

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

BRIAN JOHNSON,

Plaintiff,

vs.

MINNEAPOLIS PARK AND  
RECREATION BOARD,

Defendant.

0:12-cv-00806-MJD-JJG

**PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Plaintiff Brian Johnson (Johnson), pursuant to Fed. R. Civ. P. 65(a), respectfully moves this Court for a preliminary injunction enjoining Defendants Minneapolis Park and Recreation Board (MPRB) and their agents, servants, employees, attorneys, and all persons and entities in active concert or participation with them, directly or indirectly, from applying MPRB's ban on literature distribution, on its face and as-applied, so as to prevent Johnson and other third party speakers from engaging in literature distribution in open, accessible areas of Loring Park during the 2012 Twin Cities Pride Festival and future Pride Fests.

In the absence of a preliminary injunction order, Johnson will suffer irreparable injury, in particular, the loss of rights and freedoms guaranteed by the United States Constitution. In support of this Motion, Johnson relies on the following:

- A. Affidavit of Steven Jankowski, Exhibit "A";
- B. Map of Loring Park During Pride Fest, Exhibit "B";

- C. 2009 Emails between Brian Johnson and Executive Director of Pride Fest, Exhibit “C”;
- D. 2010 Letter from Brian Johnson’s Counsel to Minneapolis Park and Recreation Board, Exhibit “D”;
- E. 2010 Letter from Minneapolis Park and Recreation Board to Brian Johnson’s Counsel, Exhibit “E”;
- F. Affidavit of Ann Walther, submitted on behalf of the Minneapolis Park and Recreation Board in *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Bd.*, No 10-cv-02579 JRT/JJG (D. Minn. 2010), Exhibit “F”; [Doc. #58].
- G. MPRB Meeting Minutes Amending Permit Rules & Application Procedures, Exhibit “G”; [Doc. #101-1]
- H. Stipulation of Dismissal of *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Bd.*, No 10-cv-02579 JRT/JJG (D. Minn. 2010), Exhibit “H”;
- I. MPRB 2011 Rules for Exhibitor/Vendor Booth at Loring Park During Pride Fest, Exhibit “I”;
- J. Pictures of Activities Occurring in Loring Park During 2011 Pride Fest, Exhibit “J”;
- K. Pictures of Street Performer in Loring Park During 2011 Pride Fest, Exhibit “K”;

- L. Pictures of Wide-Open Spaces in Loring Park During 2011 Pride Fest, Exhibit “L”;
- M. Picture of Drop Zone in Loring Park During 2011 Pride Fest, Exhibit “M”;
- N. Picture of No Pride Zone in Loring Park During 2011 Pride Fest, Exhibit “N”;
- O. *Jankowski v. City of Duluth*, No. 11-3392, slip op (D. Minn. Dec. 20, 2011), Exhibit “O”;
- P. Twin Cities Pride Frequently Asked Questions for 2012 Pride Fest, Exhibit “P”;
- Q. Twin Cities Pride Application for 2012 Twin Cities Pride Festival, Exhibit “Q”;
- R. Verified Complaint of Brian Johnson; and
- S. Memorandum of Law in Support of this Motion filed simultaneously with this Motion.

**WHEREFORE, PREMISES CONSIDERED,** Plaintiff Brian Johnson respectfully requests that this Honorable Court grant his Motion for Preliminary Injunction.

Respectfully submitted,

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CASE NO. 0:12-cv-00806-MJD-JJG

**MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY  
INJUNCTION**

**INTRODUCTION**

Plaintiff Brian Johnson (Johnson) challenges the Minneapolis Park and Recreation Board (MPRB) rules that ban leafleting throughout Loring Park during the Twin Cities Pride Festival (Pride Fest). Because the rules arbitrarily ban leafleting in a traditional public forum, Johnson seeks a preliminary injunction that will allow him to distribute literature in Loring Park during the upcoming Pride Fest as well as other Pride Fests in the future.

**STATEMENT OF FACTS**

Johnson is a Christian who wants to share his beliefs via peaceful distribution of Bibles in Loring Park during Pride Fest. (Verified Complaint, ¶¶ 9-15; 88). Loring Park is a forty-two acre public park located in Minneapolis, Minnesota. (Compl., ¶ 16). This park serves as host to many public events, including Pride Fest. (Compl., ¶¶ 18-20).

Pride Fest is an annual event that promotes and celebrates the Gay, Lesbian Bisexual, Transgender (GLBT) community. (Compl., ¶ 20). To conduct this event, Twin Cities Pride obtains a non-exclusive use permit from MPRB and erects various booths, stages, tents, and other venues throughout Loring Park where people can listen to live music, buy and eat food, watch fireworks, and purchase merchandise. (Compl., ¶¶ 21-24; Map of Loring Park During Pride Fest, attached to Motion for Preliminary Injunction as Exhibit B). During the course of the festival, Loring Park remains open to the public, allowing both festival and non-festival traffic to freely enter into the festival area. (Compl., ¶ 22). *See* (Affidavit of Steve Jankowski, ¶¶ 4-10, attached to Motion for Preliminary Injunction as Exhibit A) (detailing the wide variety of expressive and non-expressive activities that occur throughout Loring Park during Pride Fest). Knowing that many people gather in Loring Park for Pride Fest, Johnson wants to go and express his religious message there. (Compl., ¶¶ 25-26, 88).

Johnson has shared his Christian beliefs during Pride Fest since 1995. (Compl., ¶ 25). For a ten-year span, from 1998 to 2008, Johnson rented a booth in Pride Fest and distributed Bibles. (Compl., ¶¶ 27-28). But that practice came to an abrupt end in 2009, when Twin Cities Pride officials began to question the propriety of Johnson's beliefs and expression. (Compl., ¶ 32). Though Johnson had a history of peaceful interaction at the event, had always been willing to comply with booth requirements, including adherence to a non-discrimination agreement, and had consistently refrained from mentioning his beliefs about homosexuality, Twin Cities Pride denied his application because of his

belief that the Bible specifies homosexual conduct as a sin. (Compl., ¶¶ 28-35) (2009 Emails between Johnson and Pride Fest Official, attached to Motion for Preliminary Injunction as Exhibit C).

Having no access to a booth, Johnson went to the 2009 Pride Fest with the intention of distributing Bibles as he walked through the festival grounds. (Compl., ¶ 36). Soon after his arrival, though, Minneapolis police officers arrested him for trespassing. (Compl., ¶¶ 39). The police officers considered Loring Park to be private property controlled by Twin Cities Pride during Pride Fest. (Compl., ¶¶ 39).

Hoping to return to the 2010 Pride Fest, Johnson, through counsel, sent a letter to MPRB dated March 2, 2010, setting forth Johnson's constitutional right to distribute literature in Loring Park during Pride Fest. (Compl., ¶¶ 40-41; Letter from Brian Johnson's Counsel to MPRB, attached to Motion for Preliminary Injunction as Exhibit D). MPRB agreed with the legal assessment and promised to let Johnson distribute Bibles at Pride Fest. (Compl., ¶¶ 42; Letter from MPRB to Brian Johnson's Counsel, attached to Motion for Preliminary Injunction as Exhibit E).

This decision by MPRB did not sit well with Twin Cities Pride officials who wanted to exclude Johnson and his Bibles from Loring Park. In an effort to keep Johnson out, Twin Cities Pride filed a lawsuit against MPRB on the eve of 2010 Pride Fest, seeking a temporary restraining order to exclude Johnson. (Compl., ¶¶ 45). Johnson intervened in the litigation. Following arguments on the TRO, the Court denied the request, acknowledging Johnson's constitutional right to distribute literature in Loring Park

during Pride Fest. (Compl., ¶¶ 46, 49). After the ruling, Johnson was allowed to distribute Bibles during the 2010 Pride Fest, and he did so without incident. (Compl., ¶¶ 52-53).

Unable to silence Johnson's message through a TRO, Twin Cities Pride altered its strategy, and sought to relegate Johnson's message to an unoccupied "zone" in Loring Park outside of the festival confines. (Compl., ¶¶ 55-58, 63).<sup>1</sup> Johnson objected to any such zone and refused to agree to a settlement contemplating the creation of a zone. (Compl., ¶¶ 51, 57-58). Determining that a zone would be unconstitutional, MPRB likewise refused to enter into a settlement creating a no-speech zone. (Compl., ¶ 61; Affidavit of Ann Walther, attached to Motion for Preliminary Injunction as Exhibit F).<sup>2</sup> But MPRB embraced a different view after the Court, acting *sua sponte*, dismissed Johnson as an intervenor from the case. (Compl., ¶ 68).

With Johnson out of the way, MPRB and Twin Cities settled the case and adopted the promulgation of a no-speech zone. (Compl., ¶¶ 70-73). According to this settlement and to the rules MPRB implemented pursuant to this settlement, MPRB would preclude literature distribution anywhere in Loring Park during a Pride Fest except for an isolated area outside of the festival confines known as the "no pride" zone. Also, the agreement provided for a drop zone within the permitted area where literature could be left:

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<sup>1</sup> In the Order denying the TRO, the Court suggested that a speech zone might be constitutional. (Compl., ¶¶ 48-51). The issue was not briefed by any party. (*Id.*).

<sup>2</sup> In conjunction with this stance, MPRB amended its permit process to clarify that Twin Cities Pride could only receive a non-exclusive use permit to conduct the Pride Festival. *See* (Compl., ¶¶ 62-67; MPRB Meeting Minutes, attached to Motion for Preliminary Injunction as Exhibit G). *See also* (Twin Cities Pride Application for 2012 Twin Cities Pride Festival, attached to Motion for Preliminary Injunction as Exhibit Q).



Sales, sampling, or distribution of any material within Loring Park outside of an authorized MPRB booth or an authorized Twin Cities Pride both is not permitted. Non-commercial materials may be left, but not distributed, from a material drop zone located in the permitted area of Loring Park.

(MPRB 2011 Rules for Exhibitor/Vendor Booth at Loring Park, attached to Motion for Preliminary Injunction as Exhibit I). *See also* (Compl., ¶¶ 72-77; Stipulation of Dismissal in *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Bd*, attached to Motion for Preliminary Injunction as Exhibit H).

Despite the fact that MPRB only provides a non-exclusive use permit for Loring Park, MPRB effectively prevents Johnson from walking and distributing Bibles in the public park during Pride Fest. (Compl., ¶¶ 80-82). These new rules work to ban Johnson's desired speech. In light of the new rules, and the resulting ban on literature distribution, Johnson did not attempt to hand out free Bibles in Loring Park during the 2011 Pride Fest, for fear of arrest. (Compl., ¶¶ 80-82).<sup>3</sup>

The MPRB rules requiring a ban on literature distribution are still in place and apply for the 2012 Pride Fest. (Compl., ¶¶ 87). Consequently, Johnson is estopped from handing out Bibles in Loring Park during the 2012 or future Pride Fests -- despite his ongoing, ardent desire to do so. (Compl., ¶¶ 87-88). If not for the rules and actions of MPRB, Johnson would attend the 2012 Pride Fest and subsequent Pride Fests and give away free Bibles, while walking through Loring Park. (Compl., ¶ 91).

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<sup>3</sup> Steve Jankowski attended the 2011 Pride Fest and took particular notice of the drop zone and the "no pride" zone. (Ex. A, ¶¶ 11-15). He observed that both areas were out of the way and essentially unused. (*Id.*). Both places are ineffective for literature distribution. (*Id.*).

## ARGUMENT

The Eighth Circuit recognizes four factors for evaluating a motion for preliminary injunction: (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and any injury that granting the injunction would inflict on the other party; (3) the probability of the movant succeeding on the merits; and (4) the public interest. *Phelps-Roper v. Nixon*, 545 F.3d 685, 689-90 (8th Cir. 2008). Each factor supports Johnson's requested injunction.<sup>4</sup>

### **I. JOHNSON WILL LIKELY SUCCEED ON THE MERITS OF HIS FIRST AMENDMENT CLAIM**

MPRB's rules and ban prevent Johnson from distributing Bibles in a public park during a time when it is free and open to the public. Because the restriction squarely impacts expression on public property, forum analysis is necessary to determine the validity of the restriction. *See Cornelius vs. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U. S. 788, 797 (1995) (using forum analysis to evaluate policies that restrict expression on public property). This process involves three steps: A) assess whether the expressive activity deserves protection, B) determine the nature of the forum, and C) apply the appropriate level of scrutiny to the restriction on speech. *Id.* Application of these steps reveals that MPRB's prohibition on literature distribution cannot pass constitutional muster.

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<sup>4</sup> Because success on the merits is the "determining factor" in a First Amendment case, Johnson addresses this factor first. *Nixon*, 545 F.3d at 690.

### **A. Johnson's Expression is Protected by First Amendment**

The first step in forum analysis is to ask whether the First Amendment protects a speaker's desired expression. Johnson wants to distribute Bibles, wear a message promoting free Bibles on a t-shirt, and when given the opportunity, engage in one-on-one conversations about his faith. (Compl., ¶¶ 10-15, 26, 88). Each activity constitutes protected speech. *See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (oral and written dissemination of religious viewpoint are protected speech); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943) (explaining that "distribution of religious literature" is protected under First Amendment); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001) ("Words printed on clothing qualify as pure speech and are protected under the First Amendment.").

### **B. Loring Park is a Traditional Public Forum**

The second step focuses on the character of the property at issue. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). There are three basic categories of property in forum analysis: traditional, designated, and nonpublic fora. *Bowman v. White*, 444 F.3d 967, 974-76 (8th Cir. 2006). A traditional public forum is an area "historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks..." *Id.* (citation omitted). A designated public forum is an area the government intentionally opens to expressive activity for a limited purpose, such as use by certain groups or use for discussion of certain subjects. *Id.* And a nonpublic forum is property that is neither a traditional nor designated public forum. *Id.*

Johnson wants to express his beliefs in a distinctly public place, that being, Loring Park (Compl., ¶¶ 25-26). Public parks, like this one, have long been considered prototypical examples of traditional public fora. *See Hague v. CIO*, 307 U.S. 496, 515 (1939) (noting that “[w]herever” the title of parks rest, they have “immemorially” been used for assembly, communicating thoughts between citizens, and discussing public questions). *Accord Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 813 n.3 (8th Cir. 2004).

Traditional public fora “are open for expressive activity regardless of the government's intent.” *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). Hence, government entities are not free to transform these areas into nonpublic fora on a whim. “Congress, no more than a suburban township, may not by its own *ipse dixit* destroy the ‘public forum’ status of streets and parks which have historically been public forums...” *United States Postal Service v. Council of Greenberg Civic Ass’n.*, 453 U. S. 114, 133 (1981). *See also United States v. Grace*, 461 U.S. 171, 175 (1983) (government may not “transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.”).

Therefore, MPRB cannot transform Loring Park into a temporary nonpublic forum by allowing a private party to hold a public festival in the park. The permit MPRB grants to Twin Cities Pride for use of Loring Park is non-exclusive. (Compl., ¶¶ 64, 87; Ex. G). Loring Park remains free and open to the public at all times during Pride Fest. And, the mere existence of a permitted festival does not affect the traditional public forum status

of the property. *Startzell v. City of Philadelphia*, 533 F.3d 183, 197 (3d Cir. 2008); *Gathright v. City of Portland*, 439 F.3d 573, 579 (9th Cir. 2006); *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005). *Accord Ascherl v. City of Issaquah*, No. C11-1298 MJP, 2011 WL 4404145, at \*3 (W.D. Wash. Sept 21, 2011); *Jankowski v. City of Duluth*, No. 11-3392, slip op. at 10-19 (D. Minn. Dec. 20, 2011).<sup>5</sup> Accordingly, the Court rightly found Loring Park to be a traditional public forum during Pride Fest. *See Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Bd.*, 721 F. Supp. 2d 866, 873-74 (D. Minn. 2010) (holding that “Loring Park is a public forum, notwithstanding MPRB's issuance of a permit to Twin Cities Pride...”).

### **C. MPRB's Ban on Literature Distribution is Invalid**

In the third step of forum analysis, the relevant level of scrutiny is applied to the challenged regulation. For this purpose, Loring Park's forum classification becomes significant because expression in a traditional public forum “receive[s] the greatest degree of protection.” *Families Achieving Independence and Respect v. Neb. Dep't of Soc. Servs.*, 111 F.3d 1408, 1418 (8th Cir. 1997). MPRB's regulation must overcome a high standard: the regulation is to be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication to be constitutional. *Bowman*, 444 F.3d at 975.

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<sup>5</sup> This unpublished opinion is attached to Johnson's motion as Exhibit O.

**1. MPRB's regulation is effectively content-based**

MPRB's policy is in essence content-based because it bans literature distribution in light of the content-based criteria employed by Twin Cities Pride to govern access to festival booths. There is no question that Twin Cities Pride has denied – and will continue to deny – Johnson booth access due to the content of his message and beliefs. (Compl., ¶¶ 32-35; Ex. C). *See also* (Frequently Asked Questions for 2012 Pride Fest, attached to Motion for Preliminary Injunction as Exhibit P) (prohibiting any group from accessing booth if they support legislation against same-sex marriage). MPRB's regulation allows for literature distribution at Twin Cities Pride booths, while banning literature distribution outside of these booths. (Compl., ¶ 87; Ex. I). As a result, MPRB's rules facilitate a content-based exception to its no-literature-distribution rule. Speakers with messages approved by Twin Cities Pride can distribute literature at various spots in Loring Park during Pride Fest, but speakers with unapproved messages cannot because of MPRB's ban. As the Sixth Circuit has deduced, when booth access turns on content, the government's policy is necessarily content-based. *See Bays v. City of Fairborn*, 668 F.3d 814, 822 n.3 (6th Cir. 2012) (noting that rule barring material “inappropriate for a family-oriented festival” from booth access was a content-based regulation). This circumstance alone marks MPRB's ban as unconstitutional.

**2. MPRB's regulation is not narrowly tailored to a legitimate government interest**

MPRB's regulation also fails the second component of this standard: it is not narrowly tailored to serve any significant government interest. To be narrowly tailored,

regulations cannot “burden substantially more speech than is necessary to further the government's legitimate interests.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).<sup>6</sup> A restriction is “narrowly tailored” only if it eliminates no more evil than it seeks to remedy. *Frisby*, 487 U.S. at 485.

MPRB’s ban is not narrowly tailored in two respects. One, the ban is over-inclusive in restricting an activity that causes no harm (literature distribution). Two, the ban is under-inclusive because it does not ban activities strikingly similar to – and yet more problematic than – literature distribution.

**a. ban on literature distribution is over-inclusive**

MPRB’s ban is over-inclusive, precluding Johnson’s undisruptive distribution of free Bibles throughout a 42-acre public park, except for one small zone positioned outside of Pride Fest.<sup>7</sup> This ban has already served to squelch Johnson’s expression during the 2011 Pride Fest, and promises to have the same effect during the 2012 Pride Fest and future Pride Fests. (Compl., ¶ 87).

The act of distributing Bibles does not cause any appreciable harm in the festival setting. There is nothing inherently troubling about literature distribution. Most leafletters –

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<sup>6</sup> Not being narrowly tailored, MPRB’s policy is also overbroad. *See, e.g., Krantz v. City of Fort Smith*, 160 F.3d 1214, 1222 (8th Cir. 1998) (concluding that ordinance was overbroad because it lacked narrow tailoring).

<sup>7</sup> The written text of this ban is contained in the stipulation of dismissal and settlement between MPRB and Twin Cities. (Ex. H). The text is also contained in MPRB’s Rules for 2011 Exhibitor/Vendor Booth at Loring Park During Pride Fest. *See* (Ex. I) (noting that “distribution of any material within Loring Park outside of an authorized MPRB booth or an authorized Twin Cities Pride booth is not permitted. Non-commercial materials may be left, but not distributed, from a material drop zone located in the permitted area of Loring Park.”).

-- like Johnson --- raise no practical concerns at all. And difficulties unrelated to literature distribution or the “occasional bad apple” cannot serve as basis for banning of all literature distribution. *Berger v. City of Seattle*, 569 F.3d 1029, 1045-46 (9th Cir. 2009).

Complete prohibitions on literature distribution in traditional public fora are uniformly deemed invalid. *See, e.g., Grace*, 461 U.S. at 176 (invalidating ban on literature distribution on sidewalks around Supreme Court building); *Kuba v. I-A Agr. Ass'n*, 387 F.3d 850, 862 (9th Cir. 2004) (“The present policy, which relegates communication activity to three small, fairly peripheral areas, does not ‘sufficiently match’ the stated interest of preventing congestion...”); *Lederman v. United States*, 291 F.3d 36, 44-46 (D.C. Cir. 2002) (invalidating ban on “demonstrations” including “speechmaking” and “leafleting” on certain sidewalks near capital building); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577 (9th Cir. 1993) (invalidating ban on literature distribution in certain parts of city park); *See also International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 690 (1992) (noting that literature distribution does not cause congestion problems because it “does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.”). An all-encompassing ban on a particular medium, like literature distribution, is invariably too broad to survive in a traditional public forum.<sup>8</sup>

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<sup>8</sup> MPRB’s ban is so broad that it would not be constitutional even in a non-public forum, where regulations need only be reasonable. *See, e.g., Lee*, 505 U.S. at 680-683 (invalidating ban on literature distribution in nonpublic forum airport terminal); *Norfolk v. Cobo Hall Conference and Exhibition Center*, 543 F.Supp.2d 701, 712 (E.D.Mich. 2008) (invalidating total ban on leafleting in nonpublic forum, city convention center);



No particulars attributed to the Pride Fest can substantiate the ban. As the D.C. Circuit has explained, the government cannot rely on any area's unique congestion concerns to bolster the banning of literature distribution if it simultaneously allows typical pedestrian activities in the same area:

If people entering and leaving the Capitol can avoid running headlong into tourists, joggers, dogs, and strollers-which the Government apparently concedes, as it has not closed the sidewalk to such activities-then we assume they are also capable of circumnavigating the occasional protester....Some banned activities, however, cannot possibly pose that risk [of traffic control and safety]. For example, a single leafleteer standing on the East Front sidewalk will no more likely block traffic or threaten security than will photographers, star-struck tourists, and landscape painters complete with easels, but the Board has made no effort to keep any of these latter individuals away from the Capitol. "Freedom of expression...would rest on a soft foundation indeed if government could distinguish" between demonstrators and pedestrians on "a wholesale and categorical basis," without providing evidence that demonstrators pose a greater risk to identified government interests than do pedestrians.

*Lederman*, 291 F.3d at 43, 45. In other words, because literature distribution does not trigger any more concerns than standard pedestrian traffic, the government cannot ban one activity while allowing the other. A ban on literature distribution during a crowded festival open to the public is inequitable as well as inappropriate. *See, e.g., Bays*, 668 F.3d at 822-25 (enjoining ban on literature distribution and other expressive activities in public park during Fairborn Sweet Corn Festival); *Saieg v. City of Dearborn*, 641 F.3d 727, 734 (6th Cir. 2011) (enjoining ban against literature distribution on public sidewalks during street festival); *Ascherl*, 2011 WL 4404145, at \*3-5 (enjoining ban on literature

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*Wickersham v. City of Columbia*, 371 F.Supp.2d 1061, 1088-92 (W.D.Mo. 2005) (invalidating ban on leafleting at air show, a nonpublic forum, as unreasonable).

distribution in public streets and park during Salmon Days Festival); *Twin Cities*, 721 F. Supp. 2d at 874 (refusing to ban literature distribution in Loring Park during Pride Fest because literature distribution caused no problems warranting ban).<sup>9</sup>

Nor is MPRB's policy and ban on literature distribution saved by the allowance of a drop box for materials or literature distribution at a "no pride" zone.<sup>10</sup> "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

The Sixth Circuit adopted this reasoning in the context of a public festival in *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011). In *Saieg*, Dearborn banned literature distribution on certain public sidewalks during a crowded festival open to the public. *Id.* at 730-32.<sup>11</sup> The restriction did not serve to ban literature distribution everywhere in the festival area. It freely allowed literature distribution at any of the booths in the festival or at the "information table" in the festival. *Id.* Despite these possible alternatives open to him, the *Saieg* plaintiff objected to the restriction because he wanted to distribute

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<sup>9</sup> MPRB cannot justify its ban as a means to prevent litter either. *See Schneider v. State*, 308 U.S. 147, 162-63 (1939) (litter insufficient justification for ban on leafleting); *Krantz*, 160 F.3d at 1219 (following *Schneider*); *Jews for Jesus, Inc. v. MBTA*, 984 F.2d 1319, 1324 (1st Cir. 1993) ("littering is the fault of the litterbug, not the leafletter").

<sup>10</sup> Though it is true that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired" *Heffron*, 452 U.S. at 647, Johnson is not claiming this right. Johnson is only seeking the right to be free from an unjustifiable, overly broad policy that restricts literature distribution in a public place for no legitimate reason.

<sup>11</sup> Dearborn attempted to defend its ban on literature distribution as necessary for "relieving 'pedestrian overcrowding,' enhancing 'traffic flow,' minimizing 'threats to public safety,' and limiting 'disorderliness at the Festival.'" *Saieg*, 641 F.3d at 736.

literature “while roaming the Festival.” *Id.* at 732. The Sixth Circuit vindicated this objection - and invalidated the restriction - because banning literature distribution served no purpose in areas that remained free and open to non-festival traffic. *Id.* at 736-37.

This same logic applies here and condemns MPRB’s policy. Just as the restriction in *Saieg* did not serve any significant interest, MPRB’s restriction does not serve any significant interest. *See also Bays*, 668 F.3d at 824 (invalidating ban on literature distribution and signs even though “Festival does offer booths for those wishing to distribute literature and display signs, so in that sense the solicitation policy is not a total ban on those activities. However, in *Saieg*, the Sixth Circuit invalidated a festival’s leafletting restriction due to lack of narrow tailoring, even though potential speakers could obtain a booth and information table in another area.”).<sup>12</sup>

The same result was reached in *Ascherl v. City of Issaquah*, No. C11–1298 MJP, 2011 WL 4404145 (W.D. Wash. Sept 21, 2011). In *Ascherl*, a city banned literature distribution on certain streets during a crowded street festival in order to “serve public safety concerns, minimize congestion, and facilitate the orderly flow of pedestrian traffic during the festival.” *Id.* at \*1-3. Issaquah did not ban literature distribution everywhere in

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<sup>12</sup> “Literature zones” and “anti-literature zones” within a traditional public forum have been found unconstitutional in other contexts. *See, e.g., Lederman*, 291 F.3d at 39-40 (invalidating ban on literature distribution in no-demonstration zone on sidewalk on Capitol grounds even though expression was allowed in nearby lawn area on Capitol grounds); *Kuba*, 387 F.3d at 859-62 (invalidating regulation that limited expression, except conversation, to particular zones in traditional public fora); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577 (9th Cir. 1993) (invalidating rule banning literature distribution in some crowded areas of a public park, even though rule allowed literature distribution in other areas of park).

the festival. Issaquah set up two “expression areas” for literature distribution and organized protests in the festival area. *Id.* at \*1-2.<sup>13</sup> Despite the existence of these “literature distribution zones,” the *Ascherl* Court invalidated the restriction because “[t]here is no evidence that leafleting by itself causes congestion or prohibits the orderly flow of pedestrian traffic, let alone creates a public safety concern at the Salmon Days Festival.” *Id.* at \*3. The MPRB restriction is no more valid than the one challenged in *Ascherl*. Like the city in *Ascherl*, MPRB cannot specify any inherent problem created by literature distribution.<sup>14</sup>

In any event, the options carved out by MPRB – the drop box and “no pride” zone - are wholly inadequate.<sup>15</sup> The so-called drop box does not allow for any meaningful distribution at all, undermining the very purpose of the communication. Because of the preclusion on lingering, there is no assurance that the materials will actually get in the hands of the intended recipients. This concern is magnified by Twin Cities Pride’s handling of the drop zone, placing it in an unmarked tent in an isolated spot where hardly

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<sup>13</sup> Besides allowing literature distribution and protests in these two expression areas, Issaquah explicitly allowed conversation and signage everywhere in the festival area and allowed literature distribution at booths in the festival area. See <http://www.codepublishing.com/wa/issaquah/> (Issaquah City Code §5.40).

<sup>14</sup> In *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Bd.*, the lead attorney for MPRB admitted that restricting literature distribution in Loring Park to “speech zones” was unconstitutional. (Ex. F). This concession confirms what the case law shows: MPRB’s restriction is unconstitutional.

<sup>15</sup> For this reason, MPRB’s regulation fails to leave open alternative avenues of communication. See *United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999) (forcing protestors into free speech zone 150 yards away from those entering visitor center failed to leave open alternative avenues); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (seventy-five yard security zone found over broad because it prevented demonstration from reaching intended audience).

anyone passes by. (Ex. A, ¶ 11) (Pictures of Drop Zone in Loring Park During 2011 Pride Fest, attached to Motion for Preliminary Injunction as Exhibit M).

The “no pride” zone is a similarly insufficient venue for Johnson’s expression, since it deprives Johnson of an audience. No one has any reason to go anywhere near the “no pride” zone given that no festival events take place in this area (Ex. A, ¶ 13) (Pictures of “No Pride” Zone in Loring Park during 2011 Pride Fest, attached to Motion for Preliminary Injunction as Exhibit N). *See Phelps-Roper v. Nixon*, 509 F.3d 480, 488 (8th Cir. 2007) (noting that when speakers wish to express their opinions to a particular group in a particular area, “allowing them to picket in the town square or even the next block does not” provide alternative avenues of communication). Being forced outside of the festival confines, Johnson is kept from reaching those walking through Pride Fest. (Ex. B; Compl., ¶¶ 81, 84; Ex. A, ¶¶ 11-13).<sup>16</sup>

Because the features and location of the drop box and the “no pride” zone make these areas useless for communication, these places cannot be considered viable substitutes for distributing literature while moving through Loring Park. Any supposed alternative must be viable for Johnson’s speech. *See, e.g., Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) (“The mere existence of an alternative method of communication cannot be the end of the analysis. We must also give adequate consideration to whether the alternatives are ample. Whether an alternative is ample should be considered from the speaker's point of view).

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<sup>16</sup> Because Loring Park is open on all sides during Pride Fest, people can enter and leave Loring Park without ever passing by the drop box or the “no pride” zone. (Ex. A, ¶ 15).

**b. ban on literature distribution is under-inclusive**

MPRB's policy is also unconstitutionally under-inclusive because it allows for activities similar in kind to literature distribution. "[T]he notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). *Accord Republican Party of Minnesota v. White*, 416 F.3d 738, 762 (8th Cir. 2005). Under this evaluation, "[e]xemptions from an otherwise legitimate regulation of a medium of speech...may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue*, 512 U.S. at 52-53.

Numerous exemptions appear in MPRB's literature distribution ban, undermining any purported need for it. MPRB permits a wide variety of expressive and non-expressive activities that generate more congestion and more safety concerns than literature distribution. These activities include people standing around conversing, talking on cell phones, standing around eating, waiting in line at booths, passing out literature from booths, walking around with dogs, sitting on chairs in the grass, playing volleyball, and walking through the event while pushing bikes and baby strollers. (Ex. A, ¶¶ 6-7; Pictures of Activities Occurring in Loring Park During 2011 Pride Fest, attached to Motion for Preliminary Injunction as Exhibit J). MPRB even allows street performers to "pose" and engage in performances in Loring Park during Pride Fest. (Ex. A, ¶ 8; Pictures of Street Performer in Loring Park During 2011 Pride Fest, attached to Motion for Preliminary Injunction as Exhibit K). All of these activities cause just as much (if not more)

congestion and disturbance as Johnson's peaceful literature distribution.<sup>17</sup> These activities tend to draw crowds, stop traffic, and/or create congestion more than a lone individual handing out Bibles.

By allowing activities that cause more congestion and safety problems than literature distribution, MPRB implicitly concedes the lack of a need to ban literature distribution. These exceptions demonstrate a sham --- a policy that serves no useful purpose other than to ban disagreeable messages. There is no legitimate need for singling out and censoring Johnson's literature distribution. *See, e.g., Saieg*, 641 F.3d at 737 (invalidating ban on literature distribution on sidewalks during festival because city allowed public to access sidewalks and set up tables thereby undermining any basis for preventing literature distribution in area); *Ascherl*, 2011 WL 4404145, at \*4 (enjoining ban on literature distribution on public streets and sidewalks during festival because "the City allows for much more congestive activities than leafleting during the Salmon Days Festival, which undermines the credibility of its professed interest in minimizing congestion and ensuring public safety.").

Accordingly, MPRB's ban is not narrowly tailored to serve any significant government interest.

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<sup>17</sup> Meanwhile, there are many wide, open spaces in Loring Park completely unused and compatible with literature distribution. (Pictures of Wide-Open Spaces in Loring Park During 2011 Pride Fest, attached to Motion for Preliminary Injunction as Exhibit L).

## **II. JOHNSON IS SUFFERING IRREPERABLE HARM**

Johnson desires to return to Pride Fest this year and in future years, to distribute Bibles in Loring Park, but the fear of punishment prevents him from doing so. (Compl., ¶ 88). Thus, the loss of Johnson's First Amendment right to speak is both actual and imminent; this loss constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Nixon*, 545 F.3d at 690.

## **III. INJUNCTION WILL CAUSE NO HARM TO MPRB**

Granting Johnson's request for an injunction will only require MPRB to comply with the mandates of the First Amendment to the U.S. Constitution. This result would cause no true harm to MPRB. "The balance of equities, too, generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." *Nixon*, 545 F.3d at 690.

## **IV. PUBLIC INTEREST FAVORS PRELIMINARY INJUNCTION**

"[T]he determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights." *Nixon*, 545 F.3d at 690. In this matter, the public is best served by returning free speech to Loring Park.



**CONCLUSION**

Johnson deserves the opportunity to pass out Bibles in a public park, and the First Amendment guarantees him this opportunity. Therefore, Johnson respectfully asks this Court to grant his motion for preliminary injunction.

Respectfully submitted,

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