

1 Timothy D. Chandler (CA Bar No. 234325)  
2 Heather Gebelin Hacker (CA Bar No. 249273)\*\*  
3 ALLIANCE DEFENSE FUND  
4 101 Parkshore Dr., Suite 100  
5 Folsom, California 95630  
6 Telephone: (916) 932-2850  
7 Facsimile: (916) 932-2851

8 Benjamin W. Bull (AZ Bar No. 009940)\*  
9 ALLIANCE DEFENSE FUND  
10 15100 North 90th Street  
11 Scottsdale, Arizona 85260  
12 Telephone: (480) 444-0020  
13 Facsimile: (480) 444-0028

14 Kevin H. Theriot (KS Bar No. 21565)\*  
15 ALLIANCE DEFENSE FUND  
16 15192 Rosewood  
17 Leawood, KS 66224  
18 Telephone: (913) 685-8000  
19 Facsimile: (913) 685-8001

20 Attorneys for Plaintiffs

21 **UNITED STATES DISTRICT COURT**  
22 **EASTERN DISTRICT OF CALIFORNIA**  
23 **FRESNO DIVISION**

24 **KEVIN BORDEN,** )

) Case No.: \_\_\_\_\_

25 **Plaintiff,** )

26 vs. )

27 **CITY OF MODESTO,** a municipal corporation )  
28 organized and existing under the laws of the State )  
of California; **SUSANA ALCALA WOOD,** City )  
Attorney of the City of Modesto, in her individual )  
capacity; and **VICKI RICE,** Events Supervisor II, )  
Department of Parks, Recreation and )  
Neighborhoods of the City of Modesto, in her )  
individual capacity, )

**VERIFIED COMPLAINT**

**Jury Trial Requested**

29 **Defendants.** )  
30 )  
31 )  
32 )  
33 )  
34 )  
35 )  
36 )  
37 )  
38 )  
39 )  
40 )

\*Pro Hac Vice Application filed concurrently.

\*\*Designated Counsel for Service.

1 Comes now Plaintiff Kevin Borden, by and through counsel, and for his Verified Complaint  
2 against Defendants City of Modesto (“City”), Susana Alcalá Wood, and Vicki Rice, states as follows:

3 **INTRODUCTION**

4 1. This case arises from the efforts by the City, including its employees and agents, to  
5 exclude a group of Christians from a traditional public forum because of the content and viewpoint of  
6 their speech. To accomplish this, the City has been conspiring with employees of Brenden Theatres,  
7 Inc., allowing the theater to rent Tenth Street Plaza, a public plaza where Brenden and other  
8 businesses are located, virtually every Saturday evening since the fall of 2007. Not coincidentally,  
9 Plaintiff Kevin Borden has been using the Plaza to engage in religious expression every Saturday  
10 evening for the past three years. But the City rents the Plaza to Brenden or some other entity every  
11 Saturday evening, and has given them express permission to have Mr. Borden arrested if he is found  
12 within that area, even though it is still open to the public, Brenden does not exclude anyone else, and  
13 has no event taking place. Mr. Borden believes the City has also instructed its Police Department to  
14 arrest him and his companions if they engage in expressive activity in the Plaza when Brenden has  
15 rented it. These actions are clearly unconstitutional under settled precedent in this jurisdiction and are  
16 blatant violations of Mr. Borden’s constitutional rights.

17 **JURISDICTION AND VENUE**

18 2. This action raises federal questions under the United States Constitution, particularly the  
19 First and Fourteenth Amendments, and the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, 1986  
20 and 1988.

21 3. This Court has original jurisdiction over the federal claims by operation of 28 U.S.C. §§  
22 1331 and 1343.

23 4. This Court has authority to grant the requested declaratory relief under 28 U.S.C. §§  
24 2201 and 2202; the requested injunctive relief under 28 U.S.C. § 1343(3); the requested damages under  
25 28 U.S.C. § 1343(4); and attorneys’ fees under 42 U.S.C. § 1988(b).

26 5. Venue is proper in the United States District Court for the Eastern District of California  
27 under 28 U.S.C. § 1391, because the events giving rise to the claim occurred within the District, and  
28 because at least one Defendant resides in this District.

**PLAINTIFF**

6. Plaintiff Kevin Borden is, and was at all times relevant to this Complaint, a resident of Modesto, California.

7. Mr. Borden is a Christian and sincerely believes it is his religious duty to share his religious beliefs with others.

8. Mr. Borden bases this sincere belief on Mark 16:15, a verse from the Bible in which Jesus Christ commanded his disciples to “Go into all the world and preach the good news to all creation.” (NIV).

9. As a follower of Jesus, Mr. Borden believes he is required by God to share his religious beliefs with others.

10. Mr. Borden specifically believes he must share his religious beliefs within his community, as he is concerned about the moral and spiritual condition of his City and the people who live there.

11. In order to comply with his beliefs regarding his duty to share his religious beliefs with others, Mr. Borden regularly engages in open air preaching, distribution of gospel tracts, and one-on-one evangelization in public areas in Modesto, California.

12. Specifically, Mr. Borden desires to fulfill this duty by engaging in open air preaching, distribution of gospel tracts, and one-on-one evangelization in the Tenth Street Plaza in Modesto, California.

**DEFENDANTS**

13. Defendant City of Modesto is a municipal corporation and political subdivision of the State of California which may sue and be sued.

14. Defendant Susana Alcala Wood is the City Attorney of the City of Modesto.

15. As City Attorney, she is charged with preparing and approving ordinances, resolutions, contracts and other legal documents and prosecutes all violations of the Modesto Municipal Code.

16. As City Attorney, she is also charged with the responsibility of advising the City Council and all boards, commissions, officers and employees of the city regarding their official duties.

17. Upon information and belief, Defendant Wood is a policymaker for the City.

1 18. She is sued in her individual capacity.

2 19. Defendant Vicki Rice is Events Supervisor II for the Department of Parks, Recreation  
3 and Neighborhoods for the City of Modesto.

4 20. As Events Supervisor II, she is charged with the responsibility of administering City  
5 policy with respect to events and activities taking place within public facilities and on public property  
6 within the City of Modesto, including Tenth Street Plaza.

7 21. She is sued in her individual capacity.

8 **FACTUAL BACKGROUND**

9 22. Mr. Borden and his associates have been engaging in religious expression in the vicinity  
10 of Tenth Street Plaza every Saturday evening for approximately the past three years.

11 23. Mr. Borden and his associates typically wear shirts with scripture verses and/or religious  
12 messages on them, distribute tracts, hold signs with religious messages and scriptures on them, preach,  
13 and have one-on-one discussions with people about Christianity.

14 24. Tenth Street Plaza is a public plaza in downtown Modesto lined with shops, restaurants,  
15 a movie theater, and local government buildings.

16 25. It is a portion of Tenth Street that has been blocked to vehicular traffic and is reserved  
17 exclusively for pedestrians.

18 26. Beginning approximately in 2006, to facilitate their open air preaching, Mr. Borden  
19 obtained permits from the City of Modesto to conduct amplified speech in Tenth Street Plaza.

20 27. Permits for amplified speech in Tenth Street Plaza are governed by the City's policy  
21 labeled, "Tenth Street Plaza Usage Policy." A copy of the Usage Policy is attached to this Complaint  
22 as Exhibit 1.

23 28. According to City policy, a sound amplification permit is required to operate any "sound  
24 amplifying equipment," defined as "any machine or device used to amplify or project speech, music or  
25 any other sound or tone." (Ex. 1 at 2).

26 29. When Mr. Borden conducted amplified speech in the Plaza, he used a small, low  
27 wattage, battery powered personal address system.

28

1 30. One of the amplifiers he used is known as an “amp can.” It is approximately ten to  
2 twelve watts, and about twelve inches tall by five or six inches wide.

3 31. Another one of the amplifiers he used was 30 watts, approximately three feet by two  
4 feet, and had one six-inch speaker.

5 32. The volume controls on both amplifiers measured the volume level by numbers from  
6 one through ten.

7 33. Mr. Borden usually set the volume level at five or six, depending on how close people  
8 were. For example, if the Plaza was crowded and people were standing nearby, they would have the  
9 volume at a lower level.

10 34. Brenden Theatres, a large movie theater located on the Plaza, also had speakers and  
11 televisions located outside, and frequently turned the volume up fairly loud.

12 35. Brenden sets the volume of its outdoor televisions and speakers to an especially loud  
13 level if Mr. Borden and his associates are preaching in the Plaza.

14 36. There used to be a nightclub on the Plaza that has since closed, but they often played  
15 their music so loud that even if Mr. Borden’s amplifier volume was set at ten, they were completely  
16 drowned out by the loud music.

17 37. Amplification permits are issued by the Modesto Police Department.

18 38. At first, Mr. Borden received amplification permits from the Police Department with no  
19 problem.

20 39. After a period of consistently receiving permits with no problem, the Police Department  
21 gradually began placing more and more restrictions on Mr. Borden’s amplified speech.

22 40. Finally, on March 7, 2007, the Police Department refused to grant any further  
23 amplification permits to Mr. Borden unless he agreed to move to the very edge of the Plaza and point  
24 the speakers away from the Plaza area.

25 41. According to Leslie Rodriguez, who is in charge of Permits/Licensing at the Modesto  
26 Police Department, businesses located on the Plaza had complained about Mr. Borden’s expressive  
27 activity, which was the reason for the restriction.

28

1 42. Additionally, Ms. Rodriguez told Mr. Borden that they do not issue permits in the Plaza  
2 and that he would need to speak with the Parks and Recreation Department.

3 43. On the City of Modesto website, it states that amplification permits in the Plaza are  
4 administered by the Police Department. A copy of the website describing Tenth Street Plaza is  
5 attached to this Complaint as Exhibit 2.

6 44. Because moving to the very edge of the Plaza and pointing the speakers away from his  
7 audience left Mr. Borden with no purpose in using amplification, he stopped doing so.

8 45. On Saturday, March 31, 2007, Mr. Borden and a few friends were open-air preaching  
9 without amplification and passing out gospel tracts in the Plaza.

10 46. A few Modesto Police officers approached them and told them they had to leave the  
11 area.

12 47. A discussion about whether or not Mr. Borden and his friends were allowed to continue  
13 their expressive activities in the Plaza ensued between Mr. Borden, his companions, and the officers.

14 48. The officers repeatedly told Mr. Borden that his speech was offending people and that  
15 was a violation of the law.

16 49. The officers stated that the First Amendment did not protect their speech when it was  
17 offending someone.

18 50. The officers stated that they were called to the scene by Brenden, who said that their  
19 customers were offended by Mr. Borden's speech.

20 51. The officers told Mr. Borden that if he did not move and they were called back to the  
21 scene by the theater, he would be arrested.

22 52. The officers demanded that Mr. Borden move out of earshot of the theater because they  
23 were offending their customers.

24 53. An officer told Mr. Borden that if they continue, the businesses in the Plaza will  
25 complain at public meetings and the City will take away their right to be in the Plaza.

26 54. The Chief of Police, Roy Wasden, happened to be in the Plaza with his family that night  
27 and witnessed the discussion.

28

1 55. Chief Wasden joined the discussion and told Mr. Borden that people had a right to go to  
2 the theater and that he should try not to offend people.

3 56. Chief Wasden also claimed that they were violating the law by recording people in  
4 public without their permission.

5 57. When Mr. Borden reiterated that they were not physically stopping people from entering  
6 the theater, the Chief finally said that Mr. Borden and his associates were permitted to conduct their  
7 activities in the Plaza so long as they were not blocking egress into the theater.

8 58. Beginning in approximately November 2007, Brenden Theatres began obtaining events  
9 permits for the Plaza area nearly every Saturday night, and continues to do so consistently.

10 59. Brenden sets up police-style steel barricades in the Plaza to “mark” the area of the  
11 property they are renting for the night.

12 60. The barricades have gradually expanded to include more and more of the Plaza area, and  
13 presently include virtually all of it.

14 61. On several occasions, Mr. Borden and his associates have been threatened with arrest by  
15 Brenden security officers and Plaza security for “trespassing,” even on occasions when they have just  
16 been present in the area and not passing out literature or preaching.

17 62. For example, on Saturday, March 1, 2008 at 8:00pm, Joaquin Benitez, a frequent  
18 companion of Mr. Borden’s, was present in the Plaza, but was not engaging in any expressive activity.

19 63. Another individual approached Mr. Benitez and handed him a gospel tract.

20 64. The two began a private discussion, but they were approached by Brenden security  
21 guards.

22 65. The security guards told Mr. Benitez that Brenden “owned” the area, that he was not  
23 welcome, and that if he did not leave, they would arrest him.

24 66. Mr. Borden has been prohibited from exercising his First Amendment right to distribute  
25 literature in the Plaza even when Brenden did not have the Plaza rented.

26 67. On Friday, May 2, 2008, Mr. Borden and two of his children were distributing gospel  
27 tracts in the Plaza.

28

1 68. They were approached by Plaza security officers, who told them that they could not  
2 hand out any literature in the Plaza area.

3 69. The Plaza security officers wear uniforms similar to a police officer, but do not carry a  
4 gun.

5 70. Upon information and belief, the Plaza security officers are employed by the City.

6 71. Brenden has not been conducting any events in the Plaza necessitating its rental.

7 72. When Brenden reserves the Plaza, it does not exclude any members of the public from  
8 the area except for Mr. Borden and his associates.

9 73. Because of the expanding area of the Plaza that Brenden marks with the barricades when  
10 it rents the Plaza on Saturdays, Mr. Borden and his associates have now been relegated to the very  
11 edges of the Plaza area on the sidewalk adjacent to the street.

12 74. Mr. Borden has attempted for some time to get clarification from the City as to whether  
13 or not Brenden can lawfully exclude him from the permitted area and whether he himself may obtain a  
14 permit to use the area in order to facilitate his speech activities.

15 75. Initially, Defendant Vicki Rice told him that he cannot get a permit to use the area  
16 because a permit is not required for free speech activities in the Plaza.

17 76. However, Brenden gets a permit nearly every Saturday evening and excludes him from  
18 the area, threatening to arrest him.

19 77. The City has also granted permits or allowed the organizers of special events to rent the  
20 Plaza on Saturday nights. Recent examples include a PT Cruiser Car Show and a large scale concert,  
21 "X Fest," held on July 19, 2008.

22 78. On March 12, 2008, Mr. Borden contacted the City and asked whether it was lawful for  
23 Brenden to exclude him from the Plaza.

24 79. Defendant Rice told Mr. Borden that the City had met with Brenden Theatres and its  
25 attorneys to make sure what they were doing was legal.

26 80. Mr. Borden told Defendant Rice that he would be contacting an attorney to verify  
27 whether his constitutional rights were being violated.

28



1 81. Mr. Borden contacted Leslie Rodriguez on March 12, 2008 to obtain a permit for  
2 amplification, but she did not respond.

3 82. On April 9, 2008, Mr. Borden contacted the City again and asked what he would have to  
4 do to obtain a permit to facilitate his speech in the Plaza.

5 83. He was told by Stacy Bean, a city employee, that there is no application, but instead he  
6 would have to secure an acceptable date with the City, purchase insurance, pay a \$150 fee, and the City  
7 would “draft a license” for him.

8 84. Ms. Bean also told Mr. Borden that if he was engaging in free speech activity, he did not  
9 require a permit.

10 85. However, Ms. Bean told Mr. Borden that “freedom of speech” included political events  
11 or demonstrations and his activity was not considered “freedom of speech.”

12 86. Mr. Borden explained how he had been threatened with arrest by Brenden security  
13 guards and Ms. Bean told him she would have her supervisor, Defendant Vicki Rice, contact him.

14 87. Ms. Bean confirmed that Brenden rents the Plaza every Saturday evening and asked Mr.  
15 Borden to conduct his activities on another day.

16 88. On Saturday, April 12, 2008, Mr. Borden and a few companions were in the Plaza area.

17 89. They were wearing shirts with scriptures and/or religious messages on them, but were  
18 not engaging in any other expressive activity, and were merely standing in the Plaza talking to one  
19 another.

20 90. They were approached by Brenden security guards and told that the area was private  
21 property, they could not be there, and if they did not leave, they would be arrested.

22 91. On April 14, 2008, Mr. Borden contacted Defendant Rice again to clarify whether  
23 Brenden is permitted to exclude him from the Plaza.

24 92. Later on April 14, 2008, Defendant Rice told Mr. Borden in an e-mail that “[t]echnically  
25 when a usage policy has been issued for the Plaza, it becomes a ‘private event’ and the licensee controls  
26 the area. My recommendation would be as long as Brenden Theatres has rented the area, you should  
27 look for an alternative public place to preach.”  
28

1 93. Defendant Rice also told Mr. Borden that she would be seeking legal guidance to  
2 provide further clarification.

3 94. Later on April 14, 2008, Defendant Rice telephoned Mr. Borden and informed him that  
4 she had spoken with Defendant Susana Alcala Wood, the City Attorney, and that Defendant Wood said  
5 that Brenden has “every right” to exclude Mr. Borden and his associates from the Plaza and that if he  
6 goes there they can have him arrested.

7 95. According to Defendant Rice, Defendant Wood also stated that when the Plaza area is  
8 rented, it “becomes private property,” Brenden does not have to permit freedom of speech in the area,  
9 and can completely exclude Mr. Borden from the entire Plaza area if they so choose.

10 96. Defendant Rice told Mr. Borden he needed to find another place to preach and that she  
11 intended to call Brenden Theatres and inform them that they have the right to arrest Mr. Borden if he is  
12 found within the rented Plaza area.

13 97. On April 22, 2008, Mr. Borden sent a letter to Defendant Wood through counsel,  
14 explaining that granting a permit to Brenden every week and giving them permission to exclude Mr.  
15 Borden from a traditional public forum violated established case law in this jurisdiction. A copy of this  
16 letter is attached to this Complaint as Exhibit 3.

17 98. Plaintiff’s counsel never received a response to this letter.

18 99. Upon information and belief, Defendants have ordered the Modesto Police Department  
19 to arrest Mr. Borden and his companions if they continue their expressive activities in the Plaza on  
20 Saturday evenings.

21 100. Mr. Borden wishes to be able to engage in expressive activities within the Plaza area, as  
22 that area is frequented by more people than the sidewalks surrounding the area.

23 101. Additionally, it is important to Mr. Borden to maintain the same location for his  
24 expressive activities, as he has consistently been in that area every Saturday evening for three years,  
25 and often the people he talks with about his religious beliefs return to talk to him on other occasions  
26 because they know he will be in the same area.

27  
28

1 102. However, for fear of arrest, Mr. Borden only engages in expressive activities outside the  
2 barricades Brenden sets up in the Plaza area, or in the Plaza only when it appears Brenden has not  
3 rented it.

4 **STATEMENT OF LAW**

5 103. At all times relevant to this Complaint, each and all of the acts alleged herein were  
6 attributed to the Defendants who acted under color of a statute, regulation, custom, or usage of the State  
7 of California.

8 104. Defendants knew or should have known that denying Mr. Borden access to engage in  
9 religious expression in the Plaza is a clear violation of his constitutional rights.

10  
11 **CAUSES OF ACTION**

12 **I. FIRST CAUSE OF ACTION:**

13 **Violation of the Free Speech Clause of the First Amendment (42 U.S.C. § 1983)**

14 105. Plaintiff hereby incorporates and adopts by reference for all purposes each and every  
15 allegation in the preceding paragraphs of this Verified Complaint.

16 106. Tenth Street Plaza is a traditional public forum and has been opened for expressive use.

17 107. By preventing Mr. Borden from engaging in expressive activity in Tenth Street Plaza,  
18 Defendants violate Mr. Borden's right to freedom of speech, assembly, association and expression  
19 under the First Amendment.

20 108. Defendants' restrictions on speech are not content-neutral or narrowly tailored, and do  
21 not leave open ample alternative channels for communication.

22 109. Defendants' restrictions on speech grant unfettered discretion to administrators in  
23 applying the policies and/or practices, allowing them to apply the policies and/or practices in a  
24 discriminatory fashion based on the content or viewpoint of the speech.

25 110. Defendants apply their policies in a discriminatory fashion so as to inhibit the expression  
26 of less favored views or speakers.  
27  
28

1 111. Defendants' policy and practice of excluding Mr. Borden's religious speech from the  
2 Plaza is unconstitutionally overbroad.

3 112. Defendants' policies and/or practices, as well as their suppression of Mr. Borden's  
4 speech, have a chilling effect on Mr. Borden's speech, as well as that of others not before the Court.

5 113. Defendants, acting under color of state law, have applied discriminatory, unwritten, and  
6 vague policies to Mr. Borden in violation of his right to freedom of speech and expression under the  
7 First Amendment.

8 114. Defendants knew or should have known that denying Mr. Borden access to engage in  
9 religious expression in the Plaza is a clear violation of his constitutional rights.

10 115. Defendants conspired with one another and with employees of Brenden Theatres, Inc.,  
11 to deprive Mr. Borden of his First Amendment rights.

12 116. Because of Defendants' actions, Mr. Borden has suffered and continues to suffer  
13 irreparable injury which cannot be fully compensated by an award of money damages.

14 117. Plaintiff Borden has no adequate remedy at law to correct the continuing deprivations of  
15 his constitutional right to freedom of speech guaranteed by the First Amendment of the United States  
16 Constitution.

17 **II. SECOND CAUSE OF ACTION:**

18 **Violation of the Free Exercise Clause of the First Amendment (42 U.S.C. §1983)**

19  
20 118. Plaintiff hereby incorporates and adopts by reference for all purposes each and every  
21 allegation in the preceding paragraphs of this Verified Complaint.

22 119. Laws which burden the free exercise of religion must be neutral and generally applicable.

23 120. If they are not neutral and generally applicable, they must be justified by a compelling  
24 state interest.

25 121. Mr. Borden's expression in Tenth Street Plaza is motivated and required by his sincerely  
26 held religious beliefs.

27 122. Defendants effectively prohibited Mr. Borden from engaging in religious expression in  
28 Tenth Street Plaza, which is a traditional public forum.

1 123. Defendants' policy and practice of excluding Mr. Borden from Tenth Street Plaza  
2 because of his religious expression is not neutral and generally applicable.

3 124. Defendants' policy and practice of excluding Mr. Borden from Tenth Street Plaza  
4 substantially burdens Mr. Borden's free exercise of his religion without compelling or rational  
5 justification in violation of the First Amendment.

6 125. Defendants knew or should have known that denying Mr. Borden access to engage in  
7 religious expression in the Plaza is a clear violation of his constitutional rights.

8 126. Because of Defendants' actions, Mr. Borden has suffered and continues to suffer  
9 irreparable injury which cannot be fully compensated by an award of money damages.

10 127. Plaintiff Borden has no adequate remedy at law to correct the continuing deprivations of  
11 his constitutional right to free exercise of religion guaranteed by the First Amendment of the United  
12 States Constitution.

13 **III. THIRD CAUSE OF ACTION:**

14 **Violation of the Due Process Clause of the Fourteenth Amendment (42 U.S.C. § 1983)**

15 128. Plaintiff hereby incorporates and adopts by reference for all purposes each and every  
16 allegation in the preceding paragraphs of this Verified Complaint.

17 129. Defendants' policies, practices, and/or customs are impermissibly vague and ambiguous  
18 and give unfettered discretion to Defendants to suppress and/or discriminate against disfavored speech  
19 or expression in Tenth Street Plaza, violating Mr. Borden's right to due process of law under the  
20 Fourteenth Amendment.

21 130. Defendants, acting under color of state law, have applied policies, practices, and/or  
22 customs to Mr. Borden in ad hoc, discriminatory ways based on the content and viewpoint of his  
23 speech in violation of Mr. Borden's right of due process of law under the Fourteenth Amendment.

24 131. Defendants knew or should have known that applying an unwritten, ad hoc policy to Mr.  
25 Borden which prevented him from engaging in religious expression in the Plaza is a clear violation of  
26 his constitutional rights.  
27  
28

1 132. Because of Defendants' actions, Mr. Borden has suffered, and continues to suffer,  
2 irreparable injury which cannot be fully compensated by an award of money damages.

3 133. Mr. Borden has no adequate remedy at law to correct the continuing deprivations of his  
4 constitutional right to due process guaranteed by the Fourteenth Amendment of the United States  
5 Constitution.

6 **IV. FOURTH CAUSE OF ACTION:**

7 **Violation of the Equal Protection Clause of the Fourteenth Amendment (42 U.S.C. § 1983)**

8 134. Plaintiff hereby incorporates and adopts by reference for all purposes each and every  
9 allegation in the preceding paragraphs of this Verified Complaint.

10 135. The Equal Protection Clause of the Fourteenth Amendment to the United States  
11 Constitution requires that the government treat similarly situated persons equally.

12 136. Defendants allow similarly situated persons access to Tenth Street Plaza to engage in a  
13 wide variety of speech, expression and conduct.

14 137. Defendants' exclusion of Mr. Borden from Tenth Street Plaza because of his religious  
15 expression treats him differently than individuals wishing to engage in other types of speech or  
16 conduct.

17 138. Defendants have no rational or compelling reason that would justify an exclusion of Mr.  
18 Borden's expressive activities from Tenth Street Plaza.

19 139. Defendants knew or should have known that treating Mr. Borden differently than  
20 similarly situated individuals because of the content or viewpoint of his speech is a clear violation of  
21 his constitutional rights.

22 140. Because of Defendants' actions, Mr. Borden has suffered, and continues to suffer,  
23 irreparable injury which cannot be fully compensated by an award of money damages.

24 141. Mr. Borden has no adequate remedy at law to correct the continuing deprivations of his  
25 constitutional right to due process guaranteed by the Fourteenth Amendment of the United States  
26 Constitution.  
27  
28

**V. FIFTH CAUSE OF ACTION:**

**Conspiracy to Violate Civil Rights (42 U.S.C. §§1985, 1986)**

142. Plaintiff hereby incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs of this Verified Complaint.

143. Mr. Borden is a member of a protected class—he is an evangelical Christian.

144. Defendants, acting individually and under color of state law, conspired with one another and with employees of Brenden Theatres, Inc., for the purpose of depriving, directly and indirectly, Mr. Borden of equal protection of the laws and of equal privileges and immunities under the laws.

145. Specifically, Defendants conspired with employees of Brenden Theatres, Inc., to deprive Mr. Borden of his clearly established First and Fourteenth Amendment rights.

146. Upon information and belief, Defendants met with employees of Brenden Theatres, Inc., to plan a way in which they could work in concert to deprive Mr. Borden of his constitutional rights by allowing Brenden to rent Tenth Street Plaza, a traditional public forum, virtually every Saturday evening, and exclude Mr. Borden from the area on account of his expressive and religious activities.

147. Defendants continue to act in furtherance of the conspiracy by renting the Plaza to Brenden nearly every Saturday evening, facilitating their exclusion of Mr. Borden from the area in violation of his First and Fourteenth Amendment rights.

148. Upon information and belief, Defendants also continue to act in furtherance of the conspiracy by instructing its Police Department to arrest Mr. Borden and his associates if they engage in expressive activities in the Plaza when it is rented to Brenden.

149. Defendants' actions have resulted in the deprivation of Mr. Borden's right to free speech, free exercise, due process and equal protection of the laws under the First and Fourteenth Amendments.

150. Because of Defendants' actions, Plaintiff has suffered, and continues to suffer, irreparable injury which cannot be fully compensated by an award of money damages.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests the following relief:

- 1 a) A preliminary and permanent injunction against the Defendants, their agents, servants,  
2 employees, officials, or any other person acting in concert with them or on their behalf,  
3 invalidating and restraining them from enforcing customs, procedures, codes, practices and/or  
4 policies as they pertain to the conduct made the subject of this Verified Complaint, specifically,  
5 any exclusion of Mr. Borden or his expressive activities from Tenth Street Plaza, or that in any  
6 way discriminate against Plaintiff on the basis of the viewpoint or content of his expression;
- 7 b) A declaration stating that the conduct of Defendants and Defendants' policies and/or practices  
8 of restricting Mr. Borden's speech in Tenth Street Plaza are unconstitutional under the First and  
9 Fourteenth Amendments;
- 10 c) That this Court adjudge, decree, and declare the rights and other legal relations with the subject  
11 matter here in controversy, in order that such declaration shall have the force and effect of final  
12 judgment;
- 13 d) An award of nominal and/or compensatory damages to Plaintiff against the individual  
14 defendants in an amount deemed appropriate by this Court;
- 15 e) Plaintiff's reasonable costs and expenses of this action, including attorneys' fees, in accordance  
16 with 42 U.S.C. § 1988;
- 17 f) All other and further relief as this Court deems just and proper; and
- 18 g) That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's orders.
- 19

20 Dated this 23rd day of July, 2008.

Respectfully submitted,

21 /s/ Heather Gebelin Hacker

22 Heather Gebelin Hacker (CA Bar No. 249273)

23 ALLIANCE DEFENSE FUND

24 Attorney for Plaintiff


25  
26  
27  
28



**VERIFICATION OF COMPLAINT**

I, Kevin Borden, a citizen of the United States and resident of the State of California, hereby declare under penalty of perjury pursuant to 28 U.S.C. §1746 that I have read the foregoing Verified Complaint and the factual allegations therein, and the facts as alleged are true and correct.

Executed this 7 day of July, 2008, at Modesto, California.



\_\_\_\_\_  
Kevin Borden

# EXHIBIT 1

City of Modesto  
TENTH STREET PLAZA USAGE POLICY

**GENERAL INFORMATION**

Any person or group requesting to use the Tenth Street Plaza to conduct public gathering events, excluding First Amendment activities which are exempt from this policy, must first have obtained all proper permits and licenses. The City of Modesto Parks, Recreation and Neighborhoods Department ("Governing Authority") will assist the Licensee in determining permits required. Licensee shall not conduct, within or upon the premises, any other operations except those described in the license unless prior written consent of the Governing Authority has been given. Licensee, its officers, agents, and employees shall comply with all rules and regulations, laws, and ordinances adopted or established, from time to time, by any governmental agent or department thereof.

1. *AREA LOCATION*

The Tenth Street Plaza shall be the space occupied by Tenth Street between J and K, as well as the patio area between the south side of the 1020 Tenth Street building and the glass front of Tenth Street Place.

2. *HOURS OF OPERATION*

Monday through Friday	9 a.m. to 11 p.m.
Saturday, Sunday, holidays	7 a.m. to 11 p.m.

Load-in times to be determined based upon considerations of employee and consumer ingress/egress into buildings.

Amplified music will be allowed:

Monday through Friday	8 p.m. to 11 p.m.
Saturday, Sunday, holidays	Until 11 p.m.

Start times of amplified music on weekdays prior to 8 p.m. will be for special pre-approved events only (e.g., Brownbag lunch series). The start times of amplified music on weekends would be dependent on the type of the event. Extensions beyond 11 p.m. would require special approval by Council (e.g., Exclamation Fest).

3. *EXPIRATION OF LICENSE*

Licensee shall remove from the facilities all property, goods, and effects belonging to Licensee or caused by him to be brought upon the premises. If property is not removed within the time limits stated in the license, City shall have the right to dispose of, sell, store, or cause to be stored any property, for which Licensee shall pay a penalty fee, plus all storage and moving expenses incurred therefor, prior to release of the property from storage.

At the expiration of the time of use of the facilities set forth, Licensee shall quit the facilities and return all Licensee's equipment and facilities procured, which premises, equipment, and facilities shall be in as good condition and repair as before Licensee's use thereof except for ordinary wear and tear.

4. *EXAMPLES OF TYPES OF EVENTS ALLOWED*

Street faire, street festival, farmers market, trade show (limited), displays, musical events (non-amplified), and amplified music events.

5. *AMPLIFIED MUSIC EVENTS*

There will be a sound amplification permit required. Sound amplifying equipment as used here means any machine or device used to amplify or project speech, music, or any other sound or tone. Sound amplifying equipment includes public address systems, megaphones, bullhorns, phonographs, televisions, radios, cassettes, eight-track or reel-to-reel tape players, compact disc or laser players, and musical instruments.

The sound generated shall be controlled so that its volume level, duration, or character does not annoy, disturb, injure, or endanger the comfort of reasonable persons of ordinary sensibility within the City.

6. *FEES/PERMITS*

- a. The rental charge for the use of the space shall be \$150 per day for non-commercial uses. Rates for commercial uses shall be \$150 or 10% of gross sales.
- b. Nonprofit rate shall be \$100 per day. Proof of nonprofit status must be shown. Tenants of Tenth Street Plaza will also be charged \$100 per day rental.
- c. These rates may be adjusted periodically to reflect the budgeting goals of managing the Tenth Street Plaza.
- d. Other permits may be required, such as: liquor, business license, amplified sound, street closure, encroachment. There are additional costs for these permits.
- e. No event that is permitted by the First Amendment of the United States Constitution shall be charged a fee or be required to get a permit from the City.
- f. Any agency of the City of Modesto or County of Stanislaus will be able to use the space free of charge. Additional fees may apply.

7. *INSURANCE*

Indemnity and liability insurance as required by the Risk Manager for the City of Modesto. In most cases the limits of policy will be \$1,000,000.

City of Modesto, County of Stanislaus, JPA, Civic Partners of Modesto, Inc., Redevelopment Agency, and 1020 10<sup>th</sup> L.L.C. must be named as additional insured on the policy.

8. *SCHEDULING/COORDINATION*

The City of Modesto Parks, Recreation and Neighborhoods Department (Centre Plaza) shall be responsible for scheduling/coordinating the use of the Tenth Street Plaza.

9. *PAYMENT FOR DAMAGES*

Licensee agrees to pay costs of repair or replacement for any and all damages of whatever origin or nature to property of City of Modesto, County of Stanislaus, JPA, Redevelopment Agency, or any adjoining private property resulting from Lessee's exercise of its license, whether deliberate, accidental, or other causes not predicated on active negligence of City.

10. *EVENT INFORMATION*

Licensee shall provide to Events Supervisor, at least 10 days prior to the first day of scheduled event, a full and detailed outline of all event requirements.

11. *SECURITY*

Licensee shall engage and pay for adequate security personnel, to be appropriate for the intended facility use. Number of security personnel utilized to be determined by mutual agreement of Licensee and licensor and the City of Modesto Police Department.

Licensee shall be solely responsible for the orderly conduct of all persons using the premises by its invitation, either expressed or implied, during all times covered by this license. Governing Authority reserves the right to eject or cause to be ejected from the premises any person or persons objectionable due to unlawful conduct.

All private security must be bonded and licensed by the State of California.

12. *CLEANUP*

It is the responsibility of Licensees to clean, or cause to be cleaned, the Plaza and street area after the event is over and prior to the opening of business the next day. This cleanup may include the sidewalks and storefronts. There will be a refundable cleanup deposit of \$250.

13. *BOOKING*

- \* All scheduling and booking shall be done through the Centre Plaza.
- \* Dates at Tenth Street Plaza may be booked a maximum of 13 months prior to the requested date.
- \* Thirty (30) days in advance of the event, regularly scheduled events can be booked. Up to 4 dates can be booked for the month that begins the allowable period (e.g., someone calling on July 1 could book 4 events from August 1-31 of that same year). Two weeks prior to a requested event date, two additional dates can be booked by the same user, for a total of 6 in the month.
- \* At their sole discretion the Centre Plaza management will establish appropriate spacing for similar public events.
- \* The Centre Plaza management will hold tentative dates for Tenth Street Plaza that are less than 13 months out for a maximum of six weeks. If the prospective permittee does not call the Governing Authority and request a permit for the tentative hold within that six-week period, the hold will automatically be dropped at the end of the six-week period.
- \* Requests for the same event space on the same date are handled as follows:

The prospective permittee that has the date as a tentative will be notified. They will be required to make their deposit payment within three working days. If they fail to do so, their date will be released to the second party. The second party will then be required to make the deposit payment within three working days.

14. *PERMIT DEPOSIT*

No license is valid unless it is returned to the Centre Plaza management with a specified deposit by the date specified on the permit. A minimum of one-half of the fee will be required as a deposit.

In the case of cancellation of the event by the Lessee or a default of license terms by the Licensee causing the Governing Authority to void the license, the Governing Authority will retain the entire deposit as damages and bill the Licensee for any and all out-of-pocket expenses incurred as preparation for the canceled event.

Examples of causes to deny Tenth Street Plaza use

- a. Failure to fully pay the Centre Plaza management's settlement statements on or before the date specified on the permit, including all rental fees, services, and other charges.
- b. Failure to perform to the letter of the Centre Plaza management's license agreement on a past event.
- c. Damage to Tenth Street Plaza or another facility in excess of normal wear that was of an intentional or willful nature.
- d. Past situations were a prospective permittee condoned, encouraged, or engaged in activities that were deemed dangerous or harmful or potentially dangerous or harmful to event attendees.
- e. When the proposed activity is deemed to be unlawful according to City, State, or Federal law.
- f. Failure to control the sound level of amplified music.

15. *EXAMPLES OF EQUIPMENT THAT WILL HAVE TO BE PROVIDED BY THE LICENSEE*

Sound  
Staging  
Tables/chairs  
Garbage cans  
Portable restrooms

16. *CAPACITY*

Licensee shall not allow nor permit to allow more people into the Tenth Street Plaza than the determined capacity for the safe, free movement of people therein. Capacity will be determined in consultation with the Modesto City Fire Department and Police Department.

Dedicated paths of travel to businesses may be required.

17. *STORAGE*

There is not on-site storage at the Tenth Street Plaza. Licensee must make all arrangements for having equipment delivered to and removed from the site within the agreed upon timeframe of the facility rental.

18. *UTILITY CONNECTIONS*

There is limited 110 amp power located at the Tenth Street Plaza dedicated and available for the production of events. Any special power needs will have to be furnished by the Licensee. A \$10 fee will be charged per duplex.

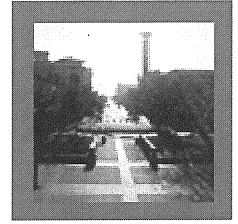
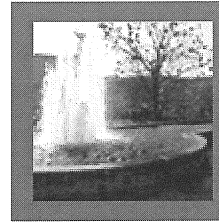
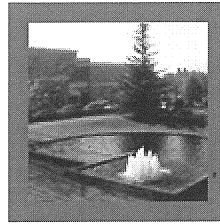
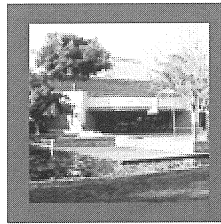
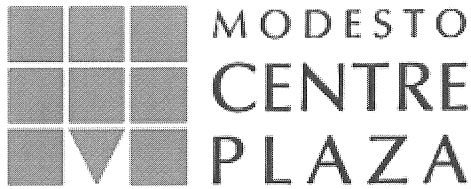
19. *BUSINESS LICENSE*

Private individuals and private companies utilizing the Tenth Street Plaza as a place to conduct business may be required to have a City of Modesto business license. One-day licenses can be obtained from the City of Modesto Finance Department at (209) 577-5389.

LICENSEE HAS READ AND UNDERSTANDS THE VENUE POLICIES AS SET FORTH ABOVE. LICENSEE AGREES TO OBSERVE AND ABIDE BY THE RULES AND REGULATIONS GOVERNING THE USAGE OF TENTH STREET PLAZA FOR PURPOSES AS STATED PER LICENSE.

# EXHIBIT 2





**Tailored services with care, flexibility, and professionalism**

<b>PEOPLE</b>	<b>PARKS</b>	<b>PROGRAMS</b>	<b>FACILITIES</b>
---------------	--------------	-----------------	-------------------

## Tenth Street Plaza - General Information

### Tenth Street Plaza - Downtown Modesto

General Information and Reservations

Stacey Bean, Events Supervisor I

Modesto Centre Plaza

1000 L Street, Modesto, CA 95354

Phone: (209) 577-6444 Fax: (209) 544-6729

[Email](#)

**Location:** Tenth Street Plaza is located in the heart of downtown Modesto on Tenth Street, between J & K Streets.

**Description:** The plaza encompasses one city block in front of the city and county building on Tenth Street, which is barricaded by bollards at either end as to allow for pedestrian traffic only.

**Hours Available:** Monday through Friday : 9:00 a.m. – 11:00 p.m. and Saturday, Sunday and holidays : 7:00 a.m. – 11:00 p.m.

**Permits:** Alcohol : Allowed / Permit required through Modesto Police Department. Daily ABC license allowed by non-profit organizations. Certain requirements and restrictions apply. Amplified Sound : Allowed / Permit required through Modesto Police Department.

**Functions:** Special events, concerts, receptions, social gatherings, fundraisers, new car displays, TV live broadcasts, press conferences, rallies, athletic demonstrations, and candlelight vigils.

**Parking:** One parking garage is adjacent to the plaza and a second parking garage is within walking distance to the plaza.

**Special Notes:** Certain types of events may require Fire Marshal and / or Police Department approval. Some events may also require private security.

### Tenth Street Plaza Reservations:

Stacey Bean, Events Supervisor I

Phone : (209) 577-6444 Fax : (209) 544-6729

[Email](#)

**General Information**

**Facility Map/Rooms**

**Professional Services**

**Rental Rates**

**Fees & Services**

**Contact/Directions**

**Tenth Street Plaza**

**John Thurman Field**

**Visit Modesto!**

**Back to Facilities Main Page**

1010 10th Street, Modesto, CA 95354 • P.O. Box 642, Modesto, CA 95353 • (209) 577-5200

Technical questions or website bugs may be addressed to [webmaster@modestogov.com](mailto:webmaster@modestogov.com)

[City of Modesto Online Privacy and Use Statement](#)

# EXHIBIT 3



Susana Alcala Wood  
Modesto City Attorney  
1010 Tenth Street  
Modesto, CA 95354  
*Via UPS Next Day Air Saver*

**Re: Unconstitutional Restriction of Free Speech in Public Forum**

Dear Ms. Wood,

My office has been contacted by Kevin Borden concerning the restriction of his speech by the City of Modesto in violation of clearly established federal law. By way of introduction, Alliance Defense Fund (ADF) is a non-profit legal and educational organization which exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of religious sentiments. Where necessary, we litigate to secure our clients' constitutional rights.

**RELEVANT FACTS**

My understanding of the situation is as follows. Kevin Borden and several others associated with him have engaged in preaching and distributing literature in the Tenth Street Plaza ("Plaza") every Saturday night for most of the past three years. Mr. Borden used to obtain amplification permits from the Modesto Police Department, and did this for approximately one year. However, the conditions on the permits gradually became more and more restrictive, and finally Mr. Borden was told by the Police Department that he was no longer able to obtain an amplification permit for the Plaza due to complaints by businesses located on the Plaza.

On one occasion when Mr. Borden and his associates were engaged in speech in the Plaza, some Modesto Police officers approached them and told them they had to leave the Plaza area. A discussion ensued, and the Chief of Police, who happened to be visiting the area with his family that night, approached and told the officers that Mr. Borden and his associates were permitted to conduct their activities in the Plaza so long as they were not blocking pedestrian traffic.

In November, 2007, Brenden Theatres, a movie theatre located on the Plaza, began obtaining events permits for the Plaza area nearly every Saturday night, and continues to do so consistently. Brenden sets up police-style steel barricades in the Plaza to "mark" the area of the property they are renting for the night. The barricades have gradually expanded to include more and more of the Plaza area, and presently include virtually all of it. On several occasions, Mr. Borden and his associates have been threatened with arrest by Brenden security officers for "trespassing," even on occasions when they have just been present in the area and not passing

out literature or preaching. Brenden has not been conducting any events in the Plaza necessitating its rental and does not exclude any members of the public from the area except for Mr. Borden and his associates. Because of the expanding area of the Plaza that the City has been allowing Brenden to rent on Saturdays, Mr. Borden and his associates have now been relegated to the very edges of the Plaza area near the sidewalk adjacent to the street.

Mr. Borden has attempted for some time to get clarification from the City as to whether or not Brenden can exclude him from the permitted area and whether he himself may obtain a permit to use the area in order to facilitate his speech activities. Initially, Vicki Rice told him that he cannot get a permit to use the area because a permit is not required for free speech activities in the Plaza; this is despite the fact that Mr. Borden cannot use the area because Brenden has been granted permits every week and excludes him from it. On April 9, 2008, Mr. Borden contacted the City again and asked what he would have to do to obtain a permit. He was told by Stacy Bean, a city employee, that there is no application, but instead he would have to secure an acceptable date with the City, purchase insurance, pay a \$150 fee, and the City would "draft a license" for him. Mr. Borden explained how he had been threatened with arrest by Brenden security guards and Ms. Bean told him she would have her supervisor, Vicki Rice, contact him.

On April 14, 2008, Ms. Rice told Mr. Borden in an e-mail that "[t]echnically when a usage policy has been issued for the Plaza, it becomes a 'private event' and the licensee controls the area. My recommendation would be as long as Brenden Theatres has rented the area, you should look for an alternative public place to preach." Ms. Rice also told Mr. Borden that she would be seeking legal guidance to provide further clarification.

Later on April 14, 2008, Ms. Rice telephoned Mr. Borden and informed him that she had spoken with you, and that you said that Brenden has "every right" to exclude Mr. Borden and his associates from the Plaza and that if he goes there they can have him arrested. According to Ms. Rice, you also stated that when the Plaza area is rented, it becomes private property and Brenden does not have to permit freedom of speech in the area and can completely exclude Mr. Borden from the entire Plaza area if they so choose. Ms. Rice told Mr. Borden he needed to find another place to preach and that she intended to call Brenden Theatres and inform them that they have the right to arrest Mr. Borden if he is found within the rented Plaza area.

### **RELEVANT LAW**

The City's exclusion of Mr. Borden from a traditional public forum by allowing a private entity to rent the forum and exclude speech it does not like is a blatant violation of the First Amendment. Contrary to your assertion, settled federal case law in this jurisdiction affirms that a public forum does not lose its designation as such when a municipality allows a private permittee to use it, and granting a permit to a private entity to use the property does not excuse the City from its obligations under the Constitution with respect to free expression.

It is beyond dispute that the religious expression that Mr. Borden engages in is protected by the First Amendment. The U.S. Supreme Court has said "[t]here is no doubt that as a general

matter peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (citations omitted). There is also no question that the Plaza is a traditional public forum. The Supreme Court has held for many years that property such as parks, streets and sidewalks are traditional public fora: "Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). The City's policies concerning the Plaza affirm that it is open to free speech activity and is generally open to the public.

The City's unjustified exclusion of Mr. Borden and his associates from a traditional public forum is a violation of the First Amendment, and the City may not simply allow a private entity to rent a public plaza for months on end in order to stifle speech the City or Plaza businesses disfavor.

### DEMAND

Mr. Borden's right to engage in expressive activities in the Plaza is supported by clearly established federal law. The violation of an individual's First Amendment rights, even for a moment, results in irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, it is imperative that Mr. Borden be accorded his First Amendment rights immediately. As such, please respond in writing by the close of business on **Tuesday, April 29, 2008** that the City will take corrective action to ensure Mr. Borden's rights are protected. If we do not receive such assurance from the City by that date, we will advise our client of his right to seek redress in federal court, including all relevant costs and attorney's fees. Should you have any questions regarding the foregoing, please do not hesitate to contact me.

Sincerely,



Heather Gebelin Hacker  
Litigation Staff Counsel  
Alliance Defense Fund

cc: Mr. Kevin Borden