April 14, 2008

Dear Assistant City Manager:

You have essentially three questions related to the Fall Festival:

1. Can the city prohibit fund-raising activities at the Festival?

The answer is probably no because the solicitation of funds is a First Amendment-protected activity, but the city can probably adopt content-neutral time, place and manner restrictions on such fund-raising, under the conditions outlined in the Analysis of Question 1.

2. Can the city prohibit the sale of merchandise at the arts and crafts venue of the Festival that do not qualify as "arts and crafts"?

The answer is that it would be extremely difficult to define what is, and what is not, arts and crafts. As I will point out below, I see no policies in the city's material on the Festival that contains any definition of what constitutes arts and crafts. The absence of such policies could lead to problems of discrimination in the issuance of permits for merchandise sales at the Festival. Even assuming that such policies could be created, a surprisingly wide range of commercial activities, such as the sale of T-shirts and other merchandise, have First Amendment protection. However, the city can probably adopt content-neutral time, place and manner restrictions on the sale of such merchandise.

3. Can the city put restrictions on the kinds of [non-first Amendment protected] merchandise that property owners abutting the sidewalks and the streets of the Festival sites can sell that compete with the arts and crafts sold at the Festival?

The answer to this question is not clear to me, but I think that the answer in one context of the question is yes, and in another it is no. There is some Tennessee law that gives municipalities great discretion in prohibiting and regulating the sale of merchandise upon city sidewalks and streets. That law indicates that, with some limited exceptions that give abutting property owners special rights of access to their abutting property for certain reasons, those owners stand in the same position as other people with respect to their rights to conduct business on the sidewalks and street. For that reason, it can be argued that if the city adopts regulations that prohibit or restrict the sale of merchandise to arts and crafts merchandise on the sidewalks and streets in certain areas of the Festival site, those regulations would apply to abutting property owners. But the 2007 Fall Festival, Downtown Merchants Participant Program, Para. 4.04, says "Merchants may sell

merchandise on sidewalks but must be items of like nature as the current business." While the city may be able to restrict sales of merchandise to arts and crafts merchandise in the venue where arts and crafts are sold, I doubt the city can confine abutting property owners to the sale of merchandise generally found in their stores. I have looked in vain for cases on that question. But it does not appear a reasonable regulation that every person who wants to sell arts and crafts at the arts and craft venue can bring in such merchandise for that purpose (assuming they meet the permit and other requirements), but that abutting merchants are restricted to selling what their businesses typically sell.

4. Can the city prohibit advertising at the Festival venues by balloon "signs"?

As far as I can determine, that question has arisen only twice in the United, both times recently. One of those cases is a U.S. Sixth Circuit Court of Appeals case. That case is not favorable, The other case, a very recent one from New Jersey, is favorable. But the Sixth Circuit case applies in Tennessee. I have discussed the possibility in my **Analysis of Question 4** that the facts in the Sixth Circuit case and the Fall Festival case may make enough difference to produce a favorable result if the question reached the courts.

BACKGROUND OF QUESTIONS

As I understand the facts behind the questions, the Fall Festival is run by the City and its primary focus is on arts and crafts sales. The site of the Festival is on a portion of Street B, including the streets and sidewalks, and two city parking lots, and additional city park land on which a children's funland is located, and on other city park land that includes the Theater, at which are held concerts during the Festival. The admission to the Festival sites on Street B and the city's parking lots, and at the children's funland are free; tickets for the concerts at the Theater are required. The city closes Street B on the Fall Festival site.

The Festival operates on sponsorships although apparently it is generally open to other merchants and other participants. A local bank sponsors the arts and crafts portion of the Festival, and a second bank sponsors the Children's Adventure Land. But there has been a "creeping" sale of Festival spots to merchants selling merchandise not related to the Festival. The sales of merchandise during the Festival appear to come from a mixed assortment of vendors. Some of the arts and crafts vendors (and food vendors) are selected by a "jury." But other vendors compete with those vendors, including merchants who own businesses in the Fair site. These merchants sell anything they ordinarily sell, but some of them have been bringing in other kinds of merchandise for the Festival. An assumption has also developed on the part of many organizations that they are allowed to engage in fund-raising activities on the Festival venues.

While I am certainly not an expert on festivals and fairs, with respect to the creeping sale of Festival spots not related to the Festival, nothing in the title of "Fall Festival," or any of the printed material I have about that Festival, indicates that it is supposed to be primarily an arts and crafts festival. Indeed, the City's Web Page on the Fall Festival reflects three aspects of the Festival: (1) "3 Days of Awesome Concerts," above a block containing the symbol of a leaf guitar, beneath which is the general heading or subheading "Fall Festival"; (2) "3 Days of Arts

and Crafts, Free Admission," below a block containing what appears to be the symbol of a leaf pallet, and the heading or subheading "Arts & Crafts, Fall Festival, Presented by Bank A;" and (3) "3 Days, 16 Acres of Fun, Free!" above a block containing the symbols that appear to be leaf balloons, and the subheading "Children's Adventure Land, Fall Festival, Presented by Bank B."

Some of the cases dealing with fairs, particularly state fairs, indicate that they are pretty much open to merchants of every kind and description. Other literature I have read on festivals and fairs suggest that even the theme-based ones do not have a well-defined system for insuring that the fair or festival retains its theme, particularly with respect to the selection of merchants or other participants. But it seems to me that a definite, clear policy that about the Fall Festival that contains and explains the theme of the Festival, and contains regulations that are logically tied to its arts and crafts theme, would help the city withstand any legal challenges to those regulations, especially where First Amendment-protected activities, including the sale of "expressive merchandise," are concerned.

In connection with that observation, I am not quite sure who is on the "jury" that selects at least some of the merchants who sell merchandise at the Festival. Nothing I can find in the special events materials I have in my possession, or on the City Website, or in the Municipal Code, indicates how that process of selection works. In fact, I find no standards in any of those places governing the issuance of permits to persons who wish to sell merchandise or services of any kind in the Festival. I speculate that might be one of the reasons for the "creep" as well.

My answers to the four questions may seem like an endless parade of redundant cases. However, repetition of the tests the courts use to analyze First Amendment-protected speech (which includes the sale of considerable merchandise), and seeing them applied in different circumstances, is useful for understanding how the courts are going to examine any challenge to fund-raising and the sale of merchandise at the Fall Festival.

MUNICIPAL CODE PROVISIONS RELATED TO FESTIVAL

The only thing that I can find in the Municipal Code about the Fall Festival is in Title 20, Chapter 3, specifically, ' 20-301:

> **Enforcement of reasonable rules and regulations permitted in areas in the immediate vicinity of the Fall Festival**. The city manager may promulgate reasonable rules and regulations related to the public health, safety and welfare to be enforced where the public is invited or permitted for Fall Festival activities and related areas in the immediate vicinity of such activities. Such rules and regulations may be enforced by authorized city officials including police officers in both areas where a ticket is required and where a ticket for admission is not required for admission. If a person violates a rule or regulation adopted pursuant to this part, he or she may be required to leave the area of the Fall Festival area activities and areas immediately adjacent thereto for the remainder of the day

or the remainder of the Fall Festival, in the discretion of the official or officer require him/her to leave based on the violation.

As will become apparent in the analysis of the City's three questions, this provision is an invitation for problems. There is probably no doubt that the city manager can be delegated authority to adopt rules for the Festival area. But such a delegation cannot bestow upon him unlimited discretion, which this delegation seems close to doing. That is true even where First Amendment activities are not involved.

Title 9, Chapter 10 of the Municipal Code, entitled **Carnival and Fairs**, also includes regulations pertaining to carnivals and fairs. Section 9-1001(5) defines "Fair" as "An enterprise principally devoted to the exhibition of products of agriculture or industry in connection with the operation of amusement rides or devises of cohesion booths." Sections 9-1002 and 9-1003, respectively require a permit to operate a carnival or fair, and prohibits any person from conducting carnival or fair on city streets, rights of way or parks, or other city property, without permission from the city. Presumably, Title 20, Chapter 3, was not intended to apply to the Fall Fair. That conclusion is supported by Title 9, Chapter 3 of the Municipal Code, entitled **Peddlers, Solicitors, Etc**. That chapter regulates peddlers, solicitors, solicitors for charitable purposes, street barkers, and transient vendors. Section 9-203 of that chapter exempts from the application of that chapter certain persons and:

> (4) Craft shows, antique shows, guns shows, auto shows and similar and temporary shows and exhibits which are not open or operating as public facilities for such particular purpose for more than fourteen (14) days during any calendar year, except that the owner, manager, operator or promotion of each such facility shall be required to obtain a business license and shall pay prior to opening and operating such facility a fee of $100.00 to the City which shall be valid at the particular location for up to fourteen (14) consecutive days. This exemption does not apply to a carnival or fair as defined in this title. Instead a carnival or fair must expressly obtain a transient vendor license in order to lawfully operate a carnival or fair within the city.

I am confused over what this provision does relative to peddlers, solicitors, etc., at the Fall Festival, particularly its first sentence. Is that Festival a "craft show" within the meaning of that section? That section goes on to say that all the types of shows to which it applies are the types "which are not one or operating as public facilities for such particular purpose..." For that reason, I assume that section was not intended to apply to the Festival, but I am not sure.

ANALYSIS OF QUESTION 1

Threshold QuestionBWhat Kind of Forum are the Venues of the Site?

The threshold question in addressing your three questions is what kind of "for a" are the

Fall Festival venues?. The answer to that question has considerable significance for what the city can and cannot do with respect to the regulation of First Amendment expressive activities at those Festival venues. A major problem in this area is that First Amendment expressive activities include fund-raising and the sale of "expressive merchandise" that includes a range of merchandise that is probably much broader than most people would contemplate.

There are three venues that make up the site: (1) The Street B venue at which the arts and crafts are displayed and sold; (2) The Children's Adventure Land, which is on city park land; and (3) the Theater, at which the concerts are held, which is also located on city park land.

In Perry Education Assn v. Perry Local Educators' Assn, 460 U.S. 37 (1983), the U.S. Supreme Court identifies three kinds of fora:

> Places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which Ahave 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. [Citation omitted by me.] In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. [Citations omitted by me.] The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channel of communication. [Citations omitted by me.]
>
> A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. [Citations omitted by me.] Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. [Citation omitted.]
>
> [In Footnote 7 within this second category, the Court said: "A public forum may be created for a limited purpose such as use by certain groups." [Citations omitted by me.] Some courts also call

limited public fora designated public fora.

> [The third category is] [p]ublic property which is not by tradition or designation a forum for public communications is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." [Citation omitted by me.] In addition to time, place and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. [Citations omitted by me.] As we have stated on several occasions, "the State has power to preserve the property under its control for the use to which it is lawfully dedicated." [Citations omitted by me.] [At 46]

Generally, then, a city's streets, sidewalks and parks reflect a "traditional public forum," in which First Amendment expression generally receives the highest level of protection. The cases are not in agreement on whether streets and sidewalks on fair and festival sites are traditional public forums, or limited public forums. In Ayres v. City of Chicago, 966 F.Supp. 701 (N.D. Ill.199), it is said that "the Court does find that the park and public sidewalks which are the site of city's sponsored festivals do constitute traditional public forums for the purpose of First Amendment analysis." [At 712] But the U.S. Sixth Circuit Court of Appeals in a 2002 unpublished, but what that Court subsequently declared was a "well-reasoned," case converts the fair and festival sites that include streets and sidewalks into limited public fora. However, a 2005 reported Sixth Circuit case ignores the unpublished case, and declares that such streets are traditional public fora. For that reason, it appears that all three Fall Festival venues are traditional public fora.

Although some of the cases involving fairs and festivals that incorporate city streets and sidewalks within their borders spend a lot of time determining whether those streets are a traditional public forum or a limited public forum, the tests governing whether a regulation that restricts First Amendment activities in either fora will pass constitutional muster are generally the same. A regulation that fails the threshold content neutrality test in a traditional public forum, and apparently in a limited public forum, is presumptively invalid, and to overcome that presumption the regulation must survive a "*strict scrutiny*" review by the court; that is, a *compelling* state interest must support the regulation, and the regulation must be narrowly tailored to serve that compelling state interest. However, if the regulation is content neutral, it must survive only an "*Intermediate scrutiny*" review by the courts; that is, the regulation must only be a time place and manner restriction on the First Amendment expression, and be narrowly tailored to serve a *significant* (not compelling) government interest, and leave open ample channels of communication. In other words, if the regulation is content neutral, the test of whether it meets constitutional muster is the same in both traditional and limited (or designated) public fora.

The *Perry* Tests Applied

I have tried insofar is possible to use U.S. Supreme Court and Sixth Circuit Court of Appeals cases throughout this analysis, the latter because Tennessee is in the U.S. Sixth Circuit. However, I have used other cases where there are no Sixth Circuit cases or where the other cases consider issues that appear important with respect to the Fall Festival.

The question of whether the city can prohibit fund-raising activities on the Fair site implicates the First Amendment. In Village of Schaumburg v. Citizens For A Better Environment, 444 U.S.620 (1980), the U.S. Supreme Court said:

> Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests-communication of information, the dissemination and propagation of views and ideas, and the advocacy of causesBthat are within the protection of the First Amendment. *Soliciting financial support is undoubtedly subject to reasonable regulation* [Emphasis is mine.] but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money... The issue before us, then, is not whether charitable solicitations in residential neighborhoods are within the First Amendment. It is clear that they are. "[O]ur cases long have protected speech even though it is in the form of ... a solicitation to pay or contribute money, *New York Times Co. v. Sullivan*, [376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964)]," *Bates v. State Bar of Arizona*, 433 U.S., at 363, 97 S.Ct., at 2699. [At 633]

The U.S. Sixth Circuit says in Ater v. Armstrong, 961 F.2d 1224 (6th Cir. 1992), that "The solicitation of money and the distribution of literature are two different categories of speech, each of which enjoys protection under the First Amendment." [At 1228]

In the unpublished Sixth Circuit case of Spinola v. Village of Granville, 39 Fed.Appx. 978, 2002 WL 1491874 (C.A.6. Ohio), the Granville Kiwanis Club sponsored an annual Fourth of July Celebration in the city. "The celebration" said the Court, "is in the nature of a street fair," occurring in a two-block area of downtown Granville over several days. "The two blocks are closed to vehicular traffic." [At 2.]

With respect to the question of whether the use of the city streets as a street fair changed then from a traditional public forum to something else, the Court said, citing for support Hefferon v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), which, as the quote below indicates involved property inside the Minnesota State Fair:

> The designated speaking area within the festival perimeters, though comprised of public streets, is not serving in that function during the festival.
>
> [R]espondents make a number of analogies between the fairground and city streets which have "immemorially been held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." But it is clear that there are significant differences between a street and the fairgrounds. A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens but also a place where people may enjoy the open air or the company of friends in a relaxed environment. The Minnesota Fair, as described above, is a temporary event attracting great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions at the Fair. The flow of the crowd and demands of safety are more pressing in the context of the Fair. As such, any comparisons to public streets are necessarily inexact.
>
> *Hefferon v. Int'l Soc'y for Kirishna Consciousness*, 452 U.S. 60 [parallel citations omitted by me.] (citations omitted) Clearly, the festival area is more akin to a fair than a normal city street. But regardless of whether we would classify the Granville festival area as a traditional public forum or a limited public forum, as a content-neutral regulation, the Ordinance is examined under the same intermediate level of scrutiny. The government may enforce content neutral time, place and manner regulations if they are narrowly tailored to serve a significant government interest and leave open alternative channels of communications. [At 6]

Although Spingola is an unpublished case, the Sixth Circuit mentions it in Parks v. Finan , 385 F.3d 694 (6t Cir. 2004), declaring "This case is also different from our well-reasoned, albeit unpublished, decision in *Spingola v. Village of Granville*, 2002 WL 1491874 (6th Cir., July 11, 2002)."

In Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) (cited in Spingola), Rule 6.05 of the Minnesota Agricultural Society, the public corporation that operated the Minnesota State Fair, provided that "[s]ale or distribution of any merchandise, including printed or written material except under license issued [by] the Society and/or from a duly licensed location shall be a misdemeanor." [At 2562] The Krishna sect's doctrines required its members to distribute or sell their religious literature *and to solicit donations*.

The Court pointed out, with obvious approval, that:

> The state does not dispute that the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment, [Citations omitted by me.] Nor does it claim that this protection is lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith. *Our cases indicate as much*. [At 647] [Citations omitted by me.] [Emphasis is mine.]

But, continued the Court:

> It is also common ground, however, that the First Amendment does not guarantee the right to communicate ones's views at all times and places or in any manner that may be desired. [Citations omitted by me.] As the Minnesota Supreme Court recognized, the activities of ISKCON, like those of others protected by the First Amendment, are subject to reasonable time, place and manner restrictions. [Citations omitted by me.] AWe have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they open ample alternative channels of communication of the information. [At 648] [Citations omitted by me.]

The question, said the Court, was whether Rule 6.0 was a permissible time, place and manner restriction, and more specifically whether the Fair could require the members of ISKCON to confine their distribution, sales, and solicitation activities to a fixed location.

The answer was yes, held the Court. Rule 6.05 was content neutral; it applied to every exhibitor alike, and the method of allocating space for exhibitors was on a first-come, first served, basis.

The state interest advanced by the state by Rule 6.05 was the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair. "As a general matter," said the Court, "it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective." [Citations omitted by me.] On this point, the Court declared that the nature of the forum was relevant to the state interest involved:

> Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum

> involved.[Citations omitted by me.] [At 651]

Krishna argued that it could only successfully communicate and raise funds at the Fair "by intercepting fair patrons as they move about, and if success is achieved, stopping them momentarily or for longer periods as money is given or exchanged for literature." [At 653] But the Court responded that:

> This consequence would be multiplied many times over if Rule 6.05 could not be applied to confine such transactions by ISKCON and others to fixed locations. Indeed, the court below recognized that some disorder would invariably result from exempting the Krishnas from the Rule. Obviously, there would be a much larger threat to the State's interest in crowd control if other religious, nonreligious and noncommercial organizations could likewise move freely about the fairgrounds distributing and selling literature and soliciting funds at will. [At 653]

Rule 6.05 also met the narrowly tailored part of the test because it was the least restrictive means for the Fair to regulate flow of traffic. The Minnesota Supreme Court had declared that there were less restrictive means, such as a penalty for disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of the Krishnas. The problem with those means, said the Court, was that they did not take into account all the other organizations that would be allowed to distribute, sell, or solicit if the booth rule could not be enforced as to ISKCON. [At 654]

Rule 6.05 also met the alterative forms of expression test as well. The Krishnas could practice their religious activities anywhere outside the Fair, and did not even deny them access to the Fair itself. They were free to orally propagate their views to the Fair crowd; they could arrange for a booth to distribute and sell literature and solicit funds.

When Heffron was decided in 1981, the U.S. District Court for the Middle District of Tennessee had already held that it was not a violation for the Nashville-Davidson County Fair Board to restrict solicitations for contributions by the Krishnas to booths at the Tennessee State Fair, in Hynes v. Metropolitan Government of Nashville And Davidson County, 478 F.Supp. 9 (M.D. Tenn. 1979). The rule in this case provided that:

> No roving vendor or solicitor, acting from either a profit or nonprofit organization or on his own behalf, shall be permitted on the fairgrounds. All spoliations for either contributions or sale must be made from within the confines of a booth or display unless otherwise exempted by the regulations adopted by the Metropolitan Board of Fair Commissioners. [At 11]

This rule, the Court observed, was content neutral: it was nondiscriminatorily applied to

all exhibitors, and there was no indication that the fair officials had any discretion to decide what organization received both. But this case is interesting because that Fair Board's state interest in that regulation had nothing to do with traffic control, but was:

> to permit any exhibitor or solicitor the opportunity to exercise the privilege freely without interruption or infringement by others seeking to exercise the same privilege. If plaintiffs were permitted roving solicitation, then every exhibitor would be entitled to do the same. It is conceivable that confrontation could occur in which several or all of the ten other religious groups would vie for the ear and attention of the same fair patron. The ensuing babel would not only be chaotic and destructive of good order, but would also deny to each exhibitor the meaningful exercise of its First Amendment rights. [At 11-12.]

I am not sure whether the Fair Board or the Court itself advanced:

> An additional interest that dovetails the right of one exhibitor to solicit from and communicate with fair goers without any interference from other exhibitors is the right of the fair patrons to their privacy and freedom from confrontations with exhibitors. Although a fairgoer necessarily gives up some of his privacy by venturing forth into a public area, he does not thereby relinquish all of his right to be let alone. The First Amendment does not mandate that a fair patron endure unwanted solicitation and proselytism from religious believers. The fairgoer should be permitted some choice as to what booth he desires to approach and with which exhibitors he desires to communicate. [At 12]

The Minnesota State Fair made similar argument in Heffron, above but the U.S. Supreme Court decided to take those up on the ground that traffic control during the fair was a sufficiently compelling state interest.

Yet the Sixth Circuit Court of Appeals in Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 2005) (without mentioning Spingola), declares that streets and sidewalks in a festival site are traditional public fora. There the City of Columbus gave a non-exclusive permit to the Columbus Arts Council to have an arts festival:

> "which is held along the river front in downtown Columbus, Ohio, on Civic Center Drive...Barricades are placed at several intersections of Civic Center Drive and its perpendicular streets to prevent automobiles from traveling down Civic Center Drive. During the Arts Festival, Civic Center Drive is open to pedestrians and vendors who set alongside the road." [At 645].

The plaintiff, Parks, attended the Arts Festival wearing a sign bearing a religious message. He was threatened with arrest by an off-duty City of Columbus Police Officer the Arts Festival hired to serve as security, if he didn't leave the barricaded area.

Citing Perry Education Assn, above, and a multitude of other U.S. Supreme Court decisions declaring that streets and sidewalks are traditional public fora, and a line of recent Sixth Circuit cases declaring the same thing, the Court declared that the streets and sidewalks inside the Columbus Arts Council Festival area to be a traditional public forum. [The Sixth Circuit cases were: United Church of Christ v. Gateway Economic Development Corp. Of Greater Cleveland, Inc. 383 F.3d 449, 452 (6th Cir. 2004) (sidewalk surrounding large sports complex); Chabad of S. Oh. & Congregation Lubavitch v. City of Cincinnati, 373 F.3d 427, 434 (6th Cir. 2004) (Fountain Square, the city's main public square); Dean v. Byerly, 354 F.3d 540, 550 (6th Cir. 2004) (streets around residence of director of State Bar); United Food & Commercial Workers Local 1099 v .City of Sidney, 354 F.3d 738, 746 (6th Cir. 2004) (sidewalks around public polling places).

None of the four Sixth Circuit cases involved streets and sidewalks in festival or fair areas, but they stand as cases supporting the proposition that the streets inside the Columbus Arts Council festival were a traditional public forum. The Court observed that the district court had found it unnecessary to determine what kind of forum was at issue. The Court rejected that conclusion, declaring that it was necessary to determine whether the streets remained a traditional public forum notwithstanding the issuance of a non-exclusive block party permit to a private organization to determine what, if any constitutional violation had occurred. However, as the cases cited above suggest, that is true only with respect to the threshold test of whether the regulation at issue that restricts First Amendment exercises is content neutral. If it does not pass that test, it must endure the strict scrutiny test.

The Court determined that the area of the festival was a traditional public forum, declaring that:

> Our "forum analysis is not completed merely by identifying the government property at issue." [Citation omitted by me.] We must also look to "the access sought by the speaker." When speaker seeks general access to public property, the forum encompasses that property. Parks sought access to public property and was not seeking to be included in any collective message of the permit holder. The Arts Festival was not a private event and, in fact, the City Code indicates that the block party permit is obtained for the purpose of "*the community at large*. [The court's emphasis.] other than a parade or commercial activity....." The City cannot, however, claim that one's constitutionally protected rights disappear because a private party is hosting an event that remained free and open to the public. Here, Parks attempted to exercise his First Amendment free speech rights at an arts festival open to all that was held on the

> streets of downtown Columbus. Under these circumstances the streets remained a traditional public forum notwithstanding the special permit that was issued to the Arts Council. [At 651-52]

It goes without saying that the Court found that Parks' free speech rights were violated by the City of Columbus. However said the Court:

> This case presents us with a unique situation. We are not faced with a challenge to the ordinance in and of itself being an unconstitutional time, place and manner restriction on Parks's speech. Rather Parks argues that both the ordinance and permit scheme as applied in this situation are unconstitutional. He claims that the City is attempting to avoid liability by hiding behind the Arts Council, which the City asserts has the discretion to exclude whomever it wants. [At 654]

Under the circumstances, said the Court, it was difficult to conclude that Park's removal from the Festival area was based on something other than the content of his speech. For that reason, some compelling state interest must be found by the city to have removed him from the Festival area. But the city had not offered any interest, let alone a compelling one. No compelling state interest being found, the Court did not need to turn to the next inquiry: whether the regulation in question was narrowly tailored to satisfy that interest.

The U.S. Ninth Circuit Court of Appeals, reputedly the most liberal circuit in the United States, in Berger v. City of Seattle, 512 F.3d 582 (9th Cir. 2008), upheld as content neutral time, place and manner restrictions on street performers at the Seattle Center, a large outdoor entertainment center of 8 acres, that attracts 10 million visitors per year. Among those regulations were ones that required the street performers to obtain a permit, required badges to be worn during street performances, barred "active solicitation" by street performers, and restricted the street performers to 16 designated locations. The "passive solicitation" restriction allowed a container with a sign noting that donations were accepted.

All of these cases stand for the proposition that fund-raising that is a part of a First Amendment expressive exercise (which will apply to most fund-raising), must generally be allowed in the Fall Festival venues. But the city can adopt content neutral time, place and manner restrictions on the fund-raising that are narrowly tailored to serve state interests supporting the restrictions. Apparently, the restrictions can vary depending on what public use actually occurs in the particular venue. The regulation must also leave open ample alternative means of communication.

The state interests are generally not complicated, reflecting the police power, usually the regulation of traffic in the festival or fair site. If the regulation pertains to traffic in the festival or fair site, it is generally held narrowly tailored if the traffic problem it seeks to regulate is reduced; it does not have to solve the traffic problem or be the solution to the problem the court would

have picked.

ANALYSIS OF QUESTION 2

Sale of First Amendment-Protected Merchandise

It is said by Justice Brennan in the U.S. Supreme Court case of Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), that

> A state fair is truly a marketplace of ideas and a public forum for the communication of ideas and information. As one court has stated, a "fair is almost by definition a congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, esthetic, and intellectual." [Citations omitted by me.]

The same appears to be true of many, if not most, fairs and festivals held by local governments. But Heffron stands for the proposition that the government can adopt content neutral time, place and manner restrictions on the sale of merchandise and solicitations at fair sites (in that case requiring that such activities be conducted from licenced booths) whether, it seems, the fair site is in a traditional or a limited public forum. It does not address the question of whether and what merchandise can be restricted. However, a line of cases addresses that question with respect to merchandise that is protected by the First Amendment.

The City of Chicago's peddler's ordinance under which a person was arrested for selling T-shirts in a city park being used for a festival was held unconstitutional in Ayres v. City of Chicago, 966 F. Supp.701 (N.D. Ill. E.D.1997). The park, held the court, was a "traditional public forum," and the peddlers ordinance was not a reasonable time, place and manner restriction, and was not narrowly tailored since it burdened free speech more than was necessary to further the city's interest in preserving orderly pedestrian traffic and protecting approved vendors from unfair competition. The plaintiff was the founder and member of the Marijuana Political Action Committee (MPAC).

The city selects a concessionaire to provide souvenirs at the City-sponsored festival in Grant park. It was the Souvenirs Vendor Agreement that caused trouble with the sale of the offending T-shirts. The city's agreement was with Accent Chicago, the president of which testified that her company sold numerous items, including T-shirts, that 75% of Accent's sales were T-shirts, and that "She is concerned that MAPC T-shirts might compete with her official merchandise."

The Court was not impressed with her concern, declaring that:

> MPAC T-shirts do not offer any meaningful completion to Accent Chicago because MPAC T-shirts are likely to be purchased by a very tiny percentage of those who are interested in Souvenir T-shirts and will likely be purchases by only those who agree with the

> controversial message it conveys. The City has failed to prove financial harm exists to the City or to Accent Chicago by permitting MPAC T-shirts to be sold at the festivals. [At 709]

The reasons the First Amendment applied to Grant Park during the festival, reasoned the Court, was that “the park land and public sidewalks which are the site of the City: Sponsored festival do constitute traditional public fora for purposes of First Amendment analysis.” [At 712]

The next inquiry, said the Court Ais whether the Peddler’s ordinance is content-based or content-neutral...:

> [That determination] is significant because it determines the standard to be applied in deciding the constitutionality of the challenged regulation. In order for the City to enforce a content-based exclusion, it must show its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Perry, 460 U.S. at 45 [parallel citations omitted by me.] With respect to content-neutral ordinances, the state may regulate the time, place and manner of expression which is narrowly tailored to serve a significant government interest and leave open amply alternative channels of communication. [At 712]

The plaintiff argued that the peddler’s ordinance was not content neutral because it did not prohibit all commercial activity. The Court did not agree, finding the ordinance was content neutral because:

> It bars all peddling in certain areas of the city without regard to the type of peddling involved. The Peddler’s ordinance applies equally to all merchandise of any kind which is sought to be brought into a City-sponsored festival without regard to whether it contains a message or the content of the message. Cubs T-shirts, Sox T-shirts ad pro and anti Mayor Daley T-shirts are banned to the same extent as MPAC T-shirts if they are brought in for sale.... [At 712],

What then were the “state interests” the city was trying to promote with the peddler’s ordinance?

(1) The aesthetic appearance of Chicago’s central business district by avoiding the visual blight associated with hordes of peddlers attempting to hawk their goods on the public ways.

The Court determined that the expressive conduct at issue was “at a festival in a public park where the aesthetics are wild and colorful, where no vehicular traffic is permitted and where aesthetics appear to be of little concern” [At 713] The Court also observed that the defendant’s exhibits [presumably pictures] “make clear, commercialism reigns supreme in Grant Park during the festivals and aesthetic values are not anywhere to be found.” [At 716]

(2) Assuring the safe and convenient circulation of pedestrians on the public ways;

The Court declared that the plaintiff and other organizations were free to circulate in the parks and could not understand why completely barring their sales activities would promote traffic flow. The Court also pointed out that the city had made provisions for street performers to appear at city festivals which attract crowds that impede traffic, and the city had made provisions for local artists to have designated areas where they could sell their art without impeding the flow of pedestrian traffic, and had made provisions for vendors, Ferris wheels, water flumes and hundreds of porta-potties without impeding traffic. For that reason, the ordinance burdened speech more than was necessary to further the city's interest in traffic flow.

(3) Protecting local merchants or approved vendors from unfair competition.

The Court also found that barring the T-shirt sales was essential to promote this purpose. The city's concern that the MPAC T-shirts would be confused with officially licensed festival T-shirts did not justify a complete sales ban. The MAPC T-shirts were not in competition with an official Taste of Chicago T-Shirt "any more than a high school basketball game is in competition with the Chicago Bulls for the consumers' money; they appealed to different tastes." The City continued "the Court could designate a site and require plaintiff to make it clear that MPAC T-shirts are not officially sponsored merchandise."

The Court also pointed to Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1982), in which the U.S. Supreme Court gave commercial speech the same protection as non-commercial speech. AIn that case, said the court:

> the ordinance permitted onsite commercial advertisements, but not noncommercial ads. Similarly, at the City festivals, the City has promoted substantial commercial speech, with all of the sponsors and official souvenir stands, but seeks to prohibit noncommercial sales of merchandise. In language equally applicable to this case, the Court held: "Insofar as the City tolerates billboards at all, it cannot choose to limit their content to commercial messages; the City may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial message." 453 U.S. at 513 [parallel citations omitted by me.] This rationale is even stronger where a traditional public fora such as Grant Park is involved. [At 714]

To the argument over the question of whether the ordinance left open ample alternative forms of communication of the plaintiff's message, the Court declared that T-shirts have become a "media unto themselves, and that the plaintiff's T-shirts are a vital means by which plaintiff communicates MPAC's message..." [At 715]

Bery v. City of New York, 97 F.3d 689 (2nd Cir. 1996) declared that "unlike the crafts of

the jeweler, the potter and the silversmith," whose work "may at times have expressive content, paintings, phonographs, prints and sculpture... always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment." [AT 696]

In the unpublished case of Trebert v. City of New Orleans, 2005 WL 2273253 (E.D. La. Feb. 2, 2005), the city's municipal code proved that artists could create and sell only "original" art along the fence at Jackson Square. The term "Original art" was defined as "only those works produced and for sale by the artists which have been accomplished essentially by hand and precludes any mechanical or duplicative process in whole or in part." [At 2] Trebert took digital photographs, printed them, and colored them with pastels. [At 1] The city argued that Trevert's photographs were not entitled to First Amendment protection because they were not art. In a footnote the Court countered with numerous photographic displays that were clearly art, but declared that "The question is not whether plaintiff's work is art, but whether it is 'speech' within the protection of the First Amendment."[At 5] The answer was yes, declared the Court, which reasoned that:

> First Amendment protection Ais not limited to written or spoken words, but includes other [media] of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints and sculptures. [citations omitted by me.] Commercial sale of expression does not deprive the expression of First Amendment protection. [citation omitted.] ....The Courts have found that mechanically reproduced images are expression entitled to First Amendment protection. [Citations omitted by me.] [At 3, 5]

Among such mechanically reproduced images the court pointed to in the cited cases were serigraphic and lithograph prints made from an original painting; altered still photographs from a movie; parody baseball trading cards; "charcoal drawings of celebrities used to create lithographic and silkscreen masters, which in turn are used to produce multiple reproductions in the form, respectively, of lithographic prints and silkscreen images on T-shirts..." [At 5]

Both Trebert and the City agreed that the ordinance at issue was content neutral and that "[p]reserving the distinctive charm, character and *tout ensemble* of the [French] Quarter is a significant government interest." [At 4]. But the Court held that the ordinance was not narrowly tailored to serve that significant government interest because "the City has produced no evidence to support is speculative assertion that the challenged ordinance would result in its interest being achieved less effectively." [At 8]

A concessionaire first approved to sell "electronically-prepackaged, computer-generated astrological planet and star summaries" at the Canfield Fair, but who the Fair shut-down shortly after she began her sales, on the ground that a Ohio administrative regulation prohibited fortune telling, palmistry, phrenology and horoscope at all fair sued the Fair alleging that her First Amendment rights were violated. In Adeline v. Machining County Agricultural Society d.b.a. The Canfield Fair, 993 F.Supp. 627 (N.D. Ohio 1998), the Court agreed.

The Ohio rule at issue was not content neutral because it sought to ban speech based on its content; for that reason the strict scrutiny test applied to the any time, place, or manner restrictions on the speech. Apparently, the compelling state interest at issue was "that fortune telling, phrenology, horoscope and other practices" prohibited by the rule are "inherently fraudulent," what the Court called the "vice label." That label was not supported by any "factual record" or "factual statement." [At 9, 11]

But in Al-Amin v. City of New York, 979 F.Supp. 168 (E.D.N.Y. 1997), the Court drew the line on what kind of merchandise was entitled to First Amendment protections. The New York
Vendor's Law regulated the sale of non-food items. A general vendor had to obtain a vending license from the City, except for exclusively written material. However, there was a waiting list so long for the license that in reality the prospect of getting one was nonexistent. In addition, another regulation prohibited general vending at the Fulton Mall. The plaintiffs, African-American Muslims, "stationed themselves in the Fulton Mall area in downtown Brooklyn, where they 'propagated information concerning their religion, and solicited donations on behalf of their faith' in exchange for books, pamphlets, perfume oils, incense and bracelets." [At 169] They were arrested and written summonses several times. They claimed that their First Amendment free exercise of religion and free speech rights were violated.

The Court declared that claims that a regulation violated the free exercise of religion clause of the First Amendment were not analyzed from "compelling government interred" basis, reasoning that under Employment Div. v. Smith, 494 U.S. 872 (1990) "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." [At 171] But the Court in Footnote 4 says Smith cautions "that a neutral law of general applicability may run afoul of the First Amendment in a 'hybrid' case, one involving not only free exercise concerns, but other constitutional protection as well, such as freedom of speech." [Citations omitted by me.] [At 171]

Under the Free Exercise Clause of the First Amendment, said the Court, whether or not the perfume oils were important to the practice of Islam, the Vendor's Law's licensing requirement and the other regulation banning sales in the area in question "are unquestionably valid, neutral laws of general application." [At 171] Footnote 4 indicates that the plaintiffs did not challenge the application of the Vendor's Law to the bracelets. [At 171]

Under the First Amendment free speech claim, the Court decided it had to determine whether the sale of the oil was an "expressive activity," and toured the cases involving the question of whether sales of merchandise were protected under the First Amendment:

> The sale of goods, under certain circumstances may constitute expressive activity, triggering First Amendment Protection. See *Riley v. Nat'l Fed.n of the Blind*, 478 U.S.781 [parallel citations omitted by me] (Awe do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech:); *Murdock v. Pennsylvania*, 319

U.S. 105 (1943) [parallel citations omitted by me] (Jehova's (sic) Witness door-to-door selling activities were "merely incidental and collateral" to their main object of preaching, and therefore were protected by the First Amendment) (citation omittedBby the Court); *Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059, 1964(9t Cir. 1990) (sale of goods inextricably intertwined with speech because environmental groups "sell their merchandise in conjunction with other activities in order to disseminate their organizations' messages"), *cert denied*, 504 U.S. 914 [parallel citations omitted by me] In *Gaudiya*, the written messages advocating the groups' cause were affixed to the goods, and the selling occurred while the plaintiffs were "distributing their literature [and] engaging in persuasive speech" 952 F.2d at 1064. Selling message-bearing T-shirts by nonprofit groups has been held to constitute expressive activity. Friends of the *Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495, 497 & note 2 (D.C.Cir 1997); *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1012 (9th Cir.) (Relying on *Gaudiya*), cert denied, 519 U.S. 1009 (1996) [parallel citations omitted by me.] [At 172-73]

But the Muslims' offer of perfume oils and incense in exchange for donations was not an expressive activity that was "inextricably intertwined" with conveying a message about Islam, declared the Court:

> This case is distinguishable from *Gaudiya* and the T-shirt cases because the goods themselves do not bear a message, nor does their sale convey a particularized message that would likely be understood by the purchasers. While plaintiffs claim that they were simultaneously involved in disseminating written matter about Islam and propagating the message of Islam by engaging pedestrians in discussion, these perfectly permissible missionary activities are not "inextricably joined" the sale of oils and incense...[At 173]

The plaintiffs also argued that their ability to raise funds by selling those goods is what enabled them to continue their proselytizing work, to which the Court responded that (1) the charitable solicitation cases didn't apply to them because they had made no allegations that they were involved in fund-raising activities; the sale of their products were to support themselves, and (2) "the reason charitable solicitation is protected activity is Anot because the First Amendment contemplates the right to raise money, but because the act of solicitation contains a communicative element." *Friends of the Vietnam Veterans*, 116 F.3d at 497. The sale of oils and incense lacks that communicative element. [At 173].

The Court declared that because the Muslims' sales of merchandise never rose to the level of First Amendment-protected activity, it need not determine if the licensing requirement was a content neutral time, place and manner regulation.

In the Sixth Circuit, the unpublished case of Wilson v. Lexington-Fayette Urban County Government, 201 Fed. Appx. 317 2006 WL 2918817 (C.A.6 (Ky.)) the plaintiff pled guilty to violating the following ordinance:

> It shall be unlawful for any peddler to sell, or offer for sale, food or goods while in the Lexington Center area, at any time during the two (2) hours preceding a ticketed Rupp Arena event or during the one (1) hour following a Rupp Arena event. Goods shall include tickets to any event taking place in Rupp arena. [At 3]

The plaintiff scalped two tickets near Rupp arena within the prohibited time frame of the ordinance.

A different ordinance defined a peddler as "one who carries his merchandise with him while traversing the streets, sidewalks or alleys of Fayette County for the purpose of exhibiting and selling such merchandise." [At 3] The plaintiff made several arguments against the ordinance: He was not a "peddler;" the ordinance, on its face and as applied, violated his right of free speech, deprived him of his property without due process of law, violated his Fourth Amendment right against unlawful search and seizure, and resulted in the conversion of his property under state law. [At 3] I will address only his arguments that he was not a peddler and that the ordinance violated his free speech rights.

The plaintiff argued that the ordinance to which he pled guilty applied to the occupation of a peddler, not to a one-time or infrequent sale. The Court rejected that argument and held that the ordinance was clear enough to give him notice that he fit the definition of "peddler."

The Court treated the sale of the tickets as commercial speech, declaring that "Speech advancing commercial transactions falls within the ambit that is 'traditionally subject to government regulation." [At 7] [Citations omitted by me.] The Court treated "commercial speech" similar to other kinds of speech. "In commercial speech cases," said the Court,

> we must [first] determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we next determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest. [At 7] [Citations omitted by me]

Having decided that the plaintiff's speech was commercial speech, the Court declared that the state interest advanced by the ordinance was the regulation of traffic in public areas to ensure public safety. It was a time, place and manner regulation that was limited to the sidewalks and

parking lots adjacent to Rupp Arena, and to the time immediately before and immediately after an arena event. For those reasons, it was narrowly tailored to accomplish the state interest.

In One World One Family v. City and County of Honolulu, 76 F.3d 1009 (9th Cir. 1996), a City and County of Honolulu ordinance banned the sale of all "goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services ... upon the public streets, alley, sidewalks, malls, parks, beaches and other public places in Waikiki." The plaintiffs set up an elaborate T-shirt display and sales tables (pictures are contained in the case) on the busiest street in Waikiki, which in Footnote 2 of the case, the Court described as "Waikiki is a relatively small self-contained district within the City of Honolulu, comprising approximately 500 acres. Within it one can find, on any given day, the highest concentration of tourists in the City. It also has a large residential population." The T-shirts contained "philosophical and inspirational messages" such as "Protect and Preserve the Truth, the Beauty of our Native Cultures," "TAKE IT EASY MEDITATE HANG LOOSE HAWAII," and "WAIKIKI HAWAII HARINAM." [At 1011] However, as the other cases herein have indicated, "philosophical and inspirational" messages are not required on T-shirts or other merchandise; commercial speech is also protected.

Obviously finding the sale of T-shirts were First Amendment protected, the Court turned to the standard for governing time, place and manner restrictions, saying that such restrictions are valid if they (1) are content-neutral; (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels of communication.[At 1012]

The ordinance was content neutral because it was a flat ban applied without reference to content, even though the ordinance contained exceptions for newspapers, "duly authorized concessions in public places, and certain souvenir items in conjunction with parades." Those exceptions did allow not the city to discriminate against ideas that it disfavored.

The ordinance furthers three legitimate state interests:

(1) "[M]aintaining the aesthetic attractiveness of Wailiki,"

(2) "[P]romoting public safety and the orderly movement of pedestrians," and

(3) "[P]rotecting the local merchant economy."

It is no surprise, given that the territory in question was Waikiki, Hawaii, had an interest in preventing visual clutter, in the regulation of traffic ("Waikiki is the center of the state's tourism industry and receives as many as 60,000 tourists a day"). Those first two state interests were upheld. The Court also found that the protection of the argument that the protection of the local merchant economy was a valid state interest:

.

> One legitimate preoccupation of local government is to attract and preserve business. Cities rely on a prosperous stable merchant community for their tax base, as well as for the comfort and welfare of their citizens. Here, the district court found that the "tax-free and

> rent-free activities of the plaintiffs ... have had a significant affect [sic] on the economy of the abutting shop owners on Kalakaua and Kuhio Avenues whose taxes contribute to the welfare and economy of this state .....As amici remind us, plaintiffs can offer Aremarkably low prices" in part because they pay no rent and aren't subject to various municipal regulations ... [W]e must take seriously the concern [the district courts findings] that "[n]o ordinary merchant, forced to pay rent in Waikiki and comply with other applicable laws, possibly could compete with those prices for any significant period of time." [At 1013] [Citation of amicus brief omitted.]

The ordinance was narrowly tailored to serve those state interests because "they would be achieved less effectively absent the regulations." [At 1013] "Without the ordinance," the Court continued:

> sidewalk vendors (commercial and charitable alike) would be free to peddle their wares on Kalakaua and Kuhio Avenues, undermining the city's effort to provide a pleasant strolling and shopping area .... A proliferation of sidewalk vendors could also aggravate the congestion on already crowded sidewalks and siphon off sales from local merchants. Besides, the peddling ordinance addresses those problems "without ... significantly restricting a substantial quantity of speech that does not create the same evils." [At 1014] [Citation omitted by me.]

[Note: Contrast this case with Ayres v. City of Chicago, considered in the **Analysis if Question 2**, on the question of whether the ordinance was narrowly tailored on the issue of protecting the state interest with respect to the sale of T-shirts by unlicensed vendors who competed for T-shirt sales with the licensed vendor.]

The Court's conclusion that the ordinance leaves open ample alternative channels of commination is somewhat novel: The plaintiffs could hand out literature, proselytizing or soliciting donations, and hand out free T-shirts to passerbys, mingle with Waikiki's tourist throngs wearing T-shirts, thereby acting as human billboards, and sell T-shirts through local retail outlets or their own stores. [At 1014]

The Court also declared that the peddling ordinance wasn't substantially broader than necessary to achieve its interests. It precisely targeted the activity causing the problem and didn't sweep in any expressive activity that didn't contribute to those problems.

These cases stand for the proposition that merchandise for which a case can be made that it is protected by the First Amendment, which protection includes political and related speech and commercial speech, can generally be sold at festival and fair sites. Such sales are also subject to content neutral time, place and manner restrictions, where such restrictions are supported by a

significant state interest, and are narrowly tailored to serve that interest. State interests approved in these cases include: traffic control, aesthetics, and protection of local merchants from competition, although in at least one of the cases the court rejected the aesthetic interest, noting that aesthetics were in short supply at the fair or festival at issue. That is probably true in many fairs and festivals. Again, the time, place and manner regulations need to be content neutral, and to advance the state interests, although the regulations need not be the perfect solution to the state interest they seek to advance. The regulations also need to leave open ample alternative means of communication.

Non-First Amendment Protected Merchandise

There is an *American Law Reports* treatise found at 14 A.L.R 3d 897, entitled "Authorization, prohibition, or regulation by municipality on the sale of merchandise on streets or highways, or their use for such purpose." Surprisingly it does not appear very helpful on the question of whether a municipality can regulate the sale of non-First Amendment merchandise at festivals or fairs. Many of the cases contained in that treatise date long before such festivals and fairs became common in municipalities. Indeed, many stand for the proposition that the public streets cannot be closed for such purposes. That view seems obsolete today.

However, in Dooley v. City of Cleveland, 135 S.W.2d 649 (Tenn. 1949), an ordinance prohibited the use of any portion of its streets "for a market place or stand, or otherwise, by any person, persons, firm or corporation, for keeping for sale and selling any fruits, vegetables, ice cream, or other refreshments, or any merchandise or other property." That ordinance, said the Court, applied only to certain streets within what was designated as a congested area. The Tennessee Supreme Court upheld that ordinance, saying:

> A municipal corporation like the City of Cleveland, endowed with the usual powers, has very broad authority over its streets. It is quite generally held that a municipality may prohibit the sale on its streets of foodstuffs, meats, and other articles of merchandise. This in the interest of public health, to relieve congestion and promote safety. McQuillin on Municipal Corporations, '1065 and cases cited. By a zoning ordinance a municipality can exclude the conduct of business enterprises on the abutting lots in a particular section of the city. [Citation omitted by me.] The power to exclude the conduct of business on the streets themselves is clearer. It is to be remembered that no one is entitled to use the highways for gain as a matter of common right. [At 650] [Citations omitted by me]

As to the application of the ordinance only to certain streets, the Court said:

> Regulations such as that before us, applicable to a designated portion of a city only, are not discriminatory and invalid if the exclusion is reasonably required. [Citation omitted by me.] While the bill before

> us avers that the area affected by this ordinance is not congested, the answer specifically denies this statement and goes into some detail. No proof is taken to support the charge of the bill. Moreover, the finding of the municipal authorities that the area was congested would be entitled to great weight in this court. [At 651]

It is said in Blackburn v. Dillon, 225 S.W.2d 46 (Tenn. 1949), that a sidewalk is generally a part of the street adjoining street, and that "An owner of property abutting on a public street has a special interest therein only to the extent of his right of ingress and egress." [Citations omitted by me] And the municipality's control over a sidewalk thereon is absolute. [Citing Harbin v. Smith, 76 S.W.2d 107, 109 (1934). In Harbin, it was said that "[t]he defendant had only an easement of access over the sidewalk." *Patton v. Chattanooga*, 108 Tenn. 197, 65 S.W. 414. "Beyond that he had no power of control and no right of use not assured to all." [At 109.] It is likewise said in Rose v. Abeel Brothers, 4 Tenn. App. 431 (1927), that an abutting property owner had the right to obstruct the sidewalk in the conduct of his business, providing that the obstruction was necessary, reasonable and temporary.

It is also said in 7 McQuillin, Municipal Corporations, ' 24:376 (3rd ed. that:

> It is a general rule that a municipal corporation can regulate the soliciting of business on sidewalks. Under general power a municipal corporation may forbid the sale of produce or other merchandise on any sidewalk or the space in front of a building used as a sidewalk, in such manner as may inconvenience passerby. Although the municipality may not have acquired an easement or title to the soil in the area within which the prohibition is operative.

Thus, municipal control over its sidewalks, even today, is broad. But as the U.S. Sixth Circuit Court of Appeals declares in Tucker v. City of Fairfield, Ohio, 398 F.3d 457 (6th Cir. 2005), "Courts have generally refused to protect on first Amendments grounds that placement of objects in public property where the objects are permanent or not otherwise easily moved," but that:

> Unlike the more permanent structure analyzed in *Graff* and *Lubavitch*, the balloon in the instant case is temporary and easily moveable. The Union only used the balloon during is protests, which last just one to two hours, and the balloon has not been shown to cause any danger that could justify a restriction on the balloons use. As the district court pointed out, at least one federal court has adopted a similar approach in analyzing whether the use of "structures" on public property is constitutionally protected speech. See *One World One Family Now, Inc. v. Nevada*, 860 F.Supp. 1457, 1462-63 (D.Nev. 1994) (holding that the groups portable tables were afforded First Amendment protection because of their limited use in facilitating the sale of expressive t-shirts, while chairs, umbrellas,

> and boxes were not protected because they were not sufficiently related to the expressive message and constituted Apermanent-type structures). This given the existing case law on the subject, we hold that the district court did not abuse its discretion in finding that the use of the portable rat balloon on the public right-of-way is deserving of First Amendment protection. [At 462-63]

As the many cases in all four question should make clear, while a municipality may have broad power over its streets and sidewalks, including the general right to prohibit structures and other uses thereon, that power is not unlimited. Any regulation of sales by merchants abutting the pub sidewalks or streets must take that into account. It is also unquestionably the law that any regulations involving sidewalk sales by abutting merchants must be reasonable and must not be discriminatory.

The New York Vendor's Law Al-Amin v. City of New York, 979 F. Supp. 168 (E.D.N.Y. 1997) and another law together prohibited the vendors from vending entirely in certain areas of the city. It defined a "general vendor" as "[a] person who hawks, peddles, sells, leases or offers to sell or lease, at retail [non-foods] and services ... in a public space." Those laws, said the Court, "are unquestionably valid neutral laws of general applicability." [At 171]

In Capital Area Right to Life, Inc. V. Downtown Frankfort, Inc., 862 S.W.2d 298 (Ky. 1993), the Downtown Frankfort, Inc.(DFI), a non-profit organization the City of Frankfort established to promote downtown revitalization, adopted a policy on festivals under which "theme festivals, events and booths are meant to be for fun and entertainment [and] *DFI reserves the right to deny participation to any displayer/merchandiser deemed inappropriate to that theme and purpose*." [At 297] [Emphasis is mine] The question in that case was whether DFI could prohibit the participation of the Capital Area Right to Life Group at the Halloween Fall Festival, which was a family-oriented festival. In holding that the answer was yes, the Court pointed out that the regulation was administered in a content-neutral manner. DFI, declared the Court:

> was engaged in restricting those who could maintain a booth to entities consistent with the festival's theme and subject matter. Thus the St. Clair Mall [the site of the Halloween Festival] was a public area, but its use on this occasion is analogous to the use of the fairgrounds in the *Heffron* case.

All these cases at least imply that a government has the right to prohibit the sale of certain merchandise at festivals and fairs that is not protected by the First Amendment, although it may be that the prohibition must be based on a theme of the festival or fair with which the merchandise is inconsistent. Those cases also suggest that a government can prohibit peddling and similar activities in certain parts of the city. Although that case involved the question of whether DFI could keep out "controversial groups," the ordinance in question provided that DFI could also keep out any "merchandise deemed inappropriate to that theme and purpose." Arguably, the Court's ruling would have been the same had DFI rejected a merchandiser whose merchandise was inconsistent with the theme of the Halloween Festival, at least as to merchandise not protected by

the First Amendment. .

There can be a downside to thematic festivals and fairs. In People for the Ethical Treatment of Animals v. Gittens, 215 F.2d 120 (D.D.C.: 2002), an art show was supposed to showcase the "whimsical and imaginative side of the Nation's Capitol," to make "public art acceptable, increase tourism, and to have FUN." [At 121] The theme of the art show was a "citywide display of elephant and donkey 'theme icons.'" [At 121] The whimsical and fun side of the art show got lost when PETA demanded that an elephant icon featuring "an elephant with tears coming from its eyes, a shackle on its right leg and multi-colored blankets on its back" that contains the words ... "The CIRCUS is Coming, See SHACKLES-BULL HOOKS-LONELINESS All Under the Big Top." The D.C. Commission on Arts and Humanities rejected the elephant display on the ground that it was not art but a political billboard that was not consistent with the "goals, spirit and theme" of the art show. PETA begged to differ. PETA won on the ground that the Commission discriminated against "noncompliant entries," which involved the Court in a surreal dispute over whether previous noncompliant entries were, or were not, art. In connection with the Fall Festival, I am not sure how standards are set for what constitute arts and crafts, although that must have been done elsewhere.

ANALYSIS OF QUESTION 4

Tethered advertising balloon signs are a common sight in various places. Some contain messages, others are simply designed to draw attention to the area over which the tethered balloon flies. But as far as I can determine, only two cases have arisen in the United States over the display of such balloons, and those two cases involve Arat' balloons being used by unions in disputes with businesses. The rat, says those two cases is a common symbol of union disputes. However, those cases are pertinent to this question. Both cases involved, among other claims, a violation of the First Amendment prohibiting restrictions on free speech

One of those cases arose in the U.S. Sixth Circuit Court of Appeals. . In Tucker v. City of Fairfield, Ohio, 398 F.3d 457 (6th Cir. 2005), a labor union held signs and displayed an inflatable rat balloon approximately 12 feet high and eight feet in diameter. Section 905.03(c) of the city's municipal code provided that "[n]o person, firm or corporation shall construct or place or cause the construction or placement of any ... structure of improvement ... on any street, alley, public right-of way, easement or public grounds without the written permission of the Public Works Director." [At 460] At the time the offenses of displaying the balloon to which this case apples occurred, the ordinance defined "structure" as "anything constructed, the use of which requires permanent location on the ground or attachment to something having permanent location on the ground, and also included anything constructed which is not enclosed within another structure and is placed in a stationary location." [At 460]

The question in this case was whether the district court erred in granting a preliminary injunction prohibiting the city from restraining Tucker from using the rat balloon during the union's labor protests. That brought up the question of whether the city would prevail on the merits of the case, which in turn brought up the questions of whether the balloon was protected by the First Amendment, and if the answer was yes, whether the city's regulations met the tests for validity under that Amendment.

The court declared that the structure was in the public right of way, which made the forum a traditional public forum. The Court pointed out that the courts had generally been reluctant to give First Amendment protection to the placement of permanent objects, or objects not easily moved, on public rights of way. But that was not necessarily true of small easily moved structures, including the balloon at issue.

The Court upheld the district courts finding that the city's ordinance was content neutral (that fining was not challenged), "Thus, for the purposes of this appeal," said the Sixth Circuit, "we assume that this finding was correct. Therefore, the ordinance is constitutional as applied if it is narrowly tailored to serve a significant government interest, leaving open other alternative channels of communication." [At 463]

The Court appears to have conceded that the substantial governmental interests served by the ordinance were "keeping the public right-of-way clear and preserving the aesthetics of the community." But it concluded that the application of the ordinance did not have any effect in serving those interests. For that reason, the ordinance did not meet the narrowly tailored test:

> .... There is no objective evidence in the record before us suggesting that the temporary placement of the balloon in the public right-of-way has any adverse effects, such as obstruction of pedestrian or automobile traffic. By applying the ordinance to prohibit the temporary use of the balloon in this case, it therefore appears that the City has applied its ordinance in a manner that is "substantially boarder than necessary" to achieve its interests. [Citations omitted by me.]

The second case involving a rat balloon is <u>State v. DeAngelo</u>, 930 A.2d 1236 (N.J. Super. A.D. 2007). There a union was flying a balloon at the site of a business with which the union had a dispute. The balloon was ten feet tall, was in the shape of a rat, but contained no words. The Lawrence Township municipal ordinance ' 535(L)(2) provided that:

> L. Prohibited Signs. All signs not permitted by this Ordinance are hereby prohibited with the following signs specifically prohibited:
>
> **
>
> 2. Banners, pennants, streamers, pinwheels, or similar devices; vehicle signs; portable signs, balloon signs or other inflated signs (excepting grand opening signs) and searchlights (excepting grand opening signs), displayed for the purpose of attracting the attention of pedestrians and motorists; unless otherwise excepted. [At 1239]

DeAngelo first argued that the rat balloon was not a sign because it contained no words.

The ordinance did not define the term "sign" but it made it clear what kind of signs were prohibited, including "balloon signs or other inflated signs...." [At 1241] The Court also turned to *Webster's New International Dictionary* 2334 (2d ed. 1950) for the definition of a "sign":

> ...as a symbol, "a conventional symbol or emblem which represents an idea, as a word, letter or mark.... In writing and printing, in ideographic mark, figure, or picture ... conventionally used to represent a term or conception, usually technical." [At 1241]

The rat sign was clearly a sign carrying a symbolic message of a labor protest, concluded the Court.

The Court turned to analyze the sign as First Amendment-protected expression, using the same tests applied in Tucker, above, and every other case involving First Amendment-protected speech The ordinance was content neutral, said the Court; all inflatable signs, other than grand-opening signs were prohibited. The Court reasoned that it did not differentiate between speakers or messages. However, a dissent in this case urged that the ordinance as not content-neutral because of the grand opening exception, and for that reason the ordinance should be required to pass the strict scrutiny (compelling state interest) test rather than the intermediate scrutiny (significant state interest) test.

Section 535(A) of the sign ordinance itself stated the state interests it advanced:

> [t]o encourage the effective use of signs as a means of communication, to maintain the *aesthetic* environment and the Township's ability to attract economic development and growth, to *improve pedestrian and vehicular safety*, to minimize the potential adverse effects of signs on nearby public and private property and to enable the fair and consistent application of the regulations contained herein. [At 1245] [The Court's emphasis]

The Court appears to have given short shrift to the narrow tailoring test, simply saying that the ordinance was narrowly tailored, simply concluding that "The purpose of the Ordinance is to enhance the aesthetics and protect public health and safety. Obviously an inflatable sign that attracts the attention of pedestrians and motorist [sic] also distracts them." [At 1245]

DeAngelo also argued that the ordinance was void for vagueness, and that it was selectively enforced.. The Court rejected both arguments, declaring that the ordinance gave notice to people of ordinary intellect what conduct was prohibited, and that the record showed no evidence that the ordinance was selectively enforced against labor unions.

Tucker and DeAngelo obviously came to opposite conclusions. However, Tucker is a Sixth Circuit case that must be given infinitely more weight than DeAngelo. For that reason, unless the City can figure out how narrowly tailor a balloon regulation, it may be fighting an uphill battle on the prohibition of advertising balloons at the Fall Festival. The Sixth Circuit made the narrow

tailoring test difficult. While it conceded the state interests in the ordinance at issue there, it simply saw no aesthetic or traffic problems arising from the balloon. For that reason there was probably no way the city could have narrowly tailored the ordinance to promote those interests. But the balloon display in Tucker lasted only an hour or two, while, presumably, the balloon display during the Fall Festival lasts considerably longer, and would attract more attention. The dissent in Tucker also pointed out that the Sixth Circuit has misapplied the narrow tailoring test. Among other ways the Court misapplied that test, said the dissent, was that it applied the test to *this* case. The dissent thought that the question of whether the ordinance should have met the narrowly tailoring test if it generally advanced those state interests in *all* cases; otherwise the city could never draft a regulation on balloons that would satisfy the courts. That dissent seems logical. Unfortunately, however, a dissent is just that: a dissent.

FESTIVALS AND FAIRS RUN BY "PRIVATE" ENTITIES

Festivals and fairs run by private entities, even in public fora, operate under some peculiar rules. For that reason, the operation of the Fall Festival under that mode might be worth consideration by the city.

Probably the most prominent case in this area is the U.S. Sixth Circuit Court of Appeals case of Lansing v. City of Memphis, 202 F.3d 821 (6TH Cir. 2000). There one of the questions was whether the City of Memphis was liable for barring a "street preacher" from expressive activities during the Memphis in May Festival, which was held in a park leased by the City of Memphis from the Memphis Park Commission. However, the Memphis in May Festival was sponsored and operated by Memphis in May International Festival, Inc., a tax exempt non-profit corporation under ' 501(c)(3) of the IRS Code. What was the legal status of the Memphis in May International Festival, Inc.:

> It is undisputed that the First and Fourteenth Amendment Protections, codified in 42 U.S.C. ' 1983, are triggered only in the presence of state action and that a private entity acting on its own accord cannot deprive a citizen of First Amendment rights. *See e.g. Flagg Brothers Inc. v. Brooks,* 436 U.S. 149 (1978) [parallel citations omitted by me.] ("most rights secured by the Constitution are protected against infringement by governments"); *Hudgens v. NLRB,* 424 U.S. 507 [parallel citations omitted by me.] ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state.") Memphis in May contends that the district court erred when it ruled that Memphis in May, despite its status as a private corporation, operated as a state actor in ejecting Lansing from the area between the barricades.
>
> However, a private entity can be held to constitutional standards

> when its actions so approximate state action that they may be fairly attributed to the state. [Citations omitted by me.] The Supreme Court in *Lugal* [457 U.S. 992] identified a two-part approach to the question of "fair attribution," effectively requiring that the action be (a) taken under color of state law, and (b) by a state actor. *See Lugal* 457 U.S. at 937]. In this circuit we have applied three tests to help in determining when the *Lugal* conditions are met. These are: (1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test. *See, e.g. Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.2d 758, 763 (6th Cir. 1999)*; [remaining citations omitted by me.]... [At 828].

The Sixth Circuit went to overturn the District Court, reasoning that under none of those three tests was Memphis in May International Festival, Inc,.a "state actor."

United Auto Workers, Local # 5285 v.Gaston Festivals, Incorporated, 43 F.3d 901 (4th Cir. 1995) explains even further the "state actor" doctrine. There GFI was a private non-profit corporation that organized and promoted the Fish Camp Jam held in downtown Gastonia, North Carolina. GFI rejected the United Auto Workers application for booth space to distribute literature on its "Buy American" campaign. "The Jam," said the Court,

> is held on public streets and sidewalks and on private property in Gastonias' downtown area. GUFI, as any other entity that wishes to use the City's land, must obtain a permit in order to use the public property during the festival. In addition to approving the permit, the City provides police protection, traffic department assistance, and sanitation services during the nine hour event. J.A. at 18. In most respects, however, the Fish Camp Jam is conducted independent of the City of Gastonia....And the City plays no active role in planning or managing the festival. GFI alone decides which individuals and organizations will participate in the Fish Camp Jam. Jam. J.A. at 159. [904-05]

The Court rejected UAW's argument that the GIF was a "state actor," declaring that:

> The mere "fact '[t]hat a private entity performs a function that serves the public does not make its acts [governmental] action.'" [Citations omitted by me.]....Rather, under the "governmental function" standard, "the function performed [must be] 'traditionally the exclusive prerogative of the state.' [Citations omitted by me.]....The organization, management and promotion of events such as the Fish Camp Jam do not fall within the domain of functions exercised

> traditionally and exclusively by the government. The government has not traditionally been the sole provider of community entertainment. Nor has it traditionally been the exclusive organizer of festivals, parades or fairs. Fairs and festivals such as the Fish Camp Jam have traditionally been administered privately by private organizations like churches, civic groups, or local business consortiums..." [at 906-08]

UAW argued that "Gastonia has ceded control of its town center to [GFI]," and "turned over the running of its downtown area to a private corporation," to such an extent that "the downtown area is essentially GFI's private property." [Citations to briefs omitted by me.] [At 908-909] By characterizing GFI's authority that way, said the Court, UAW attempted to come within the ambit of *Marsh v. Alabama*, 326 U.S. 501, in which it was held that a corporation that operated a company town was a state actor.

However, countered the Court:

> The Supreme Court has held that state action can only be found under the authority of *Marsh* where "a private enterprise [assumes]" all of the attributes of a "state-created municipality," and performs "the full spectrum of municipal powers." [At 909]

GFI did not do that, continued the Court:

> It is plain from the record before us that while GFI plays a significant role in organizing and directing the entertainment activities in the downtown area during the day long Fish Camp Jam, GFI has not been afforded and has not otherwise assumed the requisite amount of governmental control over even a single "municipal power," much less sufficient power to qualify as a state actor under *Marsh* and *Hudgens.*
>
> To begin with, the very existence of a permit system for the approval of private functions on public property demonstrates that the City of Gastonia, and not GFI, exercises ultimate control over the use of the public property and facilities. The city also provides essential services to support the festival, further confirming that GFI has not assumed plenary control over Gastonia. The Gastonia police department "provides manpower to close down the streets, protection of the site during set up, tear down, and during the festival itself ... The City traffic department provides barricades to close the streets, hangs banners, and drops electric cords from supplies on poles ... The fire department provides water for the event and presumably stands ready to assist should a fire break out ...."[At 909]

In other cases, private entities that run fairs and festivals have been found to be "state actors." In Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc., 862 SW.2d 297 (Ky. 1993), Downtown Frankfort, Inc., a non-profit corporation established to promote downtown revitalization of Frankfort, Kentucky, ran the city's festivals, one of which was a Great Pumpkin Festival. The Court concluded that DFI was a "state actor," reasoning that:

> Downtown Frankfort, Inc., has in fact taken over a function formerly performed by the City of Frankfort. The City use to hire its own staff to promote the revitalization of downtown as a place to live, visit, shop, invest, etc. During the affiant's term as Mayor, the City received a 'Main Street' program fund for this purpose and hired Randy Shipp and Todd Graham to promote downtown Frankfort.
>
> Finally, and of great significance, the St. Clair Mall upon which this festival is conducted is a public area, but a permit for a booth on this public area must be obtained from DFI: "no formal city permit is issued." This the city has delegated to DFI control over the St. Clair Mall, albeit only to the limited extent of deciding who shall be permitted to maintain booths there during the hours of the festival. [At 299]

I am sure you will have questions; hopefully, I can answer some of them.

Sincerely,

Sidney D. Hemsley
Senior Law Consultant

SDH/