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

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

I. INTRODUCTION

Plaintiff Cory Sessler brings this suit against Defendants—the City of Davenport and three law enforcement officers, Greg Behning, Jason Smith and J.A. Alcala, in their individual capacities—for allegedly violating Sessler's constitutional right to free speech. Sessler attended a privately run festival held on public streets and sidewalks in downtown Davenport, Iowa. With signs and a portable microphone, Sessler preached to passersby about his Christian faith. Nearby vendors complained his preaching was driving their customers away. After initially seeking alternate locations within the festival, the Officers ordered Sessler to move beyond the festival boundaries, allowing him to continue preaching across the street from an entrance. Sessler claims this removal violated his constitutional rights. The City and the Officers move for summary judgment on Sessler's claims.

For the reasons set forth below, the Court concludes the removal of Sessler did not violate

his right to free speech. Contrary to the determination made in the Order Denying Plaintiff's Motion for Preliminary Injunction, ECF No. 52, the Court now holds the street festival was a limited public forum. The Officers' decision to remove Sessler from this forum was viewpoint-neutral and reasonable. Because the Officers did not violate Sessler's constitutional rights, Sessler is not entitled to any of the remedies he requests against the Officers or the City. The Court grants Defendants' motions for summary judgment.

II. BACKGROUND

A. Factual Background

The following facts are undisputed or, if in dispute, viewed in the light most favorable to Sessler. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see also* Pl.'s Resp. Defs.' Statement Material Facts, ECF No. 96-1; Pl.'s App. Supp. Br. Resist. Defs.' Mots. Summ. J., ECF No. 99-3; Defs.' Resp. Pl.'s Statement Add. Material Facts, ECF No. 106-1; Defs.' Joint App. Supp. Mots. Summ. J., ECF No. 91-3. Inferences drawn from underlying facts are also viewed in the light most favorable to Sessler. *See Matsushita*, 475 U.S. at 587. Where the facts are contested by the parties, but the record contains video evidence depicting the facts in dispute, the facts are viewed "in the light depicted by the videotape." *Scott v. Harris*, 550 U.S. 372, 381 (2007).

"Street Fest" was an annual "family-oriented event" held each year in downtown Davenport. Gilliland Aff. ¶¶ 5, 12, ECF No. 91-3 at APP. 103; Gilliland Dep. 8:3–12, ECF No. 91-3 at APP. 130. The festival was held in conjunction with the *Quad City Times's* "Bix 7," a footrace that begins and ends in downtown Davenport. *Id.* ¶¶ 4, 9. Street Fest was produced and hosted by the Downtown Davenport Partnership, a division of the Quad Cities Chamber of Commerce. ECF No. 96-1 ¶ 19. In 2018, Street Fest took place on July 27 and 28. Defs.' Ex. G Supp. Resist. Pl.'s Mot. Prelim. Inj. 1, ECF No. 47. According to Jason Gilliland, the Partnership's

Director of Events, Street Fest had taken place in downtown Davenport each year for over forty years and drew approximately 20,000 attendees each year. Gilliland Aff. ¶¶ 3, 5, ECF No. 91-3 at APP. 103. The City of Davenport alleges the final year the Partnership produced Street Fest was 2019. Gilliland Dep. 8:03–14, ECF No. 91-3 at APP 130. Sessler attempts to qualify the City's allegation by alleging a similar festival is still sponsored in late July by the Partnership. Sessler Decl. ¶ 26, ECF No. 99-3 at 4–5.[1]

In 2018, Street Fest was permitted by the City of Davenport pursuant to the City's Special Events Policy. ECF No. 96-1 ¶ 20; Joint Statement Stipulated Facts, Disputed Facts, and Issues of Law 2, ECF No. 23 (initially filed regarding Pl.'s Mot. Prelim. Inj., ECF No. 2). The Policy states: "[t]he City shall be charged with the responsibility of determining whether a particular sponsor shall be entitled to conduct an outdoor special event" and sets forth factors "the City shall take into account." Defs.' Ex. D Supp. Resist. Pl.'s Mot. Prelim. Inj. 5, ECF No. 44. These factors include "the effect the proposed special event will have upon the environment and the public health and safety;" "[h]ow well the applicant, insofar as it can be determined, appears capable or incapable of executing the planned special event;" "[t]he extent to which the event contributes to the promotion of tourism;" and "[t]he extent to which the event contributes to economic revitalization." *Id.* Per the Policy, applications for a permit are reviewed by "the Special Events Committee" which includes individuals representing the Office of the City Clerk and the Davenport Police Department, among other City departments. *Id.* at 7–8. In satisfaction of the

[1] This paragraph of Sessler's Declaration includes blue text that appears to be an attempt to hyperlink a website, but the document filed does not contain that website's address either as a hyperlink or in the document's text. *See* Sessler Decl. ¶ 26, ECF No. 99-3 at 4–5. The paragraph states, within quotation marks, "Bix Block Parties are located throughout east, central and west downtown Davenport locations spanning from Rock Island Arsenal Bridge on the east to the Centennial Bridge on the west. The parties will feature a variety of live music, food, drinks and fun." *Id.* Sessler alleges the Bix Block Parties occurred in 2022 on July 29 and 30. *Id.*

Policy, the Partnership applied to host Street Fest in 2018, and the application was approved. ECF No. 23 at 2.

To accommodate Street Fest, the City closed three streets in downtown Davenport where the festival would be located. ECF No. 96-1 ¶ 21. The festival covered three blocks of West Second Street running from North Ripley Street to Brady Street, including the intersections of West Second Street and two streets between Ripley and Brady, Harrison Street and Main Street. *Id.*; *see also* Defs.' Ex. E Supp. Resist. Pl.'s Mot. Prelim. Inj., ECF No. 45. A half-block of Harrison Street and Main Street was also closed on either side of West Second Street. ECF No. 45. The City required the Partnership to secure the perimeter of the festival with fencing that would define the festival boundaries, entrances, and exits. ECF No. 96-1 ¶ 22. Pursuant to this requirement, the Partnership secured the perimeter of Street Fest with a "six-foot-high chain-link fence" and Street Fest personnel monitored the entrance and exit areas. *Id.* ¶ 23. The City also required the Partnership to hire off-duty police officers to provide security for the event. *Id.* ¶ 24. During Street Fest, fee-paying vendors were pre-approved to occupy booths within the festival's boundaries. *Id.* ¶¶ 27, 29. Other fee-paying vendors were pre-approved as "roaming vendors." *Id.* ¶ 29; *see* Defs.' Ex. F Supp. Resist. Pl.'s Mot. Prelim. Inj., ECF No. 46. Festival attendees not seeking to act as vendors were permitted to enter the festival free of charge. ECF No. 23 at 3.

On July 28, 2018, Sessler, his wife, three other adults, and two minor children attended Street Fest with the purpose of "street preaching." *Id.* They were not registered as vendors and did not seek approval from the Partnership to conduct this preaching. *Id.* Sessler believes he has a mandate to share his religious, political, and social beliefs. *Id.* at 2. In general, Sessler shares his beliefs by distributing literature, carrying portable signs, engaging with others in discussions about Jesus Christ and the Christian faith, and preaching in public with a portable microphone. *Id.* at 3.

On July 28, Sessler and his group carried signs on extendable poles with messages

including: "Hell is enlarged for adulterers . . . homosexuals . . . abortionists" and "Warning! If you are involved in sex out of marriage[,] homosexuality[,] drunkenness[,] night clubbing . . . you are destined for a burning hell[.]" *Id.* at 3; Defs.' Ex. B Supp. Resist. Pl.'s Mot. Prelim. Inj., Pl.'s Video 1 at 1:06, 3:38, ECF No. 42. Sessler and other members of his group wore t-shirts, pins, and hats displaying their messages. Pl.'s Video 1 at 0:18, ECF No. 42. One adult member of the group wore a shirt with the message: "Your sin will find you[.]" *Id.* at 3:13. The children in Sessler's group handed out pamphlets. Defs.' Ex. B, Pl.'s Video 4 at 11:00–11, ECF No. 42. Sessler and one other adult in the group preached to passersby, using a portable microphone and speaker to amplify their voices. Pl.'s Video 1 at 3:55–4:00, ECF No. 42; Defs.' Ex. A Supp. Resist. Pl.'s Mot. Prelim. Inj., Behning Bodycam Footage at 3:00–3:10, ECF No. 40.

Sessler and his group initially congregated at the corner of West Second Street and Main Street. ECF No. 23 at 4. They were informed by Partnership personnel, and later by Smith, that a vendor had reserved that location. Gilliland Aff. ¶¶ 25–26, ECF No. 91-3 at APP. 105; Defs.' Ex. B, Pl.'s Video 2 at 9:02–9:35, 15:55–16:24, ECF No. 42. Smith, Behning, and Alcala asked Sessler and his group to move to another location, and Sessler began discussing alternate locations with the officers. ECF No. 96-1 ¶ 37; Defs.' Ex. B, Pl.'s Video 3 at 0:58–1:15, 1:56–2:22, 3:29–5:00, ECF No. 42. Sessler's colleague suggested a spot across the intersection from the group's current location, but Smith would not agree to this location because he thought Sessler would be "on the microphone preaching over the top" of a vendor—a magician—who would soon perform at the intersection. Pl.'s Video 3 at 0:53–0:58, 4:02–4:20, ECF No. 42. Smith also rejected Sessler's suggestion of a second intersection, stating he was concerned there was too much foot traffic moving through that area, calling it a "choke point." *Id.* at 5:05–5:33.

Although holding firm to his position during this conversation, Smith twice stated that he sought to find a "compromise." *Id.* at 0:45–1:11; *see also id.* at 4:40–4:50. During the conversation,

Smith twice suggested a courtyard adjacent to West Second Street, to which Sessler's group ultimately agreed. *Id.* at 4:50–5:05. Before moving to that location, Smith noted "if you're screaming over the top of [vendors] or impeding their point of sales at all, then we're going to have to fix that again." *Id.* at 8:45–8:55.

Alcala then accompanied Sessler's group to the courtyard identified by Smith. *Id.* at 9:40–12:10; ECF No. 23 at 4. Upon arrival, Sessler and Alcala could not agree on a precise location within or near the courtyard. Pl.'s Video 3 at 12:02–14:55, ECF No. 42; ECF No. 23 at 4. Alcala stated Sessler could not set up in the street adjacent to the courtyard because those locations were "paid vendor positions." Pl.'s Video 3 at 13:00–13:10, ECF No. 42. Sessler and his colleagues, however, wanted to be closer to the street and did not want to be behind vendor tents, separated from the street where most people were located. *Id.* at 14:33–14:47; ECF No. 23 at 4. Accepting the disagreement, Alcala smiled and said, "we're trying to compromise." Pl.'s Video 3 at 15:22–15:35. Sessler, with Alcala, then walked away from the courtyard in search of a different location. *Id.* at 15:55–16:04. Sessler and his group were allowed to move to a third location near an entrance to Street Fest at the intersection of West Second Street and Brady Street. ECF No. 96-1 ¶ 48; ECF No. 23 at 5.

At the third location, Sessler and his group were permitted to preach for approximately thirty minutes. ECF No. 96-1 ¶ 50. Sessler acknowledged that, due to the volume of his amplified preaching, vendors "would have had to [] walk[] at least 30 feet to [be] outside of the sound of my voice." Sessler Dep. 110:16–18, ECF No. 91-3 at APP. 113. While Sessler preached, nearby vendors expressed concern about the effect of Sessler's preaching on their customers. Defs.' Ex. A, Behning Bodycam Footage at 0:49–1:10, ECF No. 40. One vendor was captured on camera, exclaiming: "I'm losing business." Pl.'s Video 4 at 17:27–17:30, ECF No. 42. This vendor later joined a second vendor in complaining to Behning. Behning Bodycam Footage at 1:04–1:10, ECF

No. 40. The first vendor complained: "they're telling our customers that they're going to Hell." *Id.* The second vendor complained that Sessler and his group were "standing in front of our booths." *Id.* at 0:49–1:04. Gilliland stated in his deposition that vendors also complained to him that Sessler's presence was impacting their business and "driving customers away." Gilliland Dep. 51:20–52:7, 62:22–25, ECF No. 91-3 at APP. 138–39, 143.

After receiving such complaints, Gilliland, along with a second Partnership associate, complained to Behning about Sessler's presence. Behning Bodycam Footage at 0:36–0:46, ECF No. 40. As shown on video captured by Behning's body camera, Gilliland told Behning "lots of people and vendors have been getting very upset." *Id.* Gilliland then asked to have Sessler removed. Gilliland Dep. 52:25–53:3, ECF No. 91-3 at APP. 139–40. In his deposition, Gilliland recounted his reason for this request:

> We had been trying to compromise with them on the location, and we were continuing to get complaints specifically from vendors. And we wanted to make sure that, you know, we were upholding, you know, what we were promising to those vendors and make sure that we had a good event for the public as well.

Id. 53:4–13. Following this conversation with Gilliland, Behning approached Sessler and told him his group would have to leave the festival's grounds. ECF No. 23 at 5. He told Sessler he would be subject to arrest if he did not leave the area. *Id.* Behning also told Sessler he would be permitted to continue his street preaching directly across the street from a nearby Street Fest exit. *Id.* Sessler and his group complied, moving to the indicated location across the street from Street Fest. *Id.*

Sessler and his group continued to preach from this final location using amplification equipment for approximately two to three hours. *Id.*; ECF No. 96-1 ¶ 66. Sessler was not asked to move from this location and had no further contact with law enforcement. ECF No. 23 at 5. While preaching from this location, Sessler and his group interacted with several pedestrians, including several people who were coming from or going toward the entrance to Street Fest across the street.

See, e.g., Defs.' Ex. B, Pl.'s Video 6 at 1:16–2:12, 8:45–9:12, 10:35–10:50, 16:22–40, ECF No. 42.

Two weeks later, Sessler contacted the Office of the Davenport City Attorney to discuss the conduct of Behning, Smith, and Alcala at Street Fest. ECF No. 23 at 5. Assistant City Attorney Mallory Hoyt told Sessler she had reviewed the incident and concluded the officers' actions were lawful. *Id.* Sessler further alleges, and the City of Davenport admits, "[t]he City Attorney's office told [him] that when the City rents out a City street to an event, the street becomes private property, even if the event is not ticketed." ECF No. 106-1 ¶ 39. In a subsequent declaration, Sessler stated his experiences at Street Fest and his conversation with Hoyt left him in fear of citation or arrest. Sessler Decl. ¶¶ 17–30, ECF No. 99-3 at 5–6. He claims that, but for his fear of citation or arrest, he would continue his street preaching activities at upcoming festivals, including events in downtown Davenport in August 2022, November 2022, and March 2023. *Id.* ¶¶ 23–27.

Additional facts are set forth below as necessary.

B. Procedural Background

In January 2019, Sessler filed a complaint with this Court against the City of Davenport and against Behning, Smith, and Alcala in their "individual capacit[ies]." Compl., ECF No. 1; *see also* Pl.'s Br. Resist. Defs. Behning and Smith's Mot. Summ. J. 3–4. ECF No. 99. The complaint alleges the application of the Policy to Sessler by the City of Davenport and by Behning, Smith, and Alcala violated Sessler's rights under the First Amendment to "Freedom of Speech" (Count I) and to "Free Exercise of Religion" (Count II). ECF No. 1 at 12–16. Sessler's complaint sought "a preliminary and permanent injunction restraining and enjoining Defendants . . . from enforcing the Policy in the manner Defendants enforced it against [Sessler.]" *Id.* at 16, 18. The complaint further sought a declaratory judgment "under the Declaratory Judgment Act to determine the parties' rights and duties regarding enforcing the challenged Policy[;] prohibiting enforcement in the

manner Defendants enforced it against [Sessler]"; and "declaring that the actions taken by Defendants in prohibiting [Sessler] from expressing his religious views on July 28, 2018, violated [his] constitutional rights, specifically, his rights to free speech and free exercise of religion." *Id.* at 17. He also seeks "nominal and/or compensatory damages" against both the City and the Officers, as well as costs and reasonable attorneys' fees. *Id.* at 17–19.

In pursuit of the first of these remedies, Sessler filed a motion for preliminary injunction on the same day he filed his complaint. *See* Mot. Prelim. Inj., ECF No. 2. The parties conducted discovery before Defendants filed their Resistance, and a hearing on the motion was held before this Court on July 16, 2019. *See* Order Adopting Proposed Scheduling Order and Disc. Plan, ECF No. 20; Tr. Mot. Hr'g, ECF No. 61. In September 2019, this Court denied Sessler's motion for a preliminary injunction, finding Sessler was unlikely to succeed on the merits of his freedom of speech claim. Order Denying Pl.'s Mot. Prelim. Inj. 20, ECF No. 52. The Court did not consider Sessler's free exercise claim "in light of the substance of Sessler's filings and representations," and because "Sessler only addressed his freedom of speech claim" at oral argument on the motion. *Id.* at 2–3. Both parties appealed aspects of the Court's denial. Pl.'s Notice of Appeal, ECF No. 53; Defs.' Notice of Cross-Appeal, ECF No. 57. The Eighth Circuit affirmed the Court's order in March 2021. *Sessler v. City of Davenport*, 990 F.3d 1150, 1152 (8th Cir. 2021).

Following the Eighth Circuit's decision, further discovery was scheduled and a trial date was set. Scheduling and Trial Setting Order, ECF No. 70. In February 2022, discovery was closed, and in June 2022, the City and the defendant Officers separately filed motions for summary judgment. Defs.' Behing and Smith's Mot. Summ. J., ECF No. 91; Def. Alcala's Joinder Defs. Behning and Smith's Mot. Summ. J., ECF No. 93; Def. City's Mot. Summ J., ECF No. 92. Both motions sought summary judgment on each of Sessler's claims. ECF No. 91; ECF No. 92. Sessler

resists both motions. Pl.'s Br. Resist. Def. City's Mot. Summ. J., ECF No. 96; ECF No. 99. Neither party requested oral argument on the motions for summary judgment, and the Court declines to order it. *See* Fed. R. Civ. P. 78(b); LR 7(c).

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, the Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original). "As to materiality, the substantive law will identify which facts are material." *Id.* at 248. A dispute of material fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *accord Tongerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc).

To survive a motion for summary judgment, the non-moving party must identify sufficient evidence to raise a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon 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."). "[U]nsupported conclusions and speculative statements . . . do not raise a genuine issue of fact." *Hamilton v. Bangs, McCullen, Butler, Foye & Simmons, L.L.P.*, 687 F.3d 1045, 1050 (8th Cir. 2012). Moreover, if the non-moving party's only evidence is the party's "own deposition testimony" the Court "will not find this persuasive such that it is capable of defeating summary judgment." *Muldrow v. City of St. Louis*, 30 F.4th 680,

688 (8th Cir. 2022); *cf. Anderson*, 477 U.S. at 249-50 ("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (internal citations omitted)).

IV. DISCUSSION

Sessler alleges "Defendants' enforcement of the Policy on July 28, 2018, under color of state law, has deprived, and continues to deprive, [Sessler] of his constitutional rights," namely his rights to Free Speech and Free Exercise under the First Amendment. ECF No. 1 at 10–11; *see also id.* at 11 ("Defendants' enforcement of the Policy, and their customs, policies, and actions under color of state law, deprived Plaintiff of his right to Freedom of Speech and Freedom of Religious Expression protected under the United States Constitution."). He seeks permanent injunctive relief and damages "to redress deprivations by Defendants, acting under color of state law, of certain rights [to Free Speech and Free Exercise] . . . under the United States Constitution as brought pursuant to 42 U.S.C. § 1983." *Id.* at 3. He also requests declaratory relief and states the "Court is authorized to grant Declaratory Judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202." *Id.*

In his complaint Sessler uses the term "Defendants'" to refer collectively to both the City of Davenport and Officers Smith, Behning, and Alcala. *Id.* at 2–3. His complaint thus alleges both the City of Davenport and the Officers violated his constitutional rights on July 28, 2018 and further alleges they continue to violate his constitutional rights through their enforcement of the Special Events Policy. *Id.* at 1, 11. He claims these violations give rise to a right to money damages against both the City and the Officers pursuant to 42 U.S.C. § 1983. *Id.* at 3. He also requests injunctive relief against both the City and the Officers, "restraining and enjoining Defendants, and all persons acting in concert or participating with them, from enforcing the Policy in the manner Defendants enforced it against [Sessler]." *Id.* at 16. This request for injunctive relief is also stated under § 1983. *Id.* at 3.

Sessler's request for declaratory relief is both backward-looking and forward-looking. He requests "a judgment and decree declaring that the actions taken by Defendants in prohibiting Plaintiff from expressing his religious views on July 28, 2018, violated Plaintiff's constitutional rights." *Id.* at 17. He also requests "a Declaratory Judgment under the Declaratory Judgment Act to determine the parties' rights and duties regarding enforcing the challenged Policy and prohibiting enforcement in the manner Defendants enforced it against this Plaintiff." *Id.* at 17, 19. This request is forward-looking, seeking a declaration of rights concerning the City's and the Officers' continuing enforcement of the Policy.

In their motions for summary judgment, the City and the Officers separately address the claims Sessler asserts and relief he requests. *See generally* ECF No. 91; ECF No. 92. The Officers argue they are immune from a suit seeking monetary damages under § 1983 pursuant to the doctrine of qualified immunity. Defs. Behning and Smith's Br. Supp. Mot. Summ. J. 6–8, ECF No. 91-2. They also argue Sessler cannot seek injunctive or declaratory relief against them under § 1983 because he sues them in their individual, not official, capacities. *Id.* at 5–6. Sessler resists, arguing the Officers are liable for money damages because they violated "clearly established" constitutional rights. ECF No. 99 at 22–26. He also argues the Officers are subject to injunctive and declaratory relief in their individual capacities. *Id.*

The City argues it is not liable for monetary damages under § 1983 because there is no genuine issue of fact as to whether Sessler's alleged constitutional violations resulted from an official policy, an unofficial custom, or a deliberately indifferent failure to train or supervise. Def. City's Br. Supp. Mot. Summ. J. 12, ECF No. 92-2 (citing *Corwin v. City of Independence*, 829 F.3d 695, 699 (8th Cir. 2016)). It argues Sessler's request for injunctive and declaratory relief cannot be provided because Sessler lacks standing to request such relief on the basis of his constitutional claims. *Id.* at 6–10; Def. City's Reply Supp. Mot. Summ. J. 1–4, ECF No. 103. It

argues Sessler lacks standing to request this relief because he cannot establish an appropriate injury-in-fact. ECF No. 92-2 at 8–10 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Duhe v. City of Little Rock*, 902 F.3d 858, 866–67 (8th Cir. 2018)). The City further argues Sessler's requests for injunctive and declaratory relief are moot. ECF No. 92-2 at 10–11. Sessler resists, arguing the violation of his constitutional rights resulted from an official policy of the City. ECF No. 96 at 16–18. He also argues the City's further violation of his constitutional rights is "imminent" and thus sufficient to establish the disputed elements of the standing and mootness inquiries. *Id.* at 3–16.

With regard to Count II, alleging violation of his right to free exercise of religion, the Court notes that none of Sessler's briefings, whether in support of his motion for preliminary injunction or in resistance to Defendants' motions for summary judgment, has attempted to argue his right to free exercise was violated. *See generally* Pl.'s Br. Supp. Mot. Prelim. Inj., ECF No. 2-1; Pl.'s Reply Supp. Mot. Prelim. Inj., ECF No. 27; ECF No. 96. Similarly, Sessler's Statement of Facts in support of his resistance does not identify any facts that would support his free exercise claim. *See generally* Pl.'s Statement Facts Supp. Resist. Defs.' Mots. Summ. J., ECF No. 96-2. Due to the absence of legal argument in defense of this claim and the absence of citations to the record that would support the alleged violation of his right to free exercise, the Court concludes Sessler has failed to raise a genuine issue of material fact as to whether the Officers violated his right to free exercise of religion under the First Amendment. Accordingly, the Court grants Defendants' motions for summary judgment as to Count II.

With regard to Count I, alleging violation of the right to free speech, the Court separately addresses the disputes concerning the three remedies Sessler requests. *See* ECF No. 1 at 16–20. First, the Court addresses Sessler's request for monetary damages against the Officers. The Court concludes the Officers are immune under the doctrine of qualified immunity in part because they

did not violate Sessler's constitutional rights when they removed him from Street Fest. Second, the Court addresses Sessler's request for monetary damages against the City. The Court concludes the City is not liable for monetary damages under § 1983 pursuant to the interpretation of that statute set forth in *Monell v. Department of Social Service*, 436 U.S. 658 (1978). Third, the Court addresses jointly Sessler's request for injunctive and declaratory relief against both the Officers and the City. The Court concludes Sessler lacks standing for the injunctive relief he requests. With regard to declaratory relief, to the extent not already addressed by other parts of this Order, the Court concludes Sessler also lacks standing for this relief. For these reasons, and for the reasons set forth below, the Court grants Defendants' motions for summary judgment as to Count I. Finally, the Court concludes Sessler is not entitled to attorney's fees and must pay his own costs.

A. Sessler's Request for Monetary Damages Against the Officers Under § 1983

Sessler claims Behning, Smith, and Alcala, operating under the color of law, violated his constitutional right to free speech when they told him he had to leave the gated area of Street Fest and continue preaching across the street. ECF No. 1 at 13, 15; ECF No. 91 ¶ 2. He seeks monetary relief against the Officers, among other claims for relief. ECF No. 1 at 17, 19. Behning, Smith, and Alcala move for summary judgment on Sessler's claims against them. ECF No. 91; ECF No. 93. They argue they are immune from his claim for monetary damages under the doctrine of qualified immunity because he has failed to carry his burden of showing they violated clearly established rights. Defs. Behning and Smith's Reply Supp. Mot. Summ. J. 12–14, ECF No. 106; ECF No. 91 ¶ 6.

Section 1983 imposes civil liability upon any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Nevertheless, "[q]ualified immunity shields government officials from suit unless their conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known." *Davis v. Hall*, 375 F.3d 703, 711 (8th Cir. 2004) (internal quotation marks omitted) (quoting *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996); *accord Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")).

In determining whether an officer is entitled to qualified immunity from a suit alleging a constitutional violation, the Court asks, "(1) whether, taking the facts in the light most favorable to the injured party, the alleged facts demonstrate that the official's conduct violated a constitutional right; and (2) whether the asserted constitutional right is clearly established." *Wallingford v. Olson*, 592 F.3d 888, 892 (8th Cir. 2010) (internal quotation marks omitted). The Court may address either question first, and "if either question is answered in the negative, the public official is entitled to qualified immunity." *Id.* (internal quotation marks and citations omitted). "The party asserting immunity always has the burden to establish the relevant predicate facts, and at the summary judgment stage, the nonmoving party is given the benefit of all reasonable inferences." *White v. McKinley*, 519 F.3d 806, 813 (8th Cir. 2008). To overcome the defense of qualified immunity, the plaintiff must show "the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right" and "the right was clearly established at the time of the deprivation." *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010).

The Court first addresses the first prong of the qualified immunity standard, finding the Officers did not violate Sessler's right to free speech. In the course of this analysis, the Court

finds Street Fest was a limited public forum and that Sessler's removal was reasonable and viewpoint-neutral. This conclusion establishes the Officers' immunity. The Court recognizes this analysis differs from the reasoning and conclusion in the Court's Order Dismissing Plaintiff's Motion for Preliminary Injunction. *See* ECF No. 52. In that Order, the Court found Sessler was likely to succeed in showing Street Fest was a traditional public forum. *Id.* at 13. Seemingly relying on this analysis, the parties' briefs on the Officers' motion for summary judgment appears to assume Street Fest was a traditional public forum. *See* ECF No. 91-2 at 13–14; ECF No. 99 at 6; ECF No. 106 at 4. To address the issues raised by these briefs, the Court elects to also address the second prong of the qualified immunity standard. In addressing this prong, the Court assumes Street Fest was a traditional public forum. Even under that assumption, the Court finds Sessler has not shown his removal violated a clearly established right. Accordingly—although the further conclusion is superfluous as to the Officers' qualified immunity defense—the Court also finds the Officers are immune under the second prong of the qualified immunity standard, applying the analysis applicable to a traditional public forum.

1. Prong one: did the Officers violate Sessler's right to free speech?

The First Amendment, as applied to the states under the Fourteenth Amendment, provides that state actors "shall make no law . . . abridging the freedom of speech." U.S. Const. amends. I, IV; *see Murdock v. Pennsylvania.*, 319 U.S. 105, 108 (1941). *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.* sets forth a three-part test that determines whether this mandate has been violated. 473 U.S. 788 (1985). In Sessler's case, *Cornelius* requires the Court to first determine whether Sessler's speech was the type of speech protected under the First Amendment. *Id.* at 797. Second, the Court "must identify the nature of the forum [in which the speech occurred], because the extent to which the Government may limit access depends on whether the forum is public or

nonpublic." *Id.* Last, the Court must determine whether the Officers' reasons for removing Sessler from Street Fest satisfy the standard appropriate for the type of forum identified. *Id.*

a. Protected speech

The parties do not dispute whether Sessler's speech was protected by the First Amendment. *See* ECF No. 91-2; ECF No. 99; *see also* ECF No. 2-1 at 7–8; Defs.' Br. Resist. Pl.'s Mot. Prelim. Inj. 14, ECF No. 26. They agree Sessler's street preaching at Street Fest "shared his religious" message. ECF No. 106-1 ¶ 4. "[O]ral and written dissemination of . . . religious views and doctrines is protected by the First Amendment." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Sessler's preaching and signs expressed beliefs that were components of his religious faith. ECF No. 23 at 2–3. The Court thus finds Sessler's preaching was speech protected by the First Amendment. *Cf. Heffron*, 452 U.S. at 647.

b. The nature of the forum

Per *Cornelius*, the Court must next determine the nature of the forum in which Sessler shared his protected speech. 473 U.S. at 797. "[P]rotected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property." *Id.* at 799–800. The Supreme Court has distinguished three types of forums, within each of which distinct standards provide distinct "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." *Id.* at 800. Put in other words, "the extent to which the Government can control access depends on the nature of the relevant forum." *United States v. Kokinda*, 497 U.S. 720, 726 (1990) (internal quotation marks omitted) (quoting *Cornelius*, 473 U.S. at 800). These three forum types are 1) "traditional public forums," 2) "designated public forums," and 3) "[l]imited public forums (sometimes called nonpublic

forums)." *Powell v. Noble*, 798 F.3d 690, 699 (2015); *accord Cornelius*, 473 U.S. at 800.

In both traditional public forums and designated public forums, the government's power to "permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983). These two forum types differ only in the reason they are open to public expression. Traditional public forums have been traditionally open to such use—such forums "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 Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Traditional public forums include streets, parks, and sidewalks. *Ball v. City of Lincoln*, 870 F.3d 722, 730 (8th Cir. 2017). In contrast, designated public forums have been created by a government act "intentionally open[ing] a nontraditional forum for public discourse." *Id.* (quoting *Cornelius*, 473 U.S. at 802). Despite these distinct origins, the two forum types are subject to the same constitutional standards. Content-based restrictions on speech are constitutionally permitted only if "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45. Content-neutral restrictions on the time, place, or manner of speech are permitted if they "are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

In limited public forums, however, "[t]he government retains much broader discretion to restrict expressive activities." *Ball*, 870 F.3d at 730. These forums include public properties that are "not by tradition or designation" public forums but have been opened by the government for limited purposes, communicative or otherwise. *Id.* at 730–31 (quoting *Perry*, 460 U.S. at 46). In these forums, the government can restrict speech if restrictions "are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius*, 473 U.S. at 800 (internal quotation marks omitted) (quoting *Perry*, 460 U.S. at 46).

In their briefs on the Officers' motion for summary judgment, the parties do not discuss the forum type at issue. *See* ECF No. 91-2 at 11–14; *see also* ECF No. 99 at 6; *see generally* ECF No. 106. This issue, however, was extensively discussed in the parties' briefs on Sessler's motion for preliminary injunction. *See generally* ECF No. 2-1; ECF No. 26; ECF No. 27. In the Order Denying Plaintiff's Motion for Preliminary Injunction, the Court held Sessler's position "as to the second prong of the *Cornelius* test [concerning forum type] is likely to succeed." ECF No. 52 at 13. Upon further review of the now-completed record, however, the Court has reconsidered the parties' arguments on this issue and revised its finding. Sessler, through his briefing, argued Street Fest was a traditional public forum. ECF No. 2-1 at 9–15; *see generally* ECF No. 27. Defendants argued Street Fest was a limited public forum. ECF No. 26 at 14–20. For the reasons that follow, the Court now holds the public streets and sidewalks on which Street Fest took place were altered from their historic designation as a traditional public forum to a limited public forum during the two days when Street Fest was underway. *Cf. Powell*, 798 F.3d at 700.

The Eighth Circuit has defined several factors that the Court must consider when conducting a forum analysis. *Ball*, 870 F.3d at 731. The Court must consider the 1) "physical characteristics" of the property and "any special characteristics regarding the environment" surrounding the forum, such as "the special characteristics of the school environment" or "the unique nature of military bases," 2) "the traditional use of the property," 3) "the objective use and purposes of the space," and 4) "the government intent and policy with respect to the property." *Bowman v. White*, 444 F.3d 967, 978 (8th Cir. 2006) (internal quotation marks and citations omitted); *accord Ball*, 870 F.3d at 731. No one factor is dispositive. *Ball*, 870 F.3d at 731.

The Eighth Circuit found the public sidewalks in the "non-paid-admission areas" of the Iowa State Fairgrounds "should be considered a limited public forum, at least during the 11 days each year when the Iowa State Fair is underway." *Powell*, 798 F.3d at 699–700. Discussing

the physical appearance of the space, the court noted "fencing that mark[s] the fairgrounds during the fair [is a] special characteristic[] that clearly set[s] these areas apart from regular public sidewalks." *Id.* at 700. The district court, affirmed in *Powell*, noted the sidewalks at issue were "within the mostly fenced-in perimeter of Fairgrounds property, but they [were] outside of the paid-admission-required portions of Fairgrounds property." *Powell v. Noble*, 36 F. Supp. 3d 818, 832 (S.D. Iowa 2014). The area was also distinguished by "congestion, signage, [and] police presence." *Powell*, 798 F.3d at 700. The Eighth Circuit did not discuss the sidewalks' "traditional use" but noted the property's objective use: "The property in question—at least during the fair—serves the specific purpose of allowing tens of thousands of people to enter and exit the fair's paid admission areas." *Id.* The sidewalks did not serve as "open, unrestricted thoroughfares for general public passage but rather . . . as a congested conduit for ingress and egress" to the fairgrounds. *Id.* This objective use was consistent with the government's intent and policy with respect to these areas, which was "to facilitate safe and efficient access to the fair." *Id.*

In *Ball*, the Eighth Circuit held a pedestrian plaza adjacent to the Pinnacle Bank Arena in Lincoln, Nebraska was a limited public forum. 870 F.3d at 736. Considering physical appearance and special characteristics, the court noted "cement planters, metal stanchions or bollards, and flagpoles" marked the "curved and irregular" border to the Plaza area. *Id.* at 733. These features worked alongside the "colored and patterned concrete, as well as [] brick-like pavers" to "distinguish the Plaza Area" as "a special enclave." *Id.* (citing *Int'l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992)). The court said there was "no evidence of the Plaza Area's 'historic' use," but considering actual use since the area's opening in 2013, it was "not primarily used as [a] thoroughfare for the public to travel" even though members of the public were permitted to pass through. *Id.* at 734. Rather, the primary functions were "as a venue for commercial use by Arena Tenants, as a means to facilitate safe and orderly access to the Arena

for its patrons, as a security screening area, and as a gathering place and entryway for Arena patrons." *Id.* The city's intent and purpose with respect to the Plaza Area was "to protect the contractual rights of Arena Tenants, to allow for crowd management and safety, to provide a forecourt or gathering place for Arena patrons, and to provide an area for security screening." *Id.* at 735.

The Court finds Street Fest to be substantially similar to the forums at issue in *Powell* and *Ball*. Like the sidewalks in *Powell*, Street Fest was distinguished from adjacent streets and sidewalks by fences, congested pedestrian traffic, and security presence. *Cf. Powell*, 798 F.3d at 700. These features distinguished the stretch of West Second Street on which Street Fest took place as a "special enclave." *Cf. Lee*, 505 U.S. at 680. Also like the sidewalks in *Powell*, the streets and sidewalks on which Street Fest took place were the sort of government property traditionally open to public discourse. *See Perry*, 460 U.S. at 45. But in *Powell*, the eleven days of the Iowa State Fair temporarily altered that historical status due to the other *Ball* factors, including special characteristics, objective actual use, and government intent and policy for the area during those eleven days. *Powell*, 798 F.3d at 700. The Court finds the same is true of Street Fest.

The primary actual use of the property at issue during Street Fest was as a venue for commercial activity. During Street Fest, the streets and sidewalks at issue served as a highly congested pedestrian mall, permitting fee-paying vendors to engage with attendees. This corresponds with a footrace attended by tens of thousands of runners, that started and ended in the same location as Street Fest. Gilliland Aff. ¶¶ 5, 9, ECF No. 91-3 at APP. 103; ECF No. 96-1 ¶ 19. The congestion was not present because Street Fest was serving as a "forecourt" for an arena or the state fair's attractions, but Street Fest attendees and vendors did use the highly congested area as a venue for commercial activity. *Cf. Ball*, 870 F.3d at 734–35.

Also as in *Ball*, the City's intention and policy for Street Fest was consistent with these

actual uses. The City approved the Street Fest application pursuant to factors including "[t]he extent to which the event contributes to the promotion of tourism;" and "[t]he extent to which the event contributes to economic revitalization." ECF No. 44 at 5. The Partnership's application stated the event would have food sales, music, and "shopping to support the Bix 7 weekend." Defs.' Ex. H Supp. Resist. Pl.'s Mot. Prelim. Inj. 3, 5, ECF No. 48. The same application projected 20,000 attendees at a site covering just three blocks of a city street. *Id.* at 5; *see also* Defs.' Ex. E, ECF No. 45. Approval of this application, pursuant to the Policy, expressed the City's intention to use the street for an event involving high pedestrian congestion and commercial activity. *Cf. Ball*, 870 F.3d at 734–35.

Considered together, the physical markers and special characteristics, objective uses, and government intention and policy lead the Court to find Street Fest was a limited public forum, the traditional use of the streets and sidewalks on which the festival took place notwithstanding. As noted in *Ball*, one factor among the four cannot be treated as dispositive. *Ball*, 870 F.3d at 731. Sessler has not cited to Eighth Circuit authority that would persuade the Court to find otherwise. Sessler cites to *Johnson v. Minneapolis Park and Recreation Board*, but this case predates *Powell* and *Ball*. ECF No. 27 at 4 (citing 729 F.3d 1094 (8th Cir. 2013)). Moreover, the Eighth Circuit in *Johnson* did not conduct a forum analysis because the parties agreed on the nature of the forum. *Johnson*, 729 F.3d at 1096. For these reasons, *Johnson* does not change the Court's analysis. Sessler also cites to *Parks v. City of Columbus*. ECF No. 27 at 4 (citing 395 F.3d 643 (6th Cir. 2005)). But, unlike *Powell* and *Ball*, *Parks* is not binding on the Court, and further, the Sixth Circuit in *Parks* does not articulate sensitivity to the same factors clearly set forth in *Ball*. *See Parks*, 395 F.3d at 648–49 ("[T]o determine whether a public place constitutes a traditional public forum, we must look to the purpose of the forum and whether it has been customarily used for communication and assembly. Moreover, use of a forum as a public thoroughfare is often regarded

as a key factor in determining public forum status." (internal quotation marks and citations omitted) (cleaned up)).

c. Was Sessler's removal reasonable and viewpoint-neutral?

In a limited public forum, the government may restrict speech only if the regulation is "reasonable and 'not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Kokinda*, 497 U.S. at 721 (quoting *Perry*, 460 U.S. at 46); *accord Powell*, 798 F.3d at 700 ("Our precedent makes clear that the appropriate standard for a limited public forum is whether restrictions on speech are reasonable and viewpoint-neutral."). Restrictions must be "reasonable in light of the purpose which the forum at issue serves." *Victory Through Jesus Sports Ministry Found. v. Lee's Summit Sch. Dist.*, 640 F.3d 329, 335 (8th Cir. 2018) (internal quotation marks omitted) (quoting *Perry*, 460 U.S. at 49). Reasonable restrictions "need not be the most reasonable or the only reasonable limitation." *Id.* (internal quotation marks omitted) (quoting *Cornelius*, 473 U.S. at 808). "The reasonableness of a restriction on access is supported when 'substantial alternative channels' remain open for the restricted communication." *Id.* (quoting *Perry*, 460 U.S. at 53).

The action Sessler challenges is the Officers' "enforcement of the Policy on July 28, 2018." ECF No. 1 at 10. As Sessler clarifies in his resistance to the City's motion for summary judgment, the "enforcement" at issue is the Officers' "removal of [Sessler] from the Festival" on July 28, 2018, in reliance on the Policy. ECF No. 96 at 4–5. Sessler argues this removal violated his right to free speech. ECF No. 99 at 6, 12. The Officers argue this removal was not unreasonable or viewpoint-based because it was motivated by requests to remove a disruption of commerce at the festival, not a particular viewpoint. ECF No. 26 at 20–22. Sessler argues the removal was viewpoint-based because it was motivated by festivalgoers' disagreement with Sessler's message. ECF No. 27 at 5–6; ECF No. 99 at 6–10.

The record shows the Officers decided to remove Sessler from Street Fest because, after trying to find a location acceptable to Sessler in which he would not disrupt vendors' commerce, vendors continued to complain that Sessler was driving away customers. At their first encounter with Sessler, the Officers asked him to move to a different location within Street Fest because he was occupying a site reserved by a fee-paying vendor. Gilliland Aff. ¶¶ 25–26, ECF No. 91-3 at APP. 105; Pl.'s Video 2 at 9:02–9:35, 15:55–16:24, ECF No. 42. Seeking a compromise location, Smith suggested a courtyard, but Sessler did not find this location acceptable. Pl.'s Video 3 at 14:33–14:47, ECF No. 42; ECF No. 23 at 4. Sessler wanted to be closer to the street, but Alcala was concerned the part of the courtyard Sessler indicated would encroach on "paid vendor positions." Pl.'s Video 3 at 14:33–14:47, ECF No. 42; ECF No. 23 at 4. Sessler found a third location, and the Officers initially permitted this location, but one nearby vendor grew concerned she was "losing business" because Sessler was "telling [her] customers that they're going to Hell." Pl.'s Video 4 at 17:27–17:30, ECF No. 42; Behning Bodycam Footage at 1:04–1:10, ECF No. 40. She expressed these concerns to Gilliland and Behning. Behning Bodycam Footage at 1:04–1:10, ECF No. 40. A second vendor also expressed similar concerns. *Id.* at 0:49–1:10. Gilliland later reported he understood the vendors to be concerned Sessler's preaching was "driving customers away." Gilliland Dep. 51:20–52:7, 62:22–25, ECF No. 91-3 at APP. 138–39, 143. Responding to these pleas from vendors, and to Gilliland's own request, Behning then removed Sessler from the festival. Gilliland Dep. 52:25–53:3, ECF No. 91-3 at APP. 139–40; Behning Bodycam Footage at 0:49–1:10, ECF No. 40.

The Officers' decision to remove Sessler from Street Fest because he was "driving customers away" from vendors was a reasonable restriction of Sessler's speech. In *Ball*, the Eighth Circuit found it reasonable to restrict protected speech in a limited public forum to "prevent interference with Arena Tenants' contractual use[] of the Plaza area . . . for commercial purposes."

870 F. 3d at 737. Similarly, the City here formed an agreement with the Partnership to use public property for Street Fest, and the Partnership in turn formed agreements with fee-paying vendors to use Street Fest for commercial purposes. *See* ECF No. 46; Defs.' Ex. G Supp. Resist. Pl.'s Mot. Prelim. Inj., ECF No. 47; ECF No. 48 at 3–6. In removing Sessler from Street Fest, the Officers were preventing interference with this commercial purpose. *Cf. Ball*, 870 F. 3d at 737.

"The availability of nearby areas open for expressive activity also supports a finding that [Sessler's removal was] reasonable." *Ball*, 870 F. 3d at 737 (citing *Victory Through Jesus*, 640 F.3d at 335). After Sessler was removed, he was permitted to continue preaching across the street from an entrance to Street Fest for over two hours. ECF No. 96-1 ¶ 66. From this position, Sessler continued to engage with many Street Fest attendees as they passed him while entering or exiting Street Fest. Pl.'s Video 6 at 1:16–2:12, 8:45–9:12, 10:35–10:50, 16:22–40, ECF No. 42. Sessler also remained free to continue his street preaching on other stretches of sidewalk throughout the City. These "'substantial alternative channels' remain[ed] open for the restricted communication." *Victory Through Jesus*, 640 F.3d at 335 (quoting *Perry*, 460 U.S. at 53). This provides further support for the conclusion Sessler's removal was reasonable.

Sessler's removal was also viewpoint-neutral. The Officers' actions sought to address a disruption—behavior that was "driving customers away." Gilliland Dep. 62:22–25, ECF No. 91-3 at APP. 143. One vendor did appear upset that Sessler was telling her customers they were "going to Hell," but her concern appears motivated by her perception that Sessler's speech was causing her to "los[e] business." Pl.'s Video 4 at 17:27–17:30, ECF No. 42; Behning Bodycam Footage at 1:04–1:10, ECF No. 40. There is no further evidence in the record any state actor was motivated by the content of Sessler's speech, asserting Street Fest customers were going to Hell. The record, therefore, does not support the inference this action targeted the content of Sessler's speech, much less the viewpoint he expressed. Sessler's removal appears motivated by

the interest of limiting disruption, and this supports the conclusion that the action was reasonable and viewpoint neutral. *Cf. Ball*, 870 F. 3d at 737.

For the foregoing reasons the Court holds the Officers did not violate Sessler's constitutional rights when they removed him from Street Fest on July 28, 2018. Street Fest was a limited public forum, and the Officers' decision to remove him was reasonable and viewpoint-neutral.

2. Prong two: did the Officers violate "clearly established" rights?

The parties' discussion of qualified immunity focuses on a debate as to whether the Officers violated any "clearly established" rights. *See* ECF No. 91-2 at 6–14; ECF No. 99 at 22–28; *see generally* ECF No. 106. Moreover, even where Sessler addresses the first prong of the qualified immunity analysis, his arguments in resistance to the Officers' motion for summary judgment appear to assume Street Fest was a traditional public forum. ECF No. 99 at 6. As noted above, this assumption likely relied on the Court's forum analysis in the Court's Order Denying Plaintiff's Motion for Summary Judgment. *See* ECF No. 52 at 10–13. To address the focal point of the parties' dispute concerning qualified immunity, the Court considers whether Sessler has demonstrated the Officers violated any "clearly established" constitutional rights when removing Sessler, *on the assumption* that Street Fest was a traditional public forum. The Court concludes the Officers did not.

To show that a right is clearly established, the plaintiff bears the burden of "identify[ing] 'controlling authority' from the Supreme Court or [the Eighth Circuit's] prior case law or 'a robust consensus of cases of persuasive authority' that places the constitutional question beyond debate." *Hanson as Tr. for Layton v. Best*, 915 F.3d 543, 548 (8th Cir. 2019) (cleaned up) (quoting *De La Rosa v. White*, 852 F.3d 740, 746 (8th Cir. 2017)). There need not be "a case directly on point,"

Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018), and "there is no requirement that the very action in question has previously been held unlawful," *Peterson v. Kopp*, 754 F.3d 594, 600 (8th Cir. 2014) (internal quotation marks omitted). But the plaintiff can carry this burden "only if earlier cases give [defendant] fair warning that his alleged treatment of [plaintiff] was unconstitutional." *Peterson v. Kopp*, 754 F.3d 594, 600 (8th Cir. 2014) (internal quotation marks and citation omitted). Such precedent must show "'[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 634, 640 (1987)).

a. Defining the rights at issue

"An important task in determining whether the law was clearly established at the time the individual defendants acted is to avoid defining the law at a 'high level of generality.'" *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 985 (8th Cir. 2021) (quoting *Kisela*, 138 S.Ct. at 1152); *see also White v. Pauly*, 580 U.S. 73 (2017) ("'[C]learly established law' should not be defined 'at a high level of generality.' . . . [It] must be 'particularized' to the facts of the case.") (quoting *Ashcroft*, 563 U.S. at 742; *Creighton*, 483 U.S. at 640). The Court may look to the parties for a definition of the right at issue, and if the parties disagree the Court may use the account of the right providing "[t]he more specific and accurate framing of the issue." *Occupy Nashville v. Haslam*, 769 F.3d 434, 443 (6th Cir. 2014). Ultimately it is the duty of the Court to define the particularized right plaintiff must clearly establish. *See, e.g.*, *Turning Point USA at Ak. State Univ. v. Rhodes*, 973 F.3d 868, 879–80 (8th Cir. 2020).

Sessler argues there is a "clearly establish[ed] [] right to evangelize at a free, public festival without being required to locate outside the festival area." ECF No. 99 at 23. Behning, Smith and Alcala dispute Sessler's definition of the right, and they provide a more detailed description of the

right at issue:

> Sessler alleges his constitutional rights to free speech . . . were violated when Officers Behning and Smith told him he had to leave the gated area of Street Fest and continue preaching across the street because the [Partnership] did not want him to continue his street preaching activities in the gated area after receiving complaints from fee-paying vendors.

ECF No. 91-2 at 6–7. Even the Officers' description, however, fails to describe the disputed free speech right with sufficient particularity. *See Bus. Leaders in Christ*, 991 F.3d at 980 ("The Supreme Court has admonished lower courts not to define clearly established law at a high level of generality." (internal quotation marks and citations omitted)). A "specific and accurate framing of the issue" must include additional details. *Cf. Occupy Nashville*, 769 F.3d at 443 (finding an appropriately defined right to remain in a plaza overnight "cannot be divorced" from its context, "the continuous, 24-hour-a-day, seven-day-a-week occupation of the Plaza, of which it was part").

The Officers' description of the right at issue does note some important aspects of the context within which Sessler's free speech rights are in dispute. Like Sessler, the Officers acknowledge Sessler claims a right to continue preaching his religious beliefs within the boundaries of a free festival open to the public. They add Sessler sought to continue preaching after the host of the festival requested his removal due to complaints from vendors who paid fees to participate in the festival. These are all facts that define "the contours" of the right at issue, but more particularity is appropriate. *Cf. Ashcroft*, 563 U.S. at 741. The Officers removed Sessler from the festival after vendors complained that Sessler's nearby preaching was driving customers away from their booths. Gilliland Dep. 62:22–25, ECF No. 91-3 at APP. 143. Further, the Officers removed Sessler after attempting to accommodate him with an alternate location the Officers' deemed appropriate. ECF No. 96-1 ¶ 37; Video 3 at 0:58–1:15, 1:56–2:22, 3:29–5:00, ECF No. 42. These facts also provide essential "contours" to the particular right at issue. *Cf. Ashcroft*, 563 U.S. at 741.

Considering this further context, the right at issue is appropriately defined as Sessler's right, under the Free Speech Clause, to continue preaching at a free festival, open to the public and hosted on city streets and sidewalks, after fee-paying vendors complained his nearby preaching was driving away their customers, and after officers sought to accommodate Sessler with a location where this disturbance would not continue. To overcome the Officers' defense of qualified immunity, Sessler must prove this right was clearly established.

b. Was Sessler's right to continue preaching "clearly established"?

Sessler suggests a case from the Eighth Circuit, *Johnson v. Minneapolis Park & Recreation Board*, "clearly establishe[d]" his right to continue preaching at Street Fest. ECF No. 99 at 22–23 (citing 729 F.3d 1094). He also cites to three other circuit court cases as evidence of "a robust consensus of cases of persuasive authority." *Id.* at 24–25 (quoting *Ashcroft*, 563 U.S. at 742) (citing *Bible Believers v. Wayne Cnty.*, 805 F.3d 228 (6th Cir. 2015); *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005); *Saieg v. City of Dearborn*, 641 F.3d 277 (6th Cir. 2011)). The Officers argue these cases fail to show they violated a clearly established right because the "cases are readily distinguishable and have no bearing on the particular and undisputed facts of this case." ECF No. 106 at 4.

As discussed above, the constitutional test pertinent to the right Sessler claims requires the settlement of several issues: 1) whether Sessler's speech was protected speech; 2) what type of forum Street Fest was; and 3) depending on the type of forum, whether Sessler's rights were violated pursuant to the appropriate standard. *See Johnson*, 729 F.3d at 1098–1101; *see also Cornelius*, 473 U.S. at 797. As also discussed above, Sessler's speech was protected under the First Amendment, and for the purposes of the second prong of the qualified immunity analysis, the Court assumes Street Fest was a traditional public forum. Accordingly, to clearly establish his

right to continue preaching at Street Fest, he must provide "a robust 'consensus of persuasive authority'" showing he had a right to continue preaching pursuant to the test appropriate for traditional public forums. *See Ashcroft*, 563 U.S. at 742 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

Within a traditional public forum, the government can impose content-neutral restrictions on speech if those restrictions are "narrowly tailored to serve a significant government interest" and the government "leave[s] open ample alternative channels or communication." *United States v. Grace*, 461 U.S. 171, 177 (1983). In contrast, "[f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45. Two of the cases Sessler cites concern government action that is "decidedly content-based." *Bible Believers*, 805 F.3d at 247; *see also Parks*, 395 F.3d at 645–46. Both of these cases, however, are easily distinguishable from the facts of this case. Other cases he cites concern content-neutral government action. *See Saieg*, 641 F.3d 727; *see also Johnson*, 729 F.3d 1094. These cases can also be distinguished from the facts of this case. For this reason, Sessler's cited cases do not show Sessler had a clearly established right to continue preaching at Street Fest, even under the assumption Street Fest was a traditional public forum. The Court comes to this conclusion by first considering whether *Bible Believers* and *Parks* "clearly establish" Sessler's removal was "content-based." Concluding they do not, the Court then considers whether Sessler's removal violated clearly established rights governing content-neutral action.

i. Was it clearly established that Sessler's removal was content-based?

Sessler cites *Parks* as a case clearly establishing Sessler's right to continue preaching. ECF No. 99 at 24. In *Parks,* the City of Columbus had granted the Columbus Arts Council a permit

to host an arts festival on city streets in downtown Columbus. 395 F.3d at 645. As in this case, the permitted event was free and open to the public. *Id.* Also similar to the case at bar, the plaintiff in *Parks*, Douglas Parks, was a member of the public who attended the festival "to proclaim and communicate his religious beliefs." *Id.* Parks sought to do so by "wearing a sign bearing a religious message," *id.* at 646, and while at the festival, Parks "act[ed] in a peaceful manner." *Id.* at 654. The Sixth Circuit recognized "the only difference between [Parks] and the other patrons was that he wore a sign communicating a religious message and distributed religious leaflets." Nonetheless, the festival host requested Parks's removal, and an officer instructed Parks to move beyond the boundaries of the festival, telling him, "the sponsor of the event did not want him there." *Id.* at 646. He also told Parks he would be arrested if he did not comply. *Id.* Parks, fearing arrest, obeyed. *Id.*

After holding the arts festival was a traditional public forum, the Sixth Circuit considered whether Parks's removal was content-based or content-neutral. *Id.* at 652. The court noted "[t]here was no evidence that the Arts Council had a blanket prohibition on the distribution of literature or that others engaging in similar constitutionally protected activity were removed from the permitted area." *Id.* at 654. Further, the court noted the officer provided "no explanation as to why the sponsor wanted [Parks] removed." *Id.* He communicated only that the sponsor did not want Parks there. *Id.* The court held "under these circumstances we find it difficult to conceive that Parks's removal was based on something other than the content of his speech." *Id.*

This holding, however, does not clearly establish the removal of Sessler was content-based. Importantly, the officers in this case emphasized the reason the host wanted Sessler removed was because fee-paying vendors had complained his speech was "driving customers away." Gilliland Dep. 51:24–52–1, 62:22–25, ECF No. 91-3 at APP. 138–39, 143. Consistent with this rationale, Behning communicated to Sessler he was being removed "because of complaints from vendors

and patrons." ECF No. 23 at 7. Behning also stated to Sessler at the time of removal that the decision to remove him and his colleagues had nothing to do with the content of their message. ECF No. 96-1 ¶ 61. The holding of *Parks* does not clearly establish a right applicable to this case because the *Parks* court's analysis emphasized the lack of any rationale provided for the removal. *Cf. Parks*, 395 F.3d at 654. Where, as here, the record reflects the rationale of the officers involved with the removal, the inference made in *Parks*—that the lack of any rationale suggested the reason for removal was the content of the speech—cannot be made. *Cf. id.*

Sessler also cites *Bible Believers* as a case clearly establishing Sessler's right to continue preaching. ECF No. 99 at 24 (citing 805 F.3d at 238–39). *Bible Believers* held the removal of festival attendees was content-based. 805 F.3d at 238–39. In *Bible Believers*, a "self-described evangelical [Christian] group[]" called "the Bible Believers" attended the Arab International Festival in Dearborn, Detroit, an area home to the second largest Arab American population in the country. *Id.* at 235–36. The Bible Believers attended the festival "for the purpose of spreading their Christian beliefs," and did so by carrying "banners, signs, and tee-shirts that displayed messages associated with those beliefs." *Id.* at 236. "Many of the signs and messages displayed . . . overtly anti-Muslim sentiments," *id.*, including the message "Islam Is A Religion of Blood and Murder," *id.* at 238. These messages were "offensive to a predominantly Muslim crowd," at the Arab International Festival, *id.* at 238, and over the course of the Bible Believers' attendance, other patrons of the festival became aggressive, "some throwing bottles and others shouting profanities . . . [;] a few kids began throwing larger items such as milk crates." *Id.* at 239. When this response further escalated, police officers keeping security at the festival removed the Bible Believers, telling them: "apparently what you are saying to them and what they are saying back to you is creating danger." *Id.* at 240. At first, the Bible Believers resisted removal, but they complied after the officers attending confirmed they "would be cited for disorderly conduct if they did not

immediately leave." *Id.*

The Sixth Circuit, analyzing the case, held the Bible Believers's speech was protected religious speech. *Id.* at 242–47. They also treated the festival as a traditional public forum per agreement between the parties. *Id.* at 242. The court then held the removal of the Bible Believers was not "content neutral." *Id.* at 247. Although Wayne County argued the officers' actions were taken to advance the content-neutral goal of "maintaining the public safety," the court found the actions of the officers "decidedly content-based" because the police officers "acted against the Bible Believers in response to the crowd's negative reaction," effectuating a "heckler's veto." *Id.* at 247. A heckler's veto occurs when police action allows or disallows speech "depending on the reaction of the audience." *Id.* (quoting *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep't*, 533 F.3d 780, 787 (9th Cir. 2008). Sessler says Behning, Smith, and Alcala's decision to remove Sessler due to the reactions of the vendors and festivalgoers also "enforced a heckler's veto," meaning their action was not content-neutral. ECF No. 99 at 9. The Officers respond that *Bible Believers* is not on point because "Sessler and his colleagues were not asked to leave Street Fest to calm a violent or hostile crowd." ECF No. 106 at 5.

Contrary to Sessler's contention, *Bible Believers* does not clearly establish Behning, Smith and Alcala's actions were content-based. The reaction of the hostile crowd in *Bible Believers* is too far from the peacefully asserted complaints of vendors to clearly establish this precedent would apply. *Cf. Peterson*, 754 F.3d at 600 ("For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" (alteration in original) (quoting *Creighton*, 483 U.S. at 640)). More fundamentally, far from providing fair warning, other persuasive cases on this issue suggest the Officers' decision to remove Sessler was content-neutral.

Bible Believers and Sessler both cite *Forsyth County v. Nationalist Movement* for the

proposition that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Bible Believers*, 805 F.3d at 247 (citing *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992)); *see also* ECF No. 99 at 25 (same). *Forsyth County* concerned an ordinance charging a fee for public demonstrations in an amount "depend[ing] on the administrator's measure of the amount of hostility likely to be created by the speech based on its content." 505 U.S. at 134 ("Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit."). Forsyth County argued the ordinance was content-neutral because it was "aimed only at a secondary effect—the cost of maintaining public order." *Id.* The Supreme Court was not persuaded because the costs of maintaining public order "are those associated with the public's reaction to the speech," and specifically to its content. *Id.*

Forsyth County certainly does not stand for the principle that an action is content-based any time police officers remove a speaker in response to complaints from a speaker's audience. *Startzell v. City of Philadelphia* makes this abundantly clear. 533 F.3d 183 (3d Cir. 2008). In *Startzell*, the organizers of an LGBT Pride Day street festival requested the removal of "eleven Christians affiliated with an organization known as Repent America" who believed "homosexuality is sinful" under their faith. *Id.* at 189. Philadelphia police officers acted on the request to remove these speakers only after they "used bullhorns and microphones in an attempt to drown out the platform speakers [who were part of the festivities] and then, most significantly, congregated in the middle of the walkway." *Id.* at 199. The Third Circuit noted:

> The right of free speech does not encompass the right to cause disruption, and that is particularly true when those claiming protection of the First Amendment cause actual disruption of an event covered by a permit. The City has an interest in ensuring that a permit-holder can use the permit for the purpose for which it was obtained.

Id. at 198. The Third Circuit concluded the police action, in response to Repent America's disruption of the permitted festivities, "was not based on the content of [the group's] message but

on their conduct." *Id.* at 199.

Under the assumption Street Fest was a traditional public forum, *Startzell* appears far more pertinent to the case at bar than *Bible Believers*. Rather than respond to Sessler's preaching by throwing objects, fee-paying vendors complained to event organizers and police. Gilliland Dep. 62:22–25, ECF No. 91-3 at APP. 143; *cf. Bible Believers*, 805 F.3d at 239 ("After approximately seven minutes of proselytizing, some elements of the crowd began to express their anger by throwing plastic bottles and other debris at the Bible Believers."). Police then removed Sessler in response to this reaction. ECF No. 23 at 5. Like in *Startzell*, the vendors' reaction was in response to the disruption of the purpose of the event, here, to stimulate commerce in downtown Davenport. ECF No. 96-1 ¶ 25; *cf. Startzell*, 533 F.3d at 198. Such a reaction is far closer to the content-neutral action in *Startzell* than the content-based action in *Bible Believers*. The apparent relevance of *Startzell*, despite the precedent of *Bible Believers*, illustrates there was not a "'robust consensus of cases of persuasive authority' [] plac[ing] the constitutional question beyond debate." *Ashcroft*, 563 U.S. at 742. Accordingly, it was not clearly established Sessler's removal was content-based.

ii. Was it clearly established Sessler's removal was not narrowly tailored to a significant government interest?

Sessler's remaining two cases are offered to "clearly establish" his rights were violated under the intermediate scrutiny standard applied to content-neutral "time, place, and manner restrictions." ECF No. 99 at 22–26; *see Grace*, 461 U.S. at 177. Such restrictions must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* "[T]he significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 650–51. The "narrow tailoring requirement means not only that the regulation must promote[] a

substantial government interest that would be achieved less effectively absent the regulation, but also that the factual situation demonstrates a real need for the government to act to protect its interests." *Johnson*, 729 F.3d at 1099 (internal quotation marks and citations omitted). Sessler relies on *Saieg* and *Johnson* to show the Officers' actions failed this test. ECF No. 99 at 22–26 (citing *Saieg*, 641 F.3d 727; *Johnson*, 729 F.3d 1094).

Saieg, like *Bible Believers*, concerned Christian evangelists seeking to share their beliefs at the Arab International Festival in Dearborn, Michigan. *Saieg*, 641, F.3d at 729. George Saieg founded a ministry with "the purpose of proclaiming the Holy Gospel of Jesus Christ to Muslims." *Id.* at 731. He had planned for ninety members of his ministry to roam the festival and distribute leaflets with information on the Christian faith, but the Dearborn Chief of Police informed Saieg he "would not permit[ted] . . . to distribute leaflets while walking around the Festival." *Id.* at 732. Instead, Saieg's group was only permitted to distribute their literature from a booth. *Id.* After the festival, Saieg sued the City and the Chief of Police for violating his right to free speech in its application of the leafletting ban. *Id.* The Sixth Circuit, applying intermediate scrutiny to this policy, found Saieg's rights were violated because the leafletting ban did not further a substantial government interest and was not narrowly tailored. *Id.* at 736–40.

The *Saieg* defendants named several interests motivating the policy: "pedestrian overcrowding, enhancing traffic flow, minimizing threats to public safety, and limiting disorderliness at the Festival." *Id.* at 736 (internal quotation marks omitted). The court acknowledged "[i]n appropriate contexts, each of these governmental interests can be substantial." *Id.* (discussing *Heffron*, 452 U.S. at 649–50). But it also noted that the defendants must do more than "assert interests that are important in the abstract." *Id.* (cleaned up) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)). Because the defendants kept sidewalks open for public use during the festival, the court found, in the context of this case, "the interests in crowd

control and public safety [were] not so pressing that they justify restricting normal activity that occurs on streets and sidewalks," namely, leafletting. *Id.* at 737.

The *Saieg* court also found the ban on pedestrian leafletting was not narrowly tailored to these interests, even assuming the interests advanced by this prohibition in one part of the festival—along the outer perimeter—were significant. *Id.* at 739–40. The primary interest justifying a ban on leafletting in that area was "to curb vehicular traffic and provide parking." *Id.* at 740. But because Saeig sought to leaflet on foot, the restriction on "pedestrian leafletting [was] substantially broader than necessary to further the interest in vehicular traffic control and parking." *Id.* at 740.

Johnson, while discussing similar interests in a similar context, focused on the element of narrow tailoring. *See Johnson*, 729 F.3d at 1099–1100. The case concerned Brian Johnson, a "self-described 'professing Evangelical Christian,'" who wanted to distribute Bibles at Twin City Pride to "bring the greater [gay, lesbian, bisexual, and transgender] community together." *Id.* at 1096 (alteration in the original). Following separate litigation between Johnson, the Board, and the festival hosts, the Minneapolis Park and Recreation Board adopted a resolution prohibiting Twin City Pride attendees from personally distributing literature in Loring Park during the festival. *Id.* Johnson sued, seeking a preliminary injunction against enforcement of the resolution on the theory that it violated his right to free speech. *Id.* at 1098.

The Eighth Circuit held Johnson was likely to succeed on the merits because the resolution, although content-neutral, was not narrowly tailored to serve a significant government interest. *Id.* at 1102. The court recognized the resolution's purported goal of "controlling crowds" was a "significant governmental interest that bears directly on public safety." *Id.* at 1100 (citing *Heffron*, 452 U.S. at 650–51). But the court concluded the Board provided little evidence the resolution furthered this goal at all. *Id.* The regulation was also underinclusive because it admitted street

performers and volunteers soliciting donations for a political campaign, each of which the court viewed as more likely to cause congestion than literature distribution. *Id.* at 1100–01.

Even when the Court assumes Street Fest was a traditional public forum, however, *Saieg* and *Johnson* do not clearly establish that Behning, Smith and Alcala violated Sessler's free speech rights when they removed him from Street Fest. Both cases concern challenges to policies banning the distribution of materials, not the removal of speakers orally presenting their views with microphones. *Cf. Saieg*, 641 F.3d at 730–31; *Johnson*, 729 F.3d at 1097–98. *Johnson*, an Eighth Circuit case, does not establish any rights, as it is a ruling on a motion for a preliminary injunction. *Johnson*, 729 F.3d at 1096. At most it shows a certain right is likely to be established. But that right, similar to the right established by *Saieg*, is not the right at issue here. Both *Saieg* and *Johnson* concerned government action justified by the government's interest in reducing traffic flow and maintaining public safety. *Saieg*, 641 F.3d at 731; *Johnson*, 729 F.3d at 1100. While these cases raise questions about whether this interest is significant for purposes of intermediate scrutiny, that discussion is inapposite. The right Sessler must clearly establish is his right against removal for interfering with the commercial activities of fee-paying vendors at the festival. Sessler's cited cases do not speak to this particular right. For this reason, Sessler fails to carry his burden.

Furthermore, a reasonable officer could have concluded Sessler's removal would survive intermediate scrutiny. "The government may restrict disruptive and unwelcome speech to protect unwilling listeners when there are other important interests at stake." *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 686 (8th Cir. 2012). The government has a significant interest in limiting the disruption of a permitted event, especially disruption that contravenes the event's purposes. *Cf. Startzell*, 533 F.3d at 201 (recognizing the City of Philadelphia's legitimate interest in "ensur[ing] that OutFest's permit to engage in its speech activities is respected"). A primary purpose of Street Fest was "to showcase downtown Davenport and to encourage

festivalgoers to return to the downtown area to explore local businesses." ECF No. 96-1 ¶ 25. By driving customers away from vendors at the festival, Sessler was disrupting a primary purpose of Street Fest. *See* Gilliland Dep. 62:22–25, ECF No. 91-3 at APP. 143. A reasonable officer could have viewed the removal of Sessler as advancing the legitimate interest of ensuring Street Fest's permit to facilitate commerce was respected. *Cf. Startzell*, 533 F.3d at 201.

A reasonable officer could have also viewed the removal of Sessler—after attempting to accommodate him with an alternative location—as narrowly tailored to this legitimate interest. Narrow tailoring does not require that the state action be "the least intrusive means of achieving the desired end." *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) (internal quotation marks and citations omitted). Such action should not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest," the tailoring is appropriate. *Id.* at 800. In this case, the Officers directed Sessler to a second location after receiving complaints and warned him his preaching must not intervene in vendors' "point of sale." Video 3 at 4:45–4:55, ECF No. 42. They directed him to a second location that he disliked and so permitted him to preach at a third location for thirty minutes, at which point they concluded they needed to act on the complaints they continued to receive. ECF No. 96-1 ¶¶ 50, 60. Reasonable officers could conclude that after these multiple attempts to accommodate Sessler, the decision to remove him from the festival entirely was "not substantially broader than necessary" to prevent him from disrupting commerce at Street Fest. *Cf. Ward*, 491 U.S. at 799–800.

iii. Was there "fair notice" Sessler's removal would not block "ample alternative channels for speech"?

Again, assuming Street Fest was a traditional public forum, a reasonable officer could also

conclude Sessler retained "ample alternative channels of communication" when compelled to preach across the street from one of Street Fest's entrances. *Grace*, 461 U.S. at 177 (internal quotation marks omitted) (quoting *Perry*, 460 U.S. at 955). "An alternative is not ample if the speaker is not permitted to reach the intended audience." *Saieg*, 641 F.3d at 740 (internal quotation marks and citations omitted). Alternative channels, however, are not insufficient simply because the speaker's message "would have been somewhat less effective" when expressed from the alternate. *Startzell*, 533 F.3d at 203. The Eighth Circuit found a narrow time and place restriction prohibiting picketing within 500 feet of funerals left open ample alternative channels for speech because it permitted the speakers "to lawfully picket and protest throughout the remainder of the city" including "right up to the 500-foot line." *Phelps-Roper v. Ricketts*, 867 F.3d 883, 895 (8th Cir. 2017). The record shows Sessler's preaching, while across the street from a Street Fest entrance, captured the attention of pedestrians coming and going from Street Fest. *See, e.g.*, Pl.'s Video 6 at 1:16–2:12, 8:45–9:12, 10:35–10:50, 16:22–40, ECF No. 42. Insofar as Sessler's target audience was the public attending Street Fest, he was not prevented from reaching them. *Cf. Saieg*, 641 F.3d at 740. As in *Ricketts*, he was also permitted to protest close to the boundaries of the restricted event. *Cf.* 867 F.3d at 895–96. Given these factors, a reasonable officer could have concluded Sessler's final location beyond the boundaries of Street Fest was an adequate alternative channel for speech.

For the foregoing reasons, Sessler has failed to carry his burden of showing Behning, Smith, and Alcala violated a clearly established right, even if Street Fest is considered a traditional public forum. The case law discussed by Sessler does not show a member of the public has a right to continue preaching at a permitted event open to the public after event organizers requested his removal due to complaints that his preaching was driving customers away from fee-paying vendors. Rather, the case law on point suggests a reasonable officer could have concluded Sessler

had no constitutional right to continue preaching within the boundaries of Street Fest following such complaints, as long as he was permitted to continue preaching across the street from an entrance to Street Fest. The Officers violated no clearly established right, so they are entitled to qualified immunity from Sessler's claims against them.

B. Sessler's Request for Monetary Damages Against the City Under § 1983

Sessler alleges the Policy "as applied by Defendants" "impede[s]" his right to free speech. ECF No. 1 at 13. In connection with this claim, Sessler requests "an award of nominal and/or compensatory damages against Defendant City." ECF No. 1 at 17, 19. "Municipal liability under § 1983 . . . must arise from 'action pursuant to official municipal policy of some nature.'" *Miller v. City of St. Paul*, 823 F.3d 503, 506 (8th Cir. 2016) (quoting *Monell*, 436 U.S. at 691).[2] The City argues it is liable for money damage under § 1983 only if an alleged constitutional violation resulted from an official policy, unofficial custom, or a deliberately indifferent failure to train or supervise. ECF No. 92-2 at 12. The City argues a reasonable jury could not find a genuine issue of material fact as to whether any policy, custom or failure to train caused a violation of Sessler's constitutional rights. *Id.* at 13–18.

Sessler's resists, arguing the Officers' actions were "sanctioned by the City." ECF No. 96 at 17. He suggests the City's Policy itself authorized the removal of Sessler. ECF No. 96 at 4. He also argues the removal was sanctioned by the City because "the City Attorney, speaking for the City, affirmed the actions of the officers at Street Fest." ECF No. 96 at 17. Sessler compares the latter aspect of his removal to the actions of the Wayne County Corporation

[2] The City interprets Sessler's plea for "nominal and/or compensatory damages" as a request for "money damages from the City under 42 U.S.C. § 1983." ECF No. 92-2 at 11. Sessler's brief appears to affirm this interpretation. ECF No. 96 at 16–18 (relying on a section of *Bible Believers*, 805 F.3d at 260, in which the Sixth Circuit discusses conditions under which "a municipality may be found responsible for § 1983 violations, and held liable for damages").

Counsel in *Bible Believers*. *Id.* (citing *Bible Believers*, 805 F.3d at 260). In that case, Sessler emphasizes, the Sixth Circuit viewed the officers' actions as an official policy in part because the Corporation Counsel "sanction[ed] the Deputy Chiefs' decision to remove the Bible Believers from the Festival." *Id.* (quoting *Bible Believers*, 805 F.3d at 260). The City rebuts these arguments by arguing "[t]he Special Events Policy does not vest the City Attorney, the City Legal Department, or any members of Davenport law enforcement with final authority regarding approval, suspension, revocation, or interpretation of a permit issued under the Special Events Policy." ECF No. 92-2 at 14. The City also contrasts the facts in *Bible Believers* with the facts of the case at bar and cites *Miller v. City of St. Paul*, as the more relevant authority with closer facts. ECF No. 103 at 4–5 (citing *Miller*, 823 F.3d 503).

The disposition of this issue requires identification of the actions attributable to the City. All parties acknowledge the adoption of the Policy was an action of the City. *See* ECF No. 92-2 at 14; ECF No. 96-1 ¶ 92. But Sessler does not target the Policy on its face. *See* ECF No. 96-1 ¶ 92 ("[T]he language of the Policy itself does not regulate speech or the conduct of attendees at Street Fest."). Rather, in Sessler's view, "the issue is that the Policy authorized the Street Fest permit, on which Defendants based the removal of [Sessler] from the Festival. Defendants removed [Sessler] at the behest of the Festival organizer based on its permit, which was authorized by the Policy." ECF No. 96 at 4. Sessler seeks to show his removal from Street Fest was the City's action. *Id.*

Assuming the removal of Sessler was attributable to the City, whether under *Monell* or otherwise, the City would not be liable for a constitutional violation because, as discussed above, Sessler's removal from Street Fest did not violate his constitutional rights. This alone is sufficient to establish the City is free of liability under § 1983. Even if the Officers had violated Sessler's rights through their decision to remove him from Street Fest, this violation would not create

liability for the City under *Monell* or § 1983 because the removal action did not carry out an "official policy" of the City.

An initial indication that the removal of Sessler was not enforcement of an "official policy" is that the Special Events Policy does not grant permittees rights to remove event attendees or otherwise authorize the Officers' decision to remove Sessler from Street Fest. The Policy does not appear to address a permittee's right of removal at all. *See* ECF No. 44; *see also* ECF No. 96-1 ¶ 95 ("[T]he City's Special Events Policy does not restrict a special event permittee's right to exclude persons from the permitted area.") The most pertinent section of the Policy appears to be a paragraph on "Security," which states:

> The sponsor shall provide security for the proposed special event[;] . . . [t]he sponsor shall have a minimum amount of security or support staff which shall include Davenport Police Officers[;] . . . [a]ny security personnel hired by the sponsor of the proposed special event will operate under the direction of the Police Chief, Fire Chief or his/her designee.

ECF No. 44 at 13. This paragraph does not grant permittees any rights. The reference to the Police Chief's direction of security personnel might draw a connection between the Officers' decision-making and the actions of the Police Chief. But Sessler does not identify any demonstrating the Officers relied on the Police Chief's direction on July 28, 2018.

The record does suggest, however, the Officers correctly relied on parts of the Special Events Policy when they decided to remove Sessler. Sessler maintains "the City's Officers relied upon the City's Policy in removing Plaintiff from the Festival." ECF No. 96 at 12. It is true that, while seeking suitable locations for preaching within Street Fest, Smith told Sessler the Festival area was "private ground" and "under rent," and the Partnership had "leased this property from the City." Video 3 at 00:17–00:27, 02:58–03:09, ECF No. 42. During the same conversation Behning told Sessler, "they have control over [the Festival Area], they're responsible for it." *Id.* at 00:35–00:37. When later instructing Sessler he must leave the Festival to avoid

arrest, Behning also told Sessler the Festival organizer wanted him to leave "their grounds" and "because the organizer here has got a permit, he's got it leased, he's responsible for it, he controls it." Behning Bodycam Footage at 03:14–03:18, 06:06–06:13, ECF No. 41.

Sessler provides one source of evidence that the Officers' statements might reflect a City policy: his description of a conversation with a City Attorney a few weeks after July 28, 2018. Defs. Behning and Smith's Resp. Pl.'s Statement Facts ¶¶ 37–40, ECF No. 103-1. In that conversation, the City Attorney told Sessler she believed the Officers' actions on July 28, 2018 were lawful. *Id.* ¶ 38. She said, "when the City rents out a City street to an event, the street becomes private property, even if the event is not ticketed," and "the City stood by the conduct of its Officers." *Id.* ¶¶ 39–40. The similarity between the City Attorney's statement that a street used by a permitted event becomes "private property" and Smith's statement that Sessler was on "private ground" does support the inference the Officer's relied upon the City Attorney's interpretation of the Policy. *Cf. Matsushita*, 475 U.S. at 587.

Sessler, as noted, argues these facts show the removal was pursuant to City policy. ECF No. 96 at 17 (citing *Bible Believers*, 805 F.3d at 260). In *Bible Believers*, "the Deputy Chiefs [of Police] consulted Corporation Counsel at the Festival to confirm that they could threaten the Bible Believers with arrest for disorderly conduct because the Bible Believers['s] speech had attracted an unruly crowd of teenagers." 805 F.3d at 260. After the Corporation Counsel, "direct[ed] and authoriz[ed] the Deputy Chiefs to threaten the Bible Believers with arrest for disorderly conduct," Wayne County Police Officers told the evangelists they would be arrested if they did not leave the Arab International Festival. *Id.* The Sixth Circuit also found the Corporation Counsel, pursuant to the Wayne County Municipal Code, "possesse[d] final authority to establish municipal policy" because the Corporation Counsel was the "chief legal advisor to the County CEO and 'all County agencies,' including the Sheriff's Office." *Id.* (alterations in original)

(quoting Wayne Cty. Mun. Code § 4.312). These facts established the Deputy Chiefs' decision to remove the Bible Believers through the threat of arrest was an "official policy" of Wayne County under *Monell*, creating municipal liability for damages. *Id.* at 260–61.

The facts of the case at bar, however, are distinguishable from the facts of *Bible Believers*, in several important respects. The Sixth Circuit's analysis emphasizes the fact the Wayne County Corporation Counsel provided contemporaneous advice to the Deputy Chiefs of Police, directing the police presence at the Arab International Festival. *Id.* The court cites to a Supreme Court case in which, similarly, "Deputy Sheriffs . . . sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law and commanded the officers." *Id.* In this case, Sessler has not raised any evidence showing the Officers sought advice from appropriate superiors about the proper response to the specific situation created by Sessler's presence at Street Fest.

Sessler's evidence only demonstrates that the Officers may have relied on prior advice from the City Attorney directing the Officers to view Street Fest as taking place on "private ground." Video 3 at 00:17–00:23, ECF No. 42; ECF No. 103-1 ¶¶ 37–40. Sessler, however, provides no evidence showing the City Attorney "possesse[d] final authority to establish municipal policy." *Cf. Bible Believers*, 805 F.3d at 260. Even assuming the City Attorney had such authority and instructed the Officers to view the streets of Street Fest as "private property," such advice did not direct the Officers to remove Sessler. ECF No. 103-1 ¶ 39. This is true, most obviously, because the record does not suggest the City Attorney provided any contemporaneous advice. It is also true because the advice to treat Street Fest as "private property" did not specify the conditions under which a street preacher should be removed. *Cf. Bible Believers*, 805 F.3d at 260–61; *see also Miller*, 823 F.3d at 505, 508 (finding the City of St. Paul's "denial of wrongdoing" in a letter to

street preachers alleging violation of First Amendment rights was merely a "litigating position" and not an "official policy" of the City). Because removal of street preachers was not the City's "official policy," any constitutional violation perpetrated by that removal could not create liability for the City under § 1983.

C. Sessler's Requests for Permanent Injunctive Relief and Declaratory Relief

Sessler seeks a permanent injunction against the Officers, in their individual capacities, and against the City, enjoining all of them "from enforcing the Policy in the manner Defendants enforced it" against Sessler on July 28, 2018. ECF No. 1 at 16, 18. He also requests "a declaratory judgment under the Declaratory Judgment Act" determining Sessler's and the City's "rights and duties regarding enforc[ement of] the challenged Policy and prohibiting enforcement in the manner Defendants enforced it against this Plaintiff." *Id.* at 17, 18. This request asks the Court to enter a judgment "declaring that the actions taken [by the City] in prohibiting [Sessler] from expressing his religious views on July 28, 2018, violated [Sessler's] constitutional rights." ECF No. 1 at 17, 19. The request also asks the Court to "declar[e] the challenged portions of Defendant City's Policy are unconstitutional as applied to Plaintiff's desired speech because they violate rights guaranteed under the First Amendment." *Id.*

The Officers argue Sessler cannot seek injunctive nor declaratory relief against them under § 1983 because the Officers may be sued under that section in their individual capacities for monetary damages only. ECF No. 91-2 at 5. Sessler acknowledges he sues Behning, Smith, and Alacala in their individual capacities, but he argues officials may be sued in their individual capacities for injunctive and declaratory relief. ECF No. 99 at 4. In support of this position, he cites *Denke v. South Dakota Department of Social Services*, 829 F.2d 688 (8th Cir. 1987) and *Ex Parte Young*, 209 U.S. 123 (1908).

The City, in contrast, argues Sessler is not entitled to injunctive or declaratory relief

because he lacks standing and his request for this relief is moot. ECF No. 92-2 at 6–11. The City argues Sessler lacks standing to sue for an injunction because he cannot raise a genuine issue of fact as to whether he will soon suffer an immediate or continuing injury, *id.* at 8 (citing *Lyons*, 461 U.S. at 111), and because no such injury is "fairly traceable to the City's Special Events Policy," *id.* The City argues Sessler's request for injunctive relief is moot because the Partnership has decided they will no longer host Street Fest. *Id.* at 10–11.

In resistance, Sessler argues he has established facts showing he has standing and his request for injunctive and declaratory relief is not moot. ECF No. 96 at 2–16. He argues he has established injury-in-fact for purposes of standing because he has concrete plans to engage in street preaching at public events taking place in Davenport, and "it is no stretch at all to find it likely that, if [he] engages in the same conduct in which he engaged at Street Fest in 2018, at a special event in the City, he will be subject to the same result." ECF No. 96 at 8. He argues he has established the causation prong of the standing analysis by showing "the City's Officers relied upon the City's Policy in removing Plaintiff from the Festival," and he suggests the Court's Order on his motion for preliminary injunction supports this position. ECF No. 96 at 4–5, 12. He argues his request for injunctive relief is not moot because even if the Partnership no longer holds Street Fest, he desires to share his religious message at other special events hosted in Davenport in the future. *Id.* at 13.

The Court finds Sessler lacks standing to request injunctive relief. The Court does not reach the issue of mootness. With regard to declaratory relief, the Court has already stated neither the Officers nor the City violated Sessler's constitutional rights on July 28, 2018. The only remaining declaratory relief among Sessler's requests is forward-looking. He asks for the Court to provide a declaratory judgment "prohibiting enforcement *in the manner Defendants enforced it against Plaintiff*." ECF No. 1 at 17, 19 (emphasis added). This relief is similar to the injunctive relief

Sessler requests: "[t]hat this Court issue a . . . permanent injunction restraining and enjoining Defendants, and all persons acting in concert or participating with them, from enforcing the Policy *in the manner Defendants enforced it against this Plaintiff*." *Id.* at 16, 18 (emphasis added). Both instances of forward-looking relief requested against all Defendants cannot be provided for the same reason; Sessler lacks standing to request such relief.

"[T]he irreducible constitutional minimum of standing contains three elements": 1) "the plaintiff must have suffered an injury in fact;" 2) there must be a "fairly traceable" causal connection between the injury and "the challenged action of the defendant," and 3) it must be likely that the injury is "redressable by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). An "injury in fact" is the "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (internal quotation marks omitted) (quoting *Lyons*, 461 U.S. at 102). An injury is "concrete" only if it is "'*de facto*'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016) (quoting Black's Law Dictionary 479 (9th Ed. 2009)). Particularized, in this context, means "the injury must affect the plaintiff in a personal and individual way." *Id.* at 339 (quoting *Lujan*, 504 U.S. at 560). This conception of "concrete and particularized" injury does not mean "the risk of real [future] harm cannot satisfy the requirement of concreteness." *Id.* at 341. Rather, the Supreme Court has recognized "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *TransUnion L.L.C. v. Ramirez*, 141 S. Ct. 2190, 2210 (2021) (citing *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 n.5 (2013); *Lyons*, 461 U.S. at 102). This risk of future harm, however, must satisfy the requirement an injury-in-fact is "actual or imminent," where imminent injuries are "certainly impending" or at least carry a "substantial risk" of occurring. *Clapper*, 568 U.S. at 409, 414 n.5; *see also Lyons*, 461 U.S. at

101–02 ("The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the official conduct." (internal quotation marks omitted)). Merely "possible" future injury, in contrast, is not sufficiently imminent. *Clapper*, 568 U.S. at 409; *accord Missouri v. Biden*, No. 21-3013, 2022 WL 12230261, at *3 (8th Cir. Oct. 21, 2022) ("The Supreme Court has 'repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.'" (emphasis in original) (quoting *Clapper*, 568 U.S. at 409)).

At the summary judgment stage, the plaintiff's request for injunctive relief can survive only if the plaintiff raises a genuine issue of fact as to the existence of standing. *See Lujan*, 504 U.S. at 561. The same is true for declaratory relief sought under the Declaratory Judgment Act. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (U.S. 1937) ("The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense."). This includes the requirement of raising a genuine issue of fact as to whether an injury-in-fact is "actual or imminent." *See Lujan*, 504 U.S. at 561; *Lyons*, 461 U.S. at 101-02. Sessler cannot raise such evidence. He argues "based on what happened at Street Fest in 2018, it is reasonable to believe that, when [Sessler again preaches at a special event in the City, he] will again be removed from the area." ECF No. 96 at 6–7. Put differently, his only evidence an invasion of a legally protected interest is "certainly impending" is that he intends to preach again at events similar to Street Fest, and he expects he will be treated by Defendants in the same manner as he was treated on July 28, 2018. *Id.*

This Court has held, however, Defendants did not violate Sessler's rights on July 28, 2018. Accordingly, even under the specious collection of assumptions that there will be an event in the near future substantially identical to Street Fest and Sessler will be removed from such an event

under substantially the same circumstances and in substantially the same manner in which he was removed on July 28, 2018, Sessler would not suffer a violation of his right to free speech at this future event. "[P]ast wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," but where there are no identified past wrongs during the past events at issue, the past events provide no evidence of future injury. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also Lyons*, 461 U.S. at 102 (citing *O'Shea*, 414 U.S. at 496). Given this, Sessler's attempt to prove a "certainly impending" injury does not raise a genuine issue of fact as to whether an invasion of a legally protected interest is imminent. *Cf. Lujan*, 504 U.S. at 561. For this reason, Sessler lacks standing to request the injunctive and declaratory relief at issue, and the Court lacks jurisdiction to grant it.

D. Fees Under 42 U.S.C §§ 1983, 1988, 28 U.S.C. § 1920, and FRCP 54

Sessler asks the Court to grant him "costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1988, Rule 54, and 28 U.S.C. § 1920." ECF No. 1 at 18. Section 1988 authorizes the Court "in its discretion" to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" in an action to enforce 42 U.S.C. § 1983. 42 U.S.C. § 1988. Similarly, Federal Rule of Civil Procedure 54 states "costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. Pro. 54(d)(1). Section 1920 authorizes the Court to tax as costs six categories of fees. 28 U.S.C. § 1920.

Under these statutes and Rule 54, a party is entitled to the specified fees and costs only if they prevail in their action. *See* 42 U.S.C. § 1988(b); Fed. R. Civ. Pro. 54(d)(1). Sessler did not prevail on his claims against the City or the Officers, so he is not entitled to the costs or attorney's fees he requests.

V. CONCLUSION

Sessler sought monetary damages, injunctive relief, and declaratory judgments in

connection with the alleged violation of his constitutional rights under the First Amendment by the City and three law enforcement officers on July 28, 2018. On that date, Sessler sought to share his Christian faith with other attendees of Street Fest, a privately organized festival held on City streets and sidewalks in downtown Davenport. Fee-paying vendors adjacent to Sessler, attempting to sell their goods, complained his preaching was driving away their customers. For this reason, the Officers ordered Sessler to continue his preaching across the street from an entrance to the festival.

While this action by the Officers restricted Sessler's freedom of speech, the Court concludes the Officers did not violate Sessler's constitutional rights. The only right litigated by the parties was Sessler's right to free speech, and the Court concludes the Officers did not violate this right, nor did the City through its relation to this action. For these reasons, among others, Sessler cannot obtain monetary damages, injunctive, or declaratory relief against the Officers or the City.

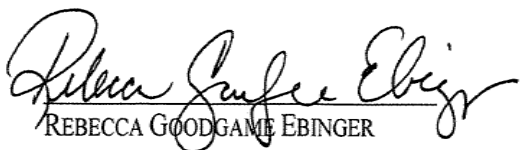
Accordingly, **IT IS ORDERED** that Defendants Greg Behning, Jason Smith, and J.A. Alcala's Motion for Summary Judgment, ECF No. 91, is **GRANTED**.

IT IS FURTHER ORDERED that Defendant City of Davenport's Motion for Summary Judgment, ECF No. 92, is **GRANTED**.

The Clerk of Court is directed to enter judgment in favor of Defendants Greg Behning, Jason Smith, J.A. Alcala, and the City of Davenport. The parties are responsible for their own fees and costs.

IT IS SO ORDERED.

Dated this 10th day of November, 2022.



REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE