No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIAN JOHNSON

Plaintiff-Appellant,

v.

MINNEAPOLIS PARK AND RECREATION BOARD,

Defendant-Appellee.

Appeal from the United States District Court
District of Minnesota

APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL (EMERGENCY)

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1. Appellant Brian Johnson (Johnson), in accordance with Fed. R. App. P. 8, hereby moves this Court for an injunction pending appeal. This motion is being filed in conjunction with Johnson's Notice of Appeal.

2. On June 11, 2012, the district court denied Johnson's motion for a preliminary injunction he sought against Minneapolis Park and Recreation Board (MPRB) relating to his desire to engage in constitutionally-protected expression in a traditional public forum during Twin Cities Pride Festival (Pride Fest). Because the next festival is scheduled to take place in less than two weeks, on June 23 and 24, 2012, it is impracticable for Johnson to first move in the district court to grant injunction pending appeal.

3. Attached to this motion is Johnson's Verified Complaint (as Exhibit 1), Motion for Preliminary Injunction and supporting exhibits (as Exhibit 2), Johnson's Memorandum in support of that motion (as Exhibit 3), MPRB's Response (as Exhibit 4), Johnson's Reply (as Exhibit 5), and the district court's Memorandum of Law & Order on the motion (as Exhibit 6).

4. As a tenet of his Christian faith, and as an essential means for communicating his desired message, Johnson wants to hand out free bibles in Loring Park, a forty-two acre public park in Minneapolis, Minnesota, to those attending Pride Fest. (Verified Complaint, ¶¶ 9-15, 16, 88). For a ten-year time span, Johnson was able to rent a booth in Pride Fest and distribute bibles. (Compl.

¶¶ 25, 27-28). But that changed in 2009. That year, Twin Cities Pride denied his application due to disagreement with his viewpoint. (Compl. ¶¶ 28-35). Without access to a booth, Johnson tried to walk through the park during the 2009 Pride Fest and hand out bibles to attendees, but Minneapolis police officers stopped him. (Compl. ¶¶ 36, 39).

5. Hoping to return the following year, for the 2010 Pride Fest, Johnson, through counsel, sent a letter to MPRB expounding on his constitutional right to speak in the park. (Compl. ¶¶ 40-41; Exhibit D to Motion for Preliminary Injunction). Concurring with the legal assessment, MPRB decided to let Johnson hand out bibles in the park. (Compl. ¶ 42; Exhibit E to Motion for Preliminary Injunction). To prevent this from happening, Twin Cities Pride filed a federal lawsuit against MPRB on the eve of the 2010 Pride Fest. (Compl. ¶ 45). Johnson was allowed to intervene in that case and assert his legal rights. And, in consideration of a request for Temporary Restraining Order, the court denied the request, acknowledging Johnson's constitutional right to hand out bibles in the public park. (Compl. ¶¶ 46, 49). Following this ruling, Johnson was free to hand out bibles during the 2010 Pride Fest and did so without incident. (Compl. ¶¶ 52-53).

6. After that event, the court, by *sua sponte* order, dismissed Johnson as an intervener. (Compl. ¶ 68). Shortly thereafter, Twin Cities Pride and MPRB entered into an agreement contemplating MPRB banning literature distribution

anywhere in Loring Park during Pride Fest except for an isolated area outside of festival boundaries known as the "no pride" zone. Pursuant to that agreement, MPRB promulgated a ban on literature distribution during Pride Fest. (Compl. ¶¶ 70-73). This ban is what Johnson challenges in the subject lawsuit and seeks to enjoin in his request for preliminary injunction.

7. The reasons for granting the injunction pending appeal are the same as for granting the injunction in the first place, and are enumerated in Johnson's pleadings attached to this Motion. In short, Johnson seeks to enjoin MPRB's ban on literature distribution during Pride Fests that keep him from handing out bibles in open, accessible parts of a public park, and violate his right to free speech. A fuller recitation of facts relied on for the injunction request are found in the statement of facts set out in Johnson's Memorandum in support of the motion, attached as Exhibit 3.

8. Ruling against Johnson below, the district court made a number of regrettable errors, subjecting the decision to reversal on appeal. But because this Court would not ordinarily be able to rule on the matter prior to the upcoming event, Johnson seeks this temporary relief. The scope of this Motion only relates to Johnson's ability to engage in his desired expression during the 2012 Pride Fest; this Court need not yet rule on facial relief or any other relief beyond the 2012 event as contemplated in the appeal as a whole.

9. Due to the urgency of the Motion, and for the sake of brevity, Johnson relies on and directs this Court's attention to the arguments found in the pleadings attached. Johnson only adds arguments herein pertaining to the some of the more egregious errors made by the court below.

10. The district court determines that MPRB's ban on literature distribution is content-neutral. (Exhibit 6, pp. 20-24). Aside from ignoring the context of the ban, this deduction also fails to account for the wording and import of it: "Sales, sampling, or distribution of any material within Loring Park outside of an authorized MPRB booth or an authorized Twin Cities [booth] is not permitted." It is undisputed that speech "authorized" by Twin Cities turns entirely on content. MPRB bans - under the force of law - content that Twin Cities finds objectionable (outside of booth), while permitting content that Twin Cities finds appropriate (inside a booth). Whether this ban is unconstitutional is a separate (albeit related) question, but there can be little doubt that this ban orchestrates a restriction on content, marking it content-based. The district court relies on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) in concluding otherwise, but this reliance is misplaced. *Hurley* concerned a private party's action in controlling their own message (a parade), not the action of a governmental entity in facilitating a content-based heckler's veto.

11. The district court's error regarding the content-based nature of the ban is significant – because it dictates the standard of scrutiny – but this issue is not controlling. Under intermediate scrutiny, the ban is still clearly unconstitutional. The district court also erred in its analysis of this scrutiny. MPRB's ban is not narrowly tailored to a significant governmental interest.

12. The issue squarely before the district court as well as this Court was/is whether a ban on literature distribution in a traditional public forum can possibly be justified. Every court to ever consider the issue – that is, until the court below rendered its decision – has held such bans unconstitutional. *See, e.g., United States v. Grace*, 461 U.S. 171, 176 (1983); *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 862 (9th Cir. 2004); *Lederman v. United States*, 291 F.3d 36, 44-46 (D.C. Cir. 2002); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577 (9th Cir. 1993).

13. The only reason proffered by MPRB for distinguishing Pride Fest from the litany of cases holding to the contrary is the suggestion that the Pride Fest event is unusually crowded. This contention does not hold up legally or factually. The prospect of congestion alone is not a sufficient basis for completely eliminating an important medium of communication. *See Bays v. City of Fairborn*, 668 F.3d 814, 822 (6th Cir. 2012); *Saieg v. City of Dearborn*, 641 F.3d 727, 737 (6th Cir. 2011); *Lederman*, 291 F.3d at 45; *Gerritsen*, 994 F.2d at 577. These decisions do not depend on a crowd-density threshold because literature

distribution cannot substantiate the concern. In *Saieg*, for instance, the festival there had a greater crowd density than Pride Fest. (*See* discussion in Exhibit 3, pp. 9-10).

14. The district court declined to interact with the precedent on this issue, except to vaguely categorize these decisions as blindly adhering to Justice Blackmun's concurring and dissenting opinion in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). As postured by the court below, all of these other courts were wrong - while it ruled correctly – because it properly understood and followed the dictates of the *Heffron* majority opinion. (Exhibit 6, 27-28). But the district court glosses over the distinguishing feature of *Heffron*, that being, the restriction upheld in that case took place in a limited public forum, not a traditional one. 452 U.S. at 655. The principle set out in *Heffron* does not apply to speech taking place in a street or park open to a festival event. *See Bays*, 668 F.3d at 823; *Saieg*, 641 F.3d at 737. Applying a ban on literature distribution in a traditional public forum is grossly over-inclusive in scope.

15. MPRB's ban on literature distribution is also under-inclusive. While prohibiting literature distribution, MPRB simultaneously allows for numerous activities that create just as much or more congestion than literature distribution, such as walking dogs, standing and talking on cell phones, pushing bikes and baby strollers, playing volleyball, and street performance (mime). (Compl., ¶¶ 22, 85).

The district court tries to downplay these similarly impactful activities by labeling them as commonplace (except for street performance which the court opines is not enough to demonstrate under-inclusiveness) (Exhibit 6, pp. 30-35). Yet, it is the regularity of these sorts of activities that undermine the restriction at hand. *See Bays,* 668 F.3d at 822-25; *Saieg*, 641 F.3d at 734; *Lederman,* 291 F.3d at 43, 45. Precisely because MPRB can expect these activities to take place during the event, the purported concern for congestion rings hollow. MPRB does not adequately address congestion with the restriction, but focuses on protected speech instead.

16. For the foregoing reasons, Johnson respectfully requests this Court grant an injunction pending the appeal, so that Johnson may be free to hand out bibles during the upcoming 2012 Pride Fest.

Respectfully submitted this 12th day of June, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion has been produced using proportionately spaced 14-point New Times Roman typeface. According to the "word count" feature in the Microsoft Word 2007 software, this motion contains 1,698 words.

/s/ Nathan W. Kellum

CERTIFICATE OF SERVICE

I certify that on June 12, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address or record.

/s/ Nathan W. Kellum