virtually conceded that the antifraud rationale would not apply unless the com-

municator sought to obtain money from the fairgoers. *Id.*, at 14-16, 17-19. See also Brief for Petitioners 24-29.

"[I]t seems to me that if you had [distribution] activity going on with not just the Krishnas but 10 or 20 or 30 representatives from perhaps 30 to 60 or 70 groups, that inevitably is going to draw more attention and going to cause or create more or less moving pockets or moving congested crowds [I]f all of a sudden the crowd becomes aware of the fact that dozens of people are walking around passing out materials and they're going **2571 to *661 inevitably be attracted by that. Whereas, they wouldn't be if people were just talking." Tr. of Oral Arg. 18-19.

See also Brief for Petitioners 31.

But petitioners have failed to provide any support for these assertions. They have made no showing that relaxation of the booth Rule would create additional disorder in a fair that is already characterized by the robust and unrestrained participation of hundreds of thousands of wandering fairgoers. See *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 444, n.22 (CA2 1981). If fairgoers can make speeches, engage in face-to-face proselytizing, and buttonhole prospective supporters, they can surely distribute literature to members of their audience without significantly adding to the State's asserted crowd control problem. Cf. *Martin v. Struthers*, 319 U.S. 141, 151, 63 S.Ct. 862, 867, 87 L.Ed. 1313 (1943) (Murphy, J. concurring) (invalidating ordinance that banned house-to-house distribution of handbills but did not ban house-to-house proselytizing). The record is devoid of any evidence that the 125-acre fairgrounds could not accommodate peripatetic distributors of literature just as easily as it now accommodates peripatetic speechmakers and proselytizers.^{FN5}

FN5. Moreover, petitioners' expressed concerns are significantly undermined by three affidavits contained in the record which indicate that the State itself engages in the seemingly forbidden practice of leafletting.

Thus, the affidavit of Thomas Kerr states:

"2. On numerous occasions when I entered the [1977 Minnesota State Fair], the individual taking tickets would give to me a flier which stated that fairgoers might be approached by roving solicitors, that the fair neither licensed nor sanctioned them, and that complaints against them could be filed with the fair administration. On several occasions, I also noted individuals who appeared to be state fair employees handing out similar fliers at information booths and concession areas. On several occasions, I also noticed that individuals, who appeared to be state fair employees, would begin to distribute similar fliers to fairgoers in areas where I or my fellow ISKCON members were proselytizing or distributing literature." App. A-40 (emphasis added).

See also Affidavit of Joseph Beca, *id.*, at A-38; Affidavit of David C. Ewert, *id.*, at A-43. It is hard to believe the State is seriously concerned about the effects of leafletting, when apparently it too engages in such activity at the State Fair.

*662 Relying on a general, speculative fear of disorder, the State of Minnesota has placed a significant restriction on respondents' ability to exercise core First Amendment rights. This restriction is not narrowly drawn to advance the State's interests, and for that reason is unconstitutional. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969). If the State had a reasonable concern that distribution in certain parts of the fairgrounds—for example, entrances and exits—would cause disorder, it could have drafted its Rule to prohibit distribution of literature at those points. If the State felt it necessary to limit the number of per-

sons distributing an organization's literature, it could, within reason, have done that as well. ^{FN6} It had no right, however, to ban all ^{FN7} distribution of literature outside the booths. A State

FN6. Respondents recognize that some limitations may constitutionally be imposed upon their right to distribute literature. Stipulation of Fact 23 states:

"ISKCON, while unwilling to confine its religious activities to a booth, has indicated its willingness to submit to the regulation of its members in their circulation throughout the fairgrounds to proselytize, distribute and sell literature, and solicit contributions." *Id.*, at A-36.

In addition, paragraph 11 of respondents' complaint states:

"ISKCON's devotees have tried to allay any fears Defendants might have that their religious activity might be disruptive to normal Fair activities by offering to wear identifying name tags at all times, to limit the number of devotees at the State Fair Grounds, to approach only consenting patrons, to refrain from engaging Fair patrons in conversation near entrances or exits to buildings or exhibits or in areas where there are lines or queues, and to identify themselves to Fair officials, including police officials." *Id.*, at A-6.

See also Tr. of Oral Arg. 30, 34-35.

FN7. As the Minnesota Supreme Court concluded:

"The state's interest can be adequately served by means less restrictive of First Amendment rights. Conduct that tends to create disorder on the fairgrounds may be specifically prohibited." 299 N.W.2d 79, 84 (1980).

"may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those *663 interests without unnecessarily interfering with First Amendment freedoms.... 'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone....' " *Schaumburg v. Citizens for a Better Environment*, 444 U.S., at 637, 100 S.Ct. at 836, quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963).

Accord, *Grayned v. City of Rockford*, 408 U.S., at 116-117, 92 S.Ct., at 2303.

Because I believe that the State could have drafted a more narrowly drawn restriction on the right to distribute literature without undermining its interest in maintaining crowd control on the fairgrounds, I would affirm that part of the judgment below that strikes down Rule 6.05 as it applies to distribution of literature.

Justice BLACKMUN, concurring in part and dissenting in part.

For the reasons stated by Justice BRENNAN, I believe that Minnesota State Fair Rule 6.05 is unconstitutional as applied to the distribution of literature.^{FN1} I also agree, however, that the Rule is constitutional as applied to the sale of literature and the solicitation of funds. I reach this latter conclusion by a different route than does Justice BRENNAN for I am not persuaded that, under the Court's precedents, the State's interest in protecting fairgoers from fraudulent solicitation *664 or sales practices justifies Rule 6.05's restrictions of those activities.^{FN2}

FN1. Like Justice BRENNAN, I would not reach the question whether respondents can claim an exemption from the operation of Rule 6.05 because of their adherence to the doctrine of Sankirtan.

FN2. It should be stressed that Rule 6.05 does not prevent respondents from wandering throughout the fairgrounds and directing interested donors or purchasers to their

booth. See Brief for Petitioners 35-36. Thus, it is in fact only the exchange of money, rather than the solicitation *per se* of contributions or of purchases, that is limited to a booth. See 299 N.W.2d 79, 86 (Minn.1980) (opinion dissenting in part). Accordingly, I use the terms "solicitation" and "sales" to connote only the actual exchange of money, rather than the act of requesting that the fairgoer purchase literature or make a contribution at the booth.

In *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-637, 100 S.Ct. 826, 836-837, 63 L.Ed.2d 73 (1980), the Court stressed that a community's interest in preventing fraudulent solicitations must be met by narrowly drawn regulations that do not unnecessarily interfere with First Amendment freedoms. It there held that possibility of fraud in "door-to-door" or "on-street" solicitations could be countered "by measures less intrusive than a direct prohibition on solicitation," such as disclosure provisions and penal laws prohibiting fraudulent misrepresentations. *Id.*, at 637-638, 100 S.Ct., at 836-837. I see no reason why the same considerations are not applicable here. There is nothing in this record to suggest that it is more difficult to police fairgrounds for fraudulent solicitations than it is to police an entire community's streets; just as fraudulent solicitors may "melt into a crowd" at the fair, so also may door-to-door solicitors quickly move on after consummating several transactions in a particular neighborhood. Indeed, since respondents have offered to wear identifying tags, see App. A-6, and since the fairgrounds are an enclosed area, it is at least arguable that it is easier to police the fairgrounds than a community's streets.

Nonetheless, I believe that the State's substantial interest in maintaining crowd control and safety on the fairgrounds does justify Rule 6.05's restriction on solicitation and sales activities not conducted from a **2573 booth. As the Court points out, *ante*, at 2566, "[t]he flow of the crowd and demands of

*665 safety are more pressing in the context of the Fair" than in the context of a typical street. While I agree with Justice BRENNAN that the State's interest in order does not justify restrictions upon distribution of literature, I think that common-sense differences between literature distribution, on the one hand, and solicitation and sales, on the other, suggest that the latter activities present greater crowd control problems than the former. The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. For this reason, literature distribution may present even fewer crowd control problems than the oral proselytizing that the State already allows upon the fairgrounds. In contrast, as the dissent in the Minnesota Supreme Court observed, sales and the collection of solicited funds not only require the fairgoer to stop, but also "engender additional confusion ... because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc." 299 N.W.2d 79, 87 (1980). Rules restricting the exchange of money to booths have been upheld in analogous contexts, see e. g., *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 828-829 (CA5 1979) (Atlanta airports), and for similar reasons I would uphold Rule 6.05 insofar as it applies to solicitation and sales.

U.S.Minn.,1981.

Heffron v. International Soc. for Krishna Consciousness, Inc.

452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298, 7 Media L. Rep. 1489

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Westlaw

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P

United States Court of Appeals,
Ninth Circuit.

ONE WORLD ONE FAMILY NOW, a Hawaii non-profit corporation; James McDonough; Bhaktivedanta Mission, Ltd., a Hawaii non-profit corporation; Anton Voight, Plaintiffs-Appellants,

v.

CITY AND COUNTY OF HONOLULU; Frank F. Fasi, individually and in his capacity as Mayor of the City and County of Honolulu; Michael Nakamura, Chief of Police; Donna Woo, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and John Does 1-10, Defendants-Appellees.

ONE WORLD ONE FAMILY NOW; James McDonough, an individual; Bhaktivedanta Mission, Ltd., a Hawaii non-profit corporation; Anton Voight, Plaintiffs-Appellees,

v.

CITY AND COUNTY OF HONOLULU; Frank F. Fasi, individually and in his capacity as Mayor of the City and County of Honolulu; Michael Nakamura, Chief of Police, Defendants-Appellants.

Nos. 94-16373, 94-16511.

Argued and Submitted May 2, 1995.
Decided Feb. 13, 1996.

Nonprofit organizations brought § 1983 action for declaratory and injunctive relief from ordinance which would prohibit sales of their message-bearing T-shirts on sidewalks. The United States District Court for the District of Hawai'i, Harold M. Fong, Chief Judge, denied preliminary injunction against enforcement in heart of commercial area, but granted it as to the rest of city. Both sides appealed. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) plaintiffs' activities were protected under First Amendment; (2) ordinance was content-neutral; (3) ordinance was narrowly tailored to serve substantial interests; (4) other channels of communication were open to plaintiffs;

(5) selling message-bearing T-shirts on sidewalk was not uniquely valuable mode of communication; and (6) preliminary injunction to prevent enforcement of ordinance in any area of city was not warranted.

Affirmed in part; reversed in part.

Pregerson, Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Constitutional Law 92 1600

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(C) Trade or Business

92k1600 k. In General. Most Cited Cases

(Formerly 92k90.1(1))

Nonprofit groups' activities in selling T-shirts imprinted with various philosophical and inspirational messages were protected by First Amendment. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 1512

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or Restrictions

92k1512 k. In General. Most Cited Cases

(Formerly 92k90(3))

Constitutional Law 92 1514

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

Submitted At Meeting

Date 8/3/10 Item 3 Exhibit 4

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92XVIII(A) In General
92k1511 Content-Neutral Regulations
or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest.
Most Cited Cases
(Formerly 92k90(3))

Constitutional Law 92 1515

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A) In General
92k1511 Content-Neutral Regulations
or Restrictions
92k1515 k. Existence of Other Channels of Expression. Most Cited Cases
(Formerly 92k90(3))
Time, place, or manner restrictions on protected speech are valid if they are content-neutral, are narrowly tailored to serve significant governmental interest, and leave open ample alternative channels of communication. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A) In General
92k1511 Content-Neutral Regulations
or Restrictions
92k1512 k. In General. Most Cited Cases
(Formerly 92k90(3))
Speech restriction is "content-neutral" if it is justified without reference to content of regulated speech. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 1512

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and

Press
92XVIII(A) In General
92XVIII(A) In General
92k1511 Content-Neutral Regulations
or Restrictions
92k1512 k. In General. Most Cited Cases
(Formerly 92k90(3))

Constitutional Law 92 1513

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A) In General
92k1511 Content-Neutral Regulations
or Restrictions
92k1513 k. Governmental Disagreement with Message Conveyed. Most Cited Cases
(Formerly 92k90(3))
Regulation that serves purposes unrelated to content of expression is deemed neutral, even if it has incidental effect on some speakers or messages but not others; test is whether government has adopted restriction because of disagreement with message it conveys. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 1760

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1760 k. Sidewalks. Most Cited Cases
(Formerly 92k90.1(4))

Municipal Corporations 268 661(2)

268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works

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268XI(A) Streets and Other Public Ways
268k660 Power to Control and Regulate
268k661 In General

268k661(2) k. Reasonableness and Validity of Regulations in General. Most Cited Challenged ordinance which banned sales of plaintiffs' message-bearing T-shirts was content neutral, since it imposed flat ban on sales of goods on sidewalks, with certain exemptions, without regard to content; ordinance was not designed to suppress certain ideas that government found distasteful nor was it applied to plaintiffs because of views they expressed. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 1759

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1759 k. Streets and Highways. Most Cited Cases
(Formerly 92k90.1(4))

Constitutional Law 92 1760

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1760 k. Sidewalks. Most Cited Cases
(Formerly 92k90.1(4))

Municipal Corporations 268 661(2)

268 Municipal Corporations
268XI Use and Regulation of Public Places, Property, and Works
268XI(A) Streets and Other Public Ways
268k660 Power to Control and Regulate

268k661 In General

268k661(2) k. Reasonableness and Validity of Regulations in General. Most Cited For purposes of challenge to ordinance banning sales of goods and services on streets and sidewalks, city had substantial interests in eliminating visual blight of vendor stands, assuring orderly movement of pedestrians on crowded sidewalks, and protecting local merchants from unfair competition. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 1509

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1508 Time, Place, or Manner Restrictions
92k1509 k. In General. Most Cited Cases
(Formerly 92k90(3))
Validity of time, place, or manner regulation depends on relation it bears to overall problem government seeks to correct, not on extent to which it furthers government's interests in individual case. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 1760

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1760 k. Sidewalks. Most Cited Cases
(Formerly 92k90.1(4))

Municipal Corporations 268 661(2)

268 Municipal Corporations
268XI Use and Regulation of Public Places,

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Property, and Works

- 268XI(A) Streets and Other Public Ways
- 268k660 Power to Control and Regulate
- 268k661 In General

268k661(2) k. Reasonableness and
Validity of Regulations in General. Most Cited

Municipal Corporations 268 ⇐ 692

268 Municipal Corporations

268XI Use and Regulation of Public Places,
Property, and Works

- 268XI(A) Streets and Other Public Ways
- 268k691 Obstructions and Encroachments
- 268k692 k. Obstruction of Use. Most

Cited Cases

Ordinance which prohibited sales of goods and services on sidewalks, including sale of plaintiffs' message-bearing T-shirts, was narrowly tailored to serve substantial interests of eliminating visual blight of vendor stands, assuring orderly movement of pedestrians on crowded sidewalks, and protecting local merchants from unfair competition; proliferation of sidewalk vendors could aggravate congestion on already crowded sidewalks and siphon off sales from local merchants. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ⇐ 1870

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

- 92k1870 k. In General. Most Cited Cases
- (Formerly 92k90.1(1.1))

Constitutional Law 92 ⇐ 1760

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

- 92XVIII(G) Property and Events
- 92XVIII(G)2 Government Property and

Events

- 92k1760 k. Sidewalks. Most Cited

Cases

(Formerly 92k90.1(4))

Although city ordinance prohibited sidewalk sales of plaintiffs' message-bearing T-shirts, plaintiffs had alternative channels of communication to reach intended audience, such as handing out literature, proselytizing or soliciting donations; also, plaintiffs' volunteers could hand out free T-shirts to passers-by, could mingle with city's tourist throngs wearing T-shirts, and could sell T-shirts through local retail outlets or by opening their own stores. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⇐ 1600

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(C) Trade or Business

- 92k1600 k. In General. Most Cited Cases
- (Formerly 92k90.1(1))

Constitutional Law 92 ⇐ 1760

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and
Events

92k1760 k. Sidewalks. Most Cited
Cases

(Formerly 92k90.1(4))

While wearing message-bearing T-shirt might be uniquely valuable mode of communication whose total ban could raise serious constitutional questions, same can't be said for selling such T-shirt on sidewalk; although selling T-shirts is unique form of expression in sense that serving message-bearing raviolis or preaching on street corners in Donald Duck voice would be unique, it does nothing to make message uniquely significant or effective. U.S.C.A. Const.Amend. 1.

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[11] Civil Rights 78 1457(7)

78 Civil Rights

78III Federal Remedies in General

78k1449 Injunction

78k1457 Preliminary Injunction

78k1457(7) k. Other Particular Cases
and Contexts. Most Cited Cases

(Formerly 78k268)

Because ordinance banning sales of message-bearing T-shirts on sidewalk was not violation of First Amendment, preliminary injunction to prevent enforcement of ordinance for areas other than main part of downtown was not warranted; city was not obliged to prove validity of ordinance on block-by-block basis. U.S.C.A. Const.Amend. 1.

*1010 Keith M. Kiuchi, Kiuchi, Nakamoto & Ahu, Honolulu, Hawaii, for plaintiffs-appellants One World One Family Now and James McDonough.

Daniel R. Foley, Partington & Foley, Honolulu, Hawaii, for plaintiffs-appellants Bhaktivedanta Mission, Ltd. and Anton Voight.

Kathleen M. Sullivan, Stanford, California, Darolyn H. Lendio, Donna M. Woo, Hazel G. Beh, Honolulu, Hawaii, and Jon M. Van Dyke, Honolulu, Hawaii, for defendants-appellees.

Stephen V. Bomse, Terri A. Little, Heller, Ehrman, White & McAuliffe, San Francisco, California, and James A. Stubenberg, Fredrick W. Rohlfing III, Stubenberg & Durrett, Honolulu, Hawaii, for amici curiae DFS Group L.P. and Kinkai Properties Ltd. Partnership.

Appeals from the United States District Court for the District of Hawaii; Harold M. Fong, Chief Judge, Presiding.

Before PREGERSON, KOZINSKI and HAWKINS, Circuit Judges.

*1011 KOZINSKI, Circuit Judge.

OPINION

An ordinance prohibits the sale of merchandise on city streets. We must determine whether it may be constitutionally applied to bar non-profit organizations from selling message-bearing T-shirts.

I

Plaintiffs One World One Family Now and Bhaktivedanta Mission are non-profit corporations operating in Hawaii. Both organizations sell T-shirts imprinted with various philosophical and inspirational messages, such as "Protect and Preserve the Truth, the Beauty & Harmony of our Native Cultures," Ex. 3, "TAKE IT EASY MEDITATE HANG LOOSE HAWAII," Ex. 4, and "WAIKIKI HAWAII HARINAM," Ex. 6.^{FN1} Many of the T-shirts feature colorful depictions of Hawaii's scenic natural beauty, not unlike shirts sold in retail stores catering to tourists. Plaintiffs believe that selling T-shirts is a particularly effective way to communicate because those who buy and wear the T-shirts help spread the message.

FN1. "Harinam" apparently means "chant the name of god" in Sanskrit. Appellee's Br. at 5.

Aiming for a wide audience, plaintiffs, along with a number of commercial T-shirt vendors, set up several display tables on the sidewalks of Kalakaua Avenue, one of the busiest commercial streets in Waikiki.^{FN2} The City and County of Honolulu soon began to hear from visitors and local residents who complained that the T-shirt tables were an obstruction and an eyesore. Merchants with stores near the T-shirt tables also complained, citing a drop in their own sales of tourist-oriented merchandise, which they attributed to unfair competition from the sidewalk vendors.

FN2. Waikiki is a relatively small, self-contained district within the city of Honolulu, comprising approximately 500 acres. Within it one can find, on any given day,

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the highest concentration of tourists in the city. It also has a large residential population.

The city notified the sidewalk vendors (including plaintiffs) that they were violating Honolulu, Haw., Rev. Ordinances § 29-6.2(b)(7), which bans the sale of all "goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services ... upon the public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki." After police threatened them with citations for failure to comply, plaintiffs sued for declaratory and injunctive relief under 42 U.S.C. § 1983, claiming that section 29-6.2 violated their First Amendment rights, and moved for a preliminary injunction.

The district court held an evidentiary hearing. Finding that the city was regulating the time, place and manner of speech pursuant to legitimate and significant interests, it refused to enjoin enforcement of the ordinance as to Kalakaua and Kuhio Avenues—the heart of Waikiki's commercial area and the focus of the city's evidence. The district court granted a preliminary injunction against enforcement of the ordinance in the rest of Waikiki, holding that the city hadn't shown a sufficient interest in keeping plaintiffs from selling there, or that doing so would leave adequate alternative means of communication. Both sides appeal.

II

Because the focus of the litigation has been on Kalakaua and Kuhio Avenues, we deal first with the district court's decision not to enjoin enforcement of the ordinance there.

A

Before we decide which standard to use in evaluating the ordinance, we dispose of a preliminary matter: the application here of our decision in *Gaudiya Vaishnava Soc'y v. City and County of San Francisco*, 952 F.2d 1059 (9th Cir.1990), *cert. denied*,

504 U.S. 914, 112 S.Ct. 1951, 118 L.Ed.2d 555 (1992). Plaintiffs argue that, under *Gaudiya*, their selling is constitutionally protected expression. The city claims plaintiffs' activities aren't constitutionally protected at all.

*1012 In *Gaudiya*, we addressed two questions, one of first impression, the other not. The novel question was whether an ordinance prohibiting charitable organizations from selling message-bearing merchandise implicated the First Amendment. Rejecting San Francisco's contention that selling goods was unprotected conduct, we held that, when the sale of merchandise bearing political, religious, philosophical or ideological messages is "inextricably intertwined" with other forms of protected expression (like distributing literature and proselytizing), the First Amendment applies. *Id.* at 1064. The mundane question followed: Whether San Francisco's ordinance facially violated the First Amendment by giving the police chief unbridled discretion to grant or deny peddling permits for an activity protected by the First Amendment. Following a well-worn path, *see City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756-57, 108 S.Ct. 2138, 2143-44, 100 L.Ed.2d 771 (1988) (collecting cases), we held the ordinance facially invalid. 952 F.2d at 1065-66.

[1] Plaintiffs' activities closely resemble those in *Gaudiya* and the First Amendment therefore protects them. But there ends the similarity. In *Gaudiya*, the ordinance granted the police chief unbridled discretion to grant peddling permits and the plaintiffs there brought a facial challenge to this discretion. By contrast, Honolulu's ordinance is a flat ban; there are some exceptions, but no discretion to be exercised. Accordingly, on appeal, plaintiffs challenge section 29-6.2 only as applied to their activities. ^{FN3}

FN3. Below, plaintiffs purported to bring a facial challenge, as well. We assume they don't appeal the district court's rejection of their facial challenge as they make no arguments to support such a challenge.

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B

[2] Having determined that plaintiffs' T-shirt sales fall within the ambit of the First Amendment, we must decide whether Honolulu's ordinance is valid as applied to them. We use the standard governing time, place and manner restrictions.^{FN4} Such restrictions are valid if they (1) are content-neutral; (2) are narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989).

FN4. The city doesn't dispute that the sidewalks of Waikiki are a public forum, nor could it. *See, e.g., United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983).

[3][4] 1. A speech restriction is content-neutral if it is "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3068, 82 L.Ed.2d 221 (1984). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753. The test is whether the government has adopted the restriction "because of disagreement with the message it conveys." *Id.*

[5] The district court found that the ordinance furthers three legitimate governmental interests: (1) "maintaining the aesthetic attractiveness of Waikiki," (2) "promoting public safety and the orderly movement of pedestrians," and (3) "protecting the local merchant economy." E.R. at 31. None of these interests concerns the content of speech, and there's no evidence that "the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to [the plaintiffs] because of the views that they express." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct.

2118, 2128, 80 L.Ed.2d 772 (1984). The ordinance imposes a flat ban, one that is applied without regard to content. Accordingly, it is content-neutral.^{FN5}

FN5. Plaintiffs argue that the ordinance provides several exemptions that have the effect of discriminating on the basis of content. Its provisions do not apply to the "sale ... of newspapers of general circulation and to duly authorized concessions in public places." Honolulu, Haw., Rev.Ordinances § 29-6.2(b). The provision also exempts buttons and souvenir items sold in conjunction with a parade. *Id.* § 29-6.2(c). Because these exemptions don't enable the city to discriminate against ideas it disfavors, they don't render the ordinance content-based. *See Leathers v. Medlock*, 499 U.S. 439, 450, 111 S.Ct. 1438, 1445, 113 L.Ed.2d 494 (1991).

*1013 [6] 2. Cities have a substantial interest in protecting the aesthetic appearance of their communities by "avoiding visual clutter." *Id.* at 806-07, 104 S.Ct. at 2129-30. As the district court found, Honolulu's interest in eliminating the visual blight caused by unsightly vendor stands easily qualifies under this standard. Likewise, cities have a substantial interest in assuring safe and convenient circulation on their streets. *See Cox v. Louisiana*, 379 U.S. 536, 554-55, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965). The district court found that Waikiki is the center of the state's tourism industry, receives as many as 60,000 visitors a day, and consequently has "a large concentration of vehicles and pedestrians which causes unique traffic problems." E.R. at 11. Judged in light of "the characteristic nature and function of the particular forum involved," *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651, 101 S.Ct. 2559, 2565, 69 L.Ed.2d 298 (1981), the city's interest in maintaining the orderly movement of pedestrians on Waikiki's crowded sidewalks is also substantial. *See Appendix.*

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[7] Finally, Honolulu has demonstrated a substantial interest in protecting local merchants from unfair competition. See *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, ---- - ----, 114 S.Ct. 2445, 2469-70, 129 L.Ed.2d 497 (1994). One legitimate preoccupation of local government is to attract and preserve business. Cities rely on a prosperous, stable merchant community for their tax base, as well as for the comfort and welfare of their citizens. Here, the district court found that "the tax-free and rent-free activities of the plaintiffs ... have had a significant affect [sic] on the economy of the abutting shop owners on Kalakaua and Kuhio Avenues whose taxes and rent contribute to the welfare and economy of this state." E.R. at 35. This kind of unfair competition threatens to erode tax revenues and undermine the strength of its commercial life.^{FN6} As amici remind us, plaintiffs can offer "remarkably low prices" in part because they pay no rent and aren't subject to various municipal regulations. Given the district court's findings, we must take seriously the concern that "[n]o ordinary merchant, forced to pay rent in Waikiki and comply with other applicable laws, possibly could compete with those prices for any significant period of time." Br. Amici Curiae at 20.

FN6. Plaintiffs contend that the city failed to offer any concrete evidence demonstrating that their T-shirt sales actually harmed local merchants. But "the validity of [a time, place or manner] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward*, 491 U.S. at 801, 109 S.Ct. at 2759.

Given the evidence before it and the deference due the city council's determinations of necessity, see *Turner Broadcasting*, 512 U.S. at ---- - ----, 114 S.Ct. at 2470-71 (plurality opinion),^{FN7} the district court didn't err in concluding that the city had actual, significant interests. See *id.* at ----, 114 S.Ct. at 2470 (plurality opinion) (requiring finding that

"recited harms are real, not merely conjectural" to establish significant government interest); cf. *id.* at ---- - ----, 114 S.Ct. at 2472-73 (Blackmun, J., concurring). *Id.* at ---- - ----, 114 S.Ct. at 2473-75 (Stevens, J., concurring).^{FN8}

FN7. Although this portion of Justice Kennedy's opinion had only four votes, under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), it's the holding of the case, since it was the "position taken by those members who concurred in the judgment[] on the narrowest grounds." See *Turner Broadcasting*, 512 U.S. at ---- - ----, 114 S.Ct. at 2473-75 (Stevens, J., concurring) (advocating greater deference).

FN8. The district court didn't clearly err in finding that the city showed insufficient evidence that sidewalk vending was actually "causing a proliferation of fraud and duress among tourists and residents." E.R. at 31. In any case, an ordinance that bans all sidewalk vending isn't narrowly tailored to eliminate fraud. Cf. *Martin v. City of Struthers*, 319 U.S. 141, 144-49, 63 S.Ct. 862, 863-66, 87 L.Ed. 1313 (1943) (ban on door-to-door handbilling not narrowly tailored to prevent crime and fraud).

[8] Honolulu's peddling ordinance is narrowly tailored to serve these interests because they "would be achieved less effectively absent the regulation." *1014 *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758 (internal quotation marks omitted). Without the ordinance, sidewalk vendors (commercial and charitable alike) would be free to peddle their wares on Kalakaua and Kuhio Avenues, undermining the city's efforts to provide a pleasant strolling and shopping area. See Appendix. A proliferation of sidewalk vendors could also aggravate the congestion on already crowded sidewalks and siphon off sales from local merchants. Because the peddling ordinance addresses these problems "without ... significantly restricting a substantial quantity of

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speech that does not create the same evils," *Ward*, 491 U.S. at 799 n. 7, 109 S.Ct. at 2758 n. 7, section 29-6.2(b)(7) is narrowly tailored.^{FN9}

FN9. The ordinance doesn't stop anyone from handing out T-shirts free of charge. This, plaintiffs argue, makes the ordinance invalid because handing out T-shirts causes the same harm to the city's interests as selling them. The city, however, was entitled to conclude that fewer sidewalk vendors would come to hand out merchandise for free. The ordinance is therefore a "valuable, but perhaps imperfect" means of addressing the targeted problem. *Clark*, 468 U.S. at 297, 104 S.Ct. at 3071; cf. *Vincent*, 466 U.S. at 811, 104 S.Ct. at 2132 ("Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance.").

Plaintiffs suggest less restrictive alternatives Honolulu could adopt to advance its interests, such as limiting the number of vendors, their hours of operation or the size and location of their stands. A reasonable time, place and manner regulation, however, need not be the "least restrictive or least intrusive" alternative. *Id.* at 798, 109 S.Ct. at 2757. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S.Ct. at 2758.

Honolulu's peddling ordinance isn't "substantially broader than necessary" to achieve its interests. The ordinance targets precisely the activity-sidewalk vending-causing the problems the city legitimately seeks to ameliorate, and it doesn't sweep in expressive activity that doesn't contribute to those problems. As in *Vincent*, the city "did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808, 104 S.Ct. at 2130.

[9] 3. Honolulu's peddling ordinance also leaves open ample alternative channels of communication. The ordinance forecloses one narrow form of expression-sidewalk sales of message-bearing merchandise-and leaves the plaintiffs free to disseminate and seek financial support for their views through "myriad and diverse" alternative channels, such as handing out literature, proselytizing or soliciting donations. See *ACORN v. City of Phoenix*, 798 F.2d 1260, 1271 (9th Cir.1986) (ordinance prohibiting charitable solicitation from people in cars leaves open ample alternative channels of communication). In addition, plaintiffs' volunteers may hand out free T-shirts to passers-by, see note 9 *supra*, or mingle with Waikiki's tourist throngs wearing T-shirts (thereby acting as human billboards). Plaintiffs may also sell T-shirts through local retail outlets or by opening their own stores, so long as they comply with the regulations generally applicable to merchants.

Plaintiffs argue we must nevertheless invalidate the peddling ordinance because it prevents them from reaching their intended audience. They rely heavily on *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir.1990), where we invalidated the Coast Guard's 75-yard security zone around the Aquatic Park Pier during annual Fleet Week activities on San Francisco Bay. We noted that the security zone effectively prevented the plaintiff from reaching its intended audience (military officers, local government officials and other dignitaries) because its protest messages couldn't reach observers on the pier over 75 yards away. *Id.* at 1229-30. We emphasized that other channels of communication-passing out pamphlets or holding demonstrations on land-were "not viable alternatives because the invited visitors, who are the Peace Navy's intended audience, are not accessible from those positions." *Id.* at 1229 (internal quotation marks omitted).

Bay Area Peace Navy is inapposite. Nothing prevents plaintiffs here from reaching their intended audience-the tourists *1015 congregating in Waikiki. As noted, they have a number of alternat-

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ive means of disseminating their message, each of which allows them to communicate effectively with people on the sidewalks.

Finally, plaintiffs claim that the Supreme Court's recent decision in *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), casts doubt on the validity of the ordinance. In *Ladue*, the Court struck down a broad ban on the display of signs on private residential property. The opinion rested heavily on the view that the city's ordinance closed off a "unique and important" mode of expression for which there is "no practical substitute." *Id.* at ----, 114 S.Ct. at 2045-46. The Court explained that "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means." *Id.* at ----, 114 S.Ct. at 2046.

[10] Plaintiffs argue that selling message-bearing T-shirts is a unique mode of expression akin to displaying a sign in front of one's home. We are not persuaded. While wearing a message-bearing T-shirt might be a uniquely valuable mode of communication whose total ban could raise serious constitutional questions, *cf. Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), the same can't be said for selling such a T-shirt on the sidewalk. A message on one's person or home has a unique effect because it "provide[s] information about the identity of the 'speaker' [which is] an important component of many attempts to persuade." *Ladue*, 512 U.S. at ----, 114 S.Ct. at 2046. While selling T-shirts is a unique form of expression in the sense that serving message-bearing raviolis or preaching on street corners in a Donald Duck voice would be unique, it does nothing to make the message uniquely significant or effective. Various other traditional means of dissemination would get across exactly the same idea. Thus, we do not believe the sale of message-bearing T-shirts is so "uniquely valuable or important [a] mode of communication" as to be without effective substitute. *Vincent*, 466 U.S. at 812, 104 S.Ct. at 2132.

III

[11] Although the district court refused to enjoin enforcement of the ordinance on Kalakaua and Kuhio Avenues, it granted a preliminary injunction for the rest of Waikiki, finding that the city had proved its interest only as to these two streets. E.R. at 31-35. Neither party asked for this Solomonian solution and, on appeal, both correctly argue that the district court erred in differentiating between Waikiki's main and side streets. Cities need not prove up their interests on a block-by-block basis, particularly where the interests asserted are as basic and traditional as Honolulu's. *See, e.g., Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981). The evidence before the district court focused on Kalakaua Avenue because that's where most of the sidewalk vendors were operating. *See* Deposition of James McDonough at 37-38; Deposition of Anton Voight at 61-62. There was ample evidence, though, that the city's interests in open and attractive sidewalks and fair competition extended throughout Waikiki. *See, e.g.,* E.R. at 11-12 (district court's findings indicating Waikiki's history of special treatment in city ordinances); Defendant's Ex. 8 at 43-55 (1992 Waikiki Master Plan indicating plans to improve and beautify streets throughout Waikiki); R.T. at 168-69 (testimony that landowners wouldn't make crucial concessions to allow further implementation of Master Plan if widened and beautified sidewalks would be inhabited by sidewalk vendors). Indeed, these types of interests can be presumed to operate throughout a city, absent a strong showing to the contrary.

The district court also found that a ban throughout Waikiki didn't leave ample alternative channels for plaintiffs to communicate their messages. Citing *Clark* and *Gaudiya*, it reasoned that a "total ban on selling expressive T-shirts in a heavily trafficked section of town" was impermissible. E.R. at 32-33. Neither we nor the Supreme Court have said any such thing. Rather, we have held broad and narrow bans in even the most desirable locations to the

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same standard. The broader the ban, of course, the more *1016 difficult it is to prove that the remaining means of communication are adequate. Difficult, however, doesn't mean impossible. As discussed above, this ordinance meets the test.

Accordingly, plaintiffs showed no likelihood of success on the merits and the district court erred in granting their motion for a preliminary injunction, even in part. *See Senate of California v. Mosbacher*, 968 F.2d 974, 977-78 (9th Cir.1992).

* * *

Honolulu's peddling ordinance is content-neutral, narrowly tailored to serve substantial interests

throughout Waikiki, and leaves ample alternative channels of communication. We therefore **AF-FIRM** the partial denial of plaintiffs motion for a preliminary injunction on its enforcement on Kalakaua and Kuhio Avenues and **VACATE** the preliminary injunction on its enforcement in other areas of Waikiki.

AFFIRMED IN PART; REVERSED IN PART.

APPENDIX

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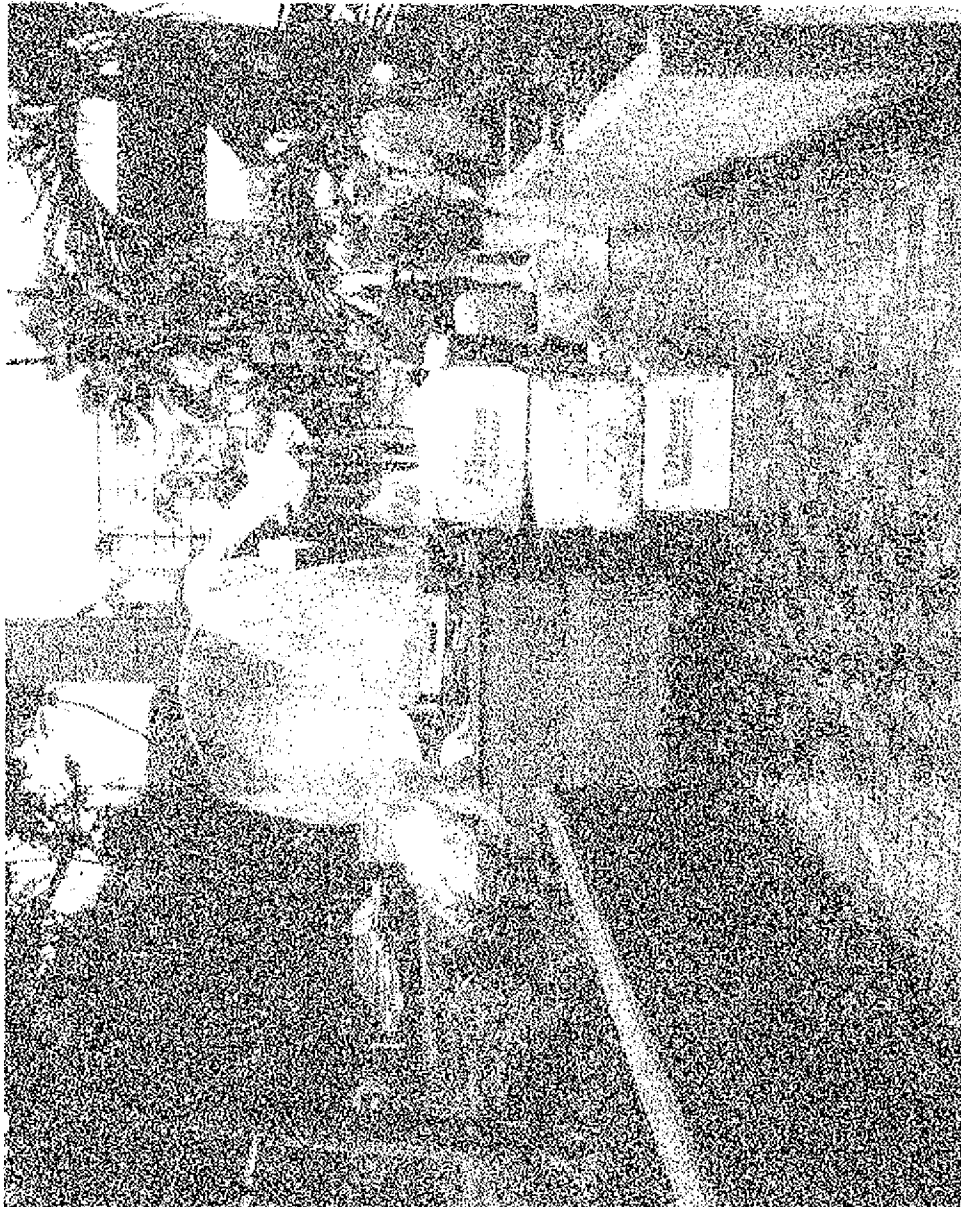
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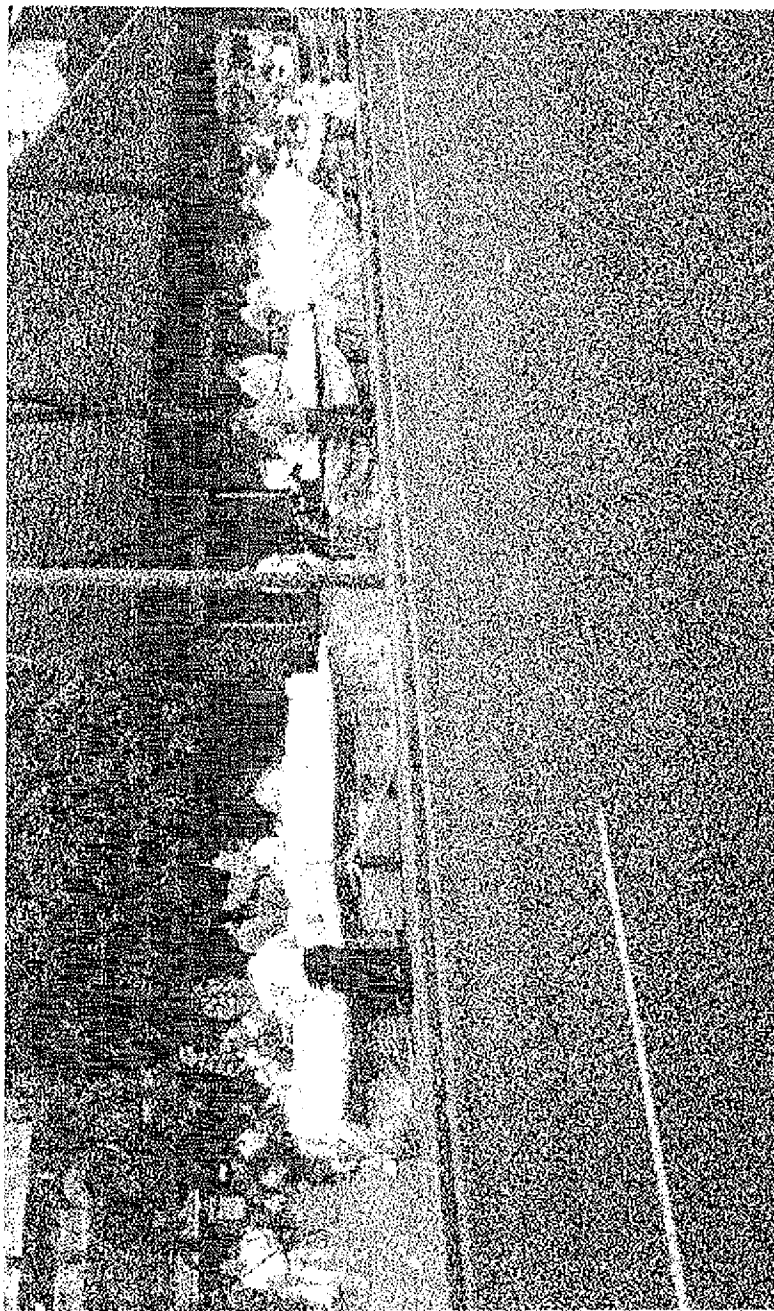
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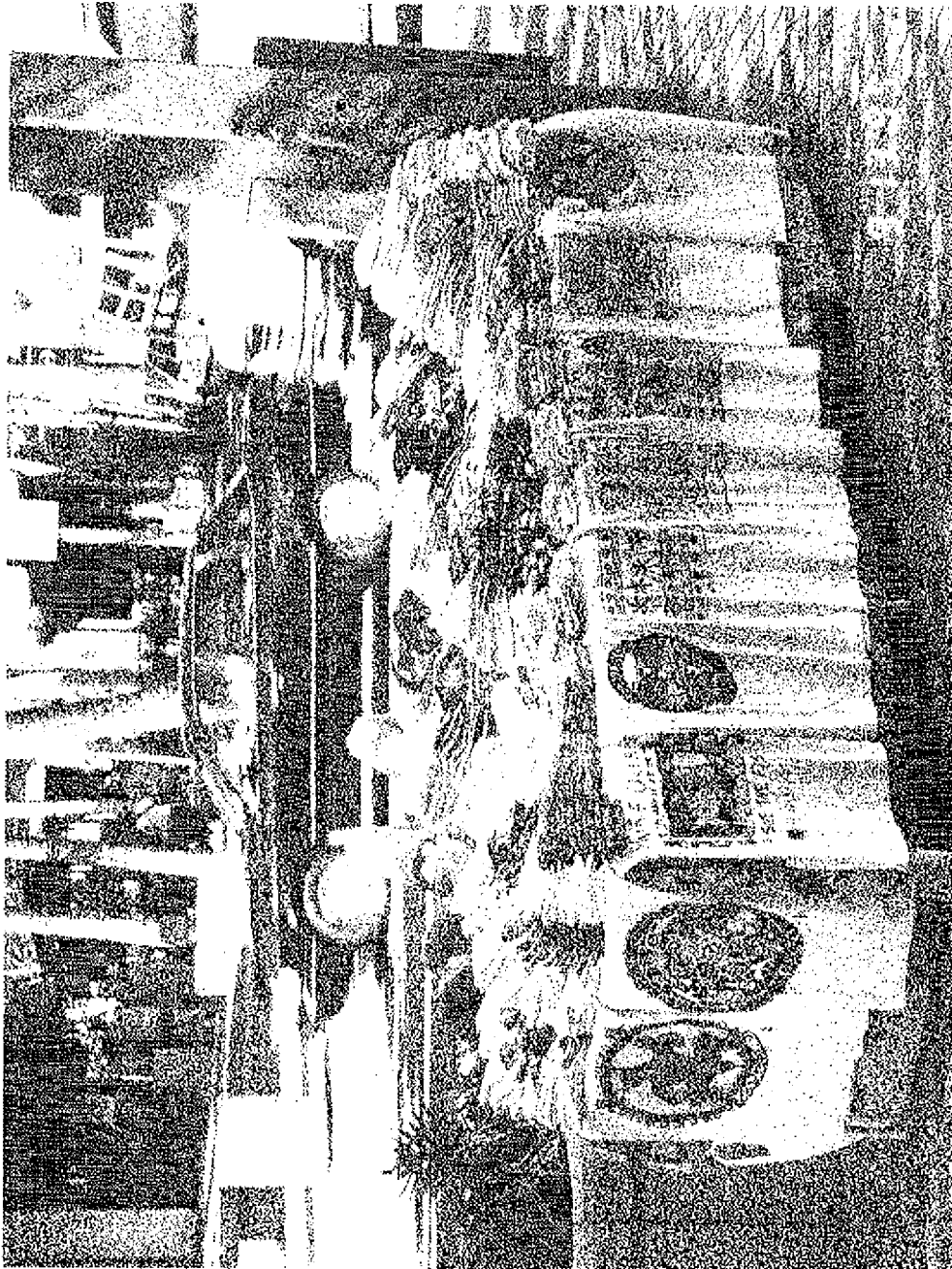


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 PREGERSON, Circuit Judge, dissenting:

Because I believe the First Amendment protects the right to speak freely in a public *1020 forum, I dissent. Two aspects of the majority opinion are troublesome. First, the majority opinion diminishes the free speech right at stake here by narrowing the scope of our decision in *Gaudiya Vaishnava Society*

v. City of San Francisco, 952 F.2d 1059 (9th Cir.1990), *cert. denied*, 504 U.S. 914, 112 S.Ct. 1951, 118 L.Ed.2d 555 (1992). Second, the majority's time, place, and manner analysis rubber-stamps Honolulu's ordinance restricting speech even though (a) the ordinance is not narrowly tailored to achieve Honolulu's civic goals, and (b) no equally effective alternative forum for the restricted speech exists. I address each concern in

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turn.

I

The majority recognizes that the plaintiffs' T-shirt sales fall within the protective ambit of the First Amendment. Nevertheless, the majority's analysis gives short shrift to our important discussion in *Gaudiya* concerning the substance of the right to speak in a public forum, which includes the right to sell message-bearing T-shirts.

In *Gaudiya*, we held that merchandise with messages affixed to the product, "when sold in conjunction with other activities in order to disseminate [an] organizations' message ... is fully protected speech." 952 F.2d at 1064-65. There, various nonprofit organizations challenged a San Francisco ordinance that prohibited selling, without a permit, T-shirts and other message-bearing merchandise at Fisherman's Wharf and Union Square. *Id.* at 1060-61. The messages conveyed-verbally or symbolically-the nonprofits' philosophies. *Id.* at 1060. The sale of message-bearing merchandise at high foot-traffic locations helped the nonprofits solicit donations, distribute literature, and educate the public about their causes. *Id.*

As in *Gaudiya*, the T-shirts at issue here bear messages that convey the religious and political philosophies of the plaintiff organizations. Some of the T-shirts read: "Meditate," "Clean and Safe Oceans for All," and "Protect and Preserve the Truth, the Beauty & Harmony of our Native Cultures." Just because the messages are printed along with pictures of flowers or fish does not diminish the religious or political quality of the speech. The messages on the merchandise in *Gaudiya* were also intermingled with aesthetic design, but we nevertheless found that the sale of the merchandise was "inextricably intertwined" with fully protected speech. *Gaudiya*, 952 F.2d at 1064 n. 5.

Also, as was true of the San Francisco nonprofits, the plaintiffs here distribute information about their

philosophies in conjunction with selling message-bearing T-shirts. The ultimate purpose of these T-shirt transactions is the dissemination of passionately-held viewpoints. The people manning the T-shirt stands discuss their religious beliefs and philosophies with anyone who stops by.^{FN1}

FN1. The plainclothes officer who investigated the T-shirt stands testified that he had a "good" conversation with an "active" member of the Bhaktivedanta Mission, who shared his religious beliefs with the officer and read aloud parts of a handout on these beliefs. The officer also testified that three organizations, including One World One Family Now, distributed literature to him.

Contrary to the majority's view, *Gaudiya* controls the disposition of the case at hand. It is true that *Gaudiya* struck down San Francisco's permit requirement because of its lack of "rules that give guidance to the chief of police." *Gaudiya*, 952 F.2d at 1065. But we didn't strike down the permit requirement merely because it was police-administered. We were concerned with San Francisco's unbridled restriction of free speech in the absence of a rational set of operating procedures; and, we looked to whether the city had given its chief of police guiding rules for restricting speech. *Id.* at 1065-66.

Applying *Gaudiya* to this case is not difficult. Under *Gaudiya*, Honolulu could have easily avoided running afoul of the First Amendment by instituting guiding rules under which nonprofits could sell their message-bearing T-shirts. But Honolulu imposed a blanket ban on such sales. This ban amounts to an unlimited governmental restriction of speech in a public forum-in substance, the same kind of governmental action condemned in *Gaudiya*. As in *Gaudiya*, there is no need here for Honolulu's unbridled ban on First Amendment activities. See *1021 *Gaudiya*, 952 F.2d at 1065. Yet the majority minimizes any substantive similarity between Honolulu's blanket ban and San Fran-

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cisco's unchecked permit scheme.

The majority opinion does not explain adequately its departure from *Gaudiya*. On the one hand, the majority acknowledges that plaintiff organizations have a "fully protected" speech right. But on the other hand, the majority fails to recognize Honolulu's duty to respect and preserve that right for it to be effective. In so doing, the majority's position only gives lip service not only to *Gaudiya*, but also to the Supreme Court's strong admonitions that message-bearing merchandise, when sold in conjunction with other First Amendment activities, is *fully protected* speech. See *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981). See also *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973) (stating that newspaper's profit motive should not be the basis for regulation of First Amendment rights); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 833, 63 L.Ed.2d 73 (1980) (holding that charitable appeals for funds in conjunction with other First Amendment activities are protected).

Underlying the majority opinion may be the notion that the nonprofits are using the First Amendment to protect a niche in the Waikiki T-shirt market. If this is so, then the matter should be remanded for further findings of fact. Without a more complete record, an unsupported suspicion that the T-shirt stands are a sham should not be the basis for circumventing the First Amendment.

II

The majority opinion's time, place, and manner discussion is thin. The majority summarily concludes that Honolulu's ordinance is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d

661 (1989). The last two conclusions are questionable.

A

To satisfy the narrowly tailored requirement, a regulation need not be the "least restrictive" means of serving the relevant government interest, but "if there are numerous and obvious less-burdensome alternatives to the restriction on ... speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 413 n. 13, 113 S.Ct. 1505, 1510 n. 13, 123 L.Ed.2d 99 (1993). Indeed, as we concluded in *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir.1991), "restrictions which disregard far less restrictive and more precise means are not narrowly tailored."

Honolulu claims that it enacted the peddling ordinance to maintain the aesthetic attractiveness of Waikiki, promote public safety and orderly movement of pedestrians, protect the local merchant economy, and prevent the nonprofit vendors from pressuring or defrauding potential buyers. These are laudable civic goals. But obvious, less restrictive means for achieving these same aims are readily available, and the majority simply chooses to ignore them.

To control congestion and visual blight, Honolulu can easily prohibit the nonprofits from setting up their stands in the most congested areas, such as areas near street intersections. Honolulu can also limit the size or number of stands that nonprofits may operate on each block, or restrict sales during certain times of the day, such as during the morning and afternoon rush hours. To protect the local merchant economy, Honolulu can require the nonprofits to display prominent signs on each stand, which is what some nonprofits already do.^{FN2} Signs would clearly identify each organization as a nonprofit. This would make it obvious to tourists and other passersby that they are not dealing with

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the traditional souvenir shop. *1022 Finally, to prevent fraud and duress, Honolulu can employ traditional legal methods, such as prosecuting those who actually commit such crimes. See *Martin v. Struthers*, 319 U.S. 141, 148, 63 S.Ct. 862, 865, 87 L.Ed. 1313 (1943) (invalidating ordinance which prohibited the distribution of handbills to residences because city can punish those who harass or defraud occupants); cf. *Schneider v. State*, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) (invalidating ordinance which prohibited passing out leaflets on city streets because obvious alternative methods such as punishing those who litter would effectively solve the littering problem).

FN2. For example, One World One Family Now's T-shirt stands display a sign that reads "One World Family."

In sum, a cursory glance at the available options reveals numerous less-restrictive alternatives to an outright ban on the sale of message-bearing T-shirts by nonprofits on Waikiki. Because Honolulu disregards obvious, far less restrictive, and more precise methods of achieving the same ends, Honolulu's ordinance is not narrowly tailored. See *Discovery Network*, 507 U.S. at 417 n. 13, 113 S.Ct. at 1510 n. 13; *Project 80's*, 942 F.2d at 638.

B

The majority also claims that plaintiff organizations remain free to spread their message through other media or in other places. Yet such alternative modes of communication may nevertheless be constitutionally inadequate if the speaker's "ability to communicate effectively is threatened." *Bay Area Peace Navy*, 914 F.2d at 1229 (citations omitted). The Supreme Court has given us guidance on this point in *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994).

In *Ladue*, private property owners challenged an ordinance that prohibited display of any signs on their property other than "For Sale" or "For Rent." The

Court struck down the ordinance because the City of Ladue foreclosed a "unique" and "important" medium of expression-the display of a sign on one's property to express a point of view. *Id.* at ---, 114 S.Ct. at 2045. The Court rejected the city's argument that the regulation left open ample alternative channels of communication because it found that hand-held signs and other media were not an adequate substitute for posted signs:

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.

Id. at ---, 114 S.Ct. at 2046.

Similarly, the T-shirt sales in this case constitute an effective and inexpensive medium of expression. When combined with oral proselytizing and literature distribution, selling message-bearing T-shirts is a particularly effective form of charitable solicitation. Indeed, a listener is more likely to expend funds to support a particular cause if he receives, in return, a T-shirt that communicates a message to him and that allows him to express *his* support for the cause by wearing it.

For the plaintiff organizations, Waikiki is a location uniquely suited to their mission. Waikiki is the social and economic center of not just the City of Honolulu, but also of the State of Hawaii. The nonprofits offered evidence that they selected Waikiki to sell their T-shirts because the area would allow them to share their philosophies with a large number of people who visit Hawaii from all over the world. Depriving plaintiffs of access to Waikiki separates them from a large and diverse audience.

The majority assumes the existence of other forums for plaintiffs' First Amendment activities. But we have held that an alternative is not adequate if the speaker is not permitted to reach the "intended audience." *Bay Area Peace Navy*, 914 F.2d at 1229. In *Bay Area Peace Navy*, we invalidated a Coast

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Guard regulation that prohibited protesters from demonstrating within a 75-yard radius of the pier during the annual "Fleet Week" celebration. We found that the 75-yard zone completely insulated the audience from the anti-war and anti-militarization views of the demonstrators. 914 F.2d at 1230. *See also Ladue*, 512 U.S. at ----, 114 S.Ct. at 2046 (alternatives to posting signs on residential property such as posting signs on commercial property are inadequate because residents may wish to reach neighbors); *1023 *Students Against Apartheid Coalition v. O'Neil*, 660 F.Supp. 333, 339-40 (W.D.Va.1987) (university regulation prohibiting shanties on lawn of building where Board of Visitors meets, impermissibly insulates the Board, the intended audience, from the protest), *aff'd*, 838 F.2d 735 (4th Cir.1988).

Here, the majority allows the City of Honolulu to exile plaintiff organizations from Waikiki. In so doing, it allows their removal from Waikiki's large and diverse audience and prevents them from spreading their message in an efficient and effective manner. Under *Bay Area Peace Navy*, Honolulu must afford plaintiffs an opportunity to reach their intended audience. This is especially true when, as discussed above in part A, there are reasonable alternative means to achieve legitimate government interests.

Accordingly, I dissent.

C.A.9 (Hawaii), 1996.

One World One Family Now v. City and County of Honolulu

76 F.3d 1009, 64 USLW 2531, 24 Media L. Rep. 1434, 96 Cal. Daily Op. Serv. 981, 96 Daily Journal D.A.R. 1623

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409 F.3d 1113, 05 Cal. Daily Op. Serv. 4630, 2005 Daily Journal D.A.R. 6366
(Cite as: 409 F.3d 1113)

H

United States Court of Appeals,
Ninth Circuit.
Victor MENOTTI; Thomas Sellman; Todd Stedl;
Doug Skove, Plaintiffs-Appellants,
v.

CITY OF SEATTLE; Paul Schell, Former Mayor of
the City of Seattle; Norman Stamper, Former Chief
of Police of the City of Seattle; Sharon Stevens, a
Seattle Police Detective; Ronald Smith, a Seattle
Police Officer, Defendants-Appellees.

Kenneth Hankin; Jennifer Hudziec; Stephanie
Lane; Denise Cooper; Nicole Pearson; on behalf of
themselves and all others similarly situated;
Plaintiffs-Appellants,
v.

City of Seattle; Paul Schell, Former Mayor of the
City of Seattle; Norman Stamper, Former Chief of
Police of the City of Seattle, Defendants-Appellees.
Nos. 02-35971, 02-36027.

Argued and Submitted Feb. 6, 2004.

Submission Vacated Feb. 17, 2004.

Resubmitted April 14, 2004.

Filed June 2, 2005.

Background: Arrestees brought class action, challenging constitutionality of city emergency order prohibiting access to portions of downtown during international trade conference, and individual claims for violations of constitutional rights. The United States District Court for the Western District of Washington, Barbara J. Rothstein, J., 2002 WL 32168077, granted summary judgment for city, and appeal was taken.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

(1) order was facially valid time, place, and manner restriction;

(2) fact issue existed as to whether officers were acting pursuant to municipal policy when they implemented order in allegedly unconstitutional man-

ner; and

(3) fact issue existed as to whether officer's warrantless seizure of protestor's sign was justified by exigent circumstances.

Affirmed in part, reversed in part, and remanded.

Paez, Circuit Judge, concurred in part, dissented in part, and filed opinion.

West Headnotes

[1] Municipal Corporations 268 ¶594(2)

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of Power

268k594 Ordinances and Regulations in General

268k594(2) k. Form and Sufficiency in General. Most Cited Cases

Municipal ordinance is facially unconstitutional if (1) it is unconstitutional in every conceivable application because it is vague or impermissibly restricts protected activity or (2) it seeks to prohibit such broad range of protected conduct that it is unconstitutionally overbroad.

[2] Constitutional Law 92 ¶1513

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or Restrictions

92k1513 k. Governmental Disagreement with Message Conveyed. Most Cited Cases

(Formerly 92k90(3))

Principal inquiry in determining content neutrality, in speech cases generally and in time, place, or

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manner cases in particular, is whether government has adopted regulation of speech because of disagreement with message it conveys. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 🔑 1730

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1730 k. In General. Most Cited Cases

(Formerly 92k90.1(4))

Fundamental principle behind content analysis of speech restriction is that government may not grant use of forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 🔑 1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited Cases

(Formerly 92k90(3))

Whether speech restriction is content neutral or content based is something that can be determined on face of it; if restriction describes speech by content then it is content based. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 🔑 1758

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1758 k. Public Squares, Plazas, and Greens. Most Cited Cases

(Formerly 92k90.1(4))

Constitutional Law 92 🔑 1845

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(K) Protests and Demonstrations in General

92XVIII(K)1 In General

92k1845 k. In General. Most Cited Cases

(Formerly 92k90.1(4))

Municipal Corporations 268 🔑 596

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of Power

268k596 k. Public Peace and Order. Most Cited Cases

Emergency order prohibiting access to portions of city's downtown area during international trade conference was content neutral, for purpose of determining its facial constitutionality; order, though predominantly affecting anti-conference protestors, prohibited protests, in support of or against, any topic within restricted zone. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 🔑 2487

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2485 Inquiry Into Legislative Judgment

92k2487 k. Motive. Most Cited

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(Formerly 92k70.3(2))
Court will not strike down otherwise constitutional statute on basis of alleged illicit legislative motive.

[7] Constitutional Law 92 1505

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1505 k. Narrow Tailoring. Most Cited Cases

(Formerly 92k90(3))

To be narrowly tailored, speech restriction need not be least restrictive means of furthering government's interests, but restriction may not burden substantially more speech than necessary to further such interests. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 1725

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)1 In General

92k1725 k. In General. Most Cited Cases

(Formerly 92k90.1(4))

Constitutional Law 92 1758

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1758 k. Public Squares, Plazas, and Greens. Most Cited Cases

(Formerly 92k90.1(4))

Municipal Corporations 268 596

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of Power

268k596 k. Public Peace and Order. Most Cited Cases

Emergency order prohibiting access to portions of city's downtown area during international trade conference was narrowly tailored to serve significant governmental interest in maintaining public order, for purpose of determining whether it was reasonable time, place, and manner restriction; zone covered only enough territory for delegates to move safely from their hotels to conference site, lasted only during conference, and was justified by difficulty of protecting delegates in environment in which small group of violent protestors were determined to cause chaos and to disrupt conference proceedings amidst tens of thousands of non-violent protestors. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 1509

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1508 Time, Place, or Manner Restrictions

92k1509 k. In General. Most Cited Cases

(Formerly 92k90(3))

Time, place, and manner restriction does not violate First Amendment simply because there is some imaginable alternative that might be less burdensome on speech. U.S.C.A. Const. Amend. 1.

[10] Constitutional Law 92 1498

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1498 k. Absolute Nature of Right. Most Cited Cases

(Formerly 92k90(3))

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First Amendment does not guarantee right to communicate one's views at all times and places or in any manner that may be desired. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 🔑 1509

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1508 Time, Place, or Manner Restrictions

92k1509 k. In General. Most Cited Cases

(Formerly 92k90(3))

Alternative mode of communication left available by speech restriction may be constitutionally inadequate if speaker's ability to communicate effectively is threatened. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 🔑 1845

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(K) Protests and Demonstrations in General

92XVIII(K)1 In General

92k1845 k. In General. Most Cited Cases

(Formerly 92k90.1(4))

Municipal Corporations 268 🔑 596

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of Power

268k596 k. Public Peace and Order. Most Cited Cases

Emergency order prohibiting access to portions of city's downtown area during international trade conference left ample alternative channels of communication, for purpose of determining whether it

was reasonable time, place, and manner restriction; protestors were able to demonstrate and express their views immediately outside restricted zone, including positions directly across street from relevant sites. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 🔑 1490

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1490 k. In General. Most Cited Cases

(Formerly 92k90(1))

First Amendment does not require that individuals retain most effective means of communication, but only that individuals retain ability to communicate effectively. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 🔑 1510

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1508 Time, Place, or Manner Restrictions

92k1510 k. Reasonableness. Most Cited Cases

(Formerly 92k90(3))

To comply with First Amendment, even a reasonable time, place, and manner restriction on speech must contain adequate standards to guide official's decision and render it subject to effective judicial review. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 🔑 1758

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and

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Events

92k1758 k. Public Squares, Plazas, and
Greens. Most Cited Cases
(Formerly 92k90.1(4))

Municipal Corporations 268 ⚡ 594(2)

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of
Power

268k594 Ordinances and Regulations in
General

268k594(2) k. Form and Sufficiency in
General. Most Cited Cases

Emergency order prohibiting access to portions of
city's downtown area during international trade
conference was not facially overbroad restriction on
speech, even though it gave officers discretion to
permit persons with reasonable purpose to enter
zone. U.S.C.A. Const.Amend. 1.

[16] Civil Rights 78 ⚡ 1351(1)

78 Civil Rights

78III Federal Remedies in General

78k1342 Liability of Municipalities and Oth-
er Governmental Bodies

78k1351 Governmental Ordinance,
Policy, Practice, or Custom

78k1351(1) k. In General. Most Cited
Cases

Section 1983 liability may attach to municipality
only where municipality itself causes constitutional
violation through execution of government's policy
or custom, whether made by its lawmakers or by
those whose edicts or acts may fairly be said to rep-
resent official policy. 42 U.S.C.A. § 1983.

[17] Civil Rights 78 ⚡ 1351(1)

78 Civil Rights

78III Federal Remedies in General

78k1342 Liability of Municipalities and Oth-
er Governmental Bodies

78k1351 Governmental Ordinance,

Policy, Practice, or Custom

78k1351(1) k. In General. Most Cited
Cases

Existence of municipal policy or custom may be es-
tablished, for purpose of imposing § 1983 liability
on city, by showing: (1) longstanding practice or
custom which constitutes standard operating pro-
cedure; (2) that decision-making official was, as
matter of state law, final policymaking authority
whose edicts or acts may fairly be said to represent
official policy in area of decision; or (3) that offi-
cial with final policymaking authority either deleg-
ated that authority to, or ratified decision of, subor-
dinate. 42 U.S.C.A. § 1983.

[18] Federal Civil Procedure 170A ⚡ 2491.5

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2491.5 k. Civil Rights Cases in
General. Most Cited Cases

Issue of material fact as to whether police officers
were acting pursuant to municipal policy when they
allegedly implemented emergency order, prohibit-
ing access to portions of city's downtown area dur-
ing international trade conference, in manner that
excluded only conference protestors precluded
summary judgment on question of city's § 1983 li-
ability. 42 U.S.C.A. § 1983.

[19] Civil Rights 78 ⚡ 1355

78 Civil Rights

78III Federal Remedies in General

78k1353 Liability of Public Officials

78k1355 k. Vicarious Liability and Re-
spondeat Superior in General; Supervisory Liability
in General. Most Cited Cases

Section 1983 liability is imposed against supervi-
sory official in his individual capacity for his own
culpable action or inaction in training, supervision,
or control of his subordinates, for his acquiescence
in constitutional deprivations of which complaint is
made, or for conduct that showed reckless or cal-

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lous indifference to rights of others. 42 U.S.C.A. § 1983.

[20] Civil Rights 78 ⚡1358

78 Civil Rights

78111 Federal Remedies in General

78k1353 Liability of Public Officials

78k1358 k. Criminal Law Enforcement; Prisons. Most Cited Cases

Mayor and police chief, responsible for facially constitutional emergency order, prohibiting access to portions of city's downtown area during international trade conference, could not be held personally liable under § 1983 for allegedly unconstitutional applications of order, absent evidence that they personally took part in alleged constitutional violations or caused constitutional violations through their individual actions. 42 U.S.C.A. § 1983.

[21] Arrest 35 ⚡63.4(2)

35 Arrest

3511 On Criminal Charges

35k63 Officers and Assistants, Arrest Without Warrant

35k63.4 Probable or Reasonable Cause

35k63.4(2) k. What Constitutes Such Cause in General. Most Cited Cases

Test for probable cause to arrest is whether facts and circumstances within officer's knowledge are sufficient to warrant prudent person, or one of reasonable caution, to believe, in circumstances shown, that suspect has committed, is committing or is about to commit offense. U.S.C.A. Const.Amend. 4.

[22] Federal Civil Procedure 170A ⚡2491.5

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2491.5 k. Civil Rights Cases in General. Most Cited Cases

Issue of material fact as to arrestee's behavior at time he was arrested for pedestrian interference and obstructing officer precluded summary judgment on his claim that police lacked probable cause to make arrest. U.S.C.A. Const.Amend. 4.

[23] Civil Rights 78 ⚡1351(4)

78 Civil Rights

78111 Federal Remedies in General

78k1342 Liability of Municipalities and Other Governmental Bodies

78k1351 Governmental Ordinance, Policy, Practice, or Custom

78k1351(4) k. Criminal Law Enforcement; Prisons. Most Cited Cases

City could not be held liable, under § 1983, for unidentified police officer's allegedly unlawful search of protestor's bag and seizure of protestor's fliers, absent evidence of city policy or custom of committing such unlawful searches and seizures. 42 U.S.C.A. § 1983.

[24] Federal Courts 170B ⚡776

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk776 k. Trial De Novo. Most Cited Cases

District court's grant of qualified immunity from § 1983 liability is reviewed de novo. 42 U.S.C.A. § 1983.

[25] Arrest 35 ⚡71.1(8)

35 Arrest

3511 On Criminal Charges

35k71.1 Search

35k71.1(8) k. Search Not Incident to Arrest; Time and Distance Factors. Most Cited Cases
Officer's warrantless seizure of protestor's sign could not be justified as incident to arrest, even if officer had probable cause to make arrest, where no arrest was made. U.S.C.A. Const.Amend. 4.

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[26] Federal Civil Procedure 170A ⚡ 2491.5

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.5 k. Civil Rights Cases in General. Most Cited Cases
Issue of material fact as to whether exigent circumstances justified officer's warrantless seizure of protestor's sign precluded summary judgment on protestor's Fourth Amendment claim. U.S.C.A. Const.Amend. 4.

[27] Arrest 35 ⚡ 63.4(1)

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without Warrant
35k63.4 Probable or Reasonable Cause
35k63.4(1) k. Grounds for Warrantless Arrest in General. Most Cited Cases
There is no general exception to Fourth Amendment's warrant requirement for conduct that, absent special needs consistent with Supreme Court's precedents, is asserted to be "reasonable." U.S.C.A. Const.Amend. 4.

[28] Civil Rights 78 ⚡ 1376(6)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(6) k. Sheriffs, Police, and Other Peace Officers. Most Cited Cases
Reasonable police officer would have understood that his warrantless seizure of protestor's sign without arrest and without exigency offended guarantees of Fourth Amendment, for purpose of determining officer's entitlement to qualified immunity from § 1983 liability. 42 U.S.C.A. § 1983.

[29] Constitutional Law 92 ⚡ 1845

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(K) Protests and Demonstrations in General
92XVIII(K)1 In General
92k1845 k. In General. Most Cited Cases
(Formerly 92k90.1(4))

Municipal Corporations 268 ⚡ 189(1)

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k179 Police
268k189 Rights, Duties, and Liabilities of Policemen
268k189(1) k. In General. Most Cited Cases
Police officer who seized protestor's sign did not violate protestor's First Amendment rights; only evidence was that sign was seized due to protestor's violation of emergency order, prohibiting protests in portions of city's downtown area during international trade conference, and not out of any opposition to protestor's political beliefs or desire to chill protestor's speech. U.S.C.A. Const.Amend. 1.
*1117 James E. Lobsenz, Carney Badley Spellman, P.S., and Aaron H. Caplan, American Civil Liberties Union of Washington, Seattle, WA, for appellants Victor Menotti, Thomas Sellman, Todd Stedl, and Doug Skove.

Steve W. Berman, Hagens Berman LLP, Seattle, WA, Arthur H. Bryant, Trial Lawyers for Public Justice, Oakland, CA, and Michael E. Withey, Stritmatter Kessler Whelan Withey Coluccio, Seattle, WA, for appellants Kenneth Hankin, Jennifer Hudziec, Stephanie Lane, Denise Cooper, and Nicole Pearson.

Ted Buck, Stafford Frey Cooper, P.C., Seattle, WA,

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for the appellees.

Appeal from the United States District Court for the Western District of Washington; Barbara J. Rothstein, District Judge, Presiding. D.C. Nos. CV-00-00372-BJR, CV-00-01672-BJR.

Before RONALD M. GOULD, RICHARD A. PAEZ, Circuit Judges, and ROSLYN O. SILVER, ^{FN*} District Judge.

FN* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

Opinio by Judge GOULD; Partial Concurrence and Partial Dissent by Judge PAEZ.

OPINION

GOULD, Circuit Judge:

In this case we search for the proper balance between, on the one hand, the vibrant rights of free speech and assembly in an open society and, on the other hand, the needs of a city to maintain order and security. We consider the constitutionality of an emergency order prohibiting access to portions of downtown Seattle, Washington, during the 1999 World Trade Organization (WTO) conference. Appellants filed lawsuits in the United States District Court for the Western District of Washington seeking damages for the constitutional*1118 rights that were alleged to be violated by the emergency order. Four of the Appellants also filed individual claims in which they alleged that their constitutional rights were infringed by Seattle police officers in the course of the conference. We determine that the emergency order was a constitutional time, place, and manner restriction on speech on its face, and we affirm the judgment of the district court on that issue. But we also determine that there are genuine issues of material fact whether the emergency order

was constitutional as applied to certain Appellants, and we reverse and remand for trial on that issue. As for the Appellants' individual claims, we affirm in part, reverse in part, and remand.

I

On October 2, 2000, Plaintiffs-Appellants Kenneth Hankin, Jennifer Hudziec, Stephanie Lane, Denise Cooper, and Nicole Pearson (the Hankin plaintiffs) ^{FN1} filed suit against the City of Seattle, then-Seattle Mayor Paul Schell, and then-Seattle Police Chief Norman Stamper in the United States District Court for the Western District of Washington, on behalf of a class defined as:

FN1. Robert Hickey, Carroll Jackson, and Emily Maloney were also named plaintiffs in the lawsuit, but they are not parties to this appeal.

All persons who were arrested by the City of Seattle and its police agents or its affiliated police agents on December 1 and 2, 1999, pursuant to the defendants' "no protest" policies and directives which were eventually embodied by the City of Seattle's Local Proclamation of Civil Emergency Order Number 3 (and subsequent revisions) and who were subsequently not convicted of any crime. Included in this class are all persons arrested pursuant to such policies both inside and outside the zone established by Order Number 3.

The Hankin plaintiffs sought damages, alleging that defendants violated their rights under the United States Constitution. The Hankin plaintiffs also requested declaratory relief stating that the emergency order violated the United States Constitution.

On March 7, 2000, Victor Menotti, Thomas Sellman, Todd Stedl and Doug Skove (the Menotti plaintiffs) filed a lawsuit against the City of Seattle, Schell, Stamper, and Officer Michael Jennings and Detective Sharon Stevens of the Seattle Police De-

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partment.^{FN2} The Menotti plaintiffs filed an amended complaint on January 9, 2002, adding Seattle Police Department Officer Ronald Smith as a defendant. The Menotti plaintiffs alleged that defendants violated their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution and sought damages. Menotti and Sellman also alleged that defendants committed false arrest.

FN2. Andrew Russell, Lauren Holloway, and Ronald Matyjas were also plaintiffs in the lawsuit, but they are not part of this appeal. Officer Jennings is also not part of this appeal.

The district court consolidated the two cases for the purpose of resolving legal issues common to all parties. On October 29, 2001, the district court granted the defendants' motion for partial summary judgment regarding the constitutionality of the emergency order, holding that as applied it was a constitutional time, place, and manner restriction on speech. The district court concluded that the emergency order: (1) was content neutral in that it did not exclude speech based on content or viewpoint, (2) was narrowly tailored because it "covered only enough territory for the WTO delegates and the President [of the United States] to move safely from *1119 their hotels to the convention [center] and lasted only during the conference," (3) served a significant government interest of maintaining order in an emergency situation, and (4) provided ample alternatives for expression because protestors could demonstrate just outside the boundaries of the restricted zone.

The district court denied the plaintiffs' cross-motion for summary judgment on the constitutionality of the emergency order as applied. The district court also granted the City's motion for summary judgment on the Hankin plaintiffs' claims under 42 U.S.C. § 1983 alleging a failure to train or supervise officers, holding that the Hankin plaintiffs had not presented any evidence supporting this contention.

On January 8, 2002, the district court denied the Hankin plaintiffs' motion for class certification. On August 29, 2002, the district court granted summary judgment to all defendants as to the Hankin plaintiffs' remaining claims, based on the district court's ruling of the constitutionality of the emergency order. The district court entered final judgment as to the Hankin plaintiffs pursuant to Fed.R.Civ.P. 54(b) on November 5, 2002.

As for the lawsuit filed by the Menotti plaintiffs, the district court on November 1, 2001, denied the Menotti plaintiffs' motion for partial summary judgment based on the alleged federal constitutional violations. On January 14, 2002, the district court, based on its ruling that the emergency order was constitutional, granted the defendants' motion for summary judgment as to Sellman's claims. However, the district court denied the defendants' motion for summary judgment as to the claims of Skove and Stedl, finding that genuine issues of material fact existed as to the circumstances of their arrests.

On January 14, 2002, the district court also granted defendants' motion to dismiss the Menotti plaintiffs' claims against Schell and Stamper in their individual capacities, holding that the Menotti plaintiffs had not provided any evidence showing that Schell or Stamper were personally involved in the seizure or arrest of these plaintiffs.

On August 15, 2002, the district court granted Officer Smith's motion for summary judgment based on qualified immunity as to Skove's claims. The district court determined that Smith was entitled to qualified immunity on Skove's Fourth Amendment claim because Smith had acted reasonably, and further that Smith was entitled to qualified immunity on Skove's First Amendment claim because no constitutional violation had occurred. The district court denied Skove's cross-motion for summary judgment on the same claims.

Finally, on October 1, 2002, the district court granted summary judgment to the City on Menotti and

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Stedl's claims under 42 U.S.C. § 1983, holding that there was probable cause to arrest Menotti, and that Menotti and Stedl had submitted no evidence of a municipal policy or custom of illegally seizing or searching handbags. The district court entered final judgment as to the Menotti plaintiffs on October 1, 2002.

The Menotti plaintiffs filed a timely notice of appeal on October 23, 2002. The Hankin plaintiffs filed a timely notice of appeal on November 13, 2002. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand.

II

In reviewing de novo the district court's grant of summary judgment, where the facts are disputed we view the evidence in the light most favorable to the non-moving party. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003). We determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant *1120 substantive law. We do not weigh the evidence or determine the truth of disputed material facts, but determine only whether there is a genuine issue for trial. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir.1999) (en banc).

The WTO is an international group comprised of member nations that discuss trade issues and enter into trade agreements.^{FN3} In January 1999, the White House announced that the City of Seattle, Washington (the City) had been selected as the location for the first WTO conference to be held in the United States. The conference was to take place from November 30, 1999 to December 3, 1999. Representatives from the 134 WTO-member nations,^{FN4} including the President of the United States, were to convene in Seattle.

FN3. The WTO was established on January 1, 1995, during the Uruguay Round negotiations held pursuant to the General Agreement on Tariffs and Trade. Accord-

ing to its web site, the WTO "is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business." What is the WTO?, *at* http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Oct. 7, 2004). The WTO's objectives have generated a vigorous opposition by those who believe that the WTO "favor[s] trade expansion over all else." Lynda Gorov, *The Varied Foes of WTO Unite in Seattle Protests*, Boston Globe, Nov. 30, 1999, at A1.

FN4. As of the filing date of this Opinion, the WTO has 148 member nations.

Those who opposed the WTO's agenda and specific activities convened in Seattle well in advance of the opening of the conference, and protest activity began taking place. Three weeks before the opening of the conference, unknown individuals broke windows at a Gap clothing store in downtown Seattle and threw several "Molotov cocktails" ^{FN5} into the building, causing substantial damage. The "anarchist" ^{FN6} symbol was spray-painted onto the walls of the Gap store and on the adjoining sidewalk. Other protestors attempted to gain entry into downtown Seattle offices of timber and forest product companies. Protestors trespassed onto downtown Seattle's Old Navy store, and hung a huge protest banner on the face of the storefront. On November 26, 1999, the day after Thanksgiving, a group of fifty to sixty protestors entered a parade without permission to protest the WTO.

FN5. A "Molotov cocktail" is an explosive device consisting of "a bottle, gasoline, and a rag." *United States v. Simmons*, 83 F.3d 686, 687 (4th Cir.1996).

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FN6. "The anarchist movement represents a range of groups, from organized and primarily nonviolent groups like the Industrial Workers of the World to loosely knit and more extremist splinter groups...." Ruth Teichroeb, *Fringe Anarchists in Middle of Violent Demonstrations*, Seattle Post-Intelligencer, Dec. 1, 1999, at A15. The "anarchist" symbol consists of the letter "A" in a circle, and the symbol "is one of the most familiar symbols of anarchism and represents the slogan 'Anarchy Is Order.'" *Id.*

Protest activity began to intensify on November 29, 1999, one day ahead of the WTO conference. While most protestors were peaceful, others were violent. The level of violence cannot be considered de minimis and in some cases posed threats to persons.^{FN7} Some protestors vandalized property by spray painting buildings and breaking windows. Others pounded on windows of downtown stores and threw *1121 rocks at police officers. Police formed a security perimeter around the Niketown store in downtown Seattle because of protestors encouraging a crowd to take over the store. Damage to property and risks to individuals on this day were not insignificant, though limited in geographic area to a few blocks in the center of the City, and protestors dispersed late into the evening.^{FN8}

FN7. The dissent, while acknowledging that violence occurred, argues that our "account exaggerates its pervasiveness" because most protestors were peaceful. Dissent at 1160. We of course explicitly recognize that "most protestors were peaceful," but this does not negate the harsh reality and striking import of the widespread violence instigated by those protestors who were not peaceful. Moreover, the description of the WTO riots that follows is not just that of the majority. The whole world witnessed the rampant violence and chaos in the streets

of Seattle at the outset of the WTO meeting. The dissent's account misapprehends reality by minimizing the violence and its import. Any fair and objective review of the record would lead to the conclusion that District Judge Barbara J. Rothstein's order granting summary judgment to the City correctly described an emergency situation marked by pervasive vandalism, theft, arson, and assault that overwhelmed law enforcement resources. These acts of violence are undisputed in the record before us. One may disagree on the legal implications of the violence under First Amendment doctrine, and doubtless we and the dissent do so disagree. But to minimize the violence and threat to the City, to visiting foreign dignitaries, and to Seattle's citizens, as our dissenting colleague does, is wrong.

FN8. Appellants have not alleged a negligence cause of action against the City for having advance notice of but failing to prevent the chaos that stemmed from the violence that marred the WTO conference. However, the pattern of protest propagating civil disorder and violence is relevant to understanding the City's interest in restoring and maintaining order to allow the WTO conference to proceed securely. Our dissenting colleague fails to give this interest adequate heed.

The WTO conference opened formally on November 30, 1999, and from law enforcement's perspective, things got worse. Police logs indicate that demonstrators gathered in the downtown area as early as 5:45 a.m. At least some among the protestors had violent intentions. On a videotape introduced as part of the record, a masked protestor says, "50,000 people that really care.... I'm hoping that we can come out here, and get crazy and fucking up shit ..., that every city in the world knows that it can't host the WTO conference and it better

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give control of the city back to the people or that city's going to be torn to pieces."

Those protestors who chose to use violence to disrupt the WTO's conference used an array of weapons, devices, and tactics to obstruct the conference. The disruption of normal city life was so extreme in some locations that it bordered on chaos. Police officers in contemporaneous reports said that they saw protestors carrying bottles filled with flammable liquids, locking down intersections by forming human chains from lightpost to lightpost, breaking windows at retail stores,^{FN9} overrunning and looting small retail stores, and jumping on cars. By 8:00 a.m., protestors had cut off vehicular access to the Paramount Theater and the Washington State Convention & Trade Center, the primary meeting venues of the conference. After demonstrators were discovered inside meeting venues, police requested and received a "lock down"^{FN10} of the Washington State Convention & Trade Center and the Sheraton Hotel, where many WTO delegates were staying.^{FN11} Seattle Police Department, *1122 *The Seattle Police Department After Action Report, World Trade Organization Ministerial Conference*, Apr. 4, 2000, at 36-39 [hereinafter "*WTO After Action Report*"].

FN9. Niketown, the site of protest on the prior day, again attracted the attention of violent protestors. Officers received reports that Niketown was being ransacked by protestors, and the officers had to rescue employees through a rear alley door.

FN10. A "lock down" of these facilities meant that no persons could enter or exit.

FN11. The increased level of protection for delegates was necessary for their security. It also was even more important because WTO meeting venues had been designated the equivalents of foreign embassies, mandating heightened security protection.

Some protestors directed violence at law enforce-

ment authorities: Among the violent, there were protestors who assaulted police officers with chemical irritants, and others who vandalized police cars. Some violent protestors threw metal spikes, cans, bottles, signs, empty gas canisters, and pieces of concrete at officers, who were forced to wear riot gear for protection. Other protestors deliberately disregarded police lines and attempted to break through in violent confrontations with police. According to a report of the Seattle City Council prepared after the WTO convention, "officers were put in perilous situations where, often cut off from communication, they were expected to endure physical assaults and taunts for long periods without food, rest, restrooms, or water." Seattle City Council, *Report of the WTO Accountability Review Committee*, Sept. 14, 2000, at 5 [hereinafter "*ARC Report*"]. Some officers were "violently barged with ball bearings ('pachinko' balls), rocks and bottles,[and] squirted with urine." *Id.* at 10 & n. 14. One police officer on duty suffered a heart attack, and a helicopter evacuation was required because medical units could not break through the gathered crowd to provide medical assistance.

Some officers did not take the passive resistance approach in response to being targeted by violence, and mutual insecurity among police and protestors caused the situation to spiral out of control. In lieu of large-scale arrests, some officers responded with tear gas and similar non-lethal weapons like pepper gas, beanbag guns, and rubber bullets. *Id.* at 4. The gravity of the situation caused some officers to resort to measures characterized later by the City Council as "out of proportion to the threats faced," provoking further disturbance and resistance from violent protestors.^{FN12} *Id.* at 4, 11.

FN12. The dissent focuses on the Seattle Police Department for its response, finding significance in the City Council's remark that officers "likely intensified the situation." Dissent at 1161. The dissent's characterization is incorrect as a description of police conduct as a whole, and in any

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event is irrelevant to the analysis of Order No. 3's constitutionality. The City Council's *ARC Report* acknowledges that "police officers on the front lines had no basis for confidence that the violence would stop with rocks and bottles," and the report "thankfully endorses the performance of those officers who underwent unnecessary hardship and were the victims of poor planning and leadership in the field." *ARC Report* at 4, 10. Moreover, whether Order No. 3 comports with the First Amendment does not turn on who is to blame for the intensity of the situation that the City faced. See discussion *infra* Part III. Whatever the complex of causes, the City was faced with riots and disorder beyond its control that threatened the safety of visiting foreign officials, prompting Order No. 3, and its permissibility must be assessed in light of the crisis facing the City when it was adopted. Finally, it is also likely that most of the time when police attempt to quiet a violent disturbance the situation is intensified, which is a collateral consequence of law enforcement's response to violent protest.

The general public was also at risk. Some violent protestors started fires in the streets and in large dumpsters, and then protestors prevented fire trucks from entering the area. A driver of a garbage truck was pulled from his vehicle and assaulted in the core downtown area. Once police were overwhelmed, some uses of non-lethal weapons, such as chemical irritants, failed to discern law-abiding demonstrators and bystanders from the law-breakers they were intended to disperse. Not only dignitaries from many nations *1123 worldwide with interest in the WTO's trade conference, but also, regrettably, panic, confusion, and chaos were visiting Seattle.

Some protestors even directly interfered with WTO delegates in an effort to disrupt the progress of the

conference. Some violent protestors held, pushed, or tackled WTO delegates to prevent their entry into conference venues. Some WTO delegates were forcibly prevented from leaving conference venues. Some violent protestors stopped one delegate's car and punctured its tires. Reflecting the extreme dangers to delegates, protestors, and the public, at least one WTO delegate drew a gun in response to the protestors' attempts to detain him, requiring immediate police intervention.

Some violent protestors were well-organized, and their actions were coordinated. Some protestors gathered intelligence about police operations during the protest by asking officers questions about law enforcement tactics. Other protestors listened in on squad briefings taking place on city streets. Still others used cellular telephones and "walkie-talkies" to coordinate protestors' activities.^{FN13} By one account, Seattle's streets turned into "seeming war zones." *ARC Report* at 4. It is perplexing how our dissenting colleague can rely on the City Council's report, with its acknowledgment of the "war zone" atmosphere in Seattle, and still urge the violence was not pervasive; although the *ARC Report* suggests that violent protestors were less than one percent of the total protestors, this is not a small amount of violence given the activities in which the protestors engaged, and where there were tens of thousands of protestors.

FN13. On the previous day, a protestor on a bicycle rode ahead of a group of protestors, communicating to the crowd via radio the locations of police officers.

Despite the gravity of these problems, not all protest was violent or disruptive. Much protest activity was ordered and reasonable. Several marches involving primarily peaceful protestors took place in the downtown area on November 30, 1999. These marches, comprised of concerned persons who were not violent and who were not breaking the law, caused the inflow of tens of thousands of persons into downtown Seattle. The largest protest of the day, a march organized by the AFL-

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CIO, was estimated by police to have involved 40,000 persons. Other protest marches involving significant numbers of persons included a march of about 1000 members of the Sierra Club, a march of 500 students from the University of Washington, and a march of 1000 protestors from the Tibetan Rights Association. These marches by non-violent protestors showed the substantial public sentiment opposing the WTO or its activities. Protests such as these are the positive fruits of an open society, and encourage us to scrutinize with care the constitutional issues raised by city and police responses to the breakdown of civic order and security caused by violent protestors seeking to disrupt the WTO conference.^{FN14}

FN14. The dissent's characterization of the decision to enact Order No. 3 as following the realization that the "crowd was simply larger than the police had anticipated" again ignores the violence and riot that threatened the WTO conference. It misapprehends the extent of disorder and insecurity caused by the large crowd: The police "were not going to be able to bring the situation under control without taking some sort of drastic action," and "the only recourse" they had was to "establish the police perimeter" to "provide security for the delegates." See Dissent at 1160.

As noted by the Seattle Police Department's *WTO After Action Report*, these largely peaceful demonstrations took place *1124 amid the chaos and disruption caused by the violent protestors. The report also specified that the combination of heightened security measures required for WTO delegates and the large number of protestors rendered police unable effectively to make individual arrests of those protestors who were breaking the law. The report stated:

This was a pattern that occurred throughout the conference and presented significant tactical challenges to police commanders. The protestors were establishing a fluid, dynamic method of op-

eration that consisted of rapid deployment and the use of non-criminal protestors to buffer smaller pockets of protestors engaging in significant criminal acts.

WTO After Action Report at 35. One Seattle police captain's report noted that officers "heard and saw numerous incidents of property destruction, burglary, and looting; but we were unable to leave our lines to take enforcement actions."

At about 3:30 p.m. on November 30, 1999, then-Seattle Mayor Paul Schell declared a civil emergency in the City of Seattle, pursuant to Seattle Municipal Code Section 10.02. The Mayor also imposed a general curfew. The governor of the State of Washington then authorized the deployment of, and called out, the National Guard.^{FN15}

FN15. The dissent chastises the City for poor planning driven by political and cost considerations. Dissent at 1161. This condemnation does not control whether Order No. 3 comports with the First Amendment. Our analysis properly focuses on the City's chosen means to restore order once lost to violent protestors bent on preventing the WTO conference from proceeding. See discussion *infra* Part III.A.2.

President Clinton arrived at the Westin Hotel in downtown Seattle between 1:30 a.m. and 2:30 a.m. on December 1, 1999. A few hours after the President's arrival, when protest activity had temporarily subsided, Mayor Schell signed "Local Proclamation of Civil Emergency Order Number 3" (Order No. 3). Order No. 3 said, in pertinent part:

WHEREAS, the Mayor declared a civil emergency exists in the City of Seattle ("the City") in the Proclamation Dated November 30, 1999; and

WHEREAS, after the issuance of the Proclamation and despite the deployment of hundreds of law enforcement officers, the City continued to experience civil disturbances resulting in injury

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to persons and damage to property; and

WHEREAS, the level of city disturbances and danger to persons and property has been highest in those areas in which there are protests in the vicinity of World Trade Organization ("WTO") meetings; and

WHEREAS, the City understands its obligations to permit expressive activity pursuant to reasonable time, place and manner restrictions necessitated by the existing public safety concerns for WTO delegates, dignitaries, citizens, public safety employees and protestors; and

WHEREAS, the Chief of Police and other public safety officials have determined that the safety of WTO delegates, dignitaries, citizens, public safety employees and protestors cannot be preserved without reasonably limiting access to areas used by WTO personnel; and

WHEREAS, it is imminently necessary to use extraordinary measures to protect the public peace, safety and welfare; and

WHEREAS, the civil emergency necessitates the utilization of emergency powers granted to the Mayor pursuant to *1125 Seattle Municipal Code, Chapter 10.02 and [Wash. Rev.Code] Chapter 38.52. Therefore

A limited curfew is imposed in the portion of the City within the following boundaries: Starting on the corner of 4th Avenue and Lenora Street, then proceeding south on 4th Avenue to Seneca Street, then east on Seneca Street to the I-5 freeway, then north along the I-5 freeway to Boren Avenue, then north on Boren Avenue to Pine Street, then west on Pine Street to 6th Avenue, then north on 6th Avenue to Lenora Street, then west on Lenora Street to, and concluding at 4th Avenue and Lenora, as shown on the attached map.

The effect of Order No. 3 was that all persons, subject to limited exceptions, were prohibited from entering the portion of downtown Seattle described in

the order. The exceptions to the prohibition on entering the restricted zone were granted for: (1) delegates and personnel authorized by the WTO to participate in official WTO functions; (2) employees and owners of businesses within the restricted area and other personnel necessary to the operation of those businesses; and (3) emergency and public safety personnel. ^{FN16} Violations of Order No. 3 were punishable by a fine of not more than \$500 and/or imprisonment of not more than 180 days. At all times, the Washington State Convention & Trade Center and the Paramount Theater were within the restricted zone, as well as the major hotels where WTO delegates were staying (i.e., the Four Seasons Hotel, Cavanaughs, and the Sheraton Hotel). The restricted zone skirted these venues, and in substance provided a protective perimeter. ^{FN17}

FN16. In an amendment to Order No. 3 issued later that day, additional exemptions were granted for city staff and credentialed members of the press.

FN17. We attach as Appendix A a diagram of the boundaries of the restricted zone that was part of the record in this case.

In the early morning hours of December 1, 1999, Seattle Assistant Chief of Police Harv Ferguson issued an "Operations Order" to implement Order No. 3 and the restricted zone. The Operations Order told officers that "[v]ehicles and/or pedestrians ... are authorized access inside the [restricted zone] if they have a reasonable purpose for entering the perimeter. A reasonable purpose includes work, shopping at a specific location within the [restricted zone], or other like type reasonable activity." Thus, as it was interpreted, Order No. 3 excluded all persons except delegates and personnel authorized by the WTO for its official functions, employees and owners of businesses within the restricted area, their customers, other personnel necessary to the operation of those businesses, and emergency and public safety personnel. Initially, Order No. 3 had not explicitly permitted shoppers to enter, but it had

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allowed business owners and persons necessary to run their businesses to enter, which implicitly supported the interpretation of the Operations Order.

At a press conference on the morning of December 1, 1999, Assistant Seattle Police Chief Edward Joiner^{FN18} explained the City's adoption of Order No. 3:

FN18. Chief Stamper had delegated to Assistant Chief Joiner the task of planning the Seattle Police Department's response to the WTO conference.

We're going to adopt a policy that's pretty much in line with what's done in other cities around the world when they have an event of this magnitude, and that is, to take the core area where the [WTO] conference is occurring ... and prohibit any demonstrations within that core area for the remainder of the week.

*1126 Seattle Police Captain James Pugel testified in deposition ^{FN19} that Assistant Chief Joiner had instructed him, in connection with the implementation of Order No. 3 and the Operations Order, "[n]o large protests. No people can come marching through [the restricted zone]. There will be no marches."

FN19. The Menotti plaintiffs submitted Captain Pugel's deposition testimony in support of their motion for partial summary judgment and in opposition to the City's motion for partial summary judgment.

Chief Stamper testified in deposition^{FN20} that the effect of the Operations Order was to exclude protestors from entering the restricted zone:

FN20. The Menotti plaintiffs submitted Chief Stamper's deposition testimony in support of their motion for partial summary judgment and in opposition to the City's motion for partial summary judgment.

From the officer's point of view, we have made it clear that we could not permit large groups to gather to block intersections and so forth, and from their point of view what they're thinking and what they believe is their direction is to make sure that nobody comes into that, into the so-called no-protest zone unless he or she is there to shop or has legitimate business purpose in the downtown area, so from their point of view it effectively meant anybody coming in to protest.

Order No. 3 and the accompanying Operations Order decreased violence and protest within the restricted zone. But it did not stop either violence or protest within the restricted zone. Inside the restricted zone, protestors gathered in open defiance of Order No. 3, and police made about 300 arrests. ^{FN21}

FN21. Even outside the restricted zone, there were some problems of violence incidental to protest. Some violent protestors caused property damage, threw debris, blocked the street, and trapped people in their cars. Some protestors jumped onto an officer's patrol car and shook it by its light bar, while others laid in front of the car and prevented the officer from escaping. Some protestors took over the fuel pumps at a gas station and attempted to fill small bottles with gasoline.

President Clinton addressed the WTO conference on December 1, 1999, and departed the next morning. There was no violence immediately incident to his presentation. On December 2, 1999, Mayor Scheil amended Order No. 3 by reducing the size of the restricted zone. As modified, the restricted zone was reduced to exclude the Westin Hotel because President Clinton had since departed.^{FN22} Police logs indicate that protest violence decreased on December 2, 1999, and through the conclusion of the WTO conference on December 3, 1999. Order No. 3 expired at 7:00 a.m. on the morning of December 4, 1999.

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FN22. We attach as Appendix B a diagram of the revised boundaries of the restricted zone that was part of the record in this case.

In opposition to the City's motion for summary judgment, plaintiff-appellant Kenneth Hankin submitted a declaration stating that he was arrested for violating Order No. 3 by trespassing inside the restricted zone with the purpose of protest. Hankin testified via declaration that, on the morning of December 1, 1999, he and others participated in a group protest that began in Denny Park, north of downtown Seattle and outside the restricted zone. As their group approached Westlake Park, a downtown shopping plaza and public square within the restricted zone, Seattle police surrounded them. The group responded by sitting on the ground. Hankin testified that, without warning, Seattle police arrested the group of protestors, and then turned to another portion of Westlake Park, where Hankin was standing. Hankin and others beside him were arrested.

*1127 Victor Menotti submitted his deposition testimony in support of his motion for partial summary judgment.^{FN23} Menotti testified that he was a credentialed participant in the WTO conference and that, on December 1, 1999, he was standing on a sidewalk talking with a small group about a WTO conference meeting he had just attended. Without warning, police charged the group surrounding Menotti. Menotti ran, believing that police were trying to disperse the crowd, but stopped when he realized he was being pursued. Menotti was arrested for pedestrian interference and obstructing an officer; however, the charges against Menotti were dismissed before a probable cause hearing was held.

FN23. We consider these depositions because they were part of the record when the district court granted summary judgment to the defendants on the Menotti plaintiffs' claims. Fed.R.Civ.P. 56(c) (stating that summary judgment should be

granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

Thomas Sellman also introduced his deposition testimony and that of Seattle Police Detective Sharon Stevens in support of his motion for partial summary judgment. Sellman testified that he was within the restricted zone on December 1, 1999, distributing leaflets containing a cartoon criticizing the WTO. Stevens testified that she and another officer witnessed Sellman distributing the flyers and asked Sellman what business he had in the zone. When Stevens ascertained that Sellman did not come within one of the exceptions to Order No. 3, Stevens ordered him to leave the restricted zone. When Sellman attempted to hand out another flyer, Stevens placed him under arrest for failing to disperse. Sellman spent two nights in jail and was released thereafter.

Todd Stedl presented deposition testimony in support of his motion for partial summary judgment. Stedl testified that, after hearing about Order No. 3 on December 1, 1999, he decided to enter the restricted zone and distribute leaflets containing the text of the First Amendment. While standing just outside the zone, Stedl tried to hand a leaflet to an officer, who reacted by grabbing the fliers and searching Stedl's bag. When Stedl complained that the officer could not seize his fliers or search his bag without a warrant, the officer told him to contact City Hall and to leave the restricted zone. Stedl asked for the officer's badge number, and the officer told Stedl to leave. The officer later approached Stedl again and told him to leave the area. Stedl told the officer that he thought he already was outside the zone. The officer replied that Stedl should get going. When Stedl asked how far, the officer told him fifteen blocks. Stedl testified that he was too intimidated to return to the zone to pass out

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more leaflets, and felt that if he had returned, he would be arrested. The officer was never identified.

Doug Skove introduced his deposition testimony and video evidence in support of his motion for partial summary judgment. Skove testified that, on December 2, 1999, he decided to go to Seattle after hearing about the restricted zone. He carried a sign that read on one side, "Is the WTO in control of Seattle too?" and on the other side "I have the right to protest non-violently." The video evidence shows that a police officer (later identified as Seattle Police Officer Ronald Smith) saw Skove carrying the sign as Skove walked into a crosswalk. Smith said to Skove, "Hey, what did the Mayor tell you? Other side of Fourth, other side of Seneca." FN24 As *1128 Skove finished crossing the street, Smith approached, grabbed Skove's sign and pulled it away from his hands. Skove turned to his right and continued walking across the street and away from Smith, while Smith shouted "Come here, hey pal!" Skove continued walking away. Smith said, "That's alright, that's okay," as Smith walked away, folded Skove's sign, and threw it away. After Skove had another encounter with police where a second sign was seized, Skove was warned he would be arrested if he continued protesting. Skove left the restricted zone.

FN24. This was an instruction from Smith to Skove to exit the confines of the restricted zone.

III

The Hankin and Menotti plaintiffs contend that Order No. 3 was an unconstitutional time, place, and manner restriction on its face, and the Menotti plaintiffs also contend that Order No. 3 unconstitutionally conferred unfettered police discretion for its implementation. The Hankin plaintiffs also contend that Order No. 3 was unconstitutional as applied to them because the City had adopted a policy of arresting only anti-WTO protestors within the restricted zone.^{FN25}

FN25. "A facial challenge alleges that any enforcement of the ordinance creates an unacceptable risk of the suppression of ideas. An as-applied challenge alleges that the restriction on speech is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Kuba v. I-A Agric. Ass'n*, 387 F.3d 850, 856 (9th Cir.2004) (internal quotation marks and citation omitted).

A

[1] We first address the facial constitutionality of Order No. 3. We have held that "[a]n ordinance is facially unconstitutional if (1) it is unconstitutional in every conceivable application because it is vague or impermissibly restricts a protected activity or (2) it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." *Vlasak v. Superior Court*, 329 F.3d 683, 688 (9th Cir.2003) (internal quotation marks and citation omitted). The Supreme Court has held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The Hankin plaintiffs contend that Order No. 3 was facially unconstitutional because it was overbroad. In evaluating this overbreadth challenge, we determine whether Order No. 3's restrictions on speech were content neutral, were narrowly tailored to serve a significant governmental interest, and left open ample alternative means of communication. *Vlasak*, 329 F.3d at 689; see also *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

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[2][3][4] We address first whether Order No. 3 was

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content neutral. "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The reason for this rule is to protect and preserve free and unfettered speech for the ultimate good of society. We have expressed this basic reason in varied ways, but it is unassailable that the "fundamental principle" behind content analysis is that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial *1129 views." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (internal quotation marks and citation omitted). In assessing whether a restraint on speech is content neutral, we do not make a searching inquiry of hidden motive; rather, we look at the literal command of the restraint. Stated another way, we agree with Justice Kennedy's observation in *City of Los Angeles v. Alameda Books, Inc.*, that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring). Our circuit has adopted this view. *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1164 (9th Cir.2003).

[5] Applying these principles here, we see Order No. 3 as content neutral on its face. Even when we credit plaintiffs' evidence and give plaintiffs all reasonable inferences, the text of Order No. 3 is not in dispute, and it does not favor one content over another. The purpose of enacting Order No. 3 had everything to do with the need to restore and maintain civic order, and nothing to do with the content of Appellants' message. See *United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir.2000) ("[A] restriction on expressive activity is content-neutral

if it is justified, i.e., based on a non-pretextual reason divorced from the content of the message attempted to be conveyed."). As a matter of law, Order No. 3 was not a regulation of speech content, but rather was "a regulation of the places where some speech may occur." See *Hill v. Colorado*, 530 U.S. 703, 719, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Under Order No. 3, persons could not protest-in support of or against-any topic within the restricted zone. *Id.* (holding that restrictions are not content based where they "apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech") (internal quotation marks and citation omitted). The restricted zone established by Order No. 3 applied equally to persons of all viewpoints. That Order No. 3 predominantly affected protestors with anti-WTO views did not render it content based. See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.").

[6] Further, the City's evidence in testimony of Mayor Schell,^{FN26} Police Chief Stamper,^{FN27} and Assistant Chief Joiner^{FN28} *1130 was that the City did not implement Order No. 3 because of disagreement with the message of anti-WTO protestors. Instead, the motivating factor in the adoption of Order No. 3, as stated in its text, was the City's observation that "the level of civil disturbances and danger to persons and property ha[d] been highest in those areas in which there [were] protests in the vicinity of [WTO] meetings," and the need to ensure the safety of WTO delegates as well as downtown residents and workers. The plaintiffs did not submit evidence controverting the text of Order No. 3, which is not in dispute, or contradicting the purposes recited by the Mayor and police chief.^{FN29}

FN26. Schell testified in deposition that a "secure zone" was his "primary objective" in enacting Order No. 3, and that the ad-

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vice he received from his staff was that a "secure zone" was necessary in order to assure the safety of downtown residents and WTO delegates.

FN27. Stamper testified in deposition that a paramount goal was maintaining security and avoiding violence. He testified, "I also need to emphasize that we had a crucial intersection blocked completely denying access of emergency vehicles and denying access to the WTO venue itself.... [T]hose were formidable challenges bigger by far than anything, once again, that I had seen in the six years I had been here.... [O]ur concern is the violence could erupt on either side, that a delegate, for example, angered at being denied access could actually resort to violence, in this case, possibly armed violence."

FN28. Joiner testified in deposition that "the only recourse we had was to establish the [restricted zone] where we could provide security for the delegates and so forth." Joiner also testified that "[w]e would not have allowed [peaceful protesters] to stay [within the restricted zone] under the circumstances because we couldn't-we could not be assured that the demonstration would remain peaceful given the experience that we already had."

FN29. Appellants submitted the deposition testimony of Schell and Stamper in an attempt to establish that the City's purpose in adopting Order No. 3 was unlawful, in that the City implemented Order No. 3 with the purpose of eliminating protestors from the downtown area. But this evidence is consistent with the objective of Order No. 3 to eliminate all persons, with limited exceptions, from the downtown area. Even if plaintiffs could establish that the City had an illicit motive in adopting Order No. 3, that would not be dispositive. The Su-

preme Court has held unequivocally that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

Appellants contend that Order No. 3 was content based because it permitted exemptions for shoppers and downtown workers to enter the restricted zone. We reject this argument because these exemptions did not enable the City to discriminate against ideas it disfavored. See *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1012 n. 5 (9th Cir.1996) ("Because these exemptions don't enable the city to discriminate against ideas it disfavors, they don't render the ordinance content-based."). The exemptions permitted shoppers and downtown workers to go about their business in the restricted zone and did not enable the City to discriminate against any persons on the basis of their views. Further, there is no evidence that those persons who were permitted to enter the restricted zone were part of the security problem that prompted the adoption of Order No. 3. See *Hill*, 530 U.S. at 723, 120 S.Ct. 2480 ("[A] statute that restricts certain categories of speech only lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside.").

We hold that Order No. 3 was content neutral, and proceed to address the other factors necessary for a reasonable time, place, and manner restriction. ^{FN30}

FN30. We also hold that Order No. 3 was not "viewpoint-based" on its face. Viewpoint discrimination occurs "when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir.2001) (internal quotation marks and citation omitted). Here, Order No. 3's ban on

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protests did not prohibit a particular viewpoint, and applied equally to persons who wished to protest about any topic. As in *Hill*, Order No. 3 “applie[d] equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries.” 530 U.S. at 723, 120 S.Ct. 2480.

2

[7] We next assess whether Order No. 3 was narrowly tailored to serve a significant government interest. The Supreme Court has held that “[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby*, 487 U.S. at 485, 108 S.Ct. 2495. To be narrowly tailored, a statute “need not be the least restrictive means of furthering [the government’s] interests, but the restriction *1131 may not burden substantially more speech than necessary to further the interests.” *United States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir.1999). However, “the First Amendment demands that municipalities provide ‘tangible evidence’ that speech-restrictive regulations are ‘necessary’ to advance the proffered interest in public safety.” *Edwards v. City of Coeur d’Alene*, 262 F.3d 856, 863 (9th Cir.2001). The tailoring of the restraint must of course correspond to the purposes it serves. *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 (holding that the narrowly tailored requirement is satisfied “so long as the [neutral] regulation promotes a substantial government interest that would be achieved less effectively absent the regulation”) (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)).^{FN31}

FN31. While the City was not required to choose the least restrictive alternative, an assessment of alternatives can still bear on the reasonableness of the tailoring of Order No. 3 and whether it was “narrowly tailored” as required. We have said that “if there are numerous and obvious less-

burdensome alternatives to the restriction on [protected] speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n. 13, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993); *Edwards*, 262 F.3d at 865.

[8] Applying the rule of *Ward* and its standard here, we return to the issue of whether Order No. 3 was narrowly tailored to serve a significant government interest. No one could seriously dispute that the government has a significant interest in maintaining public order; indeed this is a core duty that the government owes its citizens.^{FN32} The Supreme Court has declared that “[i]t is a traditional exercise of the States’ police powers to protect the health and safety of their citizens.” *Hill*, 530 U.S. at 715, 120 S.Ct. 2480 (internal quotation marks and citation omitted); see also *Edwards*, 262 F.3d at 863; *One World One Family Now*, 76 F.3d at 1013. In the face of violent riot, the City had a duty to restore order and to ensure the safety of WTO delegates and the residents of Seattle.^{FN33} The City also had an interest in seeing that the WTO delegates had the *1132 opportunity to conduct their business at the chosen venue for the conference; a city that failed to achieve this interest would not soon have the chance to host another important international meeting.^{FN34}

FN32. The district court was not required to accept the conclusion of Appellants’ declarant that the City’s only interest was to “transport the delegates to the conference.” That was not an accurate summary of the record before the district court. Nor in our analysis were we required to pretend as if the movement of delegates was the City’s only interest in the face of riot. The record before the district court showed widespread violence and the breakdown of civic order. On the undisputed facts before the district court, the City’s interest in main-

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taining peace and order is fairly presented. The dissent's attempt to reduce the City's interest to transporting delegates is wrong. Our analysis properly focuses on the City's interest when it enacted Order No. 3: restoring order and providing security to the core downtown area to protect the President, visiting world dignitaries, and the general public, and to allow the WTO conference to proceed.

FN33. The dissent argues that our account of the breakdown in public order "does not paint a clear picture of the situation confronting City officials" because the protestors had left the core downtown area and the violence had subsided when Order No. 3 was implemented. Dissent at 1160. But there is no logical connection between an assessment of the violence that occurred when WTO proceedings were ongoing and a temporary cessation of violence after WTO proceedings had concluded for the day. Even a fierce battle may experience a respite of calm, and the calm of an evening can precede a storm in the morning. The City was well aware that some protestors wanted to shut down the WTO conference by violent means and that the WTO conference was to resume the following day, and so there was a strong likelihood that more "organized violence of a serious nature [was] about to occur." See *Collins v. Jordan*, 110 F.3d at 1363, 1373 (1997).

In any event, the dissent's claim, based on a single "sweep of the streets" at 8:00 p.m., that the streets of Seattle were "calm and under control" during the evening of November 30, Dissent at 1160, ignores the undisputed evidence. By 9:00 p.m., officers were in danger of being assaulted and injured by some aggressive protestors who held the advantage of Capitol Hill's higher ground. On-

going skirmishes continued until 3:30 a.m., with officers fending off "rocks, bottles, golf balls, and ... incendiary devices." *WTO After Action Report* at 42. Moreover, violent protestors had established a pattern of converging, protesting, and then dispersing only to reassemble later at another location. *Id.* at 35. Given the violent protestors' aim to shut down the WTO conference and their pattern of conduct, a realistic depiction of events in the record is that the violence had "temporarily subsided" during the evening of November 30, not that the violence had "ended," as the dissent maintains. Even crediting Appellants' evidence and giving all reasonable inferences to the Appellants, as we must under the summary judgment standard, the record does not permit a rational conclusion that the City should have thought the violence "ended."

FN34. This interest is embraced within the City's asserted interest in restoring order and maintaining security, which are necessary for public safety, effective commerce, and the vitality of the City.

The Appellants nonetheless contend that the safety net cast by the City was too broad, and that it restricted protest unduly in too large of an area, and thus wasn't narrowly tailored.^{FN35} We turn to these contentions.

FN35. The Menotti plaintiffs and the Hankin plaintiffs argue that Order No. 3 was not narrowly tailored because the restricted zone was too large, and because the restricted zone banned protected forms of speech. In addition, the Hankin plaintiffs argue that the City should have "expended" the effort necessary to ensure clear passage for the delegates to and from the [WTO conference] venues without infringing unnecessarily on protestors'

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rights.”

Here, the City had a tough problem. Violent protestors were damaging the City and jeopardizing the progress of the WTO conference. Yet violent protestors were breaking the law amidst throngs of lawful protestors. In this setting, per evidence that is not materially in dispute, large numbers of non-violent protestors prevented police from curbing effectively the activities of the violent protestors.^{FN36} Police reports said that “[t]he protestors were establishing a fluid, dynamic method of operation that consisted of rapid deployment and the use of non-criminal protestors to buffer smaller pockets of protestors engaging in significant criminal acts.” *WTO After Action Report* at 35. The violent protestors damaged the City and disrupted the WTO conference, but they were able to elude capture due to the tens of thousands of non-violent protestors in the downtown area. The implementation of Order No. 3 was necessary to permit police to restore and then to maintain order and safety in downtown Seattle, for WTO conference delegates and the public, and to allow officers to execute their law enforcement duties by arresting those breaking the law.^{FN37}

FN36. We are concerned here with the *effect* that the large number of peaceful protestors had on the ability of police to quell the significant criminal acts of the violent protestors. The impeding or “buffer” effect of peaceful protestors is undisputed on the record.

FN37. The Hankin plaintiffs contend that “[t]here was no attempt to preserve lawful protest and arrest only those who broke the law, just an attempt to ban all protest.” But the record does not support that argument. The restricted zone created by Order No. 3 was implemented only after a full day of protests on November 30, 1999. Before the implementation of Order No. 3, protestors had been allowed in the downtown area, resulting in the City's police force being

overwhelmed, as well as significant damage and disruption to the downtown area. If the Hankin plaintiffs contend that there was no attempt to preserve lawful protest on December 1, 1999, then that too is belied by the record. Protestors were allowed access to streets immediately adjacent to the delegates' hotels and conference sites. There was not a total bar to protest, and the scope of the restrictions must be tested under the legal standards identified above for time, place, and manner restrictions on speech.

*1133 Citing the Supreme Court's decision in *Madsen*, as well as our decisions in *Baugh* and *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir.1990), Appellants contend that there are cases invalidating restricted protest zones that were smaller in scope than the restricted zone implemented by Order No. 3. This argument misapprehends the case law and ignores the factual circumstances of this case. None of these cases establish a *per se* rule on the boundaries that a city may draw in creating a restricted zone during protest activities. Further, none of these cases dealt with the factual circumstances presented here: a small but dedicated group of violent protestors who inflicted disruption and destruction on city streets and threatened the safety of world leaders, while obscured and sheltered by about 50,000 peaceful protestors, all within a concentrated portion of a metropolitan downtown area. We decline Appellants' invitation to interpret the above cases as defining conclusively the appropriate scope of “narrow tailoring” in the context of establishing a buffer zone on protest activity.^{FN38}

FN38. The Menotti plaintiffs also argue that Order No. 3 did not further a significant governmental interest because it permitted entry into the restricted zone of persons not engaged in protest. We disagree. There is no evidence that those permitted in the restricted zone were part of the problem addressed by Order No. 3. Persons

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who lived, worked, or had other business in the restricted zone could go about their business without impeding the City's ability to maintain a secure environment in the restricted zone. Though Order No. 3 contained exemptions that allowed certain persons to enter the zone, it still furthered a significant governmental interest by excluding from the zone the protest activity that was a security threat to the downtown area.

Appellants' contention that the large size of the restricted zone rendered it constitutionally impermissible ignores significant considerations that confronted City officials. As seen from the diagram of the restricted zone, the various hotels and meeting venues of the WTO conference were spread out across several blocks of downtown Seattle. The size of the restricted zone cannot sensibly be evaluated without considering the size of the area in which delegates were housed and had to move freely in order to do the work of the WTO conference. To achieve the goal of providing secure protection for WTO delegates and ensuring safe transit for delegates between venues and hotels, the City crafted the restricted zone as being bounded by the outermost venues of the conference and the hotels where delegates were staying.^{FN39} As the district court saw it, "the *1134 [restricted] zone covered only enough territory for the WTO delegates and the President to move safely from their hotels to the [WTO] convention and lasted only during the conference."^{FN40} We conclude the district court's analysis of this issue was sound and in accord with law.

FN39. Appellants make much of a declaration submitted by a former law enforcement official, who contended that Seattle police should have used pedestrian tunnels and dedicated roadways to facilitate the movement of WTO delegates. Yet, these contentions do not address the fact that the tunnels in question did not connect all of

the hotels and venues being used by WTO delegates. The suggestions in the declaration provide no practical way to stop the behavior of violent protestors in the downtown Seattle area on November 30, 1999. Moreover, Appellants' alternatives were not a feasible means for the City to balance its interest in hosting the WTO conference with reliable safety for delegates, and the demonstrators' interest in expressive activity. *See Kuba*, 387 F.3d at 862 n. 12 (recognizing that suggested alternatives that are "far less restrictive and more precise means of regulating the time, place, and manner of speech" is just the first step in a "narrow tailoring" analysis, and that a court must also consider "whether the alternatives both are feasible and allow substantially more speech"). Even crediting Appellants' declarations and giving all reasonable inferences to Appellants, we cannot say that the alternatives were a feasible means to respond to the prevalent violence that gravely threatened the security of the WTO conference and the peace and order of the City.

FN40. That Order No. 3 protected a "*particular method*" of getting WTO delegates to the conference does not mean, as the dissent argues, that this is the only "interest Order No. 3 actually served." *See* Dissent at 1168 n. 7. As we have explained, Order No. 3 brought order and security to the core downtown area, providing safety for delegates and allowing the WTO conference to proceed as scheduled. *See* discussion *supra* at 1131-32.

We also reject Appellants' contention that the size of the restricted zone enforced by Order No. 3 was an overreaction that needlessly restricted the rights of peaceful protestors. In the context of a massive demonstration with tens of thousands of participants, once a pattern of chaotic violence had been

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established, it was unrealistic to expect police to be able to distinguish, minute by minute, those protestors with benign intentions and those with violent intentions. In this regard, the Supreme Court's decision in *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), has particular application. In *Hill*, the Court upheld a Colorado law that made it unlawful for any person within 100 feet of an abortion clinic knowingly to approach within eight feet of another person without that person's consent to provide materials or counseling. The Court reasoned:

[T]he [restricted zone's] prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary. Such individualized characterization of each individual movement is often difficult to make accurately. A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.

Id. at 729, 120 S.Ct. 2480.

Here, the size of the restricted zone was justified by the difficulty of protecting world leaders in an environment in which a small group of violent protestors were determined to cause chaos and to disrupt the conference proceedings midst tens of thousands of non-violent protestors.^{FN41} In different*1135 circumstances, it might be possible for law enforcement authorities, on an individualized basis, to distinguish between peaceful protestors and those with violent intentions. But in these circumstances, after the broad antagonism to the WTO had ripened into pervasive illegal and violent disruptive actions, it would not have been practical to require police, on a continuing basis, to make an accurate determination of each protestor as violent or not violent. Appellants also argue that police

should have had more extensive staffing on the street so that they could permit protestors to enter anywhere and simply arrest and remove those who violated the law.^{FN42} But we should hesitate to say that the law requires such a solution in an emergency situation like that here where law-breaking and law-abiding protestors were often indistinguishable, and where those abiding the law might have interfered indirectly with enforcement against violent protestors.

FN41. The dissent is wrong to characterize the City's means as a "poor fit" with the City's interest based on the occurrence of violence outside the restricted zone. It is not required for our legal analysis that the City's measure to restore order where it was most needed had to maintain peace and security perfectly in all areas outside the restricted zone. The dissent's argument that Order No. 3 was not narrowly tailored because it "did not protect anyone outside of the perimeter," Dissent at 1171, ignores or minimizes the core interest addressed by Order No. 3: protecting the President and foreign dignitaries who came to Seattle to conduct the business of the WTO. The City needed to restore and maintain order in the core downtown area to achieve this interest, and Order No. 3 "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485, 108 S.Ct. 2495. We decline the dissent's suggestion that a city's means to achieve its significant interest of restoring and maintaining security can never be narrowly tailored absent a policy completely efficacious in eliminating violence. *See, e.g., Ward*, 491 U.S. at 800, 109 S.Ct. 2746 ("The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests *or the degree to which those*

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interests should be promoted.”) (emphasis added); see also *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807-10, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (upholding a ban on posting signs on public streets to achieve the significant public interest of “avoiding visual clutter” even though posted signs only “add somewhat” to the city’s visual clutter).

Similarly, the dissent’s argument that the restricted zone’s size “allowed” violence to continue in areas outside the zone, Dissent at 1171, is unsupported by and contrary to the record, which places some officers and notes hundreds of arrests outside the zone. As the conference moved toward completion, and the situation calmed, police were able “to escort and monitor non-permitted demonstrations outside the perimeter in a manner consistent with permitted demonstrations.” *WTO After Action Report* at 45. Moreover, the district court correctly found that the City reasonably concluded in Order No. 3 that “the level of city disturbances and danger to persons and property [was] highest in those areas in which there are protests in the vicinity of World Trade Organization (‘WTO’) meetings.” Contrary to the dissent’s assertion, the perimeter did more than protect WTO delegates; Order No. 3 brought safety and security to the downtown area, protecting businesses, their employees, and the City’s citizens as well.

FN42. The Menotti plaintiffs acknowledged that “the primary response of a municipality to crime should be to arrest the criminals,” but faulted the City for “fail[ing] to put enough officers on the streets on November 30th to accomplish this task.” The Hankin plaintiffs also criti-

cized the City’s police department plan for law enforcement, arguing that “common police tactics and planning would have provided a much more secure downtown without sacrificing speech. For example, it is common police practice to establish lines of defense around certain buildings before protestors arrive, [and] to have squads specifically intended to pursue violent individuals within crowds.”

Appellants contend that *Collins v. Jordan*, 110 F.3d 1363 (9th Cir.1996), controls the outcome of this case. We disagree. In *Collins*, the Mayor of San Francisco responded to sporadic violent protests by directing police officers to “cause the dispersal and prevent the continuation of any gatherings of people anywhere in the City and County of San Francisco whenever the peace officer on the scene has reason to believe that the gathering endangers or is likely to endanger persons or property.” *Id.* at 1367. We affirmed the district court’s denial of qualified immunity to the officers, because “it was clear at that time, as it is today, that the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter).” ^{FN43} *Id.* at 1372. *1136 However, we said in *Collins* that our holding was narrow:

FN43. Appellants contend that, since there was a decrease in violence in the hours immediately prior to the imposition of Order No. 3, this statement means that here the City acted unlawfully in adopting Order No. 3. We disagree.

In *Collins*, we described the “limited violence and disorder” that had taken place as involving “a few injuries to people, none of them extensive or life-threatening. The principal incidents involved property damage and appear to have been confined to an area of about four blocks.... [M]ost of the city was free

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from any form of unlawful conduct.” 110 F.3d at 1372. Here, the violence that had taken place was substantially more severe, involving assaults on police and WTO delegates, fires, medical emergencies, evacuation of retail stores, and a general loss of civic order. Moreover, *Collins* invalidated an order that banned all demonstrations throughout the whole county. In Seattle, however, protestors could still demonstrate in all City areas outside the restricted zone.

Collins does not hold that, when a city is confronted with violent, dangerous protests of the type in this case, it must wait for further violence to occur before taking measures to restore civic order. Despite the dissent's characterization of *Collins* as involving “a similar emergency order adopted under analogous circumstances,” Dissent at 1169-70, we face a factually and legally distinguishable case, and the weight the dissent places on *Collins* again shows the dissent's minimization of the crisis in Seattle. See also *supra* note 34 (recognizing that, on the undisputed facts, the City had reason to believe and was entitled to believe that the violence attendant to the WTO conference had not ended prior to Order No. 3's enactment, but had just temporarily subsided and would resume contemporaneous with WTO proceedings).

We need not address the question of whether at some point—for example if there is widespread continuing violence that appears to be beyond the ability of the police to control—a time-limited ban on all demonstrations might be lawful. Similarly, we need not decide whether, and under what circumstances, specific, reliable information that organized violence of a serious nature is about to occur might justify a determination that a clear

and present danger exists warranting the banning of a particular demonstration.
Id. at 1373.

The scope of the violence that plagued Seattle on November 30, 1999, and the clear and present risks to world leaders attending the WTO conference, render *Collins* inapposite. In *Collins*, the violence that San Francisco faced before it restricted protest was much less severe than Seattle faced in this case. Further, San Francisco restricted speech throughout the whole county,^{FN44} while Seattle merely restricted access within a well-defined security zone to facilitate a public event.^{FN45}

FN44. San Francisco County has a land area of 47 square miles. United States Census Bureau, *California Quick Facts, San Francisco County* (2000), available at <http://quickfacts.census.gov/qfd/states/06/06075.html> (last revised Feb. 1, 2005).

FN45. The dissent argues that we have allowed the constitutional framework “to be shaped” by our “characterization of the level of violence.” Dissent at 1169 n. 12. The dissent misunderstands our application of First Amendment doctrine, which assesses the means the City used in light of the ends the City needed to achieve. We have applied the correct legal framework established by the Supreme Court. See, e.g., *Ward*, 491 U.S. at 799, 109 S.Ct. 2746. Under this precedent, understanding the City's interest is essential to assessing whether Order No. 3 was narrowly tailored to achieve that interest. See, e.g., *id.* at 796-801, 109 S.Ct. 2746. *Collins* also recognized that a heightened city interest to end and prevent violence would require a different analysis:

Today, we decide only that the violence and disorder that occurred in San Francisco on April 30 falls far short of the

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type of occurrence that could have led any reasonable official to believe that it would be constitutional to impose a city-wide ban on all demonstrations, and that the law to that effect was clearly established.

110 F.3d at 1373. In our view, *Collins* does not dictate a conclusion that Order No. 3 is facially unconstitutional because *Collins* addressed a significantly broader restriction on speech enacted in response to a significantly less dire situation.

*1137 Mass demonstrations involving tens of thousands of participants are an important form of political protest and have a great pedigree. Consider Martin Luther King, Jr.'s march on Washington, at which he delivered the "I Have a Dream" speech to a crowd of over 250,000 on the Washington Mall. When a crowd is generally peaceful, large protests do not necessarily create risks to public safety and security, even though the crowd must be managed by a city. But once multiple instances of violence erupt, with a breakdown in social order, a city must act vigorously, and more extensively, to restore order for all of its residents and visitors. Adding large numbers of police on the street might be the solution in some cases, but in other cases could lead to more intense violence. In light of the City's significant governmental interest in restoring and maintaining civic order to the core downtown area, Order No. 3 and the restricted zone it implemented were narrowly tailored. ^{FN46}

FN46. The dissent views *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir.1994), as presenting a "similar problem." Dissent at 1170-71. The dissent's analogy to *Grossman* is off the mark, and reflects the dissent's pervasive misapprehension of the scope of violence and disorder presented in Seattle by the WTO protests. *Grossman* addressed the City of Portland's permitting scheme as applied to a "small, peaceful anti-nuclear protest, involving six to eight

people," 33 F.3d at 1201-02, and is factually inapposite to this case which involved tens of thousands of protestors and hundreds of violent and lawbreaking ones.

In addition to being factually inapposite, *Grossman's* reasoning is not persuasive in an analysis of whether Order No. 3 was a reasonable time, place, and manner restriction. Portland's permanent permitting scheme made it unlawful "for any person to conduct or participate in any organized entertainment, demonstration, or public gathering, or to make any address, in a park without ... written permission." *Id.* at 1204. Portland's stated interest was "protecting the safety and convenience of park users," and "maintaining normal quiet in the area adjacent to or near the park." *Id.* at 1205-06 & n. 11. We held this scheme facially invalid in part because the distinction between groups displaying messages and groups not displaying messages was "absolutely empty in terms of the ordinance's stated goals." *Id.* at 1206-07. But *Grossman* did not hold or suggest that such a distinction is necessarily empty in all cases. Here, the record supports the City's distinction: The violence and disorder visiting downtown Seattle during the four days of the WTO conference was incident to the presence of protestors, not emergency personnel, business employees, or shoppers. *Grossman* in no way controls, and is not persuasive on, the constitutionality of a city's necessary but temporary response to a breakdown of civic order in an emergency setting. *Grossman* did not involve such a breakdown in order and is of no help in assessing the City of Seattle's proper response to a crisis that threatened the safety of Seattle's visitors and citizens.

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While it is plausible that Order No. 3 was not the least restrictive means of achieving the City's goal, that is not what Supreme Court precedent requires. There is no question that the governmental interest here (security of the core downtown area) would have been achieved less effectively absent Order No. 3. Our role here is not to inject ourselves into the methods of policing, and we do not do so here. *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897 (holding that the validity of a regulation "does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests"). We conclude that Order No. 3 was narrowly tailored to achieve a significant governmental interest.^{FN47}

FN47. The dissent incorrectly refers to our assessment of the City's interest as "confused and inconsistent" because we list the following: "protecting the president and foreign dignitaries," "maintaining public order," "providing security to the core downtown area," and "seeing that the WTO delegates had the opportunity to conduct their business." See Dissent at 1167 n.6. A rational evaluation of our discussion of the City's interest, however, yields a common thread: restoring and maintaining order to the core downtown area so that the WTO conference could proceed safely and securely.

Again, it is incorrect to urge that a city's means of restoring order is not narrowly tailored because the city has not fashioned a remedy aimed at completely eliminating disorder across the entire city. See *supra* note 42. For Order No. 3 to be narrowly tailored, Supreme Court precedent requires only that it target and eliminate "no more [as opposed to no less] than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485, 108 S.Ct. 2495. The City was entitled to seek a remedy in its core area

where WTO delegates resided and worked.

*1138 3

[9][10][11] We must also assess whether Order No. 3 left ample alternative channels of communication. We have observed that "[t]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." *Ctr. for Fair Pub. Policy*, 336 F.3d at 1170 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 555 (9th Cir.1998)). A time, place, and manner restriction does not violate the First Amendment "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689, 105 S.Ct. 2897. "Of course, the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Bay Area Peace Navy*, 914 F.2d at 1229 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)). However, an "alternative mode of communication may be constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened.'" *Id.* (quoting *Taxpayers for Vincent*, 466 U.S. at 812, 104 S.Ct. 2118).

[12][13] The application of these principles presents a very difficult question. On the one hand, the restricted zone carved out a portion of the downtown area where protestors could not deliver their message directly to delegates. On the other hand, the protestors were able to demonstrate and express their views immediately outside the restricted zone, including areas directly across the street from the Washington State Convention & Trade Center and the Paramount Theater. The scope of the restriction on protest extended only to the bounds of the restricted zone, and did not apply generally to the City of Seattle. The protestors could reasonably expect their protest to be visible and audible to

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delegates, even if not as proximate as the protestors might have liked.^{FN48}

FN48. It cannot sensibly be argued that protesting outside the restricted zone was not a viable alternative on the mistaken theory that the delegates were not as accessible from that position. The Supreme Court has instructed that the First Amendment does not require that individuals retain the most effective means of communication, only that individuals retain the "ability to communicate effectively." *Taxpayers for Vincent*, 466 U.S. at 812, 104 S.Ct. 2118; *see also Hill*, 530 U.S. at 729, 120 S.Ct. 2480 (upholding a law that prohibited individuals from having a position that maximized accessibility to the target of their speech).

Given the protestors' ability to communicate directly across the street from most WTO venues, and given the violence that Order No. 3 was aimed at preventing, we think the better analysis favors the conclusion that Order No. 3 provided ample alternatives for communication. *See Hill*, 530 U.S. at 729, 120 S.Ct. 2480 ("Signs, pictures, and voice itself can cross an 8-foot gap with ease."). Appellants argue that they were prevented from communicating with WTO delegates at close range, but there is no authority suggesting that protestors have an absolute right to protest at any time and at any place, or in any *1139 manner of their choosing. *Bl(a)ck Tea Soc'y v. City Of Boston*, 378 F.3d 8, 14 (1st Cir.2004) ("[A]lthough the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access.").^{FN49}

FN49. The district court also held that Order No. 3 provided ample alternative means for communication because protestors "had access to the media and to the

public beyond the zone." The First Circuit recently expressed a similar view in resolving a challenge to a demonstration zone established by the City of Boston for the 2004 Democratic National Convention. *Bl(a)ck Tea Soc'y*, 378 F.3d at 14. The First Circuit held that the demonstration zone provided ample alternative channels for communication because "[a]t a high-profile event, such as the [Democratic National] Convention, messages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets." *Id.* Because we hold that there is no constitutional requirement that protestors be allowed to reach their designated audience in the precise manner of their choosing, we do not evaluate this alternative argument.

We do not minimize the value to society of facilitating protest communications. Justice Brandeis in *Whitney v. California* gave us a classic statement on the values of free speech:

[The Founding Fathers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Chief Justice Hughes reinforced these ideas a decade later in *De Jonge v. Oregon*:

The greater the importance of safeguarding the

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community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278 (1937). The Supreme Court over decades has never departed from this commitment to First Amendment values.^{FN50}

FN50. In *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), Justice Brennan wrote for the Court, “[i]f 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. Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.” Justice O’Connor has also remarked that “[t]he hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.” *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

Perhaps it has not been said with more elegance than in these words of Justice *1140 Brennan in the landmark decision of *New York Times Co. v. Sullivan*: “[D]ebate on public issues should be uninhibited, robust, and wide-open, and ... it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).^{FN51} However, we do not think that

even the most vital First Amendment expressions—and for purposes of our analysis we consider political protest adverse to WTO activities and internationalist philosophy to be political comment at the core of the First Amendment—can be said automatically to overcome the need of a city to maintain order and security for its residents and visitors, in the face of violence. *Burson v. Freeman*, 504 U.S. 191, 197, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (“At the same time, however, expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used.... [T]he government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.”).

FN51. Though the singular importance of these First Amendment values could hardly be overstated, it also must be kept in mind that the First Amendment was held to be applicable against the States, and here a local government, through the Fourteenth Amendment’s Due Process Clause. *De Jonge*, 299 U.S. at 364, 57 S.Ct. 255; see also *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937), (incorporating the First Amendment’s protections into the Fourteenth Amendment’s Due Process Clause on the view that the First Amendment’s protections were “implicit in the concept of ordered liberty”), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Accordingly, we apply the ample alternatives test with a practical recognition of the dire facts confronting the City in the early morning hours of December 1 during the WTO conference.^{FN52} On the evening of the first day of the WTO conference, and shortly before President Clinton was scheduled to arrive, Seattle was tense, its streets were in disar-

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ray from a long day of violent protest, and there was a general disruption of civic order. The "ample alternatives" cannot be taken to mean that *each* protestor has the right to convey his or her message in the manner preferred by that protestor—that would be impossible where, as in this case, protestors numbered in the tens of thousands. The City was required to take action to protect President Clinton and the delegates throughout the three remaining *1141 days of the conference. If the City had permitted chaos and violence to continue unabated, it would not merely lose its standing as a host city for international conferences, the City might also have sacrificed the safety of the delegates and of its residents. The permissible communications available to protestors under Order No. 3 were substantial, not perfunctory. These available communications, including protesting on the periphery of the restricted zone, were perhaps not ideal for protestors who wanted to present views in the face of delegates,^{FN53} but neither did they wholly exclude protestors from the delegates' purview.

FN52. The dissent challenges our practical recognition of the emergency confronting the City and our pragmatic application of the ample alternatives test as lacking affirmative precedential sanction. *See* Dissent at 1174. Our resolution of this issue is not contrary to established law and reflects the principle that there is no constitutional right to deliver a confrontational message of protest directly to an intended target. *See Hill*, 530 U.S. at 716-18, 120 S.Ct. 2480 ("[W]e have continued to maintain that 'no one has a right to press even 'good' ideas on an unwilling recipient.... While the freedom to communicate is substantial, 'the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.' ' "); *see also Bl(a)ck Tea Soc'y*, 378 F.3d at 14 ("[A]lthough the opportunity to interact directly with the body of delegates by, say, moving among them and distributing liter-

ature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access.").

The dissent's unsupported assertion that *Hill* is inapposite because WTO delegates were not "particularly vulnerable" and faced only "the unpleasantness or inconvenience of a large demonstration," *see* Dissent at 1167 n.6, understates the danger visiting delegates faced from violent protestors determined to derail the WTO conference.

FN53. Some protestors may have preferred the restraints of Order No. 3 as an aid to their own safety, as well as that of delegates. However, for purposes of assessing the constitutionality of Order No. 3, on the dueling summary judgment motions, we may assume that protestors generally disfavored the restraint, and had views similar to those Appellants have asserted.

In the "ample alternatives" context, the Supreme Court has made clear that the First Amendment requires only that the government refrain from denying a "reasonable opportunity" for communication. *City of Renton*, 475 U.S. at 54, 106 S.Ct. 925 ("[T]he First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city...."). We hold that, because Order No. 3 allowed protestors to demonstrate directly across the street from the Washington State Convention & Trade Center, the Paramount Theater, three out of four major hotels where WTO delegates were staying, and throughout the rest of downtown Seattle, Order No. 3 provided ample alternative channels of communication.^{FN54} We recognize that our *1142 decision takes into account a balance of the competing considerations of expression and order. But we do not think the Constitution requires otherwise.^{FN55}

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FN54. The record is void of evidence supporting the dissent's argument that WTO delegates could see and hear protestors *only* within the 25-square block restricted zone. *See* Dissent at 1173. Reason and precedent belie this proposition. *See Hill*, 530 U.S. at 718, 120 S.Ct. 2480 (holding that protestors had ample alternatives to communicate their message even if they could not communicate with their intended audience where they preferred).

The dissent, most likely recognizing the lack of evidence to support its argument, argues that "neither does the record reflect that the delegates *could* see and hear protestors, or that the alternative means of communication available to the protestors were sufficient." Dissent at 1173 n. 16. But contrary to the dissent's assertion, the undisputed facts in the record show that per the terms of Order No. 3 protestors could communicate their views directly outside most of the hotels where delegates were staying. *See* apps. A & B (showing that Order No. 3's boundary bordered delegates' hotels); *WTO After Action Report* at 46 (recognizing that protestors demonstrated at the front door of the Westin Hotel). The ability to so communicate is shown by appendices A and B. It is not disputed that major venues for delegates, as identified on the appendices, included the Four Seasons Olympic, Cavanaugh's, the Sheraton, and the Westin hotels. Of these, the Four Seasons Olympic, Cavanaugh's, and the Westin were located on the border of the restricted zone. Thus, the appendices show without inference that Order No. 3 did not restrain protestors from making their views known on Fourth Avenue and on Sixth Avenue outside the restricted zone across the street from three of the four

identified major venues for delegates situated in the restricted zone; only the Sheraton Hotel is not on the restricted zone's border. Consistent with Order No. 3 is the declaration of protestor Michael Gendler, submitted by the Appellants, which confirms that protest was allowed on the east side of Fourth Avenue. The appendices show that the east side of Fourth Avenue is adjacent to both Cavanaugh's and the Four Seasons Olympic hotels. Order No. 3 on its face imposed no limitations on expressive activity outside the restricted zone. *See also WTO After Action Report* at 45 (noting a "group of about 1,000 people" that marched southbound on Fourth Avenue). We draw no inferences in favor of our factual statement; rather, the dissent ignores the undisputed facts that do not fit its legal theory.

Moreover, according to the undisputed declaration of Assistant Chief Clark Kimerer, there were "several downtown hotels not within the buffer zone housing WTO delegates which were excluded" because police believed they could "provide adequate security." It is also undisputed that thousands of protestors did not abandon their demonstrations, but continued them throughout the rest of the downtown area for the duration of the WTO conference. *Id.* at 43-46.

These alternative means of communication taken together are sufficient as a matter of law under Supreme Court precedent because they gave a reasonable opportunity for protestors to communicate. *See City of Renton*, 475 U.S. at 54, 106 S.Ct. 925.

FN55. We reject the City's alternative contention that Order No. 3 was a permissible exercise of municipal control under a the-

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ory of an “emergency exception.” Citing to out-of-circuit cases, the City argues that Order No. 3 was valid because it was taken in good faith and there was a factual basis to decide that Order No. 3 was necessary to maintain order. *See Smith v. Avino*, 91 F.3d 105, 109-10 (11th Cir.1996), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir.1971); *Moorhead v. Farrelly*, 723 F.Supp. 1109, 1112-14 (D.Vi.1989). These cases are distinguishable, and the standard that they voice does not permit a sufficiently nuanced review of the First Amendment rights at stake here. *Smith* and *Moorhead* involved natural disasters that provided little or no warning to municipalities. While *Chalk* involved civil unrest, it was the result of an unpredictable clash between police and high school students, in contrast with this case, which involved a world trade conference planned months in advance. Also, these courts employed the emergency analysis in specific and limited contexts different from that here, the contexts of natural disasters or of civil unrest confined in a smaller area, and in each case the government’s tool was evening curfew. Our case involves political protest coupled with chaos and violence, followed by a restricted zone covering a large part of downtown Seattle, the core area including convention venues and delegates’ hotels, with the restriction applicable, day and night, for the several remaining days of the conference. The legal analysis justifying nighttime curfew in the “emergency” cases is not controlling and does not permit adequate evaluation of the competing interests in the face of the crisis that was presented. *See also* Oren Gross, *Chaos and Rules: Should Responses to Crises Always Be Constitutional?*, 112

Yale L.J. 1011, 1027-42 (2003) (outlining several problems with doctrines of emergency powers). We decline to analyze Order No. 3 based on the “emergency” doctrine, though as we have explained above, the nature of the City’s interest in security and safety has been germane to our analysis of the test for a reasonable time, place, and manner restriction.

We hold that Order No. 3 was a constitutional time, place, and manner restriction on speech on its face.

^{FN56} Because we *1143 hold that Order No. 3 was a valid time, place, and manner restriction,^{FN57} we need not reach Appellants’ contention that Order No. 3 was a prior restraint. *Baugh*, 187 F.3d at 1042 (“[E]ven prior restraints may be imposed if they amount to reasonable time, place, and manner restrictions on speech.”). ^{FN58}

FN56. At oral argument, the Hankin plaintiffs also contended that the City should have reevaluated and reduced or eliminated the restricted zone on December 2 or December 3, after the initial imposition of Order No. 3 on December 1 had decreased the violence taking place in Seattle. We do not consider this argument because it was not raised in the Hankin plaintiffs’ opening brief. *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir.1988) (“It is well established in this Circuit that claims which are not addressed in the appellant’s brief are deemed abandoned.”). Even if we were to address this contention, the facts in this case justify the continued imposition of the restricted zone. Although Order No. 3 had the effect of decreasing violence in Seattle on December 1, there was undisputed evidence that violence continued outside the restricted zone on December 2 and December 3, including an incident where protestors surrounded the King County Jail (resulting in a lockdown of the jail). Given

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the events that had taken place on November 30 and the ongoing violence from December 1 to December 3, the City was justified in maintaining the restricted zone to preserve order and security in the downtown area until the WTO conference concluded. The restriction here lasted only four days. Were we faced with such a restriction on public access over weeks or months, a duty to reevaluate surely would arise at some point. But here, the initial evaluation on December 1, in light of the limited duration of the conference, is reasonably proximate to the duration of restraint.

FN57. We also note that the district court exercised supplemental jurisdiction over Appellants' claims under the Washington State Constitution, and dismissed those claims on summary judgment. Viewing these claims as a facial challenge, we note that Washington interprets its free speech clause in its Constitution in a manner parallel to the federal Constitution's First Amendment interpretation, except that Washington courts "diverge from the Supreme Court on the state interest element of the time, place, and manner test, as [the Washington courts] believe restrictions on speech can be imposed consistent with [the Washington Constitution's free speech clause] only upon showing a compelling state interest." *Collier v. City of Tacoma*, 121 Wash.2d 737, 854 P.2d 1046, 1051 (1993) (en banc). We hold that the City's interest in restoring and maintaining safety and security also was a "compelling state interest" within the meaning of Washington law, because "the purpose [is] a fundamental one and [Order No. 3] bear[s] a reasonable relation to the achievement of the purpose." See *id.* at 1054. Thus, we affirm the district court's summary judgment dismissal of Appellants' challenge to the

validity of Order No. 3 under the Washington State Constitution.

FN58. The First Circuit recently rejected a similar argument in *Bl(a)ck Tea Soc'y*, 378 F.3d at 12.

B

[14] Appellants contend that Order No. 3 (and Assistant Chief Ferguson's Operations Order) improperly gave unfettered discretion to officers charged with enforcing the Order. The Supreme Court has required that "a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002). A regulation granting unfettered discretion to officials charged with administering that regulation is impermissible because it creates two dangers. First, such a regulation may "intimidate[] parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); see also *Griefen*, 200 F.3d at 1262. Second, unfettered discretion may permit the administering officials "to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); see also *Griefen*, 200 F.3d at 1262.

We addressed this issue in *Griefen*. There, the Forest Service had issued a closure order excluding the public from coming within 150 feet of a portion of the Nez Perce National Forest that was closed for construction and repair. *Griefen*, 200 F.3d at 1258. The closure order had exempted persons with a permit authorizing entry, law enforcement officials, rescue workers, and employees of the construction

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company doing work in the restricted zone. *Id.* Appellants challenged the closure order contending, *inter alia*, that the Forest Service had too much discretion in administering the closure order. *Id.* at 1262. We rejected this contention, explaining that “[i]f a closure of a public forum is for a valid rather than a disguised impermissible purpose, the potential for self-imposed or government censorship ... does not exist.” *Id.* We held:

*1144 In First Amendment terms, the fact that discretion to authorize entry to a closed area may be unfettered during construction is of no concern. The process of granting authority to enter a lawfully closed zone differs markedly from the process of licensing expressive activity. Such a process does not “engender identifiable risks to free expression....”

Id. at 1263 (quoting *City of Lakewood*, 486 U.S. at 757, 108 S.Ct. 2138).

[15] *Griefen* is instructive in evaluating how Order No. 3 was implemented through the Operations Order.^{FN59} We have determined that, on its face, Order No. 3 was a lawful time, place, and manner restriction on speech.^{FN60} Thus, portions of downtown Seattle covered by Order No. 3 were lawfully closed with limited exceptions for public safety officials, business owners, managers, or employees, and their customers.

FN59. The dissent argues that *Griefen* is inapposite because “the area into which the plaintiffs sought entry to protest had temporarily lost its status of public forum.” Dissent at 1175 n. 17. The dissent incorrectly reads *Griefen*, taking the sentence it relies upon out of context. In *Griefen* we said that “the immediate area of a construction zone is not an area that *has the attributes* of a public forum.” 200 F.3d at 1261 (emphasis added). We also held in *Griefen* that “[w]hen expressive conduct occurs on *public grounds*, like a national forest, the government can impose reason-

able time, place, and manner restrictions,” *id.* at 1259-60 (emphasis added), and “[i]f a closure of a *public forum* is for a valid rather than a disguised purpose, the potential for self-imposed or government censorship ... does not exist.” *Id.* at 1262 (emphasis added). Moreover, we had “no doubt” in *Griefen* that “a government entity may close areas of public forests under construction and repair,” just as we had “no doubt” that a city “could temporarily close for good reasons ... a street engulfed in a riot or an unlawful assembly.” *Id.* at 1263.

The closure order we addressed in *Griefen* closed part of the Nez Perce National Forest, which doubtless is and was a public forum. In any event, in *Griefen* we analyzed not only the reasonable time, place, and manner issues, *id.* at 1259-62, but also the protestors’ unbridled discretion challenge on the premise that the order closed a public forum. *Id.* at 1262-65. Similarly, our analysis in this case of the reasonable time, place, and manner issues raised by the Appellants proceeds on the premise that Order No. 3 closed a public forum. See discussion *supra* Part III.A. Likewise, our analysis of Appellants’ unbridled discretion challenge proceeds on the premise that Order No. 3 resulted in “a closure of a public forum [] for a valid rather than a disguised purpose.” See *Griefen*, 200 F.3d at 1259-60.

FN60. The dissent appeals to *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 573, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987), but that case is inapposite as it involved a speech restriction held to be facially unconstitutional under the First Amendment’s overbreadth doctrine. Moreover, Order No. 3 did not receive a

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“virtually open-ended interpretation,” but rather contained express limits on whom officers could exclude from the restricted zone, such as WTO personnel, workers, and public safety officials.

That officers had discretion to permit persons with a reasonable purpose to enter the restricted zone does not render Order No. 3 constitutionally deficient.^{FN61} Order No. 3 facially restrained officers from excluding certain persons specifically authorized to enter the restricted zone, and the Operations Order clarified the phrase “reasonable purpose” specifically to include ***1145** “work, shopping at a specific location ..., or other like type reasonable activity.” We have upheld a grant of official discretion to interpret what is “reasonable” in restricting speech to further a significant government interest. *See S. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1139-41 (9th Cir.2004) (rejecting an unfettered discretion argument where the statute gave a governing body power to “charge permit applicants a fee *reasonably* calculated to reimburse the county for its *reasonable* and *necessary* costs in receiving, processing and reviewing applications for permits to hold outdoor mass gatherings” (emphases added)). Should a pattern of abuse result from an official’s exercise of discretion, the proper remedy is not to “insist [] upon a degree of rigidity that is found in few legal arrangements,” but rather is to seek remedy through as-applied challenges. *Chicago Park Dist.*, 534 U.S. at 325, 122 S.Ct. 775; *S. Oregon Barter Fair*, 372 F.3d at 1139.

FN61. The dissent intimates that any statute that gives an officer discretion to administer speech restrictions is unconstitutional because it provides “the *opportunity* for abuse.” *See* Dissent at 1175. Our dissenting colleague overstates the reach of the First Amendment’s unbridled discretion doctrine. A literal “opportunity for abuse” may be present whenever an armed officer of the law is given authority to enforce a speech restriction. We are concerned in-

stead with whether Order No. 3’s contained “adequate standards to guide the official’s decision and render it subject to effective judicial review.” *Chicago Park Dist.*, 534 U.S. at 323, 122 S.Ct. 775 (2002).

Persons intending to protest were limited in time, place, and manner of their speech, but were not intimidated into censoring their speech because all protest activity was prohibited for a valid purpose in the restricted zone and speech was not restrained immediately outside the restricted zone. Further, there was no danger on the face of Order No. 3 that officers enforcing the restricted zone could indiscriminately withhold permission to speak. Order No. 3 prohibited protest *on any topic* within the restricted zone. Order No. 3 and the supplemental Operations Order did not give officers administering the Orders discretion to allow persons with “favored” views inside the zone and to exclude those with “disfavored” views. Regardless of topic or viewpoint, protestors were prohibited from the restricted zone, as were others who did not fall within the limited exceptions.

Assistant Chief Joiner’s Operation Order gave officers guidance (including specific examples) of which individuals were permitted into the restricted zone.^{FN62} The Operations Order said, “[v]ehicles and/or pedestrians ... are authorized access inside the perimeter if they have a reasonable purpose for entering the perimeter. A reasonable purpose includes work, shopping at a specific location within the perimeter, or other like type reasonable activity.”^{FN63} As in *Chicago Park District*, ***1146** “[t]hese grounds [were] reasonably specific and objective, and [did] not leave the decision to the whim of the administrator.” 534 U.S. at 324, 122 S.Ct. 775 (internal quotation marks and citation omitted); *see also S. Oregon Barter Fair*, 372 F.3d at 1132; *cf. Gaudiya Vaishnava Soc’y v. City and County of San Francisco*, 952 F.2d 1059, 1065-66 (9th Cir.1991) (“The ordinance [violates the First Amendment because it] provides no specific grounds for granting or denying permits: no explicit

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limits are placed on the Chief of Police's discretion."'). We hold that Order No. 3 and the Operations Order did not provide unfettered discretion to officers who were administering the restricted zone.

FN62. The Menotti plaintiffs contended that oral argument that, under *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), the fact that officers had any discretion to admit persons into the restricted zone rendered Order No. 3 and the Operations Order unconstitutional. We disagree. In *Hague*, the ordinance allowed a city official to deny a permit for a public meeting for any reason believed by the official to be "proper," provided that the denial was for the purpose of "preventing riots, disturbances, or disorderly assemblage." *Id.* at 502 n. 1, 59 S.Ct. 954; see also *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (holding that a county's parade ordinance granted excessive discretion to a county administrator as to the proper amount to charge for a parade permit, where there were "no articulated standards either in the ordinance or in the county's established practice" and the city administrator was "not required to rely on any objective factors" to determine the proper fee). These cases do not constitutionally prohibit the grant of any discretion to city officials. Rather, the cases hold that city officials must be guided by objective factors and standards when making decisions pursuant to a city ordinance that restricts speech. Here, officers were instructed to grant entrance into the restricted zone to those persons who had a "reasonable purpose" (defined to include "work, shopping at a specific location within the perimeter, or other like type reasonable activity") to enter the zone. The Menotti plaintiffs' argument on this score is unpersuasive.

FN63. The dissent argues that the Operations Order allowed "officers to determine unilaterally what constitutes a 'reasonable purpose,' with no further elaboration on what might be considered 'other like type reasonable activity' " Dissent at 1176. The dissent's selective quotation ignores the guidance provided by the enumeration of specific activities that constituted a "reasonable purpose," such as working or shopping. That the Operations Order listed these commercial activities served to "guide the official's decision and render it subject to effective judicial review." *Chicago Park Dist.*, 534 U.S. at 323, 122 S.Ct. 775.

C

We next address the plaintiffs' contention that Order No. 3 was unconstitutional "as applied." "An as-applied challenge alleges that the restriction on speech is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Kuba v. I-A Agric. Ass'n*, 387 F.3d 850, 852, 856, slip op. 14635, 14645 (9th Cir.2004) (internal quotation marks omitted) (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir.1998)). ^{FN64} The district court concluded that Order No. 3 as applied to the Hankin plaintiffs was a valid time, place, and manner restriction. The Hankin plaintiffs contend that Order No. 3 was unconstitutional as applied to them because the City had adopted a policy of arresting only anti-WTO protestors within the restricted zone.

FN64. In *Kuba* we addressed a facial and as-applied challenge to a state association's policy that prohibited individuals from demonstrating at the association's rodeo and circus, except in designated "free expression zones." *Kuba*, 387 F.3d at 853-55. We held the policy facially unconstitutional because the association failed to prove

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how a handful of demonstrators would cause congestion or a danger to safety, *see id.* at 859-60, and because the association's policy was not narrowly tailored when it penned demonstrators in "three small, fairly peripheral areas" and did not "sufficiently match" the interest of preventing congestion that could have been achieved with equal effectiveness but less speech-restrictive alternatives, *see id.* at 861-62. *Kuba* differs from the case before us because *Kuba* did not involve significant prior violence such as had marred Seattle. The corresponding governmental interest in *Kuba*, in preventing congestion with potential impact on safety, before the congestion occurred, was less than Seattle's interest in restoring order, after widespread violence, including vandalism and riot.

Hankin submitted a declaration in opposition to the City's motion for summary judgment in which he testified that, on December 1, 1999, he participated in a group march and protest at Westlake Park within the restricted zone. Hankin testified that police surrounded the group and arrested them without any warning, and without any determination as to whether those persons were within the exemptions to Order No. 3. Hankin testified that, immediately after arresting the large group of protestors Seattle police then turned to another portion of Westlake Park, where Hankin was standing, and arrested him and others beside him without determining whether these persons came within the exemptions to Order No. 3. Accepting Hankin's declaration testimony as true, as we must for the purposes of reviewing the district court's grant of *1147 summary judgment to the City, Hankin's testimony is evidence that the arrest of this group of persons was a "discriminatory enforcement of a speech restriction amount[ing] to viewpoint discrimination in violation of the First Amendment." *Foti*, 146 F.3d at 635; *see also Police Dept. v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (invalidating, on Equal Protec-

tion grounds, a disorderly conduct ordinance which barred picketing within 150 feet of a school in session, but exempted peaceful picketing of any school involved in a labor dispute, because "the operative distinction is the message on a picket sign").

[16] The City may be held liable for such a violation only if the arresting officers' conduct was a product of City policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691-694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). As we have explained: "Liability may attach to a municipality only where the municipality itself causes the constitutional violation through '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.'" *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 984 (9th Cir.2002) (quoting *Monell*, 436 U.S. at 694, 98 S.Ct. 2018). A municipal "policy" exists when "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (plurality opinion); *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir.2002) (per curiam).

[17] There are three ways to show a policy or custom of a municipality: (1) by showing "a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity;" (2) "by showing that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision;" or (3) "by showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate." *Ulrich*, 308 F.3d at 984-85 (internal quotation marks and citations omitted). We have held that a municipal policy "may be inferred from widespread practices or evidence of repeated constitutional violations for which the errant municipal

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officers were not discharged or reprimanded.” *Nadell v. Las Vegas Metro. Police Dept.*, 268 F.3d 924, 929 (9th Cir.2001) (internal quotation marks and citation omitted).

Although Schell (as then-Mayor of the City) was the City's chief policymaker at the time Order No. 3 was implemented, he testified in deposition that he had “relied on the [police] officers to carry out [Order No. 3] and make sure we had a secure zone for our-for the safety of our citizens and the safety of the delegates.” Thus, Schell can be said to have “delegated that authority to ... a subordinate,” in this case, Police Chief Stamper. *See Ulrich*, 308 F.3d at 985. Chief Stamper, in turn, delegated the responsibility of planning the City's response to the WTO protests to Assistant Chief Joiner. Joiner, in explaining the City's implementation of Order No. 3, said that: “We're going ... to take the core area where the [WTO] conference is occurring ... and prohibit any demonstrations within that core area for the remainder of the week.”

In support of their contention that the City had adopted a policy of suppressing anti-WTO speech in applying Order No. 3, the Hankin plaintiffs submitted declarations^{FN65} from persons stating that police refused to allow them to enter the restricted *1148 zone, even though they came within one of the exceptions to Order No. 3, unless they removed anti-WTO buttons or stickers.^{FN66} Martha Ehman testified in a declaration that on December 1, 1999, officers enforcing the restricted zone permitted her to enter after she said that she was going to work in the restricted zone. She testified that, after being permitted to enter, officers told her to stop and remove a piece of tape from her backpack that had the words “NO WTO” on it, and that officers told her she would be arrested if she did not comply. Ehman removed the tape and was allowed to proceed. Lauren Holloway testified in a declaration that, on December 1, 1999, officers enforcing the restricted zone forcibly removed anti-WTO stickers from her clothing on the basis that she was in the “No Protest Zone.” Ronald Matyjas testified that,

on December 1, 1999, while walking to his office located in the restricted zone, an officer told him that he could not wear the “No WTO” sign that he had affixed to his jacket, and that another officer tore off the sign without permission. Andrew Russell testified that, on December 1, 1999, he was refused entry into the restricted zone because he was wearing a button that said “No WTO,” and only after removing the button was he was allowed into the restricted zone. Rita Herkal testified that, on December 1, 1999, officers forcibly removed anti-WTO stickers from her clothing, and that officers told her “You're not allowed to wear stickers.”

FN65. These declarations were submitted in support of the Menotti plaintiffs' motion for partial summary judgment, and in opposition to the City's motion for partial summary judgment.

FN66. Former-Police Chief Stamper also testified via declaration that “the action of the officers [administering the restricted zone] when confronted with that WTO slash through it ... was, you know, take the symbol away, put it in your backpack, or whatever the solution was to that particular problem.”

[18] The statements of Assistant Chief Joiner and the declarants, taken in the light most favorable to Appellants, create a genuine issue of material fact as to whether it was the policy of the City to apply Order No. 3 in a manner that excluded only anti-WTO protestors. Viewing the evidence in the light most favorable to the Hankin plaintiffs, such a policy may be inferred due to the “widespread practices or evidence of repeated constitutional violations” and the absence of evidence that police officers were discharged or reprimanded for making the discard of anti-WTO expressive materials an entry ticket to the restricted zone. *See Nadell*, 268 F.3d at 929 (internal quotation marks and citation omitted). We reverse the district court's grant of summary judgment to the City on the constitutionality of Order No. 3 as applied to the Hankin

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plaintiffs, and we remand this issue for trial. Because we so hold, we reverse the district court's order denying class certification and remand that issue to the district court for reconsideration.^{FN67}

FN67. As Order No. 3 was on its face a reasonable time, place, and manner restriction, it follows that all persons who did not enter or who were excluded from the restricted zone because of that order cannot assert a valid claim individually or as a class member. However, any persons who were excluded solely because of the content of their visible communications without regard to the exemptions within Order No. 3, or those such as employees and shoppers, who came within Order No. 3's exemptions, but who were allowed to enter the restricted zone only after removing visible communications, such as buttons or stickers, hostile to the WTO, may assert an as-applied First Amendment claim. Their ability to assert a claim against the City, as contrasted with a claim against the specific officers with whom they interacted, will depend on the factual determination whether their claim is based on a policy of the City of Seattle, an issue on which we have identified a genuine issue of material fact requiring trial. As to any such claimants, we express no opinion whether the requirements for class action certification may be satisfied, leaving that issue for initial consideration in the district court after any due and appropriate proceedings.

*1149 [19][20] However, we affirm the grant of summary judgment to individual defendants Schell and Stamper regarding the Hankin plaintiffs' claims against them. "Supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional depriva-

tions of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991) (internal punctuation, quotation marks, and citations omitted). Here, Appellants have presented no evidence, other than the adoption of Order No. 3 and the Operations Order, that either Schell or Stamper personally took part in the alleged constitutional violations or caused the constitutional violations through their individual actions. We have already held Order No. 3 to be facially constitutional, and without evidence that Schell and Stamper personally played a role in the alleged constitutional violations, either directly or by acquiescence or culpable indifference, there is no basis for liability against them in their individual capacities. The evidence presented by the plaintiffs was not sufficient to establish or create a genuine issue of material fact concerning the supervisory liability of Schell or Stamper.

IV

A

We turn to the individual claims of the Menotti plaintiffs. With regard to Menotti, the district court concluded that Seattle police had probable cause to believe Menotti had committed the crime of pedestrian interference^{FN68} and obstructing a police officer.^{FN69} The district court granted summary judgment on Menotti's Fourth Amendment claim and state law false arrest claim. The district court also granted summary judgment to the City on Menotti's First Amendment claim, holding that Menotti had failed to present evidence that the officers who arrested Menotti acted under a City policy. Menotti appeals the district court's grant of summary judgment to the City and denial of his motion for summary judgment on these issues.

FN68. Seattle Municipal Code section 12A.12.015 prohibits pedestrian interference. A person commits pedestrian inter-

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ference where the person, *inter alia*, "intentionally obstructs pedestrian or vehicular traffic." To "obstruct pedestrian or vehicular traffic" is defined as "to walk, stand, sit, lie, or place an object in such a manner as to block passage by another person or a vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact." Seattle Mun.Code § 12A.12.015.

FN69. Seattle Municipal Code section 12A.16.010 prohibits obstructing a public officer. A person obstructs a peace officer where the person, *inter alia*, "[i]ntentionally and physically interferes with a public officer" or "[i]ntentionally hinders or delays a public officer by disobeying an order to stop given by such officer." Seattle Mun.Code § 12A.16.010.

[21] We first address whether the police had probable cause for Menotti's arrest. "The test for probable cause is whether facts and circumstances within the officers' knowledge are sufficient to warrant a prudent person, or one of reasonable caution, to believe, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *United States v. Puerta*, 982 F.2d 1297, 1300 (9th Cir.1992) (internal punctuation, quotation marks, and citation omitted). The question presented on Menotti's Fourth Amendment claim is whether a prudent person in the position of the *1150 officers who arrested Menotti would have believed that Menotti was committing the offenses of pedestrian interference and obstructing an officer.

[22] Menotti submitted video evidence showing that just before his arrest Menotti addressed a small group while pedestrians unaffiliated with the group walked by unimpeded. This evidence is contradicted by the deposition testimony of Seattle Police Officer Christopher Myers, one of the officers who arrested Menotti, who testified that he saw Menotti "causing a group to block both vehicular and pedestrian traffic."

We, of course, are not empowered to make factual determinations when faced with conflicting evidence. In this procedural context, where summary judgment was given to the City, we must credit the video evidence submitted by Menotti, and consider all evidence in the light most favorable to Menotti. Menotti's video evidence showed that neither he nor the group he addressed interfered at all with pedestrians, and a reasonable jury could find from this evidence, if the jury failed to credit Officer Myers's testimony, that the officers did not have probable cause to arrest Menotti. A genuine issue of material fact concerning whether pedestrians were impeded by Menotti exists, and requires trial for resolution. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

We also hold that a genuine issue of material fact exists as to whether police had probable cause to arrest Menotti for obstructing an officer. Menotti testified in deposition that when officers approached his group, the officers issued no directives or warnings, and that he ran because the officers wanted the group to disperse. Similarly, the video evidence submitted by Menotti does not show any obvious audible warnings by police immediately before Menotti's arrest. In contrast, Officer Myers testified in deposition that, when officers approached Menotti's group, they yelled "stop, police," and that Menotti started running immediately thereafter. Whatever may be decided by the trier of fact, at the summary judgment stage we must credit Menotti's testimony and conclude that a reasonable jury could determine that there was not probable cause to arrest Menotti for obstructing an officer. A genuine issue of material fact exists whether there was probable cause to arrest Menotti for obstructing an officer, and this issue also must be resolved by trial.

We hold that the district court erred by granting summary judgment for the City on Menotti's Fourth Amendment claim. We reverse the district court's grant of summary judgment dismissing Menotti's §

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1983 claim under the Fourth Amendment and his state law false arrest claim. We remand these claims to the district court for further proceedings.

We turn to Menotti's First Amendment claim. Menotti alleged in his complaint that the City violated his First Amendment rights when officers arrested him. The district court granted summary judgment to the City, reasoning that Menotti "failed to produce sufficiently probative evidence of any City policy or custom that caused a deprivation of his constitutional rights." Based on our ruling above that there is a genuine issue of material fact whether the City had a policy during the WTO conference of suppressing anti-WTO views of persons who might otherwise have qualified for entry into the restricted zone, we reverse the district court's judgment on this issue and remand it to the district court for trial.

B

Sellman was arrested for distributing leaflets within the restricted zone, and the viability of his claims depends entirely on the resolution of his constitutional challenge to Order No. 3. Sellman presented *1151 no evidence that he was targeted for arrest because of his anti-WTO views. Rather, the undisputed testimony revealed that Sellman was arrested only after Detective Stevens ascertained that Sellman had violated Order No. 3 by being in the restricted zone when he did not come within one of its exceptions, and further that Sellman did not obey an order to disperse. We affirm the district court's grant of summary judgment in favor of defendants on Sellman's claims. ^{FN70}

FN70. The parties dispute whether Sellman appeals the district court's grant of summary judgment to Officer Stevens, the officer who arrested Sellman. Sellman's only reference to Officer Stevens in his opening brief was a statement that "[s]ummary judgment should be entered in Sellman's favor, with remand to determine the dam-

ages caused by the City, Schell, Stamper, and Stevens." Because this contention was not supported by argument in Sellman's opening brief, we deem it waived. *Humble v. Boeing Co.*, 305 F.3d 1004, 1012 (9th Cir.2002) ("Issues raised in a brief but not supported by argument are deemed abandoned absent manifest injustice."); *see also* Fed. R.App. P. 28(a)(9)(A) (requiring that appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

C

[23] Stedl testified in deposition that his bag was unlawfully searched and his fliers unlawfully seized by an unidentified officer. Stedl contended that the City was liable, based on 42 U.S.C. § 1983, for an unlawful search and seizure. The district court granted summary judgment for the City on Stedl's claim, holding that Stedl had not presented evidence of a City policy to commit unlawful seizures. As we have already explained, to prevail on a theory of municipal liability, Stedl must show that the unidentified officer acted pursuant to an official policy or custom of the City. *Monell*, 436 U.S. at 691-694, 98 S.Ct. 2018; *Ulrich*, 308 F.3d at 984.

There was no evidence of any City policy authorizing the search of backpacks or the seizure of fliers. Stedl argues that such a policy may be inferred from an alleged pattern of such practices by officers during the WTO conference, but he offered deposition testimony of only two persons, himself and one other protestor, who said that police had unlawfully searched their bags. Even viewing the evidence in the light most favorable to Stedl, he has not offered evidence proving the first method of satisfying *Monell's* policy requirement: there was not evidence of a "longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity." *Ulrich*, 308 F.3d at 984 (quoting *Jett v. Dallas Indep. Sch.*

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Dist., 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989)). Similarly, Stedl didn't show "that [the unidentified officer] was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision." *Id.* at 985 (internal quotation marks omitted). Nor did Stedl's evidence establish that "an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate." *Id.* A showing of constitutional wrong by a single police officer may support a claim against that officer, but a claim against a municipality may proceed only with evidence that the officer acted under the municipality's policy or custom. Here, Stedl did not show that the unidentified officer acted under an official policy or custom of the City.

We affirm the district court's summary judgment in favor of the City on Stedl's claims.

D

Skove brought First Amendment and Fourth Amendment claims against Officer *1152 Smith for Smith's seizure of Skove's sign.^{FN71} The district court concluded that Smith was entitled to qualified immunity on Skove's Fourth Amendment claim because Smith had probable cause to believe that Skove had committed a crime (violating Order No. 3), and because the seizure involved exigent circumstances. The district court also granted summary judgment to Smith on Skove's First Amendment claim, holding that Smith's actions were a valid time, place, and manner restriction on speech. Skove appeals the district court's grant of summary judgment to Smith on both claims.

FN71. In his complaint, Skove alleged that Order No. 3 was unconstitutional as applied to him, and that Officer Smith violated Skove's First Amendment and Fourth Amendment rights in seizing Skove's sign. Skove did not allege in his complaint that the City was liable under a theory of muni-

cipal liability for an alleged Fourth Amendment violation stemming from Smith's seizure of his protest sign.

[24] We review the district court's grant of qualified immunity de novo. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994). Under *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), we take a two-step approach in determining whether Smith is entitled to qualified immunity. First, we determine whether Smith violated Skove's constitutional right. *Id.* at 200-01, 121 S.Ct. 2151. If we answer in the affirmative, we proceed to determine whether that right was "clearly established" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02, 121 S.Ct. 2151. If we determine at the first step that there was no constitutional violation, that ends the qualified immunity inquiry. *Id.*

We address Skove's Fourth Amendment claim and consider whether Smith violated Skove's constitutional rights by seizing Skove's sign. Under the Fourth Amendment, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The Supreme Court has held that "in the ordinary case, seizures of personal property are unreasonable within the meaning of the Fourth Amendment, without more, unless ... accomplished pursuant to a judicial warrant issued by a neutral and detached magistrate after finding probable cause." *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (internal quotation marks omitted). However, when faced with "special law enforcement needs," the Supreme Court "has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."^{FN72} *Id.*

FN72. Exceptions to the warrant requirement, for example, include administrative searches, *Donovan v. Dewey*, 452 U.S. 594, 598, 101 S.Ct. 2534, 69 L.Ed.2d 262

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(1981), searches incident to arrest, *see United States v. Edwards*, 415 U.S. 800, 802-03, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), automobile checkpoint searches, *see Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), reasonable detention of suspects during the execution of a search warrant, *see Michigan v. Summers*, 452 U.S. 692, 702-05, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), limited searches for weapons based on reasonable suspicion, *see Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and exigent circumstances, *see United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). We have defined exigent circumstances to include "those circumstances that would cause a reasonable person to believe that entry ... was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir.1984) (en banc).

*1153 [25] Smith contends that his seizure of Skove's sign was lawful because Smith had probable cause to arrest Skove for being in the restricted zone and not within Order No. 3's exemptions. We agree that Smith had probable cause to arrest Skove because, by engaging in protest inside the restricted zone without evidence that he was exempt, Skove had violated Order No. 3. However, it is uncontested that Smith did not arrest Skove. Had Skove been arrested, ample precedent would permit a search or seizure "incident to arrest." *Knowles v. Iowa*, 525 U.S. 113, 116-17, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (noting that the two historical rationales for the search incident to arrest exception are "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial"). We decline to ex-

tend the doctrine of "search incident to arrest" to give protection for a warrantless search or seizure when no arrest is made. It may be that Officer Smith declined to arrest Skove because Skove walked away and Officer Smith decided to maintain his post. Whatever Officer Smith's reason for not making the arrest, the seizure cannot be justified as incident to an arrest. Had an arrest been made, Smith could argue the sign was seized as evidence, *McArthur*, 531 U.S. at 331-32, 121 S.Ct. 946, but without an arrest, we do not see how Smith legitimately could be concerned about a need to preserve evidence of a crime from being destroyed.^{FN73}

FN73. Smith argues that Skove voluntarily abandoned Skove's interest in the sign when he walked away from Smith after the seizure. This argument misses the point. The sign was seized before Skove walked away. The lawfulness of the seizure had to be shown based on evidence existing before or at the time of the seizure. Skove's departure after the sign's seizure is not material on this score.

There is some merit to the argument that where there is probable cause to arrest, evidence of the crime may be seized and the seizure considered valid even if the arrest is not completed. *See Roaden v. Kentucky*, 413 U.S. 496, 504, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1974) (recognizing that "the probable cause for an arrest might justify the seizure of weapons, or other evidence or instruments of a crime, without a warrant"). A supporting reason would be that police in some settings might have to disregard competing duties to pursue and complete an arrest where, as here, a suspect walks away. Yet, we reject this position because, if police aims to arrest are so weak that they do not detain a suspect, then it seems incongruous to say that a seizure of evidence can be lawfully made without a warrant. We decline to extend the exception to warrant requirements for seizures incident to arrest to instances in which a police officer seizes evidence of a crime, but makes no arrest.

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[26] Viewing the evidence in the light most favorable to Skove, as we must in reviewing the district court's grant of summary judgment to Smith based on qualified immunity, when Smith encountered Skove there was no exigency requiring seizure of Skove's sign without a warrant. When the encounter took place on December 2, 1999, Seattle police had met with tens of thousands of non-violent and violent protestors who had inflicted severe damage on the downtown, which led to the City's promulgation of Order No. 3. The City's law enforcement resources (and officers themselves) had been taxed severely. But Smith faced a relatively calm situation at the point and time he encountered Skove on December 2. The City did not present evidence that Smith was dealing with violent protestors when he encountered Skove. By contrast, Smith's deposition testimony indicated that, just before *1154 he saw Skove, Smith was talking with a fellow officer and "taking in the atmosphere." Viewing the evidence in the light most favorable to Skove, Smith when seizing Skove's sign was not then actively engaged in preventing others from entering the restricted zone, nor was he immediately engaged in combating violence. In fact, Skove submitted video evidence that, in the light most favorable to Skove, shows that others were not immediately present and the circumstances were not exigent when Smith confronted Skove and seized his sign.

[27] We also decline to establish a general exception to the Fourth Amendment's warrant requirement for conduct that, absent special needs consistent with the Supreme Court's precedents, is asserted to be "reasonable." It has long and consistently been the law that exceptions to the warrant requirement preceding searches and seizures are for defined categorical circumstances. *See McArthur*, 531 U.S. at 330-31, 121 S.Ct. 946 (listing examples of exceptions to the warrant requirement). Because an arrest was not made, and no established exception justifies the warrantless seizure on undisputed facts, we conclude that there is a genuine issue of material fact bearing on exigency and whether Smith's seizure of Skove's sign violated the Fourth

Amendment's protection against unreasonable seizures.

We proceed to the second step of qualified immunity analysis, under which we must determine whether the right was clearly established. *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. We have held:

Whether a right is "clearly established" for purposes of qualified immunity is an inquiry that must be undertaken in light of the specific context of the case, not as a broad general proposition. In other words, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Graves v. City of Coeur D'Alene, 339 F.3d 828, 846 (9th Cir.2003) (quoting *Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151) (alteration in original).

[28] The question before us then becomes whether a reasonable officer in Smith's position would have understood that he could not lawfully seize Skove's sign absent an arrest of Skove or exigent circumstances. We have rejected the position that a seizure could be made based on probable cause to arrest, when the arrest was not completed. Moreover, viewing the evidence in the light most favorable to Skove, we cannot say that the circumstances were indisputably exigent at the time and place Officer Smith confronted Skove and seized his sign. Because the exceptions to the Fourth Amendment's warrant requirement have been categorically defined, and because "in the ordinary case, seizures of personal property are unreasonable within the meaning of the Fourth Amendment ... unless ... accomplished pursuant to a judicial warrant issued by a neutral and detached magistrate after finding probable cause," *McArthur*, 531 U.S. 326, 330-31, 121 S.Ct. 946, 148 L.Ed.2d 838 (internal quotation marks omitted), we hold that a reasonable officer in Smith's position would have understood that his warrantless seizure of Skove's sign without an arrest and without exigency offended the guarantees of the Fourth Amendment. We therefore reverse the

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district court's grant of qualified immunity to Smith on Skove's Fourth Amendment claim.^{FN74}

FN74. Skove contends that he is entitled not only to reversal of the summary judgment given Smith, but also to a grant of summary judgment establishing Smith's liability for the seizure of Skove's sign. On this requested summary relief for Skove, we view the evidence in the light most favorable to Smith, rather than as we have viewed it above most favorably to Skove. Smith testified by declaration that when he seized Skove's sign he intended to "detain Mr. Skove to determine whether he was authorized to be in the zone." Smith also said in his declaration that "[g]iven the nature and extent of the protests in the area and my assignment, I decided not to pursue Mr. Skove to detain him or arrest him for violating [Order No. 3] and ignoring my directives." Viewing the evidence in the light favorable to Smith, we conclude that there are genuine issues of material fact whether the circumstances at the time and place of the seizure showed sufficient exigency to justify warrantless seizure. *See, e.g., McConney*, 728 F.2d at 1199. The factual issue of exigency must be presented to a trier of fact.

*1155 [29] As for Skove's First Amendment claim against Smith, we determine that the district court properly granted summary judgment to Smith. To prevail on his First Amendment claim, Skove must provide evidence showing that Smith "deterred or chilled [Skove's] political speech and such deterrence was a substantial or motivating factor in [Smith's] conduct." *Stoman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir.1994). Smith testified in deposition that he approached Skove and seized Skove's sign because Skove was engaged in protest, an activity Smith knew to be prohibited by Order No. 3. Skove submitted no evidence to the district court to establish that Smith's actions were motivated by

opposition to Skove's political beliefs or that Smith's actions were motivated by a desire to chill Skove's speech. Viewing the evidence in the light most favorable to Skove, we conclude that the district court properly granted summary judgment to Smith on Skove's First Amendment claim, and we affirm the district court on this issue.

E

We reverse the district court's grant of summary judgment to the City on Menotti's Fourth Amendment and false arrest claims and remand those claims for trial. We also reverse the district court's grant of qualified immunity to Officer Smith, and remand for trial the issue of Smith's liability for the seizure of Skove's sign. We affirm the district court's dismissal of all other claims asserted by Menotti, Sellman, Stedl, and Skove.

V

Justice Stewart once observed for the Supreme Court, in no uncertain terms, that "[t]he guarantees of the First Amendment have never meant that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 47-48, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966)).^{FN75} When a city is charged with the critically important responsibility of hosting a convention of world leaders, a setting in which the eyes of the world are on the city and our country, and our nation's reputation is at stake as well, the city must have the power to maintain civic order in a responsible way that does not unduly interfere with the gathered convention or with civil liberties. In balancing desired freedom of expression and the need for civic order, to accommodate both of these essential values, a measure of discretion necessarily must be permitted to a city, on the scene with direct knowledge, to fashion remedies to restore order once

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lost. It may be that a violent subset of protestors who disrupt civic order will by their actions impair the scope and manner of how law-abiding protestors are able to present their views.

FN75. Justice Stewart's quoted observation was made in the context of the Court's decision restricting protest on a military base. The same idea, however, animates the permissibility of reasonable time, place, and manner restrictions on protest in a public forum.

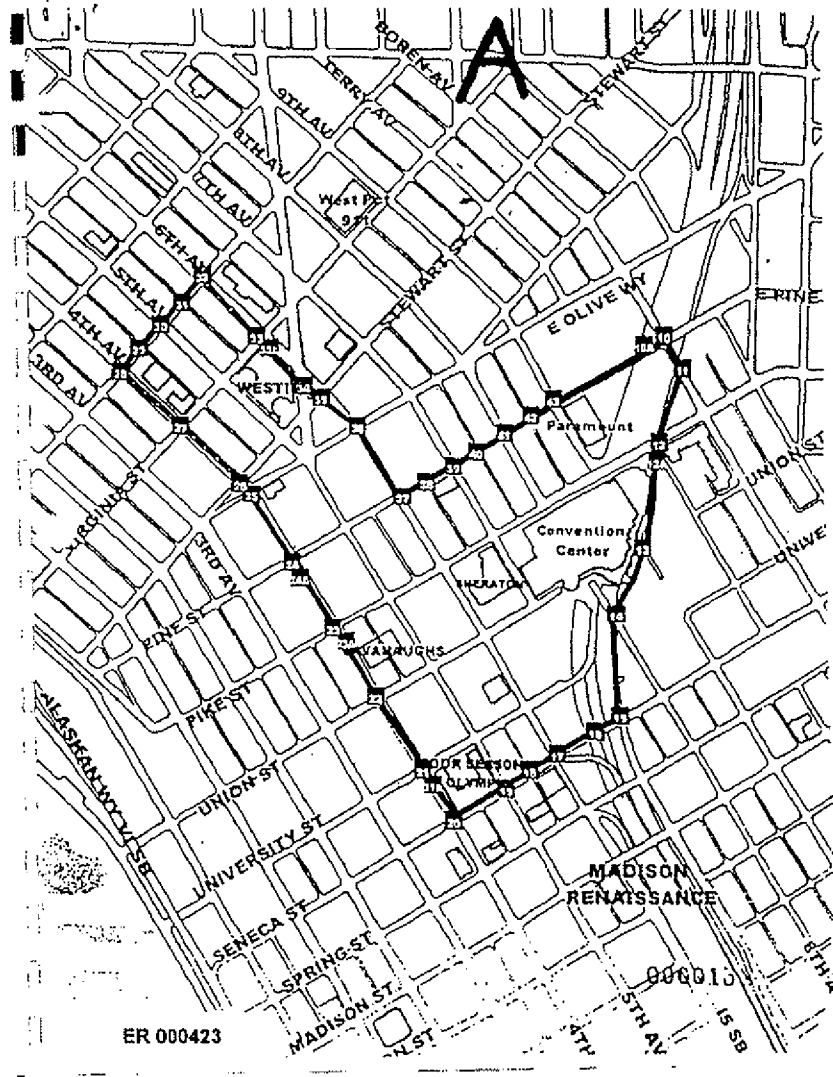
***1156** Given the breakdown of public order that confronted Seattle, we decline to hold unconstitutional the City's implementation of procedures necessary to restore safety and security to its residents and to the visiting world leaders. As occurred in this case, a city hosting an important meeting may be besieged with tens of thousands of persons, some with lawful intentions in the best tradition of civic protest, but others with violent and disruptive aims. When violent protestors substantially disrupt civic order, there must necessarily be consequences for all if a city is to satisfy its superordinate duty to provide safety and security. While respecting the liberty of protestors, a city must be permitted to act reasonably, within the bounds of the Constitution, to fulfill its responsibilities of providing physical security and the maintenance of order that is required for all of a city's residents and visitors.

We reject the facial challenges to Order No. 3, as well as the general challenge to police discretion implementing it under the Operations Order. In most respects, and particularly in regard to the permissibility of the City's adoption of Order No. 3 and its accompanying Operations Order, we affirm the judgment of the district court. However, as explained above, viewing the evidence in the light most favorable to Appellants, in some instances police conduct may have gone too far and infringed certain individual protestors' constitutional rights by making the content of their expressed views the test for their entry into the restricted zone. We reverse and remand to the district court the Hankin plaintiffs' as-applied challenge to Order No. 3, as well as the issue of class certification. We also reverse and remand to the district court identified issues regarding the arrest of Menotti and the seizure of Skove's personal property. On the record before us, we conclude that trial of disputed facts is necessary on the claims for which we reverse and remand.

**AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.**

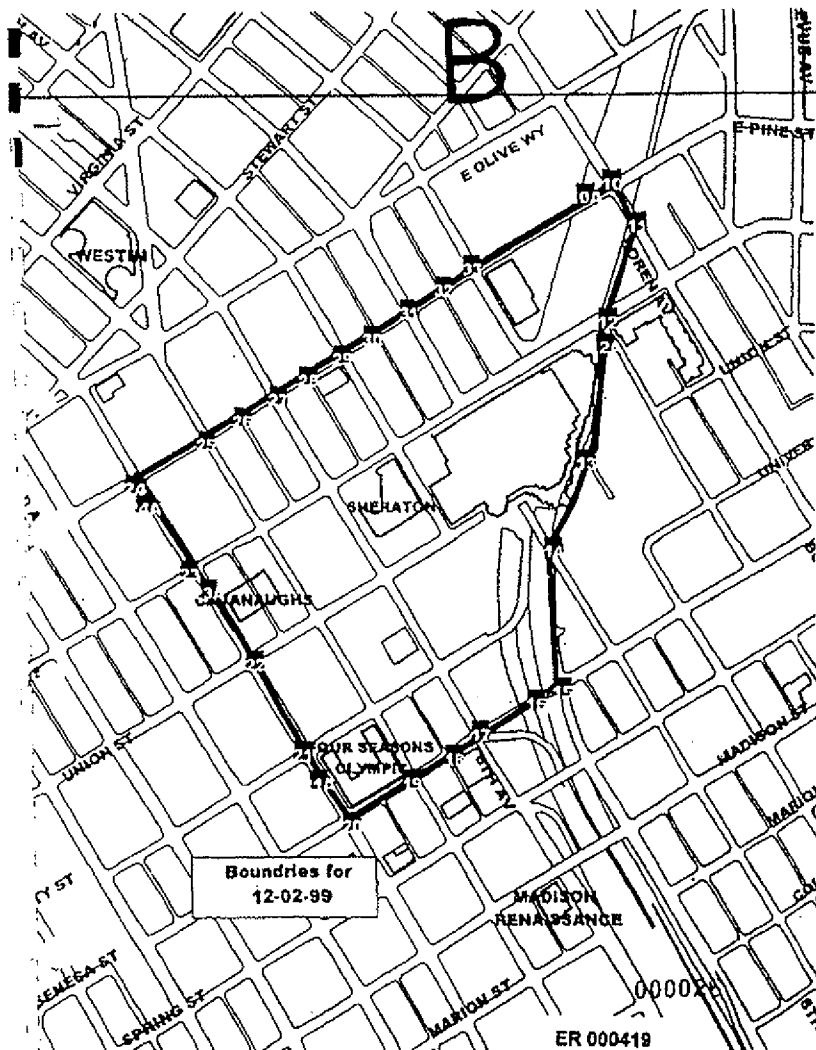
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PAEZ, Circuit Judge, concurring and dissenting:
I concur in the majority's holding that Seattle's Civil Emergency Order Number 3 (Order No. 3) was content-neutral and served a significant government interest. I cannot agree, however, that Order No. 3 was narrowly tailored and left open ample alternative channels of communication. I also disagree with the majority's determination that Order No. 3 provided adequate guidance to the law enforcement officers who were assigned the task of maintaining the perimeter of the "No Protest Zone."
FN1 Accordingly, I respectfully dissent from *1159 Parts III.A.2-3 and III.B of the majority's opinion.

FN1. According to Assistant Seattle Police

Chief Harvey Ferguson, "that was the term that was being used" until "word came out ... that was an inappropriate term" and the name was changed to "restricted zone." As I explain in Part I.B., below, the City's policy was to keep this area protest-free. City officials, police, and demonstrators all used the term "No Protest Zone" to refer to the area, and therefore I use that term throughout this dissenting opinion.

Assuming that Order No. 3 had been a valid time, place, and manner restriction on protected speech, I agree with the majority that the *Hankin* class action plaintiffs have raised material triable issues of fact

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regarding their claim that City officials enforced Order No. 3 to suppress the First Amendment speech of those individuals who sought to protest the World Trade Organization's policies. The *Hankin* class action plaintiffs should be permitted to proceed with their challenge to the Order as applied, and I therefore concur in Part III.C. of the majority opinion.^{FN2}

FN2. Because I would hold that Order No. 3 is constitutionally invalid, I would reverse the district court's adverse ruling as to Thomas Sellman and remand for further proceedings. I therefore dissent from Part IV.B. As I explain in more detail in Part III, *infra*, I concur in Parts IV.A and D of the majority opinion that Victor Menotti and Doug Skove have presented sufficient evidence to create material factual disputes for trial. I dissent, however from Part IV.C, affirming the summary judgment ruling against Todd Stedl.

The heart of my disagreement with the majority is its conclusion that Order No. 3 was narrowly tailored, that it left ample alternative avenues of expression and that, as implemented, it gave sufficient guidance to law enforcement officers to determine who could be admitted into the No Protest Zone. The majority concludes that the City's ban on all expressive activity in the 25 square blocks surrounding the WTO convention and hotels that housed WTO delegates passes our searching First Amendment review. I cannot agree, and in my view that conclusion is inconsistent with our long tradition of protecting free speech even when that protection may seem inconvenient.

The majority is correct that our inquiry into the content neutrality of Order No. 3 focuses only on the face of the Order itself. But in evaluating whether Order No. 3 is narrowly tailored and leaves open ample alternative avenues of expression, we look deeper than the text. Instead, "we must consider the [City]'s authoritative constructions of the ordinance, including its own implementation and in-

terpretation of it." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (emphasis added). While the text of Order No. 3 may be content neutral, the City's policy was to apply the law selectively such that it was not narrowly tailored to serve its asserted non-speech-related interest of preserving safety and order. As the Seattle City Council put it, "while [Order No. 3] might have met legal scrutiny on paper, [it] resulted in actions that were explicitly intended to limit protest." Report of the WTO Accountability Review Committee, Seattle City Council, at 5 (Sept. 14, 2000) (hereinafter "ARC Report").

I. Facts

A.

The picture painted in the majority's version of the events surrounding the WTO convention in Seattle fails to capture the full story. I agree with the majority that the violent protestors created a dangerous, even chaotic situation in Seattle that warranted substantial responsive measures by the City to restore order. The City surely had a significant interest in taking remedial action. Even in light of the serious violence, however, the City's response—cordoning off a 25-square-block area of downtown Seattle to restrict all forms of protest—was not constitutionally justified.^{FN3} The majority opinion omits *1160 several crucial facts that undermine its portrayal of a city in crisis. First, contrary to the majority's assumption, Order No. 3 was not justified by "the dire facts confronting the City in the early morning hours of December 1 during the WTO conference." *Maj. op.* at 1140. As Assistant Seattle Police Chief Edward Joiner's deposition testimony made clear, the decision to declare a state of emergency and to impose the police perimeter around the downtown area was *not* made in direct response to the violence and vandalism. That decision instead followed the realization that many of

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the peaceful protestors from the large, well-organized labor march would not be leaving Seattle. The crowd was simply larger than the police had anticipated. Joiner testified that

FN3. The majority states that “[t]he whole world witnessed the rampant violence and chaos in the streets of Seattle at the outset of the WTO meeting.” *Maj. op.* at 1120 n. 7. But as the Seattle City Council suggested, those images may not have accurately reflected the situation in Seattle, as peaceful political demonstrators “were drowned out by press coverage of disturbances.” ARC Report at 4.

[a]s the march concluded and it became evident that a sizeable portion of the marchers were not going to leave the downtown area as we anticipated and it became clear that we were not going to be able to bring the situation under control without taking some sort of drastic action, I made the decision that the only—the only recourse we had was to establish the police perimeter where we could provide security for the delegates and so forth.

Making the decision to impose the police perimeter, the City drew no distinction between peaceful protestors and those likely to cause violence—Joiner, for example, testified that during this process, the concept of peaceful and non-peaceful protestors “merged.”

Second, although I do not suggest that the violence confronting the City was insignificant, the majority's account exaggerates its pervasiveness. The ARC Report, for example, noted that even according to the highest estimates, only “well under one percent” of the demonstrators in Seattle engaged in acts of vandalism or violence. ARC Report at 3. Mayor Paul Schell agreed that he had “expected the vast majority of the protestors to be peaceful, and, in fact, it turned out that the vast majority of protestors were peaceful.” At a press conference at approximately 5:00 p.m. on November 30, Mayor Schell maintained that the protestors for the most

part “were friendly—they were our sons and daughters, they were our neighbors, they were the people who we work with. And there's no reason to be afraid of them.” The peaceful protestors even made efforts to prevent the violence by, for example, blocking vandals from access to store windows they attempted to break.

Further, the majority does not paint a clear picture of the situation confronting City officials at the time they adopted the Order. The violence of November 30 had ended before Order No. 3 was implemented. The nighttime curfew—not challenged here—had gone into effect and the streets of downtown Seattle were calm and under control. On Tuesday night, at roughly 8:00 pm, the police did a sweep of the streets and, according to Joiner's testimony, discovered that “[a]t that time all of the demonstrators had left. The situation was under control. It was quite peaceful.”^{FN4}

FN4. The majority's warning that “[e]ven a fierce battle may experience a respite of calm, and the calm of an evening can precede a storm in the morning[.]” *maj. op.* at 1131 n. 33, is alarmism supported by neither the evidence nor the law. The fact that violence had ended and Seattle's streets were calm when the Mayor issued the Order is undisputed in the record. Nonetheless, the majority provides the City “reason to believe ... that the violence attendant to the WTO conference had not ended prior to Order No. 3's enactment, but had just temporarily subsided and would resume contemporaneous with WTO proceedings.” *Id.* at 45 n. 44. At the summary judgment stage, however, we must view the evidence in the light most favorable to the nonmoving party. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir.1999) (en banc). Only by viewing the evidence in the light most favorable to the City can the majority conclude that the violence had “temporarily subsided.” With this improv-

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er factual determination, the majority sidesteps binding circuit law, which holds that "the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter)." *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir.1996).

***1161** As the violence on November 30 erupted, the police responded with force that, as the City Council's report concluded, likely intensified the situation. "As authorities lost control of the streets they resorted to methods that sometimes compromised the civil rights of citizens *and often provoked further disturbance.*" ARC Report at 3. The police response "was sometimes out of proportion to the threats faced" and included "seemingly gratuitous assaults on civilians." *Id.* at 4. Plaintiffs' expert Robert Klotz, the former Commander of the Special Operations and Traffic Division in the Washington, D.C. police force, concluded that "the state of emergency declared on November 30, 1999 was to a large extent an emergency of the City's own making." Klotz continued,

Being seen and heard is why demonstrators come to the event, and if they feel they are barred from doing so, it will simply make the crowd angry and more dangerous. It also makes the police the object of dissatisfaction, rather than the original source of protest. It can also motivate some people to protest police activity who never wanted to be involved originally.

One consequence "was to bring sleepy residents out of their homes and mobilize them as 'resistors.'" ARC Report at 11.

City officials were apprised of the large number of protestors planning on coming to Seattle well in advance of the conference. Klotz stated in his declaration that "[t]he preconference estimates of the size of the crowds were generally consistent with the number of people who actually attended." At a po-

lice training on demonstration management and crowd control that Seattle Police Captain Jim Pugel attended in July 1999, officials "said on a scale of 1 to 10 the WTO rated about a high 8." Furthermore, the violence that occurred in the weeks leading up to the conference should have put the City on notice that they would need to plan well for the event. *See maj. op.* at 1120. According to Captain Pugel's own After Action Report, police officials were aware by at least November 28-if not earlier-that protest groups were "intent on facilitating between 500 and 1,500 'civil disobedience' arrests" on November 30. They also knew at that time that they had insufficient resources and "that we might not be able to sustain the arrest of so many persons." There should have been no surprises.

According to the ARC Report, however, "[p]lanning for the WTO was driven by political and cost considerations that undermined the city's ability to cope with the disorders that ensued." ARC Report at 8. The Report found that the "city government failed its citizens through careless and naive planning, poor communication of its plans and procedures, confused and indecisive police leadership, and imposition of civil emergency measures in questionable ways." *Id.* at 3. Klotz similarly concluded that the City "did not adequately plan or train for the WTO conference," focusing its attention on highly unlikely events rather than "events that were, according to the available intelligence, quite likely to occur (i.e., organized civil disobedience and some vandalism)."

***1162 B.**

The manner in which the City implemented Order No. 3 is also worthy of more searching inquiry than the majority affords. The plaintiffs submitted a great deal of evidence to undermine the City's claim that Order No. 3 was necessary to contain and prevent the violence of November 30. Notably, the Order allowed anyone who did not visibly display opposition to the WTO to enter the zone, without regard to dangerousness or likelihood of violence.

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While the police scoured for “No WTO” signs and buttons, there was no evidence that officers checked bags for crowbars, weapons, or bombs. Lauren Holloway, for example, stated in her declaration that the officers she encountered at the perimeter “did not search me for weapons or ask for ID. They were only interested in our signs and stickers, which they either confiscated or forced us to remove.” Andrew Russell recounted a similar experience in his declaration. But this “selective or partial” No Protest Zone did not serve the City’s safety and security interests, as Klotz explained:

[I]t does not serve security goals to have a supposedly secure area where a very large number of inessential people are allowed to enter and roam at will. By giving a free pass to people who claimed to live, work, or even shop at locations within the zone, the City’s orders allowed a very large number of people into this supposedly secure area.... Serious terrorists or other people bent on breaking the law will have no trouble taking off their anti-WTO stickers at the boundary and pursue their plans once inside the zone.

The plaintiffs also presented significant evidence that even as members of the general public were permitted entry, protestors were turned away from the No Protest Zone. Police Chief Norman Stamper testified that, under the Operations Order that implemented Order No. 3, “a reasonable purpose does not include coming into the area for protests, so I think the language itself gives rise to the claim that this had become a no-protest zone.” At least as late as Friday, December 3, official documents referred to the area as the “ ‘No protest’ zone.” Seattle Police Officer Christopher Myers in his deposition testimony referred to it as “the protest zone. There was where protestors were allowed. There was where protestors weren’t allowed.” And testimony from several protestors reveals that police officers guarding the perimeter used the term “No Protest Zone” when speaking with the public.

Stamper clarified in his deposition that “[f]rom [the line officers’] point of view it effectively meant

anybody coming in to protest” would be excluded from the zone. Joiner testified that City officials even considered the idea of allowing in peaceful demonstrators but rejected it, “because I think at that time it had been made very clear there were not going to be peaceful demonstrations within that area.” If a person attempting to enter the zone did so, not for the purpose of shopping, but instead intended, individually, to peacefully protest, “she would not have been allowed in.”

According to the City Council’s report, “officers in the field were briefed with instructions that there would be no protests allowed.” ARC Report at 15. Seattle Police Officer Ron Smith testified that, according to “the briefing [he] was given,” protesting was not a legitimate reason to enter the zone. The State Patrol, one of the cooperating law enforcement agencies, made that policy explicit: its response plan for December 1 stated that “[f]only people with legitimate business will be allowed to enter, (working in the area, live, etc.) [sic]. Obvious protesters, people *1163 without legitimate business, or people that refuse to give information will not be allowed in the area.” In a televised public address, Joiner warned, “Anyone that goes into that area to protest will be arrested immediately.”

Even those who should have been granted access to the zone according to the plain terms of the Order, such as people who lived or worked in the zone, were denied entry if they wore “No WTO” stickers or carried protest signs. Officer Smith testified that the policy as conveyed to him by the Mayor was that “[e]ven if you live there, you are not supposed to be protesting” because “the protest area is down south of Seneca and west the Fourth [sic]. That’s what the Mayor said.” The plaintiffs offered numerous examples of Seattle police enforcing just such a policy. Michael Louis Evanson, for example, stated in his declaration that while on his way to a tuxedo fitting on 4th Avenue, he was stopped by police officers who snatched his hat and ripped off a sticker that read: “WTO: If it doesn’t work for working families, it doesn’t work.” An officer also reached

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under Evanson's poncho without permission, grabbed papers he was holding and would not return them. The papers were invitations to a party at the Methodist Church that had nothing to do with the protest.

Martha Ehman, an attorney who worked within the zone, declared that she passed through the perimeter by following the same route she normally took to walk to work every day. She saw three people in business suits pass through the perimeter without being stopped, but she was dressed casually and officers asked her where she was going. They let her pass when she told them where she worked, but as she walked away the officers yelled for her to stop when they noticed that the words "No WTO" were written in masking tape on her backpack. They asked her to remove it and she refused; they then informed her if she did not remove the tape she would be arrested. To avoid arrest, Ehman did as the officers instructed.

Ronald Matyjas also worked downtown, at his architect office just north of the Pike Place Market. He stated in his declaration that on December 1, he wore his typical work attire "with one difference: I had a[n 8.5 x 11"] sign attached to the back of my raincoat that said "No WTO." As he was walking to work, he attempted to pass through the perimeter but he was stopped by an officer who asked him why he was walking through the area. Matyjas replied that he was on his way to work. The officer told him he could not go downtown with that sign on his coat; another officer tore the sign off without Matyjas's permission. Matyjas noted that "[t]he other officers standing nearby did nothing to stop or correct the officers that confronted [him]."

Ehman, Matyjas, and Andrew Russell all stated in their declarations that once they took off their political signs, for the remainder of the week they were not stopped by police. They were *only* stopped for wearing political messages.

Michael W. Gendler, another Seattle attorney, was a partner at a law office located on the edge of the

zone at Fourth Avenue and Pike Street. He declared that he and three of his employees left their office carrying three protest signs which read, respectively, "Downtown Workers Against the WTO," "Protect Free Speech!", and "Say No to WTO" with the words "No Sale" imposed over a picture of the globe. When they attempted to enter the zone, police stopped them and refused entry even after Gendler showed the officers his business card and address. Gendler cited Order No. 3 and told the officer that he had a right to enter because he was an "owner of a business within the *1164 limited curfew area." The group was not allowed to enter. Gendler then got rid of his sign and the group walked one block further to another entrance, where Gendler (no longer displaying any anti-WTO messages) simply walked through the perimeter "without being stopped or questioned by any of the officers." His employees, however, still held their signs and they were stopped by officers who told them "they would not be allowed to proceed because they were attempting to enter a 'no protest zone.'" They again displayed their business cards and again were denied entry. "Both were informed that they could proceed without their signs, but not with them." They abandoned their signs and proceeded to enter the zone.

In many other cases, police officers simply made no attempt to determine whether or not an individual was authorized to enter the zone once they spotted any anti-WTO protest material. Andrew Russell, for example, was stopped by an officer as he attempted to enter the zone wearing a "No WTO" button. An officer told him that he could not wear his button inside the "No Protest Zone. He used that specific term." Russell was allowed to enter the zone and keep the button only after removing it from his clothes and putting the button away.

Liad Kantorowicz and her friend Lauren Holloway were stopped by the police at the perimeter. Kantorowicz held a sign and wore three stickers; two "No WTO" stickers and one sticker on her chest which read, "Attention Police Enforcement Officer,

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I refuse ... to speak to you. I demand to have my phone call. I demand to call a lawyer." The sticker also included phone numbers of lawyers. An officer noticed Kantorowicz's sign and asked to take it away. When she refused to give it to the officer, Kantorowicz recounted,

he just grabbed the sign from me and took it, threw it over his shoulder. And I said, "Can I have my sign back? It's my property." Maybe at that point he said, "No. This is a no-protest zone."

An officer then grabbed Kantorowicz and removed the stickers from her clothing.

Holloway carried a sign that read, "It's Our Duty, It's Our Right, To Fight the Power." She also wore stickers with various WTO-related slogans. When she approached the perimeter, officers grabbed her sign, crumpled it up, and threw it away behind a line of police. They told her and Kantorowicz that they were in the "No Protest Zone" and that they would have to take off every anti-WTO sticker or they would be arrested. When an officer grabbed Holloway's arm, she told him she would remove the stickers herself "[t]o get him to leave me alone."

Sue Bastian, a schoolteacher who traveled to downtown Seattle for the WTO protests, recounted, "I was just a little old lady on my way to the Methodist church carrying these signs in a bag, and I was simply walking down the street on my way to the church." In a bag, she carried one sign that read "Free Trade is Slave Trade" and another that read "Global Cops for Global Corps." She was outside the police perimeter and she did not believe that she was within the zone established by Order No. 3. Nonetheless, she stated in her declaration that a police officer approached her and blocked her passage,

and then I was surrounded by four or five others. One of them-or somebody took my WTO sticker off my rain jacket. The sticker was underneath my backback. And one of the police took my

signs away from me and looked at them and handed them to another policeman, who took them over onto the sidewalk and broke them.

The officers told her she was not allowed in the zone, refused to return her signs *1165 and told her "if you don't be quiet and leave, I will have you arrested."

Rita Herkel had a similar experience on her way to the Methodist Church. At the northeast corner of Fourth and Spring, Herkel and her friends were waiting for the light to change so they could cross the street when three police officers approached them. Herkel and her friends were wearing lime green stickers approximately 3 x 5" that read "No to WTO." The officers said, "You're not allowed to wear stickers," and began tearing the stickers off of Herkel's clothes without permission. They searched her friend's backpack, also without permission, but did not say what they were looking for. While forcibly removing the stickers from another woman in the group, the officers tore her coat.

Harold Green, an attorney in Seattle, heard on television that a "no protest zone" had been established downtown. As he stated in his declaration, "[t]hat struck me as an unconstitutionally broad edict, so I determined to learn from personal experience what the scope of the edict was." He wrote the words "I PROTEST!" on the back of one of his business cards and, wearing a suit and tie, approached an officer at the perimeter and

asked politely, "If I ask you a question, will I be subject to arrest?" He said that I would not. I then pulled my business card from my pocket, showed him the side which said "I PROTEST!," and asked him, "If I were to cross this line and display this card, would I be subject to arrest?"

He immediately responded that I was subject to arrest at that moment. I then asked him, "Am I in a zone where what I am doing is illegal?," and he repeated that I would be arrested if I did not leave.

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I was immediately confronted by two or three other riot police officers with visored helmets and long night sticks who began to shout repeatedly at me, "Go!", "Just Go!" ... As I did not want to be arrested, I put the card back in my pocket and walked back down (west) Spring Street.

Plaintiff Doug Skove similarly went downtown to protest after hearing a news broadcast describe the zone as a "no protest zone." He went inside the zone carrying a sign that said "I have the right to protest non-violently." Skove testified at his deposition that Officer Ron Smith grabbed the sign out of his hand without Skove's permission, saying "I'm going to take that" before any other communication between the two. Smith told him to come over but Skove instead walked away and was not pursued. This incident was captured on videotape.^{FN5} Officer Smith never ascertained whether Skove was authorized by the Operations Order to be within the zone before tearing the sign away from him. Smith testified in deposition that he determined only that Skove "appeared not to belong there" because "[h]e was walking around with a sign." Skove then went to the corner of Fifth Avenue and Pike Street and took out a second sign, where another unidentified officer again took the sign from his hands without permission and without any prior verbal exchange.

FN5. The videotape shows Smith approaching Skove and asking, "What did the Mayor tell you? Okay? Other side of Fourth, other side of Seneca, right?" Smith then ran toward Skove, who was crossing the street, and grabbed his sign out of his hands. As previously noted, however, on the City's motion for summary judgment, we take the evidence in the light most favorable to the plaintiffs and therefore credit Skove's recollection of the event. *Balint*, 180 F.3d at 1054.

Other people were stopped by the police while attempting to more actively protest *1166 within the zone, confirming the City policy that protesting was not a "reasonable purpose" within the meaning of

the Order. Thomas Sellman, a plaintiff in this appeal, heard on the news that Seattle had adopted a "no protest zone" where people could enter for any reason other than protest. He went downtown "basically to find out what was really meant and whether the broadcasters in some way had accurately described the intent of the Mayor and the City of Seattle." He walked down the sidewalk, within the zone, and distributed leaflets criticizing the WTO's ability to overrule endangered species laws. He was stopped by Detective S.D. Stevens, who determined that Sellman's activity was "obviously" not "legitimate business" within the scope of the Operations Order. Stevens told him he needed to go two blocks south in order to protest. Instead of leaving, Sellman handed one of his flyers to a WTO delegate as he walked by. Stevens then placed Sellman under arrest for failure to disperse.

Plaintiff Todd Stedl went to the zone to hand out copies of the First Amendment; if an officer stopped him he "planned on saying 'I'm not protesting; I'm educating.'" Stedl testified at his deposition that the officer who first stopped him at Fourth Avenue and Seneca Street reacted by saying, " 'not with this you're not,' and he grabbed the fliers that I was holding on to and then proceeded to dig into the bag where I had the remaining fliers.... As he reached into the cloth sack, I said, 'you need a search warrant to take those.' ... He said, I believe-he said something to the effect of, 'no, I don't.' " His remaining fliers were seized but Stedl was not arrested. When Stedl asked the officer for his badge number, he was told to "get going." He then left and continued to protest only outside of the zone. Stedl testified that "I was intimidated to the point that I felt that if I had returned to the no protest zone to hand out the First Amendment, that I would most likely get arrested, yeah, and that was not my intent"

After many months of investigation, the Seattle City Council concluded that "Seattle was not sufficiently mindful ... of the need to create an environment protecting the rights to speech and assembly."

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ARC Report at 5. The City's policies in implementing Order No. 3 targeted expressive activity but did not seek to distinguish between violent and non-violent protestors or to better-tailor the fit between Seattle's security problems and a legitimate solution.

II. Restrictions on Time, Place, and Manner of Speech

A. Narrow Tailoring

If a regulation restricting speech in a public forum is content neutral, our standard for determining whether it is narrowly tailored is more relaxed. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The policy adopted "need not be the least restrictive or least intrusive means" available to survive this intermediate level of constitutional scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). But a government entity is not free to adopt any regulation that serves its interests more effectively than no regulation at all; a restriction may not burden "substantially more speech" than necessary to further the government interest at stake. *Id.* at 799, 109 S.Ct. 2746; see also *Kuba v. I-A Agricultural Ass'n*, 387 F.3d 850, 861 (9th Cir.2004). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988); see also *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 ("Government may not regulate expression in such a manner that a substantial portion of the *1167 burden on speech does not serve to advance its goals."). This is so even if the rule is completely effective in eliminating the targeted evil. *Id.* at 799 n. 7, 109 S.Ct. 2746.

The 25 square blocks of downtown Seattle cordoned off by Order No. 3 were plainly a public forum; indeed, city streets are "quintessential public forums" which "have immemorially been held in

trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " *Perry Education Ass'n*, 460 U.S. at 45, 103 S.Ct. 948 (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)); see also *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir.2003). "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby*, 487 U.S. at 481, 108 S.Ct. 2495.

Our inquiry into whether Order No. 3 was narrowly tailored should begin by analyzing the government's asserted interests in responding to the violence confronting Seattle on November 30. See *Kuba*, 387 F.3d at 858. Without doubt, a city has a significant interest in preserving the safety of its residents and visitors, and in preventing violence and vandalism on city streets.^{FN6} See, e.g., *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1369 (9th Cir.1997) ("Government interests in promoting public safety and the orderly movement of pedestrians, and in protecting the local merchant economy are ... substantial."). A city cannot, however, use a concededly-legitimate interest in "security" to justify a rule drawn as broadly as it wishes. See *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 13 (1st Cir.2004) ("Security is not a talisman that the government may invoke to justify *any* burden on speech (no matter how oppressive)." (emphasis in original)). Here, Klotz's declaration suggests, "[t]he City's goal should have been to transport *1168 the delegates to the conference, not necessarily to protect a particular method of getting them to the conference (walking individually, without any designated route)." Viewing the City's interest in this broader context,^{FN7} it becomes clear that such a sweeping prohibition on speech as Order No. 3 imposed was not justified.^{FN8}

FN6. The majority's assessment of the City's significant interests is confused and

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inconsistent, and changes subtly depending upon the argument the majority seeks to bolster. At times, the majority cites "the core interest" as protecting the president and foreign dignitaries. See *maj. op.* at 1134-35 n.41. But it also claims that the City's interest was in "maintaining public order," *id.* at 1131, "providing security to the core downtown area," *id.* at 1131 n. 32, and "seeing that the WTO delegates had the opportunity to conduct their business," *id.* at 1132.

In my view, the City had a significant interest in protecting the public safety. That broad interest required that the City protect the public (including President Clinton and foreign dignitaries) both inside and outside the No Protest Zone, and provide safe transport for delegates to and from the convention. Order No. 3 helped serve those interests, but it was a sledge-hammer solution where a more tailored response would have preserved First Amendment protections. Moreover, the City did not have a constitutionally significant interest in sheltering delegates from the unpleasantness or inconvenience of a large demonstration. The Order itself was justified by a need "to protect the public peace, safety, and welfare" and to preserve the safety of "delegates, dignitaries, citizens, public safety employees and protestors" alike.

The City now argues, relying on *Hill v. Colorado*, 530 U.S. 703, 718, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), that it had a significant interest in protecting the delegates' "right to be left alone." In *Hill*, the Supreme Court upheld a law that prohibited any person from knowingly approaching within 8 feet of another person to protest, within designated areas near medical facilities. *Id.* But in

Kuba, we clarified that *Hill* "did not 'protect a potential listener from hearing a particular message,' but only 'from the potential physical and emotional harm suffered when an unwelcome individual delivers a message by physically approaching an individual at close range.'" 387 F.3d at 861 n. 10 (quoting *Hill*, 530 U.S. at 718-19 n. 25, 120 S.Ct. 2480). As in *Kuba*, the audience here was not "particularly vulnerable," *id.*, and therefore did not need "to be left alone."

FN7. The majority mischaracterizes my assessment of the City's interest as one more narrow than the situation required. *Maj. op.* at 1131 n. 33. That is inaccurate. The City's significant interest in safely transporting delegates to the convention sites is certainly broader than the interest Order No. 3 actually served: "to protect a *particular method* of getting [delegates] to the conference...." The vast size of the zone was only crucial to that more narrow interest. *Cf. maj. op.* at 1134. The majority recognizes that the City had an interest in "ensuring safe transit for delegates between venues and hotels," *id.*, but offers no convincing rationale for rejecting the plaintiffs' less-restrictive alternatives.

FN8. The majority further maintains that "[t]he City also had an interest in seeing that the WTO delegates had the opportunity to conduct their business at the chosen venue for the conference; a city that failed to achieve this interest would not soon have the chance to host another important international meeting." *Maj. op.* at 1131. I am not convinced that a city's interest in hosting such an event is "significant" for purposes of this analysis. Because it is not asserted as an interest on appeal, we should not provide this justification for the

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City.

Like a hypothetical ban on handbilling, *see Ward*, 491 U.S. at 799 n. 7, 109 S.Ct. 2746, Seattle's ban on all protesting within a large area of downtown Seattle might have effectively quelled violence and improved safety. Nonetheless, because it "burden[ed] substantially more speech than [was] necessary to further the government's legitimate interests[.]" *Kuba*, 387 F.3d at 861, Order No. 3 was not narrowly tailored. The City's solution was a poor fit in several respects.

First, Order No. 3 was geographically larger than justified.^{FN9} Protestors were banned from a 25-square-block area of downtown Seattle that purposely encompassed every place they could hope to communicate to delegates.^{FN10} Mayor Schell testified in his deposition that he never scrutinized or questioned why the zone needed to be that large—simply, "the concept was to enclose all of the delegate hotels." But as Klotz pointed out, the size of the No Protest Zone actually impeded law enforcement anywhere other than the perimeter, since "[i]t takes more officers to secure a larger space than a smaller one." The majority cites no case in which a court has upheld a similarly-large prohibition; in fact, we have struck down restricted zones of much smaller scale.^{FN11}

FN9. Order No. 3 also lasted longer than necessary. The City had the right to "act vigorously, and more extensively, to restore order," *maj. op.* at 1137, but as noted above, order *already* had been restored. *See supra* at 1160-61 & n. 4. The Mayor signed Order No. 3 in the early morning hours of December 1, long after both violence and protest activity had subsided. *See maj. op.* at 1124. Again, as we stated in *Collins*, 110 F.3d at 1372, "the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter)."

FN10. The size of the No Protest Zone was reduced considerably on December 2. The new zone excluded the Westin Hotel after President Bill Clinton departed Seattle. *Maj. op.* at 1158, *see also* Appendix B.

FN11. *See, e.g., Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir.1990) (holding that a 75-yard buffer zone surrounding naval ships in a parade, which the city claimed served its interest in safety and security, was too large and a 25-yard zone would serve that interest just as effectively); *United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir.1999) (holding that a 150 to 175-yard restriction on protestors from the entrance of a visitor center was too far); *Kuba*, 387 F.3d at 862 (holding that a policy "which relegates communication activity to three small, fairly peripheral areas" was too broad in relation to the government's interest).

*1169 Second, the Order banned *all* protesting without regard to the likelihood that it would lead to violence or disorder. Not only that, but any individual intent on causing harm could easily enter the zone simply by asserting that he or she fell within one of the Operations Order's exceptions. Order No. 3 banned peaceful expressive activity without regard to the City's stated safety-related goals. The majority concludes that it would have been too burdensome to require police to make case-by-case distinctions between "those protestors with benign intentions and those with violent intentions." *Maj. op.* at 1134 (citing *Hill*, 530 U.S. at 729, 120 S.Ct. 2480). This case is significantly different from *Hill*: the police established a perimeter around the No Protest Zone precisely so they could make case-by-case determinations as to who would be allowed in the restricted area. The majority would allow the police to search people they suspected of carrying stickers and handbills, but concludes that it "would not have been practical" for police to search for crowbars or spray paint. *Id.* at 1135. I see no basis

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for that conclusion.

In *Collins*, we evaluated a similar emergency order adopted under analogous circumstances.^{FN12} After the verdict was announced in the first Rodney King beating trial, San Francisco found itself amidst a number of demonstrations—both peaceful and violent. 110 F.3d at 1367. Those demonstrations led to “a number of violent incidents,” which caused property damage and minor injuries. *Id.* In response, then-Mayor Jordan declared a state of emergency and issued an order, approved by the Board of Supervisors, authorizing the police to disperse any gatherings “anywhere in the City and County of San Francisco whenever the peace officer on the scene has reason to believe that the gathering endangers or is likely to endanger persons or property.” *Id.* The order was thus specifically targeted to bar only demonstrations that would likely lead to violence. We nonetheless held not only that the order was facially unconstitutional, but that the law was so clearly established that no reasonable officer could believe it would be constitutional. *Id.* at 1374.

FN12. The majority is too quick to dismiss and marginalize *Collins*. By asserting that the violence confronting Seattle was worse than the violence San Francisco faced, the majority concludes that *Collins* is simply “inapposite.” *Maj. op.* at 1136. But the majority’s analysis of *Collins* focuses on the factors it finds favorable and ignores other important distinctions that ought to inform our judgment. For example, the majority characterizes San Francisco’s emergency order as “significantly broader,” *id.* at 1136 n. 45, dismissing the fact that the order was narrowly targeted to apply only to gatherings “likely to endanger persons or property.” The circumstances in Seattle were clearly analogous to *Collins* and the majority is far too eager to sidestep binding circuit law.

Moreover, the constitutional narrow tail-

oring analysis accounts for violence as part of the City’s interest weighed against its tailored response. I decline to adopt the majority’s approach that allows the legal framework to be shaped and distorted by its characterization of the level of violence.

In making that determination, we noted that “the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.” *Id.* at 1372. Similarly, in *Baugh*, we noted that “[t]he Park Service, in lieu of restraining the expressive activity by refusing to issue the permit, should have issued the permit for the lawful expressive activity and then arrested the demonstrators if and when they trespassed.” *1170 187 F.3d at 1044. The plaintiffs here argue that “police should have had more extensive staffing on the street so that they could permit protestors to enter anywhere and simply arrest and remove those who violated the law.” *Maj. op.* at 1135. Yet in the face of our clear precedent, the majority asserts “we should hesitate to say that the law requires such a solution” where a city confronts actual lawbreakers. *Id.* at 1135. That hesitation is plainly contrary to our circuit’s law.

Third, even those who were *exempt* under the plain terms of the Order were denied entry if they displayed any visible signs, stickers, or messages related to the WTO. The City’s policy was clear: protesting was not a “legitimate purpose” for entering the No Protest Zone. This restriction cannot survive constitutional scrutiny. In *Virginia v. Hicks*, the state housing authority similarly attempted to ban “any person” from the streets of a public low-income housing development “when such person is not a resident, employee, or such person cannot demonstrate a *legitimate business or social purpose* for being on the premises.” 539 U.S. 113, 116, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (emphasis in

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original). Again like here, the policy was enacted “in an effort to combat the rampant crime” that had infected the area. *Id.* at 115, 123 S.Ct. 2191. The Supreme Court upheld the policy under the First Amendment only after interpreting “legitimate business” to include expressive activity. *Id.* at 122, 123 S.Ct. 2191; see also *Hodgkins v. Peterson*, 355 F.3d 1048, 1059 (7th Cir.2004). Seattle’s clear policy of excluding any form of protest from its definition of “legitimate purposes” disregards the primacy we afford such core political speech under the First Amendment.

We considered a similar problem in *Grossman v. City of Portland*, where we invalidated a law forbidding organized demonstrations in a public park without a permit.^{FN13} 33 F.3d 1200, 1203 (9th Cir.1994). Like Seattle’s interpretation of Order No. 3, whether an individual was subject to arrest under the statute depended entirely on whether that individual was displaying a message.

FN13. Again, the majority dismisses *Grossman* by distinguishing the level of violence facing the City. But the legal framework is not altered by an assessment of the City’s interest as more or less important; the extent of the City’s interest is accounted for inherently within the narrow tailoring inquiry. See *supra* note 12. Although the facts in *Grossman* clearly differ in certain respects from the facts at issue here, that does not render its reasoning inapplicable to this context. Indeed, where the majority finds it useful to rely on cases involving minimal violence, the majority freely relies on such authority. See, e.g., *maj. op.* at 1134 (discussing *Hill*, 530 U.S. at 729, 120 S.Ct. 2480); *id.* at 1138-39 (citing *Bl(a)ck Tea Soc’y*, 378 F.3d at 14).

Consider this: if [the plaintiff] and his companions had been standing in a group in the park after meeting unexpectedly, and had been discussing gardening, or the Portland Trailblazers, the [plaintiff] would not have been arrested.

While the addition of signs-or T-shirts, or an “address”-would have occasioned the application of [the challenged ordinance], the distinctions are absolutely empty in terms of the ordinance’s stated goals.

Id. at 1207. Order No. 3 operated in exactly the same way, and we should not condone that affront to First Amendment protections.

The majority’s conclusion to the contrary is plainly wrong. Finding *Grossman* “inapposite,” the majority states that Seattle’s “distinction between groups displaying messages and groups not displaying messages” was appropriate because protestors-and “not emergency personnel, *1171 business employees, or shoppers”-caused the violence. *Maj. op.* at 1137 n. 46. The majority, however, overlooks two important points: First, a distinction between protestors and non-protestors was not at the heart of Order No. 3. The Order instead aimed to preserve the public safety by implementing a limited curfew, which would alleviate the disorder and chaos in the downtown area. See *id.* at 18-19 (quoting Order No. 3 pmb1). But the majority is also wrong as a factual matter. People within the zone (including employees and shoppers) who simply displayed messages were no more likely to cause violence than those without messages. See *id.* at 15 (describing an incident where a *delegate*, not a protestor, drew a gun against the crowd). Whether or not an individual wore a “No WTO” button should have had no bearing on her treatment by the police.

Fourth, the Order completely disregarded any interest in maintaining peace and security in areas *outside* the zone. While the Order may have served to protect delegates, it did not protect anyone outside of the perimeter. “[P]olice operations ... should convey a perception of even-handed commitment to protecting demonstrators as well as the larger public[.]” the City’s response to the demonstrations in Seattle did not serve that goal. ARC Report at 4. The majority recognizes the poor fit between the City’s asserted interests and the means it chose to respond to the violence:

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Even outside the restricted zone, there were some problems of violence incidental to protest. Some violent protestors caused property damage, threw debris, blocked the street, and trapped people in their cars. Some protestors jumped onto an officer's patrol car and shook it by its light bar, while others laid in front of the car and prevented the officer from escaping. Some protestors took over the fuel pumps at a gas station and attempted to fill small bottles with gasoline.

Maj. op. at 1126 n. 21. The majority acknowledges that a Seattle police captain's report "noted that officers 'heard and saw numerous incidents of property destruction, burglary, and looting; but we were unable to leave our lines to take enforcement actions.' " *Id.* at 1124. The large perimeter created by Order No. 3 could only be maintained by a substantial police presence; its size thereby allowed the violence in areas outside the No Protest Zone to continue. The perimeter in fact served *only* the goal of protecting WTO delegates. It therefore violated *Ward's* requirement that "[t]he tailoring of the restraint must of course correspond to the purposes it serves." *Id.* at 1131 (citing *Ward*, 491 U.S. at 799, 109 S.Ct. 2746).

Finally, and fundamentally, Order No. 3 was not narrowly tailored to the City's interests because, as Klotz put it, "it was sought to pursue the wrong goal...." That is, the Order guaranteed that WTO delegates could walk safely from their hotels to the Convention Center on city sidewalks. But as noted above,^{FN14} the City's significant interest was not so narrow; the City had less-restrictive alternatives available that would have served its interest in safety and security equally well. We have stated that "while the City need not employ the least restrictive alternative in promoting its interest in public safety, 'if there are numerous and obvious less-burdensome alternatives to the restriction on [protected] speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.' " *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 865 (9th Cir.2001)

(quoting *1172 *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 n. 13, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)) (alteration in original). Here, the plaintiffs suggested several.

FN14. *See supra* note 7.

The majority concludes that because Seattle's pedestrian "tunnels ... did not connect all of the hotels and venues being used by WTO delegates[,] the plaintiffs' suggestions were not "feasible." *Maj. op.* at 1134 n. 39. Even assuming the pedestrian tunnels were an inadequate solution, the plaintiffs in fact suggested various other worthwhile alternatives. First and foremost, "the City should have developed a plan to ensure that delegates could get to the convention." As Assistant Police Chief Clark Kimerer explained in his declaration, the City was aware that "[a]n avowed and announced goal of some of the protestors was to shut down the WTO convention, i.e., prevent the delegates from reaching their venues[.]" therefore, transportation should have been an important part of the City's response.^{FN15} Klotz suggested, for example, "planned bus and van service routes or controlled access routes" for the delegates; instead, "the only transportation option for delegates was to walk from their various hotels to [the] Convention Center through routes of their own choosing." Klotz suggested several concrete alternatives:

FN15. Contrary to the majority's assertion, I do not "attempt to reduce the City's interest to transporting delegates...." *Maj. op.* at 1131 n. 32. The City's interest extended to protecting the public safety broadly. But as this discussion demonstrates, the measures employed by the City served a much narrower interest and thus were not narrowly tailored. This list of alternative measures simply demonstrates that fact.

A dedicated drive called Convention Way runs underneath the Convention Center from approximately Ninth and Pike to Seventh and Union. It is designed to accommodate tour busses and has

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an easily protected indoor entrance to the facility.... Thus, one transportation method that should have been explored was sending buses from the hotels out to the Interstate, and into the Convention Center through this entrance. This route is indirect, but it avoids almost all protest points.

Another transportation option that I did not see explored is the pedestrian tunnel that runs from the Rainier Square building ... and exiting only a few yards from a well protected off-street entrance to the Convention Center. Mayor Schell testified in his deposition that he used this route without incident on the afternoon of November 30.

Further, the City could have used "flying squads," or mobile teams without responsibility for maintaining police lines, that could have pursued and arrested vandals and violent protestors. Although the City originally planned on pursuing this strategy, "[w]hen the day arrived, the flying squads were pulled off that duty to join the fixed police lines. As a result, the relatively small number of vandals could destroy property without threat of arrest." Lieutenant Neil Low, who was responsible for deploying flying squads, stated in his internal WTO After Action report that "[i]n concept, we were to work along with Lt. Joe Kessler's plain-clothes squad in locating and arresting hardcore protestors committing criminal acts. In actuality, we became involved in crowd control within one hour of being on the street, continuing with that for the remainder of the week."

"[T]he First Amendment demands that municipalities provide 'tangible evidence' that speech-restrictive regulations are 'necessary' to advance the proffered interest in public safety." *Edwards*, 262 F.3d at 863. As this list of alternative possibilities demonstrates, Order No. 3, as written, was not necessary to advance that interest, *1173 nor did the City provide any tangible evidence of such a requirement. The Order was not narrowly tailored and the majority's contrary conclusion disregards these

important considerations.

B. Ample Alternatives

Not only was Order No. 3 not narrowly tailored to serve the significant government interest in safety and security, it also failed to leave open ample alternative methods of communication. An entire medium of speech was foreclosed and the WTO protestors were silenced and relegated to the sidelines. "If an ordinance effectively prevents a speaker from reaching his intended audience, it fails to leave open ample alternative means of communication." *Id.* at 866 (citing *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)); *see also Bay Area Peace Navy*, 914 F.2d at 1229 ("An alternative is not ample if the speaker is not permitted to reach the 'intended audience.' "). Order No. 3 prevented protestors from entering the 25-square block area where WTO delegates could see and hear them. It confined all demonstrations to outside areas where the message the protestors sought to convey may never have reached the intended audience.^{FN16}

FN16. The majority points out that the record is "void of evidence" that protestors could not be seen or heard by delegates within the No Protest Zone. *Maj. op.* at 1141 n. 54. But neither does the record reflect that the delegates *could* see and hear protestors, or that the alternative means of communication available to the protestors were sufficient. Since it is unclear whether the message could be heard in any recognizable form, at a minimum the plaintiffs have established a genuine issue of material fact such that summary judgment is inappropriate. *Balint*, 180 F.3d at 1054. The majority states that "the undisputed facts in the record show that per the terms of Order No. 3 protestors could communicate their views directly outside most of the hotels where delegates were staying." *Maj. op.* at

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1141 n.54. I am at a loss to find *any* evidence in the record to support that statement; nothing in the record or in the majority opinion supports the conclusion that protestors could “communicate” anything to delegates within the No Protest Zone. The majority supports its factual assertion by drawing inferences in favor of the City. As previously noted, this is improper at the summary judgment stage. I am not prepared on this limited record to conclude as a matter of law that Order No. 3 left ample alternative avenues of expression.

In *Bay Area Peace Navy*, we found that a 75-yard security zone “rendered the [plaintiffs] ... demonstration completely ineffective and that passing out pamphlets on land or demonstrating at the entrance to the pier are not viable alternatives because the invited visitors, who are the [plaintiffs] intended audience, are not accessible from those positions.” 914 F.2d at 1229 (quotation marks omitted). And in *Baugh*, we held that forcing demonstrators to an area 150 to 175 yards away from their intended audience “[did] not provide a reasonable alternative means for communication of [the plaintiffs] views.” 187 F.3d at 1044. Because the regulation at issue in *Baugh* was not tailored “narrowly to allow for lawful demonstrations,” it did not leave open ample alternative means of communication. *Id.* Similarly, Order No. 3, which forced protestors to the sidelines and back entrances to the WTO conference venues, did not provide viable alternatives.

City officials all but conceded that the avenues of expression left open were insufficient to allow for meaningful communication. Before the conference began, Seattle police negotiated with organized protest groups to set up “established protest areas.” As Assistant Chief Joiner testified,

In establishing those sites we had tried to make sure that they were well located or that they met the needs of the protest *1174 groups, that they were visible, that they could see whatever event that they were protesting. In other words, they

would be located very close to them. And so we had tried to do everything we could to accommodate peaceful protests on the front side. Obviously that those agreements broke down on Tuesday morning.

After the agreements broke down and the Mayor issued Order No. 3, Joiner explained that “we had to move people out of that area.” In other words, the carefully-crafted protest areas, which would have allowed protestors to see the delegates and be seen by them, were eliminated. Instead, protestors were relegated to the inaccessible areas where no WTO delegates would be bothered by their presence.

Without citing any authority, the majority concludes that the ample alternatives test should be applied “with a practical recognition of the dire facts confronting the City...” *Maj. op.* at 1140. Nowhere in our case law, however, have we even suggested that courts should balance this factor against a city’s asserted need to restrict speech. Rather, we require that ample alternative avenues of expression be available in order for a time, place, and manner restriction to withstand First Amendment scrutiny. There is no exception for exigency.

The City asks us to adopt the rule advocated by the Second Circuit in *Bl(a)ck Tea Society*. There, the court noted that demonstrators’ messages at “a high-profile event”—the 2004 Democratic National Convention—may reach delegates even if speech is curtailed, “through television, radio, the press, the internet, and other outlets.” 378 F.3d at 14. Because the majority concludes that the ample alternatives requirement was met in any event, it does not address this argument. *Maj. op.* at 1139 n. 49. The district court, however, relied on this argument to conclude that Order No. 3 did not foreclose reasonable alternative avenues of expression. The district court was mistaken and we should dispel any notion that media interest in an event can be a substitute for constitutionally-required alternative avenues of communication. As the Seventh Circuit stated in *Hodgkins*, “there is no internet connection, no telephone call, no television coverage that can compare

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to attending a political rally in person....” 355 F.3d at 1063. Public protests are at the heart of the First Amendment and are critical for incubating civic engagement and encouraging spirited debate.

We evoked this concern in *Grossman*, 33 F.3d at 1205 n. 8, and reiterated the particular importance of preserving parks as forums for public debate precisely because ordinary people lack reliable access to the media. The need to protect the average citizen's ability to be heard “is increasingly significant now, when the extremely rich have an enormous variety of privately-owned media through which to reach the public.... At present, more democratic means of communication—demonstrations in parks, bumper stickers, signs in the windows of homes—must be jealously protected.” *Id.* The City would place the demonstrators at the mercy of the media industry. There is no way to guarantee that the message protestors seek to convey would be heard in any recognizable format. The First Amendment cannot allow a city to require that subjugation.

C. DISCRETION

Even a content-neutral time, place, and manner restriction will not survive First Amendment scrutiny if it allows for unduly broad discretion on the part of the official charged with enforcing the regulation. Thus, a regulation that restricts speech must “contain adequate standards to guide the official's decision and render it subject to effective judicial review.” *1175 *Thomas v. Chicago Park District*, 534 U.S. 316, 323, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002). This rule applies even outside the traditional context of licensing schemes. For example, in *Board of Airport Commissioners v. Jews for Jesus*, the Supreme Court held unconstitutional a city ordinance that prohibited all “First Amendment Activities” at Los Angeles International Airport, even if the law were read to apply only to expressive activity that was not “airport-related.” 482 U.S. 569, 575, 576, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987). The Court refused to validate a law that would

give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that confers on police a virtually unrestrained power to arrest and charge persons with a violation of the resolution is unconstitutional because the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.

Id. (quotation marks omitted).

The First Amendment forbids even the *opportunity* for abuse, not just policies that encourage preference for a favored view. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). If that opportunity is present, the regulation “‘creates an unacceptable risk of the suppression of ideas.’” *Kuba*, 387 F.3d at 856 (quoting *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir.1998)). Order No. 3, however, clearly afforded officers the opportunity for abuse, and was therefore constitutionally infirm.^{FN17} According to Mayor Schell's deposition testimony, the decision whether to arrest peaceful, lawful protestors within the zone “would depend on the judgment of the officers and people charged with the responsibility of carrying out that order.”

FN17. Relying on *United States v. Griefen*, 200 F.3d 1256, 1263 (9th Cir.2000), the majority concludes that, because Order No. 3 was a lawful time, place, and manner restriction, the discretion it afforded officers to allow or deny entry into the zone “does not render Order No. 3 constitutionally deficient.” *Maj. op.* at 1144. *Griefen*, in which we upheld the closure of a construction site to all but essential personnel, is inapposite, as the area into which the plaintiffs sought entry to protest had temporarily lost its status of public forum as a result of the construction activity. 200 F.3d at 1261 (“The immediate area of a construction zone is not an area that has the attributes of a public forum, or even a limited public forum, where people are en-

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titled to exercise their rights of free speech.”). The 25-block area in Seattle cordoned off by Order No. 3, on the other hand, affected a quintessentially public forum-city streets and sidewalks-and therefore the Order is subject to a higher degree of scrutiny. *See supra* at 1166-67; *see also Collins*, 110 F.3d at 1371; *ACLU of Nevada*, 333 F.3d at 1098 (“The ability to restrict speech in public forums ... is ‘sharply circumscribed.’”).

Chief Stamper acknowledged that Order No. 3 and the Operations Order interpreting it were “sufficiently vague that it made it difficult from a working cop’s point of view to distinguish between who should and who should not be left out.” Stamper himself “honestly [didn’t] know the answer” whether peaceful protest was a “reasonable purpose” under the Order. And Officer Smith testified at his deposition that he and his fellow officers were never given “a laundry list of activities which would be deemed to be legitimate.” Instead, he was told simply to apply “what a reasonable person would think legitimate business is.” In sum, the plaintiffs presented evidence that individuals with disfavored views-namely, anyone wearing a “No WTO” sticker or button-were systematically excluded from the zone, whether or not the individual should have been allowed entry under an exception to the Order.^{FN18} Furthermore, officers were permitted*1176 complete discretion to determine who was a “protestor” and what was a “reasonable purpose,” and therefore who would be excluded. The majority’s conclusion that “there was no danger on the face of Order No. 3 that officers enforcing the restricted zone could indiscriminately withhold permission to speak,” *maj. op.* at 1145, is flatly contrary to the evidence.

FN18. *See supra* Part I.

The majority concludes that under *Chicago Park District*, the guidelines contained in the Operations Order were sufficiently “specific and objective, and [did] not leave the decision to the whim of the ad-

ministrator.” *Id.* at 1146 (quoting 534 U.S. at 324, 122 S.Ct. 775). But the discretion provided here is quite different-and clearly broader-than the ordinance upheld in *Chicago Park District*. That case involved a licensing scheme that allowed the district to deny a permit

when the application is incomplete or contains a material falsehood or misrepresentation; when the applicant has damaged Park District property on prior occasions and has not paid for the damage; when a permit has been granted to an earlier applicant for the same time and place; when the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant has violated the terms of a prior permit.

534 U.S. at 324, 122 S.Ct. 775. In light of these highly objective criteria, the Supreme Court held that the disqualifying grounds were “reasonably specific and objective” to defeat a claim of unbridled discretion. *Id.* The Court has never held that a regulation allowing officers to determine unilaterally what constitutes a “reasonable purpose,” with no further elaboration on what might be considered “other like type reasonable activity,” provides sufficient guidance.^{FN19} Even if Order No. 3 were in fact a reasonable time, place, and manner restriction, it would nonetheless fail to satisfy the First Amendment’s requirements foreclosing unbridled discretion in enforcement.^{FN20}

FN19. Relying on *S. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1139-41 (9th Cir.2004), the majority suggests that we have in fact found sufficient guidance in similarly-drafted statutes. *Maj. op.* at 1144-45. But clearly the determination of “a fee reasonably calculated to reimburse the county for its reasonable and necessary costs,” *S. Oregon Barter Fair*, 372 F.3d at 1140, vests far less discretion in the enforcement officer than determining what constitutes “other like type reasonable activity.” The majority’s attempt to equate

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the two is not persuasive.

FN20. While noting the relevant facts, the majority concludes that they give rise only to a challenge to Order No. 3 as applied to particular plaintiffs. *See maj. op.* at 1144-46. The discretion conferred by Order No. 3, however, rendered it facially unconstitutional, *Chicago Park District*, 534 U.S. at 323, 122 S.Ct. 775, and incapable of any valid application. *Kuba*, 387 F.3d at 856. In *Chicago Park District*, the Court limited plaintiffs to an as-applied challenge only *after* determining that the challenged permitting scheme contained "adequate standards to guide the official's decision and render it subject to effective judicial review." 534 U.S. at 323, 122 S.Ct. 775. Because the standards provided police officers to guide enforcement of Order No. 3 were not "reasonably specific and objective," *id.* at 324, 122 S.Ct. 775, the majority incorrectly confines the plaintiffs to an as-applied challenge here. *Maj. op.* at 1148-49.

III.

As for Menotti, Stedl, and Skove's Fourth Amendment claims, I would reverse the district court's grant of summary judgment. I agree that Menotti has presented sufficient evidence to create a material factual dispute whether he impeded pedestrians and whether he obstructed an officer in the performance of his duties. Whether the police officers had probable cause to arrest Menotti turns on the resolution*1177 of these factual issues. *See, e.g., United States v. Valencia*, 24 F.3d 1106, 1108 (9th Cir.1994). I would also reverse the district court's summary judgment ruling against Stedl, because there is sufficient evidence in the record to create a genuine factual dispute whether the City had a policy of authorizing unlawful searches and seizures of those who sought to express any opposition to the WTO. *See Oklahoma City v. Tuttle*, 471

U.S. 808, 817, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Finally, I agree with the majority that Skove has alleged a violation of his Fourth Amendment rights and defendant Smith is not entitled to qualified immunity.

* * * * *

Because Order No. 3 was not narrowly tailored, did not leave open ample alternative means of communication, and afforded individual officers unbridled discretion in its enforcement, it is facially unconstitutional. I would therefore reverse the district court's grant of summary judgment against all *Hankin* plaintiffs, *cf. maj. op.* at 1149 n. 67, and against Menotti, Sellman and Skove on their First Amendment claims. I would also reverse the district court's summary judgment against Menotti, Stedl, and Skove as to their Fourth Amendment claims.

C.A.9 (Wash.),2005.
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(Cite as: 177 F.3d 954)

▷

United States Court of Appeals,
Eleventh Circuit.
James Dale SMITH, personally and on behalf of all
others similarly situated, Plaintiff-Appellant,
v.
CITY OF FORT LAUDERDALE, FLORIDA, De-
fendant-Appellee.
No. 98-4973.
June 2, 1999.

Class of homeless persons brought First Amend-
ment action challenging regulation of City of Fort
Lauderdale, Florida proscribing begging on five-
mile strip of beach and two attendant sidewalks.
The United States District Court for the Southern
District of Florida, No. 93-6970-CV-NCR, Norman
C. Roettger, Jr., J., entered summary judgment for
City. Class appealed. The Court of Appeals, Hull,
Circuit Judge, held that regulation was narrowly
tailored to serve City's interest in providing safe,
pleasant environment and eliminating nuisance
activity on beach, and thus did not violate free
speech guarantees.

Affirmed.

West Headnotes

[1] Constitutional Law 92 🔑1761

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and
Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and
Events
92k1761 k. Parks and Forests. Most
Cited Cases
(Formerly 92k90.1(4))
Five-mile strip of beach and two attendant side-
walks in Fort Lauderdale, Florida was "public for-
um" for purposes of First Amendment challenge to

regulation restricting begging. U.S.C.A.
Const.Amend. 1.

[2] Constitutional Law 92 🔑1880

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and
Press
92XVIII(M) Soliciting, Canvassing, Pamph-
letting, Leafletting, and Fundraising
92k1880 k. Begging or Panhandling. Most
Cited Cases
(Formerly 92k90.1(1.1))
Like other charitable solicitation, begging is speech
entitled to First Amendment protection. U.S.C.A.
Const.Amend. 1.

[3] Constitutional Law 92 🔑1735

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and
Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and
Events
92k1732 Public Forum in General
92k1735 k. Justification for Exclu-
sion or Limitation. Most Cited Cases
(Formerly 92k90.1(4))
Even in a public forum, the government may en-
force regulations of the time, place, and manner of
expression which: (1) are content-neutral; (2) are
narrowly tailored to serve a significant government
interest; and (3) leave open ample alternative chan-
nels of communication. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 🔑1880

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and
Press
92XVIII(M) Soliciting, Canvassing, Pamph-
letting, Leafletting, and Fundraising
92k1880 k. Begging or Panhandling. Most
Cited Cases

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(Formerly 92k90.1(4))

Vagrancy 399 1

399 Vagrancy

399k1 k. Nature and Elements of Offenses. Most Cited Cases

Regulation proscribing begging on five-mile strip of beach and two attendant sidewalks in City of Fort Lauderdale, Florida was narrowly tailored to serve City's significant government interest in providing safe, pleasant environment and eliminating nuisance activity on beach, and thus did not violate free speech guarantees; City determined that begging in such area adversely impacted tourism, begging was allowed in other public fora throughout City, and proffered alternatives of proscribing only hostile or aggressive begging or confining begging to specific parts of beach did not demonstrate that regulation was substantially broader than necessary. U.S.C.A. Const.Amend. 1.

*955 Bruce S. Rogow, Beverly A. Pohl, American Civil Liberties Union, Ft. Lauderdale, FL, for Plaintiff-Appellant.

Lisa N. Hodapp, Ft. Lauderdale, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before COX and HULL, Circuit Judges, and COHILL ^{FN*}, Senior District Judge.

FN* Honorable Maurice B. Cohill, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

HULL, Circuit Judge:

A Plaintiff-Appellant class of homeless people appeals the district court's decision granting summary judgment for the City of Fort Lauderdale on the class's First Amendment challenge to a City regulation proscribing begging on a certain five-mile strip

of beach and two attendant sidewalks. We hold the challenged restrictions on speech are narrowly tailored to serve the City's legitimate interests and thus affirm.

The controversy in this case began when the City of Fort Lauderdale enacted Rules and Park Regulations for City Parks and Beaches, intended "to provide citizens with a safe environment in which recreational opportunity can be maximized." Pursuant to this purpose, the City included in its regulations Rule 7.5, which prescribes regulations "to eliminate nuisance activity on the beach and provide patrons with a pleasant environment in which to recreate." Rule 7.5(c) states, "Soliciting, begging or panhandling is prohibited." ^{FN1}

FN1. It is undisputed that "soliciting," "begging," and "panhandling" are interchangeable terms. We use the term "begging" to encompass all three.

Plaintiffs challenge Rule 7.5(c)'s application to a five-mile strip of beach, a new, one-and-a-half-mile promenade sidewalk between that beach and Highway A1A, and the commercial-area sidewalk on the opposite side of Highway A1A-hereinafter collectively called the "Fort Lauderdale Beach area." The parties stipulate as follows:

The Fort Lauderdale Beach area is an essential part of the Fort Lauderdale tourism experience. Tourism is one of Florida's most important economic industries, and Fort Lauderdale is the premiere tourist location of Broward County. The Beach area is Fort Lauderdale's number one tourist attraction. Approximately four million tourists, many of whom are from foreign countries, visit the Fort Lauderdale area, and most of them at one time or another visit the Fort Lauderdale Beach area. City attendance records reflect that almost three million people visit the beach *956 annually (August, 1993-July, 1994 estimated figures).

The improvement of the Beach area was a high

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priority in the City's plan to expand the economic base of the community by attracting new investment. Creating an attractive infrastructure was designed to encourage quality development in the Beach area.

[1][2] As an initial matter, we note that Rule 7.5(c)'s limitations on begging in the Fort Lauderdale Beach area restrict speech in a public forum. Like other charitable solicitation, begging is speech entitled to First Amendment protection.^{FN2} See *Loper v. New York City Police Dept.*, 999 F.2d 699, 704 (2d Cir.1993) (holding "begging is at least 'a form of speech' " because of the lack of material distinctions between begging and other forms of charitable solicitation); see also *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (holding charitable organizations' solicitations for contributions are protected speech).

FN2. The parties do not raise-and thus we do not address-the issue of whether begging is commercial speech entitled to a lower level of First Amendment protection.

Additionally, this Court's precedent conclusively establishes that the Fort Lauderdale Beach area covered by Rule 7.5(c)-consisting of beach and sidewalk spaces-is a public forum. See *One World Family Now v. City of Miami Beach*, 175 F.3d 1282 (11th Cir.1999) (holding an oceanfront strip of public sidewalk in the historic Art Deco district of Miami Beach to be a "quintessential public forum"); *International Caucus of Labor Committees v. City of Montgomery*, 111 F.3d 1548, 1550 (11th Cir.1997) (confirming the longstanding principle that "[a] sidewalk, although specifically constructed for pedestrian traffic, also constitutes a public forum"); *Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1521-23 (11th Cir.1992) (holding John D. MacArthur Beach State Park to be a public forum).

[3][4] Nonetheless, Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area^{FN3} survive Plaintiffs' First Amendment challenge. Even in

a public forum, the government may "enforce regulations of the time, place, and manner of expression which [1] are content-neutral, [2] are narrowly tailored to serve a significant government interest, and [3] leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); see also *One World Family Now*, 175 F.3d at 1287. Plaintiffs do not dispute that Rule 7.5(c) is content-neutral and leaves open ample alternative channels of communication. Plaintiffs also expressly concede that the City's interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach is "a significant government interest." Plaintiffs argue only that Rule 7.5(c)'s begging restrictions are not narrowly tailored to serve that interest. We disagree.

FN3. On appeal, Plaintiffs challenge Rule 7.5(c) only as applied to begging in the Fort Lauderdale Beach area.

Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area are narrowly tailored to serve the City's interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach. The City has made the discretionary determination that begging in this designated, limited beach area adversely impacts tourism. Without second-guessing that judgment, which lies well within the City's discretion, we cannot conclude that banning begging in this limited beach area burdens "substantially more speech than is necessary to further the government's legitimate interest." *One World Family Now*, 175 F.3d at 1287 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 789, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Rule 7.5(c)'s suppression of begging in the *957 Fort Lauderdale Beach area is materially mitigated by the allowance of begging in streets, on sidewalks, and in many other public fora throughout the City. Cf. *Loper*, 999 F.2d at 701 (assessing a statute applicable to any "public place" in the state of New York).

Moreover, Rule 7.5(c)'s restrictions on begging in

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the Fort Lauderdale Beach area are not rendered unconstitutional by the possible availability of less-speech-restrictive alternatives. Plaintiffs assert that the City's interest might be served by proscribing only hostile or aggressive begging or by confining begging to specific parts of the beach. But Rule 7.5(c) need not be the "least restrictive or least intrusive means" of serving the City's interest in order to qualify as "narrowly tailored." *Ward*, 491 U.S. at 788-89, 109 S.Ct. 2746. "So long as the means chosen are not substantially broader than necessary to achieve the government's interests ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 799, 109 S.Ct. 2746. Plaintiffs' proffered alternatives fall far short of demonstrating that Rule 7.5(c)'s prohibition of begging in this Fort Lauderdale Beach area is "substantially broader than necessary."

Thus, Rule 7.5(c)'s restrictions on begging in the Fort Lauderdale Beach area do not run afoul of the First Amendment, and the district court's grant of summary judgment for the City is AFFIRMED.

C.A.11 (Fla.), 1999.

Smith v. City of Fort Lauderdale, Fla.

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225 F.3d 899
(Cite as: 225 F.3d 899)

▷

United States Court of Appeals,
Seventh Circuit.

Jimmy GRESHAM, on his own behalf and on behalf of a class of those similarly situated, Plaintiff-Appellant,

v.

Bart PETERSON, in his official capacity as Mayor of the City of Indianapolis, Indiana, and the City of Indianapolis, Indiana, Defendants-Appellees.

No. 99-3770.

Argued March 30, 2000.

Decided Aug. 31, 2000.

Homeless person brought suit challenging ordinance that limited street begging in public places and prohibited entirely activities defined as "aggressive panhandling." The United States District Court for the Southern District of Indiana, S. Hugh Dillin, J., granted summary judgment for city, and plaintiff appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) ordinance did not violate First Amendment, and (2) ordinance was not vague in defining aggressive panhandling.

Affirmed.

West Headnotes

[1] Federal Courts 170B 🔑776

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk776 k. Trial De Novo. Most

Cited Cases

Court of Appeals reviews de novo question of whether state law violates Constitution.

[2] Constitutional Law 92 🔑1512

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or Restrictions

92k1512 k. In General. Most Cited Cases

(Formerly 92k90(3))

Constitutional Law 92 🔑1514

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or Restrictions

92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases

(Formerly 92k90(3))

Constitutional Law 92 🔑1515

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or Restrictions

92k1515 k. Existence of Other Channels of Expression. Most Cited Cases

(Formerly 92k90(3))

Under First Amendment, governments may enforce regulations of time, place and manner of expression which are content neutral, are narrowly tailored to serve significant government interest, and leave open ample alternative channels of communication. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 🔑1512

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92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or Restrictions

92k1512 k. In General. Most Cited Cases

(Formerly 92k90(3))

Inquiry, under First Amendment, into whether regulation of speech is content neutral in context of time, place or manner restrictions turns on government's justification for regulation. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⚡1880

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

92k1880 k. Begging or Panhandling. Most Cited Cases

(Formerly 92k90.1(4), 92k90.1(1.1))

Vagrancy 399 ⚡1

399 Vagrancy

399k1 k. Nature and Elements of Offenses. Most Cited Cases

Panhandling ordinance that prohibited solicitation of cash at night and near public transportation vehicle or facility, parked or stopped vehicle, sidewalk cafe or bank did not violate First Amendment; ordinance was narrowly tailored to promote city's legitimate interest in safety and convenience of its citizens on public streets, and ordinance allowed many feasible alternatives to reach both daytime and nighttime downtown crowds. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚡1505

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1505 k. Narrow Tailoring. Most Cited Cases

(Formerly 92k90(3))

Government regulation can be considered narrowly tailored, for First Amendment purposes, so long as regulation promotes substantial government interest that would be achieved less effectively absent the regulation; accordingly, regulation need not be perfect fit for government's needs, but cannot burden substantially more speech than necessary. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚡1509

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1508 Time, Place, or Manner Restrictions

92k1509 k. In General. Most Cited Cases

(Formerly 92k90(3))

Time, place or manner restriction need not be least restrictive means of achieving government purpose, for First Amendment purposes, so long as it can be considered narrowly tailored to that purpose.

[7] Constitutional Law 92 ⚡1509

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1508 Time, Place, or Manner Restrictions

92k1509 k. In General. Most Cited Cases

(Formerly 92k90(3))

Adequate alternative channel of communication, for

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First Amendment purposes, does not have to be speaker's first or best choice, or one that provides same audience or impact for speech, but alternative must be more than merely theoretically available. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 🔑1509

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1508 Time, Place, or Manner Restrictions

92k1509 k. In General. Most Cited Cases

(Formerly 92k90(3))

To be adequate alternative channel of communication, for First Amendment purposes, alternative cannot totally foreclose speaker's ability to reach one audience even if it allows speaker to reach other groups. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 🔑4509(8)

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)2 Nature and Elements of Crime

92k4502 Creation and Definition of Offense

92k4509 Particular Offenses

92k4509(8) k. Disorderly Conduct and Breach of the Peace. Most Cited Cases

(Formerly 92k258(3.1))

Vagrancy 399 🔑1

399 Vagrancy

399k1 k. Nature and Elements of Offenses. Most Cited Cases

Ordinance prohibiting "aggressive panhandling" was not vague, in violation of due process, in defining aggressive panhandling as "[f]ollowing behind,

ahead or alongside a person who walks away from the panhandler after being solicited," or "[u]sing profane or abusive language, either during the solicitation or following a refusal to make a donation, or making any statement, gesture, or other communication which would cause a reasonable person to be fearful or feel compelled"; reasonable interpretation by state court could render provisions constitutional. U.S.C.A. Const.Amend. 14.

[10] Statutes 361 🔑47

361 Statutes

3611 Enactment, Requisites, and Validity in General

361k45 Validity and Sufficiency of Provisions

361k47 k. Certainty and Definiteness. Most Cited Cases

Void-for-vagueness doctrine forbids enforcement of law that contains terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

[11] Statutes 361 🔑47

361 Statutes

3611 Enactment, Requisites, and Validity in General

361k45 Validity and Sufficiency of Provisions

361k47 k. Certainty and Definiteness. Most Cited Cases

Under void-for-vagueness doctrine, legislative enactments must articulate terms with reasonable degree of clarity to reduce risk of arbitrary enforcement and allow individuals to conform their behavior to requirements of law.

[12] Constitutional Law 92 🔑4505

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)2 Nature and Elements of Crime

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92k4502 Creation and Definition of Offense

92k4505 k. Certainty and Definiteness in General. Most Cited Cases

(Formerly 92k258(2))

Statute that vests virtually complete discretion in hands of police fails to provide minimal guidelines required for due process. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ⇨1013

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k1006 Particular Issues and Applications

92k1013 k. Vagueness in General. Most Cited Cases

(Formerly 92k47)

In assessing constitutionality of allegedly vague state law or ordinance, federal court must consider any limiting construction that state court or enforcement agency has proffered.

[14] Federal Courts 170B ⇨386

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(B) Decisions of State Courts as Authority

170Bk386 k. State Constitutions and Statutes, Validity and Construction. Most Cited Cases

Injunction 212 ⇨85(2)

212 Injunction

212II Subjects of Protection and Relief

212II(E) Public Officers and Entities

212k85 Enforcement of Statutes, Ordinances, or Other Regulations

212k85(2) k. On Ground of Invalidity. Most Cited Cases

Rule that federal courts should defer to state court interpretations of state laws also discourages federal courts from enjoining statutes that could be easily narrowed by state court to avoid constitutional problems.

[15] Constitutional Law 92 ⇨1013

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k1006 Particular Issues and Applications

92k1013 k. Vagueness in General. Most Cited Cases

(Formerly 92k48(4.1))

Court of Appeals will not hold vague statute unconstitutional if reasonable interpretation by state court could render it constitutional in some application.

[16] Statutes 361 ⇨47

361 Statutes

361I Enactment, Requisites, and Validity in General

361k45 Validity and Sufficiency of Provisions

361k47 k. Certainty and Definiteness. Most Cited Cases

Laws must contain reasonable degree of clarity so that people of common intelligence can understand their meaning; furthermore, because penalties for noncompliance are less severe, laws imposing civil rather than criminal penalties do not demand same high level of clarity.

*901 Kenneth J. Falk (Argued), Indiana Civil Liberties Union, Indianapolis, IN, for Plaintiff-Appellant.

Anthony Scott Chinn (Argued), Office of the Attorney General, Indianapolis, IN, Thomas E Satrom, Office of Corporation Counsel, Indianapolis, IN, for Defendants-Appellees.

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Before WOOD, Jr., EASTERBROOK and KANNE,
Circuit Judges.

KANNE, Circuit Judge.

Jimmy Gresham challenges an Indianapolis ordinance that limits street begging in public places and prohibits entirely activities defined as “aggressive panhandling.” Gresham believes that the ordinance infringes his First Amendment right to free speech and his Fourteenth Amendment right to due process. The city considers the ordinance a reasonable response to the public safety threat posed by panhandlers. The district court found that a state court could construe the ordinance in such a way to render it sufficiently clear and specific and granted the city summary judgment on Gresham’s request for a permanent injunction. We affirm.

I. HISTORY

The parties have stipulated to the relevant facts, which for the purposes of reviewing a summary judgment motion, we accept as true. *See Cable v. Ivy Tech State College*, 200 F.3d 467, 476 (7th Cir.1999). In June 1999, the City of Indianapolis amended an ordinance regarding solicitation in public places. The ordinance, which became effective on July 6, 1999, reads as follows:

(a) As used in this section, *panhandling* means any solicitation made in person upon any street, public place or park in the city, in which a person requests an immediate donation of money or other gratuity from another person, and includes but is not limited to seeking donations:

(1) By vocal appeal or for music, singing, or other street performance; and,

(2) Where the person being solicited receives an item of little or no monetary value in exchange for a donation, under circumstances where a reasonable person would understand that the transaction is in substance a donation.

However, panhandling shall not include the act of passively standing or sitting nor performing music, singing or other street performance with a sign or other indication that a donation is being sought, without any vocal request other than in response to an inquiry by another person.

(b) It shall be unlawful to engage in an act of panhandling on any day after sunset, or before sunrise.

(c) It shall be unlawful to engage in an act of panhandling when either the panhandler or the person being solicited is located at any of the following locations; at a bus stop; in any public transportation vehicle or public transportation facility; in a vehicle which is parked or stopped on a public street or alley; in a sidewalk caf[e]; or within twenty (20) feet in any direction from an automatic teller machine or entrance to a bank.

(d) It shall be unlawful to engage in an act of panhandling in an aggressive manner, including any of the following actions:

(1) Touching the solicited person without the solicited person’s consent.

(2) Panhandling a person while such person is standing in line and waiting *902 to be admitted to a commercial establishment;

(3) Blocking the path of a person being solicited, or the entrance to any building or vehicle;

(4) Following behind, ahead or alongside a person who walks away from the panhandler after being solicited;

(5) Using profane or abusive language, either during the solicitation or following a refusal to make a donation, or making any statement, gesture, or other communication which would cause a reasonable person to be fearful or feel compelled; or,

(6) Panhandling in a group of two (2) or more persons.

(c) Each act of panhandling prohibited by this section shall constitute a public nuisance and a separate violation of this Code. Each violation shall be punishable as provided in section 103-3 of the Code, and the court shall enjoin any such violator from committing further violations of this section.

City-County General Ordinance No. 78 (1999), Revised Code of Indianapolis and Marion County § 407-102. Section 103-3 provides that a person convicted of violating the ordinance will be fined not more than \$2,500 for each violation. The ordinance does not provide for imprisonment of violators, except, of course, a past offender who violates the mandatory injunction provided in Paragraph (c) could be jailed for contempt.

Jimmy Gresham is a homeless person who lives in Indianapolis on Social Security disability benefits of \$417 per month. He supplements this income by begging, using the money to buy food. He begs during both the daytime and nighttime in downtown Indianapolis. Because different people visit downtown at night than during the day, it is important to him that he be able to beg at night. Gresham approaches people on the street, tells them he is homeless and asks for money to buy food. Gresham has not been cited for panhandling under the new ordinance, but he fears being cited for panhandling at night or if an officer interprets his requests for money to be "aggressive" as defined by the law.

Gresham filed this class action shortly after the ordinance took effect, requesting injunctive and declaratory relief. Gresham moved for a preliminary injunction barring enforcement of the ordinance on the grounds that it was unconstitutionally vague and violated his right to free speech. The district court, after hearing oral argument, notified the parties that it would convert its order on the preliminary injunction into an order on the merits. The parties filed additional memoranda of law, but no additional

evidence. On September 28, 1999, the court entered a final order denying the motion for preliminary injunction and dismissing the case.

In the order, the district court construed the list of six actions that constitute aggressive panhandling as exclusive, eliminating the danger that someone could be cited for other, unenumerated acts. The court further ruled that the proscription in Paragraph (d)(5) against actions that make a person "fearful or feel compelled" was not unconstitutionally vague because it could be interpreted to mean "fear for his safety or feel compelled to donate." The court held that because the ordinance was civil in nature and the actions prohibited under aggressive panhandling were not related to speech interests, no intent element was necessary. Finally, the court found the ordinance to be a valid content-neutral regulation under *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

II. ANALYSIS

[1] On appeal, Gresham raises two principal arguments. First, he contends that the provisions defining aggressive panhandling are vague because they fail to provide clear criteria to alert panhandlers and authorities of what constitutes a violation and because they fail to include an intent element. Second, he argues that the statute fails the test for content-neutral time, place and manner restrictions on protected speech. We review *de novo* the question of whether a state law violates the Constitution. See *Scariano v. Justices of Supreme Court of Ind.*, 38 F.3d 920, 924 (7th Cir.1994).

A. The First Amendment

Laws targeting street begging have been around for many years, but in the last twenty years, local communities have breathed new life into old laws or passed new ones. Cities, such as Indianapolis, have tried to narrowly draw the ordinances to target the most bothersome types of street solicitations and

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give police another tool in the effort to make public areas, particularly downtown areas, safe and inviting.

While the plaintiff here has focused the inquiry on the effects of the ordinance on the poor and homeless, the ordinance itself is not so limited. It applies with equal force to anyone who would solicit a charitable contribution, whether for a recognized charity, a religious group, a political candidate or organization, or for an individual. It would punish street people as well as Salvation Army bell ringers outside stores at Christmas, so long as the appeal involved a vocal request for an immediate donation.

The ordinance bans panhandling by beggars or charities citywide on any "street, public place or park" in three circumstances. First, it would prohibit any nighttime panhandling § 407-102(b). Second, it would prohibit at all times-day or night-panhandling in specified areas. § 407-102(c). Third, it would prohibit "aggressive panhandling" at all times. § 407-102(d)(1)-(6). The defendants emphatically point out that the ordinance allows a great deal of solicitation, including "passive" panhandling, which does not include a vocal appeal, street performances, legitimate sales transactions and requests for donations over the telephone or any other means that is not "in person" or does not involve an "immediate donation." Under the ordinance, one could lawfully hold up a sign that says "give me money" and sing "I am cold and starving," so long as one does not voice words to the effect of "give me money."

Several courts before us, as well as many commentators, have grappled with understanding panhandling laws in light of the First Amendment guarantee of free speech and the constitutional right to due process. See, e.g., *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir.1999); *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir.1993). To this point, the Supreme Court has not resolved directly the constitutional limitations on such laws as they apply to individual beggars, but has provided clear direction on how they apply to organized

charities, not-for-profits and political groups. See *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980).

To the extent the Indianapolis ordinance could be enforced against organized charities, such as the United Way, Salvation Army or others, the Supreme Court's holding in *Schaumburg* would control resolution of the case. In *Schaumburg*, the Supreme Court considered a local prohibition on solicitation by charities that did not use a certain percentage of their contributions for charitable purposes. 444 U.S. at 623-24, 100 S.Ct. 826. As a threshold consideration, the Court determined that solicitations by organized charities were entitled to First Amendment protection. *Id.* at 632, 100 S.Ct. 826. The Court found that charities often engage in core First Amendment speech while soliciting donations, and that without such appeals for support, the flow of information on many social, economic, political and cultural topics*904 would cease. As such, the solicitations by organized charities were "within the protection of the First Amendment" although "subject to reasonable regulation." *Id.*

The Court placed charitable solicitations by organizations in a category of speech close to the heart of the First Amendment, and distinguished it from "purely commercial speech" which is "primarily concerned with providing information about the characteristics and costs of goods and services." *Id.* Commercial speech, on the other hand, has been placed lower in the First Amendment food chain, somewhere between political speech and pornography. It deserves protection, but authorities are more free to regulate commercial speech than core-value speech.

Other courts examining issues similar to those at

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hand did not distinguish between solicitation for organized charities and solicitation by individual beggars. The Eleventh Circuit held that “[l]ike other charitable solicitation, begging is speech entitled to First Amendment protection.” *Smith*, 177 F.3d at 956 (citing *Schaumburg*, 444 U.S. at 632, 100 S.Ct. 826). The Second Circuit likewise held that for First Amendment purposes, the distinction between begging for a charity and begging for one’s self is not significant. *Loper*, 999 F.2d at 704. “We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed.” *Id.* Both *Smith* and *Loper* held that limitations on panhandling must be analyzed under the same *Schaumburg* framework as limitations for charities. *Smith*, 177 F.3d at 956; *Loper*, 999 F.2d at 704.

Indeed, the Court’s analysis in *Schaumburg* suggests little reason to distinguish between beggars and charities in terms of the First Amendment protection for their speech. Solicitation, the Court reasoned, “is characteristically intertwined with informative and perhaps persuasive speech” which the First Amendment protects. *Schaumburg*, 444 U.S. at 632, 100 S.Ct. 826. Because they are intimately connected, solicitation cannot be restricted without also risking the flow of information. Importantly, the *Schaumburg* Court expressly rejected the suggestion that the message and the solicitation could be considered severable. *Id.* at 628-32, 100 S.Ct. 826. The village had argued that the ordinance prohibited only the request for money and left the charity free to propagate its views, but the Court called this view of the First Amendment protection for solicitors “too limited.” After extensively reviewing its own case law on the subject, the Court held that restrictions on a charity’s request for money necessarily implicate restrictions on speech itself. *Id.* at 632, 100 S.Ct. 826.

Similarly, the Indianapolis ordinance protects the communication of ideas by solicitors and limits only the bare request for cash. Yet the two can be closely intertwined. Beggars at times may commu-

nicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few. Like the organized charities, their messages cannot always be easily separated from their need for money. While some communities might wish all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support. *See Schaumburg*, 444 U.S. at 632, 100 S.Ct. 826 (“[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests ... that are within the protection of the First Amendment.”). Neither the parties to this appeal nor any authorities found by this Court suggest we should distinguish between restrictions on organized charities and individuals for purposes of understanding the First Amendment guarantees. Therefore, assuming for the purposes of this appeal that some panhandler speech would be protected by the First Amendment, we find that *Schaumburg* *905 provides the appropriate standard to analyze this claim.^[FN1]

^[FN1] As an aside, we note that the Court in *Schaumburg* distinguished solicitation from commercial speech, which is “primarily concerned with providing information about the characteristics and costs of goods and services.” 444 U.S. at 632, 100 S.Ct. 826. The Eleventh Circuit, noting that the parties did not raise the argument, declined to reach the issue of whether panhandling could be considered commercial speech and therefore subject to more regulation. *See Smith*, 177 F.3d at 956 n. 2. We too will follow that prudent approach and not decide an issue the parties declined to raise. *See generally* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 Yale L.J. 1165, 1229 (1996) (discussing possibility of treating begging

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as commercial speech). In any event, considering the Supreme Court's definition of commercial speech as outlined in *Schaumburg*, we doubt panhandling falls into this classification.

[2] After recognizing a First Amendment right to solicit money in public places, the *Schaumburg* Court held that a government may enact "reasonable regulations" so long as they reflect "due regard" for the constitutional interests at stake. 444 U.S. at 632, 100 S.Ct. 826. The parties assume that the proper analysis to determine whether the Indianapolis ordinance is one such reasonable regulation is that set out for "time, place and manner" restrictions in *Perry*, 460 U.S. at 45, 103 S.Ct. 948. Because the Indianapolis ordinance does not ban all panhandling, we agree that the law could be understood as a time, place or manner regulation. See *Cantwell v. Connecticut*, 310 U.S. 296, 304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Under *Perry*, governments may "enforce regulations of the time, place and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." 460 U.S. at 45, 103 S.Ct. 948. Other courts considering restrictions on solicitation also have applied the time, place, manner analysis from *Perry*. See *Smith*, 177 F.3d at 956; *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 953 (D.C.Cir.1995); *Loper*, 999 F.2d at 704-05.

[3] Colorable arguments could be made both for and against the idea that the Indianapolis ordinance is a content-neutral time, place or manner restriction. The Supreme Court has held that "[g]overnment regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.' " *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citation omitted). To help apply this somewhat circular definition, the Court instructed that the principal inquiry is "whether the government has adopted a

regulation of speech because of disagreement with the message it conveys." *Id.* In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-29, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the Court held that a ban on newsracks containing commercial handbills but not newspapers was content-based because "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack." Similarly here, whether a solicitor violates the ordinance depends on whether he asked for cash rather than for something else. On one side of the argument, the city ordinance does not prohibit all solicitation on city streets, only solicitations for immediate cash donations. One could, for instance, ask passers-by for their signatures, time, labor or anything else, other than money. Only by determining the specific content of a solicitor's speech could authorities determine whether they violated the ordinance, which would seem to be a content-based restriction. See *id.* at 429, 113 S.Ct. 1505; *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. But as *Ward* and more recently *Hill v. Colorado*, 530 U.S. 703, ---, 120 S.Ct. 2480, 2491, 147 L.Ed.2d 597 (2000), emphasized, the inquiry into content neutrality in the context of time, place or manner restrictions turns on the government's*906 justification for the regulation. Because the parties here agree that the regulations are content neutral, we need not decide whether the Indianapolis ordinance can be justified without reference to the content of the regulated speech. Thus the Indianapolis ordinance should be upheld if it is narrowly tailored to achieve a significant governmental purpose and leaves open alternate channels of communication.

[4][5][6] The city has a legitimate interest in promoting the safety and convenience of its citizens on public streets. See *Madsen v. Women's Health Center*, 512 U.S. 753, 768, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (holding that the state "also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks ..."); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650,

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101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (recognizing state interest in safety and convenience of citizens using public fora); *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (recognizing state interest in safety and convenience on public roads); *Ayres v. City of Chicago*, 125 F.3d 1010, 1015 (7th Cir.1997) ("There are unquestionable benefits from regulating peddling, First Amendment or otherwise, [including] the control of congestion."). The plaintiff concedes this much, but argues that a total nighttime ban on verbal requests for alms is substantially broader than necessary and therefore cannot be considered narrowly tailored. However, a government regulation can be considered narrowly tailored "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799, 109 S.Ct. 2746. This means the regulation need not be a perfect fit for the government's needs, but cannot burden substantially more speech than necessary. *Id.* at 800, 109 S.Ct. 2746. Furthermore, a time, place or manner restriction need not be the least restrictive means of achieving the government purpose, so long as it can be considered narrowly tailored to that purpose. *Id.* at 797, 109 S.Ct. 2746.

The city determined that vocal requests for money create a threatening environment or at least a nuisance for some citizens. Rather than ban all panhandling, however, the city chose to restrict it only in those circumstances where it is considered especially unwanted or bothersome-at night, around banks and sidewalk cafes, and so forth. These represent situations in which people most likely would feel a heightened sense of fear or alarm, or might wish especially to be left alone. By limiting the ordinance's restrictions to only those certain times and places where citizens naturally would feel most insecure in their surroundings, the city has effectively narrowed the application of the law to what is necessary to promote its legitimate interest.

[7][8] Finally, the plaintiff contends that the statute

fails to provide ample alternative channels of communication. We disagree. An adequate alternative does not have to be the speaker's first or best choice, *see Heffron*, 452 U.S. at 647, 101 S.Ct. 2559, or one that provides the same audience or impact for the speech. *See Ward*, 491 U.S. at 802, 109 S.Ct. 2746; *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (holding that in context nonpublic forum, an ample alternative does not need to be the most efficient one for speaker's purposes). However, the Court has "shown special solicitude for forms of expression that are much less expensive than feasible alternatives," *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 n. 30, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), and so an alternative must be more than merely theoretically available. It must be realistic as well. *See Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). Furthermore, an adequate alternative*907 cannot totally foreclose a speaker's ability to reach one audience even if it allows the speaker to reach other groups. *See Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir.1996) (holding that total ban on sidewalk art does not leave open alternative means of communication because alternative display in galleries or museums would not reach the same audience.)

The Indianapolis ordinance allows many feasible alternatives to reach both the daytime and nighttime downtown Indianapolis crowds. Under the ordinance, panhandlers may ply their craft vocally or in any manner they deem fit (except for those involving conduct defined as aggressive) during all the daylight hours on all of the city's public streets. Gresham contends that soliciting at night is vital to his survival, a fact we do not dispute, but the ordinance leaves open many reasonable ways for him to reach the nighttime downtown crowd. He may solicit at night, so long as he does not vocally request money. He may hold up signs requesting money or engage in street performances, such as playing music, with an implicit appeal for support. Although

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perhaps not relevant to street beggars, the ordinance also permits telephone and door-to-door solicitation at night. Thus to the extent that “give me money” conveys an idea the expression of which is protected by the First Amendment, solicitors may express themselves vocally all day, and in writing, by telephone or by other non-vocal means all night. Furthermore, they may solicit in public places on all 396.4 square miles of the city, except those parts occupied by sidewalk cafes, banks, ATMs and bus stops. This is a far cry from the total citywide ban on panhandling overturned by the court in *Loper*, 999 F.2d at 705 (“[A] statute that totally prohibits begging in all public places cannot be considered ‘narrowly tailored.’”), or the total ban on panhandling in a five-mile area of public beach upheld by the court in *Smith*, 177 F.3d at 956.

B. Vagueness

[9] Gresham next challenges certain provisions of the ordinance as unconstitutionally vague. Specifically, he contends that the definition of aggressive panhandling in sections (d)(4) and (d)(5) are not sufficiently clear to direct authorities on the enforcement of the law, nor to allow panhandlers such as Gresham to avoid violating the law. Section (d)(4) prohibits “[f]ollowing behind, ahead or alongside a person who walks away from the panhandler after being solicited.” Gresham argues hypothetically that police could cite a person for inadvertently violating this section merely by walking in the same direction as the solicited person, without intending to engage in “aggressive panhandling.” Also, section (d)(5) refers to making a person “fearful or feel compelled” without defining what the terms mean in relation to panhandling. A generalized guilt at economic inequality might make one “feel compelled” even by the meekest request for money.

[10][11][12] The void-for-vagueness doctrine forbids the enforcement of a law that contains “terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as

to its application.” *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). Legislative enactments must articulate terms “with a reasonable degree of clarity” to reduce the risk of arbitrary enforcement and allow individuals to conform their behavior to the requirements of the law. *Id.* A statute that “vests virtually complete discretion in the hands of the police” fails to provide the minimal guidelines required for due process. See *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

[13][14][15] In assessing the constitutionality of an allegedly vague state law or ordinance, “a federal court must, of course, *908 consider any limiting construction that a state court or enforcement agency has proffered.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (“*Hoffman Estates*”); see also *Roberts*, 468 U.S. at 630-31, 104 S.Ct. 3244; *Kolender*, 461 U.S. at 355 & n. 4, 103 S.Ct. 1855. In this case, the Indiana courts have not yet had an opportunity to interpret the terms of the Indianapolis ordinance, and so we have no authoritative judicial construction of its terms. See generally, *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 141 (Ind.1999) (“We have regularly said that courts have an overriding obligation to construe our statutes in such a way as to render them constitutional if reasonably possible.”) (internal quotation and citations omitted). However, the rule that federal courts should defer to state court interpretations of state laws, see *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999), also discourages federal courts from enjoining statutes that could be easily narrowed by a state court to avoid constitutional problems. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (“[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by

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the state courts.”) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 497, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965)). Therefore, we will not hold a vague statute unconstitutional if a reasonable interpretation by a state court could render it constitutional in some application.

[16] Laws must contain a “reasonable degree of clarity” so that people of “common intelligence” can understand their meaning. *Roberts*, 468 U.S. at 629, 104 S.Ct. 3244. Furthermore, because the penalties for noncompliance are less severe, laws imposing civil rather than criminal penalties do not demand the same high level of clarity. See *Hoffman Estates*, 455 U.S. at 498-99, 102 S.Ct. 1186. Like the civil sanction at issue in *Hoffman Estates*, Gresham faces only a fine for noncompliance with the Indianapolis law. However, this lowered burden is mitigated by the fact that the Indianapolis ordinance potentially interferes with the right of free speech, suggesting that a “more stringent vagueness test should apply.” *Id.* at 499, 102 S.Ct. 1186 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) and *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

The challenged provisions in this case define what the City Council meant by the term “aggressive panhandling” and must be read in that context. The district court was rightly concerned that Paragraph (d) could be construed as offering an incomplete list of examples of prohibited behavior, leaving open the possibility that other unspecified actions might also be considered illegal, which would raise serious due process concerns. The district court suggested that the list might be exclusive rather than illustrative, a reasonable interpretation which, if adopted by the Indiana courts, would save it from a vagueness challenge.

Likewise, Paragraphs (d)(4) and (d)(5) are subject to reasonable interpretations that answer the vagueness challenge. A state court interpreting Paragraph (d)(4) may read it to prohibit “following” only in the context of a continued request for money such

that the victim reasonably interprets the behavior as a threat. A continuing request for a donation coupled with “following” would be prohibited, but walking in the same direction as the solicited person would not be against the law if the walking were divorced from the request. Construed this way, the statute would prohibit the type of harassing behavior that governments routinely outlaw. See, e.g., Ind.Code § 35-45-2-1 (prohibiting as intimidation a threat by words or action that forces a person to engage in conduct against their will); Ind.Code § 35-45-10-1 (prohibiting as stalking a “course of conduct*909 involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened.”); *Johnson v. State*, 648 N.E.2d 666, 670 (Ind.Ct.App.1995) (upholding stalking statute against vagueness challenge). Numerous cases hold that governments may proscribe threats, extortion, blackmail and the like, “despite the fact that they criminalize utterances because of their expressive content.” *United States v. Hayward*, 6 F.3d 1241, 1259 (7th Cir.1993) (Flaum, J., concurring); see, e.g., *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (upholding constitutionality of law against threatening life of the President); *United States v. Velasquez*, 772 F.2d 1348, 1357 (7th Cir.1985) (holding that threats of physical violence are not protected by First Amendment); see also *R.A.F. v. City of St. Paul*, 505 U.S. 377, 420, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (Stevens, J., concurring) (quoting Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L.Rev. 265, 270 (1981)) (“Although the First Amendment broadly protects ‘speech,’ it does not protect the right to ‘fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.’ ”).

Paragraph (d)(5) could be construed to prohibit “any statement, gesture, or other communication” that makes a reasonable person feel they face danger if they refuse to donate, that they are being compelled out of physical fear. The possibility that

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a polite request for a donation might be heard as a threatening demand by an unusually sensitive or timid person is eliminated by the "reasonable person" standard included in the ordinance. A statement that makes a reasonable person feel compelled to donate out of physical fear amounts to a prohibition on robbery or extortion, which of course would be constitutional. While it is not a certainty that the state courts would adopt constitutional interpretations of the panhandling provisions, they are entitled to the opportunity to do so, and we will not interfere with that right. The district court did not err in refusing to enjoin the ordinance based on the vagueness concerns.

III. CONCLUSION

For the foregoing reasons, we Affirm the district court's denial of a permanent injunction and dismissal of Gresham's complaint.

C.A.7 (Ind.),2000.

Gresham v. Peterson

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(Cite as: 154 F.3d 972)

▷

United States Court of Appeals,
Ninth Circuit.

CHILDREN OF THE ROSARY; Katherine A.
Sabelko; Arizona Civil Liberties Union, Plaintiffs-
Appellants,

v.

CITY OF PHOENIX; Richard C. Thomas, in his of-
ficial capacity as Public Transit Director for the
City of Phoenix; Neal Manske, in his official capa-
city as Deputy Director, Phoenix Transit Depart-
ment, City of Phoenix; Transportation Displays,
Inc. Defendants-Appellees,

and

ATC/Vancom Management Services, Inc., Defend-
ant.

No. 97-16821.

Argued and Submitted March 12, 1998.

Decided Aug. 28, 1998.

Anti-abortion organization and civil rights organiz-
ation sued city, alleging that city's standards for ac-
cepting advertising on municipal buses violated the
First Amendment. The United States District Court
for the District of Arizona, Stephen M. McNamee,
J., denied organizations' application for a prelimin-
ary injunction, and they appealed. The Court of Ap-
peals, Byron R. White, Associate Justice of the
United States Supreme Court, Retired, sitting by
designation, held that: (1) bus advertising panels
were nonpublic fora; (2) city's ban on noncomm-
ercial advertising on municipal buses was reasonable
in light of city's interests in maintaining neutrality
and preventing a reduction in income earned from
selling commercial advertising space; (3) city's ad-
vertising standard was not impermissible viewpoint
discrimination; (4) advertisements submitted by
plaintiff organizations were not changed to com-
mercial advertisements by simply adding an offer to
purchase a bumpersticker containing political or re-
ligious message; and (5) organizations failed to es-
tablish invalidity of city's advertising policy based

on facial overbreadth, underinclusiveness, or
vagueness.

Affirmed.

Noonan, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Injunction 212 ¶138.1

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Pro- cure

212IV(A)2 Grounds and Objections

212k138.1 k. In General. Most Cited

Cases

To obtain preliminary injunction, movant must
show likelihood of success on merits and possibility
of irreparable injury or existence of serious ques-
tions going to the merits and balance of hardships
tipping in movant's favor.

[2] Federal Courts 170B ¶815

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk814 Injunction

170Bk815 k. Preliminary Injunc- tion; Temporary Restraining Order. Most Cited Cases

Court of Appeals reviews denial of preliminary in-
junction for abuse of discretion, and will find abuse
of discretion where district court based its ruling on
erroneous view of the law or on clearly erroneous
assessment of the evidence.

[3] Constitutional Law 92 ¶1761

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

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92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1761 k. Parks and Forests. Most Cited Cases

(Formerly 92k90.4(1))

For First Amendment purposes, "traditional public forum" is a place that has traditionally been available for public expression, such as a public park. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 1745

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1744 Designated Public Forum in General

92k1745 k. In General. Most Cited Cases

(Formerly 92k90.4(1))

For First Amendment purposes, "designated public forum" is a nontraditional forum that government has opened for expressive activity by part or all of the public; creation of designated public forum requires a decision intentionally opening a nontraditional forum for public discourse. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 1766

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1766 k. Transit Systems and Stations. Most Cited Cases

(Formerly 92k90.1(4))

City did not create "designated public forum" by opening up exterior panels on buses for advertising by the general public, but, rather, bus advertising

panels were nonpublic fora for purposes of First Amendment analysis; city had consistently restricted political and religious advertising, and, although city did accept some noncommercial advertising under prior policy, such as public service announcements, only one percent of the advertisements displayed on the exterior of buses were noncommercial. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 1751

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1748 Non-Public Forum in General
92k1751 k. Justification for Exclusion or Limitation. Most Cited Cases

(Formerly 92k90.1(4))

In nonpublic forum, government has the right to make distinctions in access on basis of subject matter and speaker identity, but must not make distinctions based on speaker's viewpoint; touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 1754

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1754 k. Advertising in General. Most Cited Cases

(Formerly 92k90.1(4))

Governmental advertising standards applicable to nonpublic forum need only be reasonable for First Amendment purposes; they need not be the most reasonable or the only reasonable limitation. U.S.C.A. Const.Amend. 1.

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[8] Constitutional Law 92 1766

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1766 k. Transit Systems and Stations. Most Cited Cases
(Formerly 92k90.3)

Municipal Corporations 268 718

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k718 k. Means of Public Transportation and Communication. Most Cited Cases
City's ban on noncommercial advertising on municipal buses was reasonable, for First Amendment purposes, in light of city's interest in maintaining position of neutrality on political and religious issues, fear that buses and passengers could be subject to violence if advertising was not restricted, and interest in preventing reduction in income earned from selling advertising space to commercial advertisers. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 1766

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1766 k. Transit Systems and Stations. Most Cited Cases
(Formerly 92k90.3)

Municipal Corporations 268 718

268 Municipal Corporations

268XI Use and Regulation of Public Places,

Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k718 k. Means of Public Transportation and Communication. Most Cited Cases
City's ban on noncommercial advertising on municipal buses was not impermissible viewpoint discrimination under First Amendment, since city did not use political or religious controversy as test for accepting advertising, but instead implemented neutral standard based on its desire to avoid jeopardizing revenue and the city's neutrality. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 1507

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1507 k. Viewpoint or Idea Discrimination. Most Cited Cases
(Formerly 92k90(3))

For First Amendment purposes, "viewpoint discrimination" is a form of content discrimination in which government targets not subject matter, but particular views taken by speakers on a subject. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 1751

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1748 Non-Public Forum in General
92k1751 k. Justification for Exclusion or Limitation. Most Cited Cases
(Formerly 92k90.1(4))

First Amendment does not prohibit the government from imposing content-based exclusions in nonpublic forum, as long as such are reasonable, and motive is not dispositive when there is no indica-

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tion that government is implementing policy in a viewpoint discriminatory manner that reflects an intent to use policy to exclude disfavored perspectives on the issues. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 🔗1766

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1766 k. Transit Systems and Stations. Most Cited Cases

(Formerly 92k90.3)

Municipal Corporations 268 🔗718

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k718 k. Means of Public Transportation and Communication. Most Cited Cases

City's ban on noncommercial advertising on municipal buses was not shown to favor one side of a debate, in violation of First Amendment, based on fact that city's standard might permit an advertisement for a family planning clinic that offered abortion services while barring messages opposing abortion; city was merely requiring that an advertisement convey a commercial message. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 🔗1766

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1766 k. Transit Systems and Stations. Most Cited Cases

(Formerly 92k90.3)

Municipal Corporations 268 🔗718

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k718 k. Means of Public Transportation and Communication. Most Cited Cases

Advertisements submitted by anti-abortion organization and civil rights organization were "ideological communications," and essential issue-oriented nature of the advertisements could not be changed to commercial advertisements by simply adding an offer to purchase a bumpersticker containing political or religious message, and, thus, city's rejection of organization's advertisements, pursuant to city policy banning noncommercial advertising on municipal buses, was not unconstitutional viewpoint-based discrimination. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 🔗1766

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1766 k. Transit Systems and Stations. Most Cited Cases

(Formerly 92k90.1(4))

Municipal Corporations 268 🔗718

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k718 k. Means of Public Transportation and Communication. Most Cited Cases

When government was acting as proprietor in non-public forum, specifically, bus advertising panels,

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government could regulate that nonpublic forum by rejecting advertisement combining political and religious advertisements with a commercial offer. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 🔗857

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)9 Freedom of Speech, Expression, and Press

92k857 k. Carriers. Most Cited Cases

(Formerly 92k42.3(1))

Religious and civil rights organizations could not mount valid facial overbreadth challenge to city policy banning noncommercial advertising on municipal buses, absent any claim of "a realistic danger" of compromising First Amendment rights of third parties. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 🔗1766

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1766 k. Transit Systems and Stations. Most Cited Cases

(Formerly 92k90.3)

Municipal Corporations 268 🔗718

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k718 k. Means of Public Transportation and Communication. Most Cited Cases

City policy banning noncommercial advertising on municipal buses was not shown to be unconstitutionally underinclusive, on ground that it did not

ban commercial speech containing religious or political elements, where there was no showing that city's policy was giving an advantage to one side in a debate. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 92 🔗1766

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1766 k. Transit Systems and Stations. Most Cited Cases

(Formerly 92k90.3)

Municipal Corporations 268 🔗718

268 Municipal Corporations

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k718 k. Means of Public Transportation and Communication. Most Cited Cases

Anti-abortion organization and civil rights organization failed to show that city policy banning noncommercial advertising on municipal buses was unconstitutionally vague, based on organizations' contention that city's standard presented a danger of discrimination against disfavored subjects in the guise of determining what is commercial speech; city could only reject an advertisement if it failed to propose a legitimate commercial transaction, a standard which would leave it with relatively little discretion in accepting or rejecting advertisements for display. U.S.C.A. Const.Amend. 1.

***974** Jay Alan Sekulow, The American Center for Law and Justice, Washington, DC; Benjamin W. Bull, The American Center for Law and Justice, Scottsdale, Arizona; James Weinstein, College of Law, Arizona State University, Tempe, Arizona; Nicholas S. Hentoff, Hentoff Law Offices, Phoenix, Arizona, for the plaintiffs-appellants.

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Donald O. Loeb, Campana, Vieh, Shore, Owens & Loeb, P.C., Scottsdale, Arizona, for the defendants-appellees.

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding. D.C. No. CV-97-0138-SMM.

Before: WHITE,^{FN*} Associate Justice, (Ret.), NOONAN and THOMAS, Circuit Judges.

FN* The Honorable Byron R. White, Associate Justice of the United States Supreme Court, (Ret.), sitting by designation, pursuant to 28 U.S.C. § 294(a).

Opinion by Justice WHITE; Dissent by Judge NOONAN.

WHITE, Associate Justice (Ret.):

The issue presented in this appeal is whether there is a likelihood that limiting advertising on municipal buses to "speech which proposes a commercial transaction" violates the First Amendment. We hold that there is not a sufficient likelihood of a constitutional violation to justify the grant of a *975 preliminary injunction and affirm the district court.

I

The city of Phoenix sells advertising space on the exterior panels of its buses for the purpose of raising revenue. Prior to November 1, 1996, the city's advertising standards prohibited advertising "support[ing] or oppos[ing] a candidate, issue or cause, or which advocates or opposes a religion, ... or belief." Pursuant to this standard, the city rejected an advertisement submitted by plaintiff-appellant Children of the Rosary (COR) in September 1995. The proposed advertisement stated:

"Before I formed you in the womb, I knew

you"-God

Jeremiah 1:5

CHOOSE LIFE!

[COR Logo] Children of the Rosary

The COR logo is a fetus surrounded by a rosary, which is connected to a cross at the top. On October 10, 1995, COR sued the city and obtained an injunction preventing the city from enforcing the standard against COR and requiring the city to display the COR advertisement.

On November 1, 1996, new advertising standards took effect. The new standards limited the subject matter of bus advertising to "speech which proposes a commercial transaction." On November 15, 1996, the city advised COR that its advertisement would not be displayed because the advertisement did not propose a commercial transaction. In response, COR submitted a revised advertisement for display on the exterior bus panels. The revised advertisement stated:

"Before I formed you in the womb, I knew
you"-God

Jeremiah 1:5

Purchase this message as a bumpersticker for your vehicle!

Contact [phone number]

[COR Logo] Children of the Rosary CHOOSE LIFE!

The city rejected COR's revised advertisement because, in the city's view, the primary purpose of the advertisement was not to propose a commercial transaction, but instead promote a non-commercial message.

Subsequently, plaintiff-appellant Arizona Civil Liberties Union (AzCLU) submitted its own advertisement for display on buses. Their advertisement stated:

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The ACLU Supports Free Speech for Everyone

To purchase this bumper sticker please call [phone number]

The city rejected this advertisement because it did not comply with the new advertising standard.

On January 23, 1997, appellants filed suit against the city under 42 U.S.C. § 1983 in the United States District Court for the District of Arizona alleging that the city's advertising standards violated the First Amendment.^[FN1] On August 1, 1997, the district court denied appellants' application for a preliminary injunction. This appeal followed.

[FN1. In addition to the city of Phoenix, appellants sued Richard C. Thomas, the city's Public Transit Director, Neal Manske, Deputy Director of the transit department, ATC/Vancom Management Services, Inc., a corporation that manages the transit system under a contract with the city, and Transportation Displays, Inc., a corporation that administers the placement of advertising on city buses in compliance with city standards. For convenience, we refer to the defendants collectively as the "city."

II

[1] We have jurisdiction under 28 U.S.C. § 1292(a)(1). To obtain a preliminary injunction, a movant must show a likelihood of success on the merits and the possibility of irreparable injury or the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor. *See Foti v. City of Menlo Park*, 146 F.3d 629, 634 (9th Cir.1998).

[2] We review the denial of a preliminary injunction for abuse of discretion, and will find an abuse of discretion "where the district*976 court 'based its ruling on an erroneous view of the law or on a

clearly erroneous assessment of the evidence.' " *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir.1998) (quoting *Cooter & Gell v. Harmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)); *see MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir.1993).

To prove a violation of 42 U.S.C. § 1983, appellants must establish that 1) the city acted under color of state law; and 2) the city deprived appellants of a right secured by the Constitution or laws of the United States. *See Fred Meyer, Inc. v. Casey*, 67 F.3d 1412, 1413 (9th Cir.1995).

III

There are three primary issues we must address in determining whether the district court applied the correct First Amendment framework. First, we must properly classify the advertising panels under the Supreme Court's "forum approach" for assessing the validity of restrictions on the use of government property. *See International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (ISKCON). Second, once we determine the type of forum at issue, we ascertain the relevant level of scrutiny for this forum. Finally, we must determine whether the city improperly applied this standard in rejecting the advertisements submitted by appellants.

A

[3] The Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora. A traditional public forum is a place "that has traditionally been

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available for public expression," such as a public park. *ISKCON*, 505 U.S. at 678, 112 S.Ct. 2701. Neither party argues that a bus advertising panel is a traditional public forum. Instead, the parties debate whether the bus panel is a designated public forum or a nonpublic forum.

[4] A designated public forum is a nontraditional forum that the government has opened for expressive activity by part or all of the public. *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 & n. 7, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The creation of a designated public forum requires a decision "intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802, 105 S.Ct. 3439; *see Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, ---, 118 S.Ct. 1633, 1641, 140 L.Ed.2d 875 (1998) (*AETC*). Hence, the Court has looked to the policy and practice of the government, the nature of the property and its compatibility with expressive activity, and whether the forum was designed and dedicated to expressive activities in determining if the government created a designated public forum. *See Cornelius*, 473 U.S. at 802-03, 105 S.Ct. 3439; *AETC*, 523 U.S. at ---, 118 S.Ct. at 1641.

In defining the relevant forum, the Court has "focused on the access sought by the speaker." *Cornelius*, 473 U.S. at 801, 105 S.Ct. 3439. In this case, we agree with the district court that the relevant forum at issue is the exterior advertising spaces on the city's buses.

[5] Appellants contend that the city created a designated public forum by opening up the exterior panels on buses for advertising by the general public. However, a review of the city's standards and practices indicates that the city has not opened a public forum. The city has consistently restricted political and religious advertising. *See* Excerpts of Record at 22 (affidavit of Public Transit Director). Although under its prior policy the city did accept some non-commercial advertising, such as public service announcements, only one percent of the advertisements displayed on the exterior of buses were non-

commercial. *See* Excerpts of Record at 22 (affidavit of Public Transit Director).^{*977} The city submits that its current ban on noncommercial advertising supports a finding that the advertising panels are nonpublic fora.

The Supreme Court's decision in *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), strongly supports our conclusion that the advertising panels are nonpublic fora. In *Lehman*, the Court upheld a ban on political advertising on public transit vehicles. The plurality opinion squarely rejected the argument that the advertising space on buses constituted a public forum protected by the First Amendment. *Id.* at 301-02, 94 S.Ct. 2714. The Court noted that the city was engaged in commerce and had "discretion to develop and make reasonable choices concerning the type of advertising" it would display. *Id.* at 303, 94 S.Ct. 2714. In our view, *Lehman* undermines appellants' claim that if a city has opened a property for communication, the property becomes a designated public forum. *See Perry*, 460 U.S. at 49 n. 9, 103 S.Ct. 948 (noting that *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981), reaffirmed *Lehman's* rationale for rejecting the argument that because an instrumentality is used for communication of ideas, it becomes a public forum).

However, appellants suggest *Lehman* is not persuasive authority. They assert that *Lehman* only concerns advertising *inside* a bus because Justice Douglas, who supplied the fifth vote for upholding the ban, based his concurrence on the fact that commuters were a "captive audience" who would be forced to view a partisan political message. This interpretation of his concurrence is far from clear. In Justice Douglas's view, the right of commuters to be free from forced intrusions on their privacy "preclude[d]" the city from transforming its buses into "forums for the dissemination of ideas upon this captive audience." 418 U.S. at 307, 94 S.Ct. 2714. The reference to "captive audience" arguably suggests Justice Douglas was referencing com-

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muters inside a bus. However, read in context, his concern about forcing messages on a captive audience applies to observers on the street and commuters inside a bus. Justice Douglas wrote:

I agree with Mr. Justice Brandeis who ... said that the visual message in streetcars is no different [from other forms of communication imposed on a captive audience], for "[a]dvertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer.... The radio can be turned off, but not so the billboard or street car placard."

418 U.S. at 307-08, 94 S.Ct. 2714 (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 76 L.Ed. 643 (1932)). We reject appellants' invitation to narrowly interpret *Lehman*.^{FN2}

FN2. Appellants also claim that the issue presented in *Lehman* was limited to advertising inside transit vehicles. However, their claim is contradicted by Justice Brennan's dissent, which stated that the petitioner was denied access to exterior and interior advertising space pursuant to the city's prohibition on political advertising, 418 U.S. at 320 n.12, 94 S.Ct. 2714.

Appellants also argue that we should not rely on *Lehman* because it was decided prior to the Supreme Court's adoption of its current approach to forum analysis in *Perry*. They claim that *Lehman* is inconsistent with subsequent Supreme Court decisions and provides little support for finding that the panels are nonpublic fora. We reject this argument. The Court relied upon and reaffirmed *Lehman*'s rationale in *Perry* and subsequent cases, and there is no suggestion in the Court's jurisprudence that the advertising panels are properly classified as designated fora. See, e.g., *Perry*, 460 U.S. at 47, 103 S.Ct. 948 (relying on restriction upheld in *Lehman* to support the proposition that selective access

does not transform government property into a public forum); *ISKCON*, 505 U.S. at 678, 112 S.Ct. 2701 (*Lehman* reflects forum-based analysis and supports proposition that lower level of scrutiny applies when government acts as a proprietor); *Cornelius*, 473 U.S. at 803-04, 806, 808-09, 105 S.Ct. 3439 (relying on *Lehman* to support, *inter alia*, propositions that "[n]ot every instrumentality used for communication ... is a *978 traditional public forum or a public forum by designation," and that a speaker may be excluded from a nonpublic forum if he wishes to address a topic not within the purpose of the forum); *United States v. Kokinda*, 497 U.S. 720, 725-26, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (plurality opinion) (extensively quoting from *Lehman* and noting the lower level of scrutiny applied to the ban on political advertising); *id.* at 737, 110 S.Ct. 3115 (relying on *Lehman* as stating the Court's "usual test for reasonableness" in a nonpublic forum); *R.A.V. v. St. Paul*, 505 U.S. 377, 390 n. 6, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (*Lehman* supports conclusion that there is "room" for "reasonable and viewpoint-neutral content-based discrimination in nonpublic forums"); see also *Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650, 657 n. 3 (2d Cir.1995), *cert. denied*, 517 U.S. 1188, 116 S.Ct. 1675, 134 L.Ed.2d 778 (1996) (rejecting the same argument presented by appellants in this case and noting that "the Supreme Court has repeatedly reaffirmed a broader reading of *Lehman*, often specifically citing to the plurality opinion").

Thus, *Lehman* provides sufficient authority for concluding that the bus advertising panels are nonpublic fora. Our conclusion is also consistent with the reasoning of other circuits. See *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir.1985); *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir.1998); see also *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir.1998). In *Planned Parenthood*, the Seventh Circuit concluded that advertising space on a bus system became a public forum where the

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transit authority permitted advertising on “a wide variety of commercial, public-service, public-issue, and political ads.” 767 F.2d at 1232. The court distinguished *Lehman* because *Lehman* “upheld the blanket exclusion of an entire class of potentially controversial speech,” while in *Planned Parenthood* the transit authority promulgated “no policy at all” with respect to the acceptance of advertising. 767 F.2d at 1233; see *Christ’s Bride Ministries, Inc.*, 148 F.3d at 254-55, 256-57 (distinguishing *Lehman* where transit authority promulgated no policy governing removal of advertisements).

Similarly, in *New York Magazine*, the Second Circuit concluded that advertising space on the outside of buses was a public forum where the transit authority permitted “political and other non-commercial advertising generally.” 136 F.3d at 130. The court found that the transit authority could not reject an advertisement based on a regulatory interest in upholding a law prohibiting the use of a person’s name without their consent. *Id.* The court distinguished *Lehman* by arguing that

disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice.

Id.

This case is easily distinguished from the decisions of the Second and Seventh Circuits because the city of Phoenix consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising. The city has not designated the advertising space on the exterior of its buses as a place for general discourse, and we therefore do not back away from our conclusion that the advertising space is a nonpublic forum.

B

[6][7] In a nonpublic forum, the government has the “right to make distinctions in access on the basis of subject matter and speaker identity,” *Perry*, 460 U.S. at 49, 103 S.Ct. 948, but “must not [make distinctions] based on the speaker’s viewpoint,” *AETC*, 523 U.S. at ---, 118 S.Ct. at 1643. “The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.” *Perry*, 460 U.S. at 49, 103 S.Ct. 948. The advertising standards “need only be reasonable; [they] need not be the most reasonable *979 or the only reasonable limitation.” *ISKCON*, 505 U.S. at 683, 112 S.Ct. 2701 (internal quotations omitted). In addition, “[w]here the government is acting as a proprietor ... its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.” *ISKCON*, 505 U.S. at 678, 112 S.Ct. 2701 (citing *Lehman* and noting that the Court upheld the political advertisement ban “even though the city permitted other types of advertising” on the buses); see *Kokinda*, 497 U.S. at 726, 110 S.Ct. 3115 (action of government acting in proprietary capacity is valid “unless it is unreasonable, or, as was said in *Lehman*, ‘arbitrary, capricious, or invidious.’”).

[8] The city sets forth four interests justifying the limitation on noncommercial speech: 1) maintaining a position of neutrality on political and religious issues; 2) a fear that buses and passengers could be subject to violence if advertising is not restricted; 3) preventing a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded “from using the same forum commonly used by those wishing to communicate primarily political or religious messages;” and 4) a concern that allowing COR’s advertisement would violate the Establishment Clause. See Answer ¶ 6.10. The district court concluded that each of the first three interests sufficiently supported the reasonableness of the revised standard. The court declined to address the Establishment Clause issue.

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We agree with the district court that any one of the three interests supports the reasonableness of the city's standard. The city's interests in protecting revenue and maintaining neutrality on political and religious issues are especially strong. The *Lehman* court recognized that:

[r]evenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

....

The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

Lehman, 418 U.S. at 304, 94 S.Ct. 2714; see *Cornelius*, 473 U.S. at 809, 105 S.Ct. 3439 ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"); *Lebron*, 69 F.3d at 658 (upholding reasonableness of policy rejecting displays favoring any political view).

Appellants recognize that the plurality in *Lehman*

"stated that the exclusion of noncommercial speech was justified by the city's asserted interest" in protecting its advertising revenue. Appellants' Opening Brief at 33. However, they argue that *Lehman's* low level of scrutiny is no longer valid in light of subsequent Supreme Court decisions. As we discussed in concluding that the panels were nonpublic fora, there is little authority to support this argument. We conclude that the city's ban on noncommercial advertising is reasonable in light of the interests asserted by the city.^{FN3}

FN3. Appellants' argument that *Metro-media, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), prohibits favoring commercial speech over noncommercial speech in bus advertising is rebutted by *Metromedia's* recognition that *Lehman* presented exactly that situation, and the Court's statement that it upheld the policy in *Lehman*. Because it involved a factual situation different from the regulation of billboards, *Metromedia*, 453 U.S. at 514 n.19, 101 S.Ct. 2882 (plurality opinion).

*980 C

[9][10] The standard may still violate the First Amendment if it discriminates on the basis of viewpoint. *Cornelius*, 473 U.S. at 811, 105 S.Ct. 3439. We must determine whether the city's standard is a permissible subject matter restriction or impermissible viewpoint discrimination, a distinction that "is not a precise one." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Viewpoint discrimination is a form of content discrimination in which "the government targets not subject matter, but particular views taken by speakers on a subject." *Id.* at 829, 115 S.Ct. 2510; see *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 281 (2d Cir.1997), cert. denied, 524 U.S. 951, 118 S.Ct. 2367, 141 L.Ed.2d 736 (1998).

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[11] Appellants first argue that even though the standard may have the facial appearance of neutrality, the standard is unconstitutional because the intent of the policy is to exclude religious and political speech. But we are dealing here with a nonpublic forum. The First Amendment does not prohibit the government from imposing content-based exclusions, as long as such are reasonable, which is the case here. Two of the reasonable exclusions are political and religious speakers in order to maintain neutrality. It is argued, however, that “[a]lthough the new Policy has abandoned the previous policy’s language, it has not abandoned its goal.” Appellants’ Opening Brief at 23. The city certainly intended to reject political and religious speakers. But motive is not dispositive when there is no indication that the city is implementing the standard in a viewpoint discriminatory manner that reflects an intent to use the policy to exclude disfavored perspectives on the issues.

The city’s previous attempt at restricting access to the forum was struck down because it prohibited the expression of religious perspectives on issues while possibly permitting others to express their perspective. The city responded by enacting a general standard regulating access to the forum. The city’s current standard does not use political or religious controversy as the test for accepting advertising, but instead implements a neutral standard based on its desire to avoid jeopardizing revenue and the city’s neutrality. See *Lehman*, 418 U.S. at 304, 94 S.Ct. 2714 (limiting advertising to commercial advertising that is generally “innocuous and less controversial” does not violate the First Amendment); *Lebron*, 69 F.3d at 658-59.

Of course, a regulation that “is in reality a facade for viewpoint-based discrimination” is unconstitutional. *Cornelius*, 473 U.S. at 811, 105 S.Ct. 3439. But “[a] facade for viewpoint discrimination ... requires discrimination behind the facade.” *Grossbaum v. Indianapolis Marion County Bldg. Auth.*, 100 F.3d 1287, 1298 (7th Cir.1996). In *Cornelius*, the Court was concerned that a government ban on

“advocacy groups” in a charity drive concealed a bias against a viewpoint expressed by an excluded group. The government argued that the advocacy organization was excluded from a government charity campaign based in part on the government’s interest in limiting participation to groups providing direct services to indigent persons. However, the Court remanded the case because there was evidence that other organizations who did not provide direct services to the poor participated in the campaign, thus raising the possibility that the organization was excluded because of its viewpoint.

We do not have similar evidence in this case. Although the city has continued to honor pre-existing contracts involving noncommercial advertisements to avoid breach of contract claims, including the display of a COR advertisement, the city has not accepted new noncommercial advertisements. The district court carefully reviewed the details of each contract and advertisement proffered by appellants as evidence of discrimination, and concluded that the standard was not a facade for viewpoint discrimination. We find no error in the district court’s findings that the noncommercial contracts were effective prior to the adoption of the new standard and that advertisements accepted after the standard took effect were commercial in nature.

We also reject appellants’ argument, based on *R.A.V. v. St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), that the standard discriminates in practice against a viewpoint*981 because it favors one side in a debate on public issues. *R.A.V.* struck down a criminal law that, among other things, prohibited displays that used certain words that would arouse anger in others on the basis of race, color, creed, religion, or gender. However, the law permitted displays containing the same words if the display did not invoke race or other classifications. Here, appellants do not explain how the city’s standard prohibits one side of a debate from employing certain language or methods to express its view, while permitting the other side to use the same methods. Or, as the Court put it in

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R.A.V., the city is not permitting "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." 505 U.S. at 392, 112 S.Ct. 2538. Moreover, as compared to the applicable level of scrutiny when the government acts as a proprietor, the level of scrutiny is higher when the government is using its sovereign power to impose criminal penalties to deprive citizens of their liberty for expressing certain views.

[12] Appellants claim that the standard might permit an advertisement for a family planning clinic that offers abortion services while barring messages opposing abortion, thus favoring one side of a debate. However, the city is merely requiring that an advertisement convey a commercial message. As in *Lehman*, the city is acting to prevent its advertising panels from becoming areas for the debate of political and religious issues with a resulting detrimental effect on the city's ability to attract long-term commercial advertising. "In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Lehman*, 418 U.S. at 304, 94 S.Ct. 2714.

D

[13] Appellants also bring an as applied challenge, claiming that the city's rejections of their revised advertisements were viewpoint-based. The district court rejected the challenge, finding that the advertisements were "ideological communications" and the essential issue-oriented nature of the advertisements could not be changed to commercial advertisements by simply adding an offer to purchase a bumpersticker containing a political or religious message. We agree with the district court.

As an initial matter, we note that if appellants' challenge is successful, the reasoning of *Lehman* is hollow because a political advertising restriction could easily be avoided by tacking on a commercial offer to purchase the political message. For example, any

candidate for political office could convert his political advertisement into a commercial advertisement by simply offering the message as a bumpersticker. This would significantly undermine the government's ability to act as a proprietor and control access to a nonpublic forum, thereby forcing the government into "an all-or-nothing choice" where "it might not open the property at all." *AETC*, 523 U.S. at ----, 118 S.Ct. at 1642.

The Court addressed a similar attempt to transform speech in *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942). The petitioner in *Valentine* attempted to evade a restriction on commercial advertising by placing a protest against a city law on the back of a handbill containing a commercial advertisement. The Court rejected this attempt to convert a commercial advertisement into a public protest, concluding:

that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.

316 U.S. at 55, 62 S.Ct. 920. Although *Valentine's* holding that the First Amendment does not protect commercial advertising has not survived, see *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420-21, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the Court has continued to reject attempts to evade a regulation by appending a message aimed at transforming the speech.

*982 In *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Court rejected another attempt to transform speech by combining commercial and noncommercial elements. The prohibition at issue in *Fox* banned the operation of commercial enterprises on state university campuses. Students challenged the prohibition on First Amendment grounds

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because they were unable to host “Tupperware parties” to sell housewares. According to the students, the parties included presentations on “how to be financially responsible and how to run an efficient home.” 492 U.S. at 474, 109 S.Ct. 3028. Thus, the students asserted, the commercial and noncommercial speech were “inextricably intertwined” and must therefore be classified as commercial speech. The Court stated that the “level of First Amendment scrutiny must depend upon the nature of the speech taken as a whole and the effect of [any] compelled statement thereon.” 492 U.S. at 474, 109 S.Ct. 3028 (internal quotations omitted). The Court concluded that including the “home economics elements” did not convert the events into educational speech.

[14] The district court did not err in finding that the proposed advertisements were noncommercial and the city did not engage in impermissible viewpoint discrimination. The Court has recognized that “there are commonsense differences between speech that does no more than propose a commercial transaction and other varieties.” *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (internal quotations omitted); see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 562, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). In this case, the advertisements are not “expression[s] related solely to the economic interests of the speaker and its audience,” *Central Hudson*, 447 U.S. at 561, 100 S.Ct. 2343, but instead seek to blur the distinction between types of speech by blending an “ideological communication,” *Virginia Bd. of Pharmacy*, 425 U.S. at 779, 96 S.Ct. 1817 (Stewart, J., concurring), with an offer to purchase the message. When the government is acting as a proprietor in this nonpublic forum, the government may regulate this nonpublic forum by rejecting an advertisement combining political and religious advertisements with a commercial offer. The city did not apply the standard in a viewpoint discriminatory manner by rejecting appellants’ advertisements promoting their

views on public issues.

IV

[15] Appellants also argue with little elaboration that the standard is overbroad, underinclusive, and vague. Appellants claim that the standard is overbroad because its restrictions are greater than necessary to protect the city’s interests. Appellants do not explain how the doctrine of overbreadth applies in this case. Indeed, they do not claim that the standard chills the speech of third parties or that others may not undertake to challenge the law. See *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987). Appellants fail to argue that there is “a realistic danger” of compromising the First Amendment rights of third parties and we find no merit in their facial overbreadth challenge. See *Jews for Jesus*, 482 U.S. at 574, 107 S.Ct. 2568 (internal quotations omitted).

[16] We also reject appellants’ assertion that the standard is underinclusive because it does not ban commercial speech containing religious or political elements. Appellants’ reliance on *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), to support their argument is misplaced. *City of Ladue* stated that a regulation may be underinclusive where it attempts to give one side of a debate an advantage or where the government seeks to control “the search for political truth.” 512 U.S. at 51, 114 S.Ct. 2038 (internal quotations omitted). Appellants do not argue in their underinclusive challenge that the city is giving an advantage to one side in a debate, and we rejected this argument in discussing whether the standard discriminates on the basis of viewpoint.

[17] Finally, appellants argue that the standard is unconstitutionally vague in reliance on a concurring opinion in **983Metromedia*, 453 U.S. at 536-37, 101 S.Ct. 2882, and a citation to that statement in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n. 19, 113 S.Ct. 1505, 123 L.Ed.2d 99

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(1993). They claim that the standard presents a danger of discrimination against disfavored subjects in the guise of determining what is commercial speech. Their brief vagueness argument makes it difficult to determine if they claim that the standard is vague because it presents a danger of viewpoint discrimination, or is vague because it “contains no standard for guidance as to prohibited and allowable conduct.” *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir.1986). To the extent appellants claim the standard is unconstitutional because of the discretion granted to the city, we reject this argument based on our discussion in previous sections.

If appellants are simply asserting that we should hold the standard unconstitutional because it is difficult to determine whether the “speech proposes a commercial transaction,” we would reject the argument. First, we note that there is no fine or other penalty in this case if a person incorrectly classifies their advertisement: The city simply rejects the advertisement. This claim is unlike the usual vagueness challenge involving a fine or other sanction that has the potential to chill conduct. *Cf. Jews for Jesus*, 482 U.S. at 576, 107 S.Ct. 2568 (unrestrained power to arrest). Second, we agree with the Fourth Circuit that the Supreme Court has provided sufficient guidance on the meaning of the standard. *See Major Media*, 792 F.2d at 1272. The city’s standard goes beyond stating that commercial speech is allowed; the city enacted the Court’s standard for identifying commercial speech.^{FN4} “[T]he test for identifying commercial speech” is whether the advertisement “propose[s] a commercial transaction.” *Fox*, 492 U.S. at 473-74, 109 S.Ct. 3028. The Fourth Circuit was not persuaded that the possible difficulty of applying the Court’s guidance in a marginal situation was sufficient to declare a policy unconstitutionally vague:

FN4. *Cf. Foti v. City of Menlo Park*, 146 F.3d 629, 638-39 (9th Cir. 1998) (striking down on vagueness grounds a portion of an ordinance banning signs displayed on

vehicles only when the vehicle has been parked in a manner designed to attract attention). The statute in *Foti* was facially invalid because it required police officers to determine whether the driver intended to park the car for the purpose of displaying a sign and provided no standard to guide their discretion. *Id.* at 639 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). Here, by contrast, the city may only reject an advertisement if it fails to propose a legitimate commercial transaction, a standard which will leave it with relatively little discretion in accepting or rejecting advertisements for display.

Although an occasional marginal case might arise raising the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not in itself justify a generalized charge that the ordinance itself is vague, given the guidance afforded by court decisions in the area.

Major Media, 792 F.2d at 1272-73. We agree with the Fourth Circuit and reject appellants’ vagueness challenge.

CONCLUSION

We AFFIRM the district court’s denial of appellants’ request for a preliminary injunction.

AFFIRMED.

NOONAN, Circuit Judge, dissenting.

That commercial speech can be distinguished from non-commercial speech, that the government as proprietor can limit a non-public forum to commercial speech so that the government makes money, and that the sides of buses in Phoenix are meant to be such a forum, are propositions I accept. They do not remedy discriminatory application of the ordinance by the City of Phoenix.

The ordinance restricts advertising to “speech

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which proposes a commercial transaction." At first blush, it looks as though the standard must be good because it incorporates a hint from a dictum of the Supreme Court: "[t]here are commonsense differences between speech that does 'no more than propose a commercial transaction,' ... and other varieties." *984 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (citation omitted). Advertisements for employment that do not express an opinion on social policy are "classic examples of commercial speech." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). An advertisement that expresses opinion and seeks financial support for a political movement is not commercial. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The distinction is tangible.

The distinction must be applied in the unique context of the medium of communication involved. Street car signs have been lumped with billboards as forming "a class by themselves." *Packer Corp. v. Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 76 L.Ed. 643 (1932) (Brandeis, J.); see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307-08, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (Douglas, J., concurring, relying on Justice Brandeis's opinion in *Packer*). Experience, however, has shown each medium of communication to be unique. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). The medium here is the exterior panels of city buses. Such panels are large-not as big as big billboards but large enough so that figures on them are more than lifesize and the print on them shouts its message. Moving and grunting as they move, buses call attention to themselves. Stuck in traffic beside or behind a bus, the driver and passengers of a car cannot avoid taking in what confronts them. It is in their face. Similarly, pedestrians waiting for a light to turn cannot avert their eyes from what a waiting bus offers to view. The exterior panels are better than billboards in

their ability to command consideration by those momentarily before them, and, unlike billboards, they move down central streets.

Not only is each medium of expression unique; the cultural context changes with the times. The context of a quarter of a century ago is not today's. We must apply precedents taking into account the context of contemporary culture. In this culture ideological conflicts exist in which the commercial side coincides with one of the two embattled positions. The commercial-non-commercial distinction should not be mechanically applied without attention to this distinct modern phenomenon.

As applied, the Phoenix ordinance bans a message that proposes a commercial transaction and, as an integral part of that proposal, identifies the product to be bought. What Children of the Rosary offers for sale is not something devised to evade the ordinance. As the record demonstrates, the bumpersticker was a good it sold prior to the ordinance's enactment. The American Civil Liberties Union offers a bumpersticker that, containing a message as to the ACLU's goals, effectively advertises the value of the ACLU as a participant in the community. A nonprofit organization may surely sell products incidental to its mission and thereby both promote its goals and help to support itself. It is hard to see why Phoenix rejected the ACLU ad-surely the message was uncontroversial-unless the city was trapped into maintaining a consistent position on bumperstickers. It may be, as the majority suggests, that the ordinance would be porous if the sale of bumperstickers is not barred; but that suggestion only shows the deficiency of the ordinance as applied and the difficulty of governmental restraint of speech.

It is something of an anomaly in First Amendment jurisprudence for more protection to be accorded commercial speech than is accorded noncommercial speech. As Justice White has observed, such a result "inverts" the normal rule. *Metromedia, Inc.*, 453 U.S. at 513, 101 S.Ct. 2882. If the inversion is permitted by precedent, it still must be done in a way

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that does not destroy the level playing field of politics or put the government's seal of approval on one of two sides of a political issue. Moneymaking is not government's primary business. It would be ironic if pursuit of profit permitted a unit of government to discriminate in the messages on government property.

Here, the message of a group acknowledging the sacredness of human life in the womb is rejected; Planned Parenthood could run an ad for an abortion clinic. The views clash; the city of Phoenix would give space to one and not the other. Analogously, if *985 Arizona should come to permit physician-assisted suicide as does Oregon, Dr. Kevorkian could advertise his services on the sides of the buses of Phoenix, but the counter advice of advocates offering free counselling against this course would be forbidden. The examples from the great life issues in our present culture speak for themselves. The clash over the environment affords other examples. A power company could extol its product. The Sierra Club, objecting to more dams, would be denied the forum. The makers of a pesticide could celebrate their wares; champions of pesticide-free farms would be barred. A developer could tout the quality of his homes; defenders of green space in the suburbs would have to be silent on the buses. The pornographer could advertise his shop; the defenders of neighborhood decency would be denied a reply. In the America of 1998 to give the commercial advertiser space, without reference to the product being pushed, is for a city to take sides more than occasionally on issues of life and health and energy and the ecosystem.

The case is further complicated by the likelihood of commercial media using the buses to advertise their products. The record indicates that the city of Phoenix is ready to accept such advertisements. Commercial media advertising can be full of political or religious content. In this way a radio station in Phoenix, like a station in San Francisco, could advertise on the buses that it broadcasts Rush Limbaugh with a photo of the man accompanying

the sales pitch. A Christian radio station could promote its product with a cross and a relevant message. A movie house could announce the return of *The Last Temptation of Christ* with an illustration of the Magdalen.

If the city of Phoenix is to be truly neutral on political and religious issues, it must go beyond the simplicity of "commercial" and be specific as to the content of commercial messages it will not accept. The city may, for instance, specify that the buses will not carry commercial messages on hot topics—e.g., abortion, cigars and cigarettes, environmental disputes, euthanasia, pornography, radio talk shows, and X-rated movies. The city will have to discriminate frankly as to content, as it permissibly may in this commercial context. Such content-based restrictions are permissible in such nonpublic fora. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). What the city may not do is discriminate as to viewpoint, *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, ---, 118 S.Ct. 1633, 1643, 140 L.Ed.2d 875 (1998), as it did in this case where in the course of applying its ordinance it effectively rewrote it to permit only "primarily commercial" messages and thereby froze out even commercial advertising by nonprofit groups without significant business transactions to advertise.

Of the three rationales for the city's policy, the avoidance of violence against the buses seems to border on the absurd; nothing in the record substantiates the fear. The other two rationales—neutrality on contentious political and religious matters and the maintenance of standards attractive to business advertisers—would both be served by the kind of precision suggested here as essential to constitutionality. Neither rationale is served by a policy that allows the ideology of one side but not the other to be smuggled in.

The Phoenix ordinance, as applied, discriminates against the appellants' commercial speech and the Phoenix ordinance, as applied, fails to mark off a

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realm of ideology-free speech from a realm where ideologues with businesses to advertise can flourish. The preliminary injunction should have been granted.

C.A.9 (Ariz.),1998.

Children of the Rosary v. City of Phoenix

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*cannot interfere
w/ revenue*

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United States Court of Appeals,
Second Circuit.Michael A. LEBRON, Plaintiff-
Counter-Defendant-Appellee,

v.

NATIONAL RAILROAD PASSENGER COR-
PORATION (AMTRAK), Defendant-Appellant,
andTransportation Displays, Incorporated, Defendant-
Counter-Claimant.**No. 1494, Docket 93-7127.**

Argued April 27, 1993.

Decided Dec. 27, 1993.

Reversed and Remanded Feb. 21, 1995.

Reargued May 11, 1995.

Decided Oct. 30, 1995.

Artist sued National Railroad Passenger Corporation (Amtrak), after Amtrak rejected artist's lease of large billboard space because artist's proposed display was "political," for violation of artist's First Amendment rights. The United States District Court for the Southern District of New York, Pierre N. Leval, J., 811 F.Supp. 993, entered judgment for artist, and Amtrak appealed. The Court of Appeals for the Second Circuit, 12 F.3d 388, reversed upon finding that Amtrak was not government actor. The Supreme Court, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902, Justice Scalia, granted certiorari, and reversed upon finding that Amtrak was governmental actor. On remand, the Court of Appeals, Mahoney, Circuit Judge, held that: (1) display was not a public forum, or was a limited public forum; (2) policy prohibiting political speech on billboard was reasonable; (3) policy was not void for vagueness; (4) policy was not void for viewpoint bias; and (5) plaintiff lacked standing for facial challenge to Amtrak's policy.

Reversed and remanded with instructions.

Jon O. Newman, Chief Judge, dissented and filed opinion.

Amended on Denial of Rehearing 74 F.3d 371,
1995 WL 767138.

West Headnotes

[1] Constitutional Law 92 1735

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and
Events

92k1732 Public Forum in General

92k1735 k. Justification for Exclu-
sion or Limitation. Most Cited Cases

(Formerly 92k90.1(4))

Regulation of speech on government property that has traditionally been available for public expression or that has been designated as public forum, whether of limited or unlimited character, is subject to highest scrutiny; such regulations survive only if they are narrowly drawn to achieve compelling state interest. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 1751

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and
Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and
Events

92k1748 Non-Public Forum in General

92k1751 k. Justification for Exclu-
sion or Limitation. Most Cited Cases

(Formerly 92k90.1(4))

Limitations on expressive activity conducted on government property which has not traditionally been available for public expression or that has not been designated as public forum need only be reasonable, as long as regulation is not effort to sup-

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press speaker's activity due to disagreement with speaker's view. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 🔗1735

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1732 Public Forum in General

92k1735 k. Justification for Exclusion or Limitation. Most Cited Cases
(Formerly 92k90.1(4))

Reasonable, content-neutral time, place, or manner restrictions are permissible in public forum. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 🔗1754

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1754 k. Advertising in General.

Most Cited Cases

(Formerly 92k90.1(4))

For purposes of determining whether public forum was involved with respect to artist's desire to place advertisement on large billboard on New York City's Pennsylvania Station, determination was limited to that unique display rather than all advertising space managed by same firm in New York City. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 🔗1734

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1732 Public Forum in General

92k1734 k. Nature and Requisites.

Most Cited Cases

(Formerly 92k90.1(4))

Government does not create public forum by inaction or by permitting limited discourse, but only by intentionally opening nontraditional forum for public discourse; even when government opens forum for some speech, forum does not become public forum if government did not intend to open forum without limitation. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 🔗1754

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1754 k. Advertising in General.

Most Cited Cases

(Formerly 92k90.1(4))

Large billboard on New York City's Pennsylvania Station was not a "public forum," or was a limited public forum for purely commercial speech, for purposes of determining whether limitations against political speech violated potential First Amendment rights of artist who leased it; display had never been open for anything other than commercial advertising. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 🔗1752

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and Events

92k1752 k. Proprietary Function of Government. Most Cited Cases

(Formerly 92k90.1(1))

Where government is acting as proprietor, managing its internal operations, rather than acting as lawmaker with power to regulate or license, its ac-

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tion will not be subjected to heightened review to which its actions as lawmaker may be subject.

[8] Constitutional Law 92 ⚡1709

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(F) Politics and Elections

92k1709 k. Advertisements. Most Cited Cases

(Formerly 92k90.3)

Policy of National Railroad Passenger Corporation (Amtrak), as proprietor of large billboard on New York City's Pennsylvania Station, to prohibit display of political speech was reasonable; Amtrak's position, as government controlled and financed public facility, made it highly advisable to avoid criticism and embarrassments of allowing any display seeming to favor any political view. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ⚡1710

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(F) Politics and Elections

92k1710 k. Signs. Most Cited Cases

(Formerly 92k90.3, 92k90.1(3))

Unwritten policy of National Railroad Passenger Corporation (Amtrak) to prohibit display of political speech on large billboard on New York City's Pennsylvania Station was not void for vagueness; Amtrak did not enjoy unbridled discretion nor could it have perpetrated illegitimate abuse of censorial power in rejecting advertisement because of its political content. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚡1710

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(F) Politics and Elections

92k1710 k. Signs. Most Cited Cases

(Formerly 92k90.3)

Policy of National Railroad Passenger Corporation (Amtrak) which gave Amtrak discretion to refuse advertising for large billboard on New York City's Pennsylvania Station that "involve[s] political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public," was not void for viewpoint bias; statement was unartfully phrased justification for policy of prohibiting all political speech on that billboard, rather than test for discriminating against controversial political advertisements. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⚡667

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)1 In General

92k667 k. Third-Party Standing in General. Most Cited Cases

(Formerly 92k42(2))

Embedded in traditional rules governing constitutional adjudication is general principle that person to whom statute may constitutionally be applied will not be heard to challenge that statute on ground that it may conceivably be applied unconstitutionally to others, in other situations not before court.

[12] Federal Courts 170B ⚡612.1

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BVIII(D)1 Issues and Questions in Lower Court

170Bk612 Nature or Subject-Matter of Issues or Questions

170Bk612.1 k. In General. Most Cited Cases

Question of standing is not subject to waiver; appellate court is required to address issue even if courts below have not passed on it, and even if

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parties fail to raise issue.

[13] Federal Courts 170B ⚡30

170B Federal Courts

170B1 Jurisdiction and Powers in General

170B1(A) In General

170Bk29 Objections to Jurisdiction, Determination and Waiver

170Bk30 k. Power and Duty of Court.

Most Cited Cases

Federal courts are under independent obligation to examine their own jurisdiction, and standing is perhaps most important of jurisdictional doctrines.

[14] Constitutional Law 92 ⚡855

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)9 Freedom of Speech, Expression, and Press

92k855 k. In General. Most Cited

Cases

(Formerly 92k42.2(1))

Constitutional Law 92 ⚡859

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)9 Freedom of Speech, Expression, and Press

92k858 Criminal Law

92k859 k. In General. Most Cited

Cases

(Formerly 92k42.2(1))

Under overbreadth doctrine, individual may bring First Amendment challenge against statute that threatens others not before court because it also threatens those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have law declared partially invalid. U.S.C.A.

Const.Amend. 1.

[15] Constitutional Law 92 ⚡1164

92 Constitutional Law

92X First Amendment in General

92X(A) In General

92k1162 Overbreadth in General

92k1164 k. Substantial Impact, Necessity Of. Most Cited Cases

(Formerly 92k82(4))

Invalidation of statute on its face, under First Amendment overbreadth doctrine, is permitted only if overbreadth is substantial. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ⚡857

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(A) Persons Entitled to Raise Constitutional Questions; Standing

92VI(A)9 Freedom of Speech, Expression, and Press

92k857 k. Carriers. Most Cited Cases

(Formerly 92k42.2(1))

Artist who was prohibited by policy of National Railroad Passenger Corporation (Amtrak) from displaying political advertisement on large billboard on New York City's Pennsylvania Station lacked standing to present First Amendment facial challenge to Amtrak's general policy under overbreadth doctrine. U.S.C.A. Const.Amend. 1.

*652 Kevin T. Baine, Washington, D.C. (Nicole K. Seligman, Steven M. Farina, Williams & Connolly, Washington, D.C., William G. Ballaine, Mark S. Landman, Siff Rosen P.C., New York City (of counsel), for Defendant-Appellant.

David D. Cole, Washington, D.C. (Center for Constitutional Rights, Washington, D.C., R. Bruce Rich, Gloria C. Phares, Robin E. Silverman, Bernadette M. McCann Ezring, Jonathan Bloom, Weil, Gotshal & Manges, New York City, of counsel), for Plaintiff-Counter-Defendant-Appellee.

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(Cite as: 69 F.3d 650)

Before: NEWMAN, Chief Judge, and LUMBARD and MAHONEY, Circuit Judges.

MAHONEY, Circuit Judge:

On remand from the United States Supreme Court, *see Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) ("*Lebron III*"), this appeal of a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-District Judge,^{FN*} again comes before us. The district court enjoined defendant-appellee National Railroad Passenger Corporation ("Amtrak") and defendant-counter-claimant Transportation Displays, Incorporated ("TDI") to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Spectacular in New York City's Pennsylvania Station ("Penn Station"), having determined that Amtrak's failure to do so violated the First Amendment. *See* *653 *Lebron v. National R.R. Passenger Corp. (AMTRAK)*, 811 F.Supp. 993 (S.D.N.Y.1993) ("*Lebron I*").

FN* Judge Leval became a member of the Second Circuit Court of Appeals on November 8, 1993.

On appeal, after staying the injunction, we reversed the judgment of the district court, "conclud[ing] that Amtrak is not a governmental actor subject to the strictures of the First Amendment." *Lebron v. National R.R. Passenger Corp. (AMTRAK)*, 12 F.3d 388, 389 (2d Cir.1993) ("*Lebron II*"). The Supreme Court reversed and remanded, holding that Amtrak "is part of the Government for purposes of the First Amendment," *Lebron III*, 513 U.S. at ----, 115 S.Ct. at 974-75, but "express[ing] no opinion as to whether Amtrak's refusal to display Lebron's advertisement violated that Amendment." *Id.* at ----, 115 S.Ct. at 975.

Because we conclude that Amtrak's historical refusal to accept political advertisements such as

Lebron's on the Spectacular is a reasonable use of that forum that is neutral as to viewpoint, and that Lebron lacks standing to assert a facial challenge to Amtrak's general policies concerning the acceptance of advertising for display at Pennsylvania Station, we again reverse the judgment of the district court.

Background

On November 30, 1992, Lebron, an artist who creates political billboard displays (frequently involving commentary on public issues), and TDI, which manages the leasing of advertising space for Amtrak, entered into a leasing agreement (the "Lease") under which Lebron would rent the Spectacular, "a curved back-lit display space approximately 103 feet wide by ten feet high ... [which] dominates the west wall of the rotunda on the upper level of Penn Station where thousands of passengers pass each day," for the months of January and February 1993. *Lebron II*, 12 F.3d at 389. Although Lebron did not specify the precise nature of his display, he did inform TDI that his work was generally political. *Id.* By the terms of the Lease, "[a]ll advertising copy is subject to approval of TDI and [Amtrak] as to character, text, illustration, design and operation.... [I]f [Amtrak] should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice." *Id.* (quoting the Lease, alterations partially added).

Lebron then submitted his proposed advertisement (the "Display") to TDI. Lebron characterizes the Display as "an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures." The district court described the Display as follows:

The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the "Right Beer," Lebron's piece is

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captioned "Is it the Right's Beer Now?" It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the *contras* in Nicaragua. Again taking off on Coors' advertising which uses the slogan of "Silver Bullet" for its beer cans, the text proclaims that Coors is "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

Lebron I, 811 F.Supp. at 995.

When TDI saw the Display, it offered Lebron any of 500 alternative billboard sites that TDI had available in New York City (none of which were in Penn Station), but Lebron rejected this offer. Echoing the allegation in his complaint that the Spectacular is "a unique advertising location in the City of New York," Lebron stated in an affidavit that:

The very size of the Spectacular allowed me to design and visualize this work with an effectiveness and clarity that would have been otherwise impossible to achieve. Its size and shape make it one of the largest advertising display spaces in New York City, and its prominent location in Pennsylvania Station means that it is visible to a large segment of the traveling public, providing an excellent opportunity *654 to reach exactly the kind of audience I hope to engage with the subject matter of this piece. For all of these reasons, I consider the space an extraordinarily unique advertising location in New York City, and a unique challenge to my communicative skills as an artist that no gallery and few other public environments could provide.

Shortly thereafter, Amtrak rejected the Display, stating that its "policy is that it will not allow political advertising on the [S]pectacular advertising sign." " *Lebron II*, 12 F.3d at 389 (quoting

Amtrak rejection letter, alteration in *Lebron II*).

This policy, however, is not committed to writing, *Lebron I*, 811 F.Supp. at 1001, although the licensing agreement between Amtrak and TDI (which is addressed to all of Amtrak's advertising space) states that: " 'All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion.' " *Id.* at 1002 (quoting licensing agreement).^{FN1} In addition, the licensing agreement provides that public service announcements may be accepted, at a reduced rate and when space is available, although they may be preempted by commercial advertising. *Id.* at 1003. Public service advertisements may be accepted only from " 'recognized, legitimate [tax exempt] not-for-profit organizations, corporations, National, State or Local government agencies and subdivisions, philanthropic or cultural organizations whose activities would be of interest or benefit to a majority of the area population,' " and must "adhere to 'good taste, decency and community standards.' " *Id.* (quoting licensing agreement, alterations in *Lebron I*).

FN1. The licensing agreements between Amtrak's predecessor, the Pennsylvania Railroad Company ("PRC"), and TDI provided that the PRC could refuse any advertisement that it deemed " 'unlawful, immoral, improper or offensive to good taste ... or [to] involve *political* or other views which could result in dissension or [to] involve [PRC] in dissension, complaints or controversy with its patrons or the public.' " *Lebron I*, 811 F.Supp. at 1001-02 (quoting PRC-TDI licensing agreements) (alterations partially added, emphasis added). However, this language has been superseded by the language quoted in the text of this opinion.

In this regard, Amtrak has leased advertising space to various noncommercial groups, including:

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the New York Department of the Environment, the New York Department of Commerce, a foundation for muscular dystrophy, and *Plain Truth* Magazine, a free magazine on political and social issues published by The Worldwide Church of God. In addition, testimony of the general counsel of TDI indicates that TDI regularly displays public service advertisements, including subjects such as the homeless, the environment, drunk driving, AIDS awareness, health issues, and race relations.

Id. at 1004. *The Plain Truth* is distributed at a four-sided, seven-foot kiosk that displays an advertisement for the magazine and is located in front of the Spectacular.

In addition, however, it is undisputed that in the twenty-six years of its existence, the Spectacular has never been used for any type of advertising other than commercial promotions. The only advertisements that have appeared on the Spectacular have promoted DuPont Company, Resorts International in Atlantic City, the Broadway play "Sophisticated Ladies," Fujitsu Computers, Nike athletic wear, and A & S Department Stores.^{FN2} Moreover, as Lebron has acknowledged, Amtrak previews proposed advertisements for the Spectacular, while it views advertisements to be used at other locations only after they are exhibited.

FN2. The stated twenty-six years of the Spectacular's existence, and the list of advertisers over that period, is premised upon the record presented on this appeal, which was completed over two years ago.

Lebron commenced this action alleging a violation of his First Amendment rights and breach of contract, and seeking equitable relief or, alternatively, damages. The district court granted a mandatory injunction requiring Amtrak and TDI to exhibit the Display on the Spectacular. *Lebron I*, 811 F.Supp. at 1005. After holding that Amtrak is a government actor subject to the First *655 Amendment, *id.* at 995-1000, the court concluded that Amtrak's refusal

to exhibit the Display violated that amendment. *Id.* at 1000-05. The court provided four bases for this determination: (1) Amtrak's policy of not accepting political advertisements is not clearly set forth, in that it is not reduced to writing, *id.* at 1001-02; (2) the policy is vague, in that it is difficult to draw the line between political, public interest, and commercial advertisements, as demonstrated by conflicting testimony by Amtrak's officials, *id.* at 1002-03; (3) the policy is not consistently applied, in that certain public service advertisements that Amtrak has accepted might be viewed as political, *id.* at 1003-04; and (4) the policy may be void as discriminating on the basis of viewpoint, in that Amtrak may inquire into whether a particular advertisement is offensive, *id.* at 1004-05.

As previously stated, we initially reversed on the ground that Amtrak is not subject to First Amendment constraints, and therefore did not consider the merits of Lebron's First Amendment claim. *Lebron II*, 12 F.3d at 392. We instructed the district court not to exercise supplemental jurisdiction over the remaining state law claim, but noted that Lebron would be free to pursue that claim in state court. *Id.* at 392-93. The Supreme Court reversed and remanded on the "government actor" issue, directing us to consider the merits of Lebron's First Amendment claim. *Lebron III*, 513 U.S. at ---- - ----, 115 S.Ct. at 974-75.

We requested supplemental letter briefs from the parties, and heard reargument on the First Amendment issues.

Discussion

[1][2][3] Because Lebron seeks access to government property, we begin with a review of the public forum doctrine.

Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if

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they are narrowly drawn to achieve a compelling state interest. *Perry [Educ. Ass'n v. Perry Local Educators' Ass'n]*, 460 U.S. [37,] 45, 103 S.Ct. [948,] 955 [74 L.Ed.2d 794] [(1983)]. The second category of public property is the designated public forum, whether of a limited or unlimited character-property that the state has opened for expressive activity by part or all of the public. *Ibid.* Regulation of such property is subject to the same limitations as that governing a traditional public forum. *Id.*, at 46, 103 S.Ct., at 955. Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view. *Ibid.*

International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, ---, 112 S.Ct. 2701, 2705-06, 120 L.Ed.2d 541 (1992). Reasonable, content-neutral time, place, or manner restrictions are permissible in a public forum. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-54, 105 L.Ed.2d 661 (1989).

"[I]n defining the forum [the Supreme Court has] focused on the access sought by the speaker.... In cases in which limited access is sought, [the Court's] cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 801, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985) (emphasis added) (holding that federal fund-raising drive, not federal workplace generally, was relevant forum for analysis).

[4] Amtrak contends that our public forum inquiry must focus on the Spectacular alone, rather than all Penn Station advertising space. We agree. Because of its unique size, location, and visibility, Lebron sought access only to the Spectacular, and refused to accept any other advertising space in New York

City managed by TDI. Although Lebron now contends that we should broaden our public forum inquiry to all Penn Station advertising space, it was he who determined that only the Spectacular would be acceptable for his display. Cf. *656 *Air Line Pilots Ass'n, Int'l v. Department of Aviation*, 45 F.3d 1144, 1151-52 (7th Cir.1995) (where speaker seeks access to diorama display cases in airport, public forum inquiry focuses on display cases rather than airport as a whole); *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n*, 797 F.2d 552, 555-56 (8th Cir.) (where speaker seeks access to advertising space in sports arena, public forum inquiry focuses on advertising space rather than entire arena), *cert. denied*, 479 U.S. 986, 107 S.Ct. 576, 93 L.Ed.2d 579 (1986).

[5] To determine the Spectacular's forum category, we must examine "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449. We must bear in mind that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.*; see also *Krishna*, 505 U.S. at ---, 112 S.Ct. at 2706 (quoting *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449). Thus, even when the government opens a forum for some speech, the forum does not become a public forum if the government did not intend to open the forum without limitation. See *United States v. Kokinda*, 497 U.S. 720, 730, 110 S.Ct. 3115, 3121-22, 111 L.Ed.2d 571 (1990) (plurality opinion); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 48, 103 S.Ct. 948, 956-57, 74 L.Ed.2d 794 (1983). When only some First Amendment access has been granted, the reasonableness test applies. *Kokinda*, 497 U.S. at 730, 110 S.Ct. at 3121-22 (plurality opinion); *Perry*, 460 U.S. at 49, 103 S.Ct. at 957.

Although Amtrak does not maintain a written policy with respect to the Spectacular, its practice is clear; it has never opened the Spectacular for any-

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thing except purely commercial advertising. *See Air Line Pilots Ass'n*, 45 F.3d at 1154 (“[A] court must examine the *actual* policy-as gleaned from the *consistent* practice with regard to various speakers-to determine whether a state intended to create a designated public forum”); *cf. AIDS Action Comm. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 10-12 (1st Cir.1994) (prohibiting advertisements concerning use of condoms pursuant to written policy prohibiting sexually explicit advertisements constituted “discrimination in the application of supposedly neutral standards” when other sexually explicit advertisements had been allowed).

[6] In light of Amtrak's undisputed practice with respect to the Spectacular, therefore, we conclude that the Spectacular is not a public forum; most likely, it is a non-public forum, or perhaps it is a limited public forum opened for purely commercial speech. *See Calash v. City of Bridgeport*, 788 F.2d 80, 83-84 (2d Cir.1986) (sports arena opened only to civic, charitable, and nonprofit groups either a nonpublic forum or a limited public forum not required to accommodate other members of general public).

Accordingly, Amtrak's policy of excluding non-commercial advertisements from the Spectacular will be upheld so long as the policy is “viewpoint-neutral and reasonable in relation to the forum's purpose.” *Calash*, 788 F.2d at 84; *see also Cornelius*, 473 U.S. at 806, 105 S.Ct. at 3451 (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”).

Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), is particularly well addressed to this issue as presented in the instant case. In *Lehman*, the city imposed a ban on political advertisements in buses, but allowed other types of advertisements, including commercial and public service ads. A candidate for public office challenged this policy as a First Amendment viola-

tion, and the Court responded as follows:

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation,*657 is part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility “will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety.” *Public Utilities Comm'n v. Pollak*, 343 U.S. [451,] 464-65, [72 S.Ct. 813, 821-22, 96 L.Ed. 1068 [(1952)].

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious.... Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation....

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favor-

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itism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

Lehman, 418 U.S. at 303-04, 94 S.Ct. at 2717-18 (plurality opinion) (emphasis added).^{FN3}

FN3. Lebron contends that because the only government interest in *Lehman* that garnered the support of a majority of the Court is protecting captive audiences, the case must be read as so limited. However, the Supreme Court has repeatedly reaffirmed a broader reading of *Lehman*, often specifically citing to the plurality opinion. See, e.g., *Krishna*, 505 U.S. at ----, 112 S.Ct. at 2705 (“[W]e have upheld a ban on political advertisements in city-operated transit vehicles”) (citing *Lehman*); *Kokinda*, 497 U.S. at 726, 110 S.Ct. at 3119 (plurality opinion) (“In *Lehman*, the plurality concluded that the ban on political advertisements (combined with the allowance of other advertisements) was permissible under [the arbitrary and capricious] standard...” (followed by quotation from *Lehman*, 418 U.S. at 304, 94 S.Ct. at 2717-18) (plurality opinion); *Cornelius*, 473 U.S. at 806, 105 S.Ct. at 3451 (“[A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum...” (citing *Lehman*); *Perry*, 460 U.S. at 47, 103 S.Ct. at 956 (“[I]n [*Lehman*] (opinion of BLACKMUN, J.), a plurality of the Court concluded that a city transit system’s rental of space in its vehicles for commercial advertising did not require it to accept partisan political advertising.”); see also *Air Line Pilots Ass’n*, 45 F.3d at 1153 n. 3 (declining “to limit *Lehman*’s holding to situations involving captive audiences”); *Calash*, 788 F.2d at 84 (citing *Lehman*

plurality opinion for proposition that “rental of space to commercial advertisers does not require City to accept political advertising on buses”). We therefore see no need to address Amtrak’s argument that its policy could be justified on the basis of the captive audience doctrine.

[7] It is especially significant that, as in *Lehman*, Amtrak acts in this case in a proprietary capacity, rather than as a governmental regulator. As the Court stated in *Krishna*:

Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. *Kokinda*, *supra*, 497 U.S., at [725], 110 S.Ct., at [3119] (plurality opinion) (citing *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961)). Thus, we have upheld a ban on political advertisements in city-operated transit vehicles, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district*658 to limit access to an internal mail system used to communicate with teachers employed by the district. *Perry Education Assn. v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

505 U.S. at ----, 112 S.Ct. at 2705.

[8][9] Amtrak’s decision, as a proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable. Amtrak’s position as a government controlled and financed public facility, used daily by thousands of people, made it highly advisable to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view. This was particularly so with respect to the Spec-

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tacular in view of its uniqueness and size. *Cf. Calash*, 788 F.2d at 84 (finding the city's decision to limit access to sports arena to civic, charitable, and non-profit groups, but not rock musicians, reasonable) (citing *Cornelius*, 473 U.S. at 809-11, 105 S.Ct. at 3452-54; *Perry*, 460 U.S. at 50-53, 103 S.Ct. at 958-59; and *Lehman*, 418 U.S. at 304, 94 S.Ct. at 2718 (plurality opinion)). Nor would a policy against "political" advertising on the Spectacular be void for vagueness in light of the Supreme Court's decision in *Lehman*, 418 U.S. at 303-04, 94 S.Ct. at 2717-18 (plurality opinion).

Lebron urges us to reach the same conclusion as the district court, arguing that Amtrak's policy is unwritten, inconsistently applied, and possibly viewpoint biased. We disagree.

The fact that a policy is not committed to writing does not of itself constitute a First Amendment violation. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770, 108 S.Ct. 2138, 2151, 100 L.Ed.2d 771 (1988) ("[T]he limits the city claims are implicit in its law must be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice."). *City of Lakewood* and the other cases cited by the district court stand for the propositions that "in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship," *id.* at 757, 108 S.Ct. at 2144, and that "the absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." *Id.* at 758, 108 S.Ct. at 2144.

Neither of these concerns is implicated here. Amtrak's prior written agreements, together with the testimony of the Amtrak official responsible for approving advertisements on the Spectacular and Amtrak's historic practice of reserving the Spectacular for commercial advertisements, dispel the notion that Amtrak enjoyed "unbridled discretion" or could have perpetrated an "illegitimate abuse of

censorial power" in rejecting an advertisement because of its political content. Furthermore, because the policy against political advertisements was limited in scope to the Spectacular, there is no evidence that Amtrak's policy has ever been applied inconsistently.

[10] The district court also intimated that Amtrak's policy might be void for viewpoint bias, depending upon which of the conflicting versions offered at trial represented Amtrak's true policy. Although the district court entered no findings of fact, its concern was primarily based upon statements appearing in Amtrak's 1967 and 1980 agreements with TDI, which gave Amtrak the discretion to refuse any advertising that "involve[s] political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public." 811 F.Supp. at 1001-02 (quoting TDI licensing agreements) (alterations partly added). Of course, if such a policy were used to screen out only controversial political advertisements—that is, political advertisements distasteful to the majority—it would be void for viewpoint bias. On the other hand, it seems more sensible to read the language as a justification, however inartfully phrased, for a categorical ban against political advertising, *see, e.g., Lehman*, 418 U.S. at 304, 94 S.Ct. at 2718 (characterizing commercial advertising as "innocuous and less controversial" than political advertising), rather *659 than as a test for discriminating against certain types of political advertisements.^{FN4}

FN4. Lebron invokes *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), which invalidated a ban on the showing of religiously oriented films in public schools when secularly oriented films on the identical subjects were permitted, to argue that Amtrak's policy violates viewpoint neutrality. Lebron perceives viewpoint discrimination because "[u]nder Amtrak's policy, the Coors Brew-

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ing Company could advertise and encourage purchase of its beer, but Lebron's critical treatment of the same subject matter, discouraging purchase of Coor's beer, was rejected because it expressed a 'political' point of view." The argument is plainly specious. The "subject matter" of the Display can hardly be described, with any remote sense of accuracy, as the merits or demerits of Coors Beer. As Lebron himself stated in an affidavit, "I do not seek to sell anything other than ideas with this advertisement."

[11] Because we have found that Amtrak's policy against political advertisements was limited in scope to the Spectacular, Lebron's attempt to attack Amtrak's policies regarding the acceptance of advertisements in Penn Station generally, rather than on the Spectacular, amounts, in substance, to a facial challenge to those policies as they might be applied to advertisements other than Lebron's and to locations not at issue. Ordinary rules of standing, of course, would bar Lebron from mounting such a challenge. As the Supreme Court has made clear: "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973) (collecting cases).

[12][13] Further, "[t]he question of standing is not subject to waiver ...: 'we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional] doctrines." ' " *United States v. Hays*, 515 U.S. 737, ---, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995) (quoting *FW/PBS, Inc. v. City*

of Dallas, 493 U.S. 215, 230-31, 110 S.Ct. 596, 607, 107 L.Ed.2d 603 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984))) (alteration in *FW/PBS*).

Broadrick also recognized, however, that "the Court has altered its traditional rules of standing to permit in the First Amendment area 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' " 413 U.S. at 612, 93 S.Ct. at 2916 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965)). *Broadrick* went on to emphasize that this overbreadth doctrine "has been employed by the Court sparingly and only as a last resort." 413 U.S. at 613, 93 S.Ct. at 2916; see also *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971) ("Procedures for testing the constitutionality of a statute 'on its face' ... are fundamentally at odds with the function of the federal courts in our constitutional plan.").

[14][15] In our view, this case affords no occasion for application of the overbreadth doctrine, and Lebron accordingly lacks standing to assert a general challenge to Amtrak's advertising policies. The doctrine has only been applied to the conduct of the government in its role as a regulator, not as a proprietor. See, e.g., *City of Lakewood*, 486 U.S. at 759-62, 108 S.Ct. at 2145 (newspaper permitted to mount facial challenge to ordinance that granted municipal mayor uncircumscribed authority to allow or disallow distribution of newspapers via newsracks on public streets); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 571, 574-77, 107 S.Ct. 2568, 2570, 2572-73, 96 L.Ed.2d 500 (1987) (allowing overbreadth challenge to ordinance that barred "First Amendment activities within the Central Terminal Area at Los Angeles International Airport"). It is invoked against a statute that " 'threatens others not before the court—those who desire*660 to engage in legally protected expression but who may refrain from doing so

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rather than risk prosecution or undertake to have the law declared partially invalid,' " *id.* at 574, 107 S.Ct. at 2572 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 2802, 86 L.Ed.2d 394 (1985)), and invalidation of a statute on its face is permitted "only if the overbreadth is 'substantial.' " *Id.* (collecting cases).

[16] Such concerns simply are not implicated by Amtrak's role as the proprietor of Penn Station, essentially seeking to derive revenues from the sale of advertising while minimizing interference with or disruption of the station's commercial function. *See Lehman*, 418 U.S. at 303, 94 S.Ct. at 2717 (plurality opinion). Thus, Lebron lacks standing to present a facial challenge to Amtrak's general advertising policies in this litigation. This would be so even if Lebron had adduced a stronger showing of erosion of Amtrak's policy against political advertisements than the handful of assertedly borderline cases that was presented in this litigation. As Chief Judge Newman pointed out in *Lebron II*, "Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors Beer for promoting 'The Far Right's political agenda.' " 12 F.3d at 394 (Newman, C.J., dissenting).

Conclusion

We reverse the judgment of the district court and remand with the instruction that the district court dismiss Lebron's complaint. As previously noted, *see Lebron II*, 12 F.3d at 392-93, Lebron is free to pursue his state law claim in state court.

JON O. NEWMAN, Chief Judge, dissenting:
Because I believe that Amtrak, a governmental entity now authoritatively determined to be subject to First Amendment limitations, *see Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), has violated the First Amendment by its rejection of the political advert-

isement that Michael Lebron contracted to display on a billboard in Penn Station, I respectfully dissent.

The Court's dismissal of Lebron's lawsuit rests on two premises, both of which, in my view, are flawed. The first concerns the identification of the forum for purposes of applying public forum analysis. The second concerns the standard for determining whether a governmental actor's policy for rejecting advertisements violates First Amendment requirements.

1. *The relevant forum.* The premise of the Court's identification of the relevant forum is that, in advertising cases, a court should consider the particular billboard on which an applicant wishes to display a message. Proceeding from this premise, the Court narrows its inquiry to "the Spectacular," the large billboard high on the west wall of the rotunda of the upper level of Penn Station. No prior case has taken such a restricted view of the relevant forum, and I think it can be readily demonstrated that the Court's premise is incorrect.

The Supreme Court has instructed that the relevant forum is to be determined by "the access sought by the speaker." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 801, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985). The meaning of that instruction is made clear by the facts of *Cornelius*. The plaintiff sought access to what the Court called "a particular means of communication," *id.*-the Combined Federal Campaign, a charity drive aimed at federal employees. The Court ruled that the charity campaign itself was the relevant forum, rather than the entirety of the federal workplace. The cases relied on by *Cornelius* further illuminate the Court's meaning. In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), the Court confined its inquiry to a school district's interschool mail system, rather than all parts of school property. *Cornelius* referred to the mail system as "a particular means of communication." 473 U.S. at 801, 105 S.Ct. at 3448 (emphasis added). In

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*661 *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), the Court confined its inquiry to advertising space on city-owned buses.

All of these cases focus on a means of communication, not the particular location where an advertiser prefers to display its ad. It is unimaginable that in *Cornelius* the Court would have permitted one political party to solicit funds through the Combined Federal Campaign at one side of the lobby of a federal building while denying another party the opportunity to solicit funds through the Campaign at the other side, or that in *Perry* the Court would have permitted one group to place a political message in the mail boxes of one school while denying another group a similar right at other schools, or that in *Lehman* the Court would have permitted political ads on one bus while prohibiting political ads on other buses.

The two cases relied on by the majority in the pending appeal, both interestingly and accurately cited with a signal meaning "compare," are also instructive. In *Air Line Pilots Assn. v. Dept. of Aviation*, 45 F.3d 1144 (7th Cir.1995), the Court focused on diorama display cases throughout an airport, rather than the entirety of the airport. The Court did not limit its analysis to one display case. In *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission*, 797 F.2d 552 (9th Cir.), cert. denied, 479 U.S. 986, 107 S.Ct. 576, 93 L.Ed.2d 579 (1986), the Court focused on all advertising space in a sports arena, rather than the entirety of the arena. The Court did not limit its analysis to one portion of the advertising space.

Nevertheless, the Court in the pending case limits its public forum analysis to the one billboard in Penn Station on which Lebron wishes to display his ad-the so-called "Spectacular." There is no question that this billboard is bigger than any other in Penn Station, more visible, and, if one can afford it, more desirable. But public forum analysis cannot be so particularized as to focus on one of several billboards on government property, no matter how

preferable that one billboard's size and location may be to an advertiser. The reason can be readily demonstrated. As everyone who has ever walked through Penn Station knows, the Spectacular is high atop the west wall of the station's rotunda, and two small billboards are high atop the north and south walls of the same rotunda. If Amtrak had permitted the Democratic Party to place political ads on either of the two smaller billboards in the rotunda, can it be seriously argued that any court would limit its forum analysis to the one large billboard and permit Amtrak to deny the Republican Party the opportunity to place its political ad on the Spectacular, just because no political ad had previously been on that precise space?

The relevant forum must be at least advertising space in the rotunda of Penn Station-the means of communication to which Lebron sought access. Once the forum is defined to have at least this scope, Amtrak's violation of the First Amendment is evident because it has leased advertising space on a kiosk in the rotunda for *The Plain Truth*, a magazine the Court acknowledges is devoted to "political and social issues." It is clearly unconstitutional for Amtrak to permit its advertising space in the rotunda to be used to convey the message of *The Plain Truth* and deny space in the same rotunda to the message that Lebron believes conveys the plain truth about the brewers of Coors Beer.

2. *Amtrak's policy*. Even if the relevant forum is the one billboard space known as the Spectacular, the Court's second premise-that the scope and lawfulness of Amtrak's exercise of discretion regarding political ads may be ascertained solely from its past practice-is also unsound. The proper inquiry, the Supreme Court has instructed, focuses not solely on past practice but on "policy and practice," *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449; see *Lehman*, 418 U.S. at 303, 94 S.Ct. at 2717 ("policies and practices"). If it were the case that the only evidence of Amtrak's approach to political ads was its past practice, an inquiry confined to that practice would be defensible. But the record in this case

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contains more evidence, and the District Court made findings based on that evidence that are not even arguably clearly erroneous.

First, the agreement between Amtrak and Transportation Displays Incorporated (TDI), the leasing agent for billboards in Penn Station,*662 states, "All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion." *Lebron v. National R.R. Passenger Corp.*, 811 F.Supp. 993, 1002 (S.D.N.Y.1993). It is difficult to imagine a more standardless statement of policy. Second, as the District Court found, neither the key Amtrak official responsible for supervising Amtrak's arrangements with TDI nor any of the executives of TDI knew of any prohibition on political advertising at any of Amtrak's facilities. *Id.* Third, other key Amtrak officials could not agree on what Amtrak's policy was. One testified that the policy prohibited only those advertisements that were both "political and divisive or objectionable," while another could not say what the policy meant. *Id.* Fourth, the guidelines of Amtrak's leasing agent, TDI, do not prohibit political advertisements but merely consider them commercial and therefore subject to full rate charge. *Id.* at 1003.

In view of this evidence, the District Court's findings that Amtrak's alleged policy against political ads was unwritten, unclear, and undissemminated provide ample basis for the Court's ultimate conclusion that the policy permitted the unfettered exercise of discretion and created the risk of abuse that the First Amendment prohibits. *See Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 899 (D.C.Cir.1984).

Disregarding the evidence and the District Judge's findings, this Court ascertains Amtrak's policy solely by looking to the past practice of not yet contracting for a political ad on the Spectacular. But where a policy is unwritten, unclear, and undissemminated, the fact that it has not yet been used dis-

criminatorily does not save it from invalidation under the First Amendment. The vice of conferring unfettered discretion on government officials to determine which messages may be conveyed is not avoided by their past pattern of not making a discriminatory decision. The vice inheres in the opportunity for discrimination, and the First Amendment requires that opportunity to be held to an acceptable minimum by a clear and well understood policy that appropriately limits the discretion of the officials who must administer it. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051, 111 S.Ct. 2720, 2732, 115 L.Ed.2d 888 (1991) (imprecise standards concerning permissible statements by lawyers); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-59, 108 S.Ct. 2138, 2143-45, 100 L.Ed.2d 771 (1988) (unfettered discretion to permit newspaper dispensing devices on governmental property). As the Supreme Court has observed,

The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement.... The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility."

Gentile, 501 U.S. at 1051, 111 S.Ct. at 2732 (citations omitted). In some cases, it might be possible to infer the existence of a policy that passes constitutional muster from a record consisting solely of a pattern of past practice. But in the pending case such a policy cannot be inferred from past practice in the face of substantial evidence that has persuaded a District Judge to make findings that the alleged policy was not understood by the officials responsible for administering it.

Wholly apart from the absence of a clear, understandable, and understood policy, Lebron might be correct that, to the extent that the defendant's policy purports to bar political ads, it is a viewpoint-based discrimination that violates the First Amendment. *See Air Line Pilots Assn. v. Department of Aviation*, 45 F.3d 1144 (7th Cir.1995). As Lebron contends,

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the defendants are willing to display an ad urging the public to buy Coor's beer but are unwilling to display his ad urging the public not to do so. He makes a substantial argument that viewpoint-based discrimination is occurring when government allows an ad promoting the sale of a product, but purports to prohibit an ad opposing a product because of the views of its manufacturer. Presumably, Amtrak would allow an ad opposing the sale of Coor's beer because of its alcoholic content or for any reason unrelated *663 to the views of its manufacturer. I need not decide whether to accept Lebron's argument since his other positions are well supported on this record.

In my view, the District Court's findings, fully supported by the evidence, entitled Lebron to prevail on his claim that Amtrak's refusal to permit display of his ad violated the First Amendment. At a minimum, he is entitled to a declaration that Amtrak has violated the First Amendment, damages (to the extent, if any, not precluded by *F.D.I.C. v. Meyer*, 510 U.S. 471, --- - ---, 114 S.Ct. 996, 1004-06, 127 L.Ed.2d 308 (1994)), and equitable relief requiring promulgation and dissemination of a clear policy concerning political ads. Since the Court concludes that Amtrak has no liability at all, I need not consider the further issue of whether the equitable relief ought to include a requirement that Lebron's ad be displayed. My statement from the prior appeal, 12 F.3d at 394 (Newman, C.J., dissenting), quoted by the Court out of its context, was directed solely at the issue of the possible scope of relief, not the issue of liability on which the Court today rules.

I respectfully dissent.

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