FIRST AMENDMENT vs. PUBLIC SAFETY
The Contributor v. City of Brentwood Story

by Roger A. Horner and Robert M. Burns



[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." - United States Supreme Court, *Ward v. Rock Against Racism*[1] (quoting *Clark v. Community for Creative Non-Violence).*[2] *An alternative channel of communication can be adequate even when the speaker is denied its best or favored means of communication.* - Sixth Circuit Court of Appeals, *The Contributor v. City of Brentwood*[3] (quoting *Phelps-Roper v. Strickland).*[4]

In 2007, a newspaper named *The Contributor* began publication in Nashville, Tennessee. Created by a non-profit corporation of the same name, *The Contributor* took its inspiration from *Street Sense*, a similar publication in Washington, D.C. Both newspapers feature articles about homelessness and poverty, and both are members of the North American Street Newspaper Association (NASNA), a nonprofit trade association of "street newspapers" which claims 23 members in the United States and eight in Canada, including papers in San Francisco, Los Angeles, Chicago and Vancouver, B.C. Like other street newspapers, *The Contributor* is sold by a network of "vendors," who are described as homeless or recently homeless. Vendors purchase copies of *The Contributor* for 25 cents each and resell them for $1.00 (and any additional amount purchasers might wish to pay.) Rather than simply selling their papers, however, vendors are encouraged to use the interaction with customers as opportunities to share personal stories and educate the public about homelessness.

Initially, ten vendors sold *The Contributor*, with sales confined to Nashville. Their numbers grew significantly, and they began to migrate to new areas. (At one point *The Contributor* had as many as 550 vendors, but currently operates with a cap of approximately 400.) The newspaper went from being published every other month to monthly, then to twice a month. With an average monthly circulation of 120,000 copies, *The Contributor* claims to be the highest-circulating street newspaper of its kind in North America.

In January 2011, Andrew Harrington and Calvin Hart were among several vendors selling *The Contributor* in Brentwood, Tennessee, a city of over 38,000 residents adjacent to the southern boundary of Metropolitan Nashville/Davidson County. Although most of Brentwood is residential, office and retail developments at its northern and southern ends grow the City's estimated daytime population to more than 60,000. Unlike downtown Nashville, opportunities to sell newspapers to pedestrians are limited in Brentwood. When Harrington, Hart and other vendors came to Brentwood, they began stepping onto busy arterial streets to sell newspapers to vehicle occupants. Harrington and Hart were both witnessed selling *The Contributor* at the Franklin Road/Maryland Way intersection, where traffic counts averaged nearly 25,000 vehicles a day. Brentwood police informed the vendors that their activities violated a local ordinance, but these efforts were unsuccessful, and newspaper sales continued on Brentwood streets. At least some of the vendors insisted their constitutional rights trumped Brentwood's ordinances.

The Citations

Ultimately, seven *Contributor* vendors were cited for violating § 58-1 of the

Brentwood Municipal Code (Code) in January and February 2011. At the time, § 58- 1 read as follows:

> *Except as permitted by other portions of this Code, no person shall use or occupy any portion of any public street, alley, sidewalk or right-of-way for the purpose of storing, selling or exhibiting any goods, wares, merchandise or materials.*

Vendors would have been in violation of § 58-1 merely for selling newspapers on Brentwood's sidewalks. However, police officers testified in Brentwood Municipal Court that they only issued citations after seeing vendors step into the roadway to make sales to vehicle occupants. The Municipal Judge found the seven vendors to be in violation of the Code. Represented by pro bono counsel, they appealed the decision to Williamson County Circuit Court.

A new ordinance and a lawsuit

Although the vendors' counsel had not addressed the constitutionality of §58-1, the City began to explore ways to amend the ordinance to avoid constitutional issues. After reviewing ordinances from other parts of the country and gathering input from outside attorneys, City staff submitted a completely rewritten version of §58-1 to Brentwood's Board of Commissioners. The "new ordinance" expanded the activities allowed in the public right-of-way. Language in the "old ordinance" prohibiting distribution of newspapers and similar materials on sidewalks was removed. However, the new ordinance still imposed restrictions on distributions in the street.

As the appeal of the Municipal Judge's finding was pending, the American Civil Liberties Union of Tennessee (ACLU-TN) notified the City that it would be representing the vendors. Phone calls and e-mails were exchanged between the City and the ACLU-TN about the City's efforts to amend and improve the ordinance. The City wished to enact a new law that would address concerns about safety and also satisfy the ACLU-TN's goal of preserving the vendors' First Amendment rights. A draft of the new ordinance was sent to the ACLU-TN for its input.

As the appeal of the Municipal Judge's finding was pending, the American Civil Liberties Union of Tennessee (ACLU-TN) notified the City that it would be representing the vendors.

In mid-June 2011, during the course of negotiations between the City and the ACLU-TN, the seven *Contributor* vendors withdrew their appeal. The City hoped the withdrawal was an acknowledgement of the City's good faith efforts. Those hopes were dashed when, without warning, the ACLU-TN and *The Contributor* abruptly called a press conference on June 29, 2011 to announce that a lawsuit had been filed in federal court against the City of Brentwood on behalf of the newspaper and two of its vendors, Harrington and Hart.[5] Because the ACLU-TN knew that the City was considering the new ordinance, City staff were mystified by the timing of the lawsuit challenging the old ordinance.

The City proceeded rapidly with formal consideration of the new ordinance. Now known as Ordinance 2011-09, it was considered at a meeting of the Board on July 11, 2011. At that meeting, City staff explained the dual purposes of the new ordinance: (1) to promote public safety on City thoroughfares, and (2) to recognize the rights of individuals to engage in free speech along those thoroughfares. The staff's recommendation was supplemented by the opinion of a professional traffic consultant. His findings included:

- People selling goods, merchandise or other materials to motorists in the street creates unexpected distractions to drivers, increasing the risk of crashes (between vehicles or involving people attempting to make sales).
- Disruptions to traffic flow due to people unexpectedly entering the street or stopping moving vehicles to make a sale can seriously hamper traffic flow and increase congestion.
- In addition to creating delay for motorists, increased congestion typically creates higher potential for traffic accidents.

The new ordinance was passed by the Board in two rounds of required readings, both without discussion or debate. Upon publication of a notice of passage on July 29, 2011, the new ordinance went into effect. When asked why there was no public deliberation about the ordinance, Board members later testified that they were hesitant to discuss the matter publicly for fear that their words would be used against them in legal proceedings. But members also testified that their reasons for approving the ordinance included obvious and common sense traffic safety concerns. Several Board members provided examples of seeing *The Contributor's* vendors engage in activities they found to be unsafe, risky or disruptive to the flow of traffic. Some members testified that their decision to enact the new ordinance was in part based on personal experiences

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with acquaintances that had lost family members in fatal motor vehicle accidents caused by distracted drivers.

The new ordinance included a one-page preamble detailing the City's intent to guard against safety hazards associated with solicitors in the public right-of-way. The preamble reflected that the new ordinance was enacted in part, because "solicitors create a safety hazard for themselves and the motoring public when entering upon public streets, distributing items to vehicle occupants, or receiving money or other items from vehicle occupants" and "distraction of motorists occasioned by solicitations . . . impedes the safe and orderly flow of traffic, causes vehicles to stop unexpectedly, causes vehicles to linger at traffic control devices, and causes motorists to fail to attend to driving."

Brentwood's new ordinance retained the old ordinance's general prohibition against using the public right-of-way (including public streets, medians, alleys or sidewalks) to sell, store or exhibit merchandise and materials. This prohibition was expanded to include the sale of services. However, an exemption was added for the sale or distribution of newspapers, magazines, periodicals, handbills, flyers and similar materials, as long as the activity was not conducted within the street itself and materials were not handed to vehicle occupants. Under this exemption, the sale of newspapers on public sidewalks was protected. Furthermore, the new ordinance did not regulate or restrict the sale of newspapers on private property, although newspaper vendors would need the property owner's permission.[6] The relevant provisions of the new ordinance stated:

> (e) Nothing in this section or in any other part of this Code shall be construed as prohibiting the sale or distribution of newspapers, magazines, periodicals, handbills, flyers or similar materials, except that:
> (1) Such activity shall be prohibited on any portion of any street within the city.
> (2) Such materials shall not be handed to the occupant of any motor vehicle that is on a street, nor shall any action be taken which is intended or reasonably calculated to cause the vehicle occupant to hand anything to the person selling or distributing the materials.

Brentwood Tennessee Municipal Code §58-1.

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After passage of the new ordinance, the ACLU-TN attorneys filed an amended complaint, again alleging a denial of the plaintiffs' rights of free speech, expression and freedom of the press, as guaranteed by the First and Fourteenth Amendments.[7] No damages were requested, but the plaintiffs sought preliminary and permanent injunctions, along with attorney's fees and costs.

Trial court proceedings

Trial was set for December 18, 2012. Meanwhile, discovery extended from the summer of 2011 to the summer of 2012 and included depositions of the seven members of Brentwood's Board of Commissioners, the City Manager, the City Attorney and the traffic consultant retained by the City. "E-discovery" was significant and costly. After key word searches turned up thousands of e-mails that would possibly be responsive to discovery requests, the City retained an outside technology consultant to assist in filtering the e-mails, producing those that were relevant and withholding communications that were considered privileged. The City ultimately provided hundreds of e-mails generated by employees, board members and citizens.

In August 2012, both sides filed motions for summary judgment. Plaintiffs argued that the timing and specificity of Brentwood's amended ordinance made it a content-based restriction on protected speech that was not necessary to serve a compelling governmental interest. And even if the ordinance were to be considered content-neutral, they claimed, Brentwood had failed to establish that it was narrowly tailored to serve a significant governmental interest. *The Contributor* maintained that an integral part of its message was its method of distribution, which encouraged face-to-face interaction between vendors and members of the community. Accordingly, plaintiffs contended that Brentwood's ordinance left no appropriate alternative means for *The Contributor* to communicate its message.

In contrast, the City argued that that the amended ordinance: (1) was justified without reference to the content of the regulated speech; (2) was narrowly tailored to serve a significant governmental interest; and (3) left open ample alternative means of communication for vendors.

Content-neutrality. While recognizing the First Amendment rights of *The Contributor's* vendors, the City argued that its ordinance was content-neutral. The United States Court of Appeals for the Sixth Circuit had previously upheld a Kentucky statute that prohibited anyone from distributing literature in the roadways but permitted anyone to solicit contributions in the roadway if certain precautions were met. The statute therefore applied evenhandedly to all who wished to distribute and solicit in roadways.[8] The City argued that Brentwood's amended ordinance likewise applied evenhandedly to all who wished to solicit or engage in commerce with individuals on roadways in the City. The new ordinance applied equally to all entities, whether for-profit or non-

profit, and was, on its face, indifferent to any specific message or viewpoint. It made no reference to the content of any prohibited speech or to the nature or makeup of any group. Indeed, the City asserted, the ordinance was aimed at the "noncommunicative impact" of those selling or distributing newspapers in the streets or engaging in transactions with drivers and passengers on Brentwood roadways. The ordinance was aimed at nothing beyond prohibiting certain manners of dissemination of information or materials that create hazards for pedestrians, motorists and passengers alike. While roadways are part of the traditional public *fora*, they are not primarily designed for the selling or distribution of a good or merchandise or as a forum in which one expresses his or her life story.

Narrow tailoring. The City also argued that the new ordinance was narrowly tailored to serve a significant governmental interest. The U.S. Supreme Court has held that narrow tailoring requires that a regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests."[9] However, narrowly tailoring does not require that a regulation be "the least restrictive or least intrusive means" of accomplishing the government's goal.[10] Driver and pedestrian safety, as well as the orderly flow of traffic in Brentwood, were substantial governmental interests. The City's motion asserted that its goal of keeping Brentwood streets safe for motorists and pedestrians would be achieved less effectively without the amended ordinance. The City's goal in enacting the new ordinance was not to limit speech but rather to expand the possibility of speech and expression within the City's boundaries. Brentwood's new ordinance expanded on those areas in the public *fora* which could be safely and appropriately used to suit *The Contributor's* business model. However, the City's motion asserted, the ordinance was worded so as to balance the requirements of free speech with the City's legitimate and well established interest in public safety and the orderly flow of traffic within its boundaries.

Alternative means of communication. Because the City's new ordinance only banned vendor interaction with individuals in cars on Brentwood roadways, the City argued that *The Contributor* and its vendors had numerous further means of communication. The City pointed out that plaintiffs were free to sell the newspaper door-to-door, to vend from newspaper vending machines, to distribute via subscription, to sell on private property (with permission), to sell on sidewalks abutting businesses on private property (with permission), and to sell to pedestrians on sidewalks within the public right-of-way in Brentwood. The fact that *The Contributor* prohibited its vendors from selling newspapers in convenience stores or other places of business had nothing to do with the City; *The Contributor* itself had restricted the "means of communication" available for distributing the publication. Brentwood's ordinance merely prohibited sales of *The Contributor*, or distribution of any other item by any other individual, from occurring in the street. As the City pointed out, plaintiffs in First Amendment lawsuits are not entitled to their "best means of communication."[11]

The trial court's decision

On October 29, 2012, the U.S. District Court in Nashville issued a memorandum opinion granting the City's motion for summary judgment. The court found:

- Both The Contributor and any solicitation of charitable contributions by The Contributor vendors are protected speech.
- The sidewalks and streets of the City of Brentwood are traditional public fora.
- The restriction at issue is content-neutral and was enacted by Brentwood's Board of Commissioners with a sufficient factual basis.

"It was not adopted because of disagreement with the message of The Contributor; it was adopted in response to valid concerns about the unconstitutionality of the old Ordinance. It was adopted for legitimate reasons (public safety, traffic safety and traffic flow), separate from the content or viewpoint of The Contributor. It applies evenhandedly to any person who wishes to distribute newspapers, magazines, periodicals, handbills, flyers or similar materials or to solicit charitable contributions from drivers or occupants of vehicles on a public street in Brentwood." (citation omitted).

- Achievement of the goals of traffic safety and flow would be significantly less effective without the City's new ordinance. Brentwood appropriately balanced its interest with the burden upon Plaintiffs' speech, and narrowly tailored the ordinance so as not to burden substantially more speech than necessary.

"If vendors were allowed to sell papers from the sidewalks to drivers or passengers in the roadway, the safety issues and traffic flow problems would not be as effectively resolved. The sales transaction itself –money and newspapers changing hands, making change – diverts the driver's attention from the roadway and disrupts the flow of traffic.(Citation omitted.) In addition, Plaintiffs have stated that part of theirprotected speech is the interaction between the homeless and formerly homeless and those buying the papers. This indicates that the encounters with motorists involve conversations which go beyond the sales transactions and can further delay traffic." (citation omitted).

- Brentwood's ordinance leaves open ample alternative methods of communication.

"Plaintiffs choose to sell their newspapers to persons in vehicles traveling in the roadway. There is no evidence before the Court that Plaintiffs are actually precluded from other means of selling: door-to-door, through subscriptions, on private property with permission, to pedestrians on sidewalks or in appropriately-placed news racks. The fact that Plaintiffs typically have not used these other means has nothing to do with the City of Brentwood. Plaintiffs have made the choice as to the medium of their message, but they can select other available means as well. . . . [J]ust because the ordinance precludes Plaintiffs from selling in the way they find most efficacious does not mean they are left without any means of selling papers at all." (citation omitted.)

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In a statement issued by the City after Judge Campbell's opinion was issued, City Manager Mike Walker said "The City's primary concern in this matter has always been public safety. . . It was never the City's intention to prohibit the sale of newspapers or to exclude anyone from Brentwood."

On to the Court of Appeals

After the district court issued a final order dismissing plaintiffs' claims, *The Contributor* and the two individual plaintiffs filed a notice of appeal to the Sixth Circuit.[12] The sole issue presented for review was "whether the City of Brentwood met its burden of showing that the Ordinance enacted by the City of Brentwood leaves *The Contributor* and its vendors ample alternative methods to communicate their constitutionally protected right to speech." Plaintiffs argued that the trial court incorrectly determined that such alternative channels existed. The brief emphasized that *The Contributor's* "particularized message" relies on the "personal relationship that develops between *The Contributor* vendors and [their] customers." Brentwood maintained that the district court did not err in finding that Plaintiffs admitted the existence of alternative means of communication; Plaintiffs had simply failed or refused to avail themselves of those alternative means. Additionally, Brentwood argued that there was no "burden" on the City to prove that the alternative methods or channels of communication available to Plaintiffs would be profitable, given *The Contributor's* business model and structure. While the Plaintiffs chose to focus the appeal on the question of alternative means of communication, the Plaintiffs themselves had done virtually nothing to test various means that should have been obvious. Brentwood's brief again asserted that Plaintiffs/Appellants were not entitled to ignore other available means of communication in favor of their "best" means.

The Sixth Circuit's decision

On August 14, 2013 the Circuit Court unanimously affirmed the trial court's dismissal. The opinion, authored by Judge David McKeague, included the following findings:

While the Plaintiffs chose to focus the appeal on the question of alternative means of communication, the Plaintiffs themselves had done virtually nothing to test various means that should have been obvious.

- Speakers do not necessarily get to use their "best" means of communication, as long as they can reach their intended audience by other means.

  An alternative channel of communication can be adequate even when the speaker is denied its best or favored means of communication. Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008). The key for purposes of the adequate-alternatives analysis is whether the proffered alternatives allow the speaker to reach its intended audience.

- The intended audience for *The Contributor* and its vendors is the general citizenry of Brentwood.

  Plaintiffs can easily reach this audience by going door-to-door, by seeking out people on sidewalks, or by distributing The Contributor via the mail, email, and news boxes. Plaintiffs offer no reason to suggest they cannot reach their intended audience by employing the City's proffered alternatives. Additionally, if Plaintiffs wish to engage in the desired face-to-face interaction with people, they may do so by going door-to-door or by seeking out pedestrians.

- An alternative channel of communication can be adequate even if it requires the speaker to change tactics. *[A]n alternative is not inadequate simply because the speaker must change its tactics. If this were so, than a speaker could limit the adequacy of alternatives by choosing its method of communication and limiting its tactics to a specific form of communication. Such a rule would largely deprive the government of the ability to enact reasonable time, place, and manner restrictions.*

- The City of Brentwood was not required to present evidence that the alternative means of communication it proffered would be adequate.

  [W]e have never placed an onerous burden on a municipality to prove the adequacy of alternative channels of communication. Instead, we have only required a municipality to proffer a list of potential alternative avenues of communication that are reasonable and made in good faith. . . . A plaintiff may then counter the government's proof by "showing that the remaining avenues or communication are inadequate." Ward, *491 U.S. at 802*. (Additional citations omitted.) *Plaintiffs have wholly failed to offer any evidence to make this showing.*

- Adequate channels of communication may exist even if one public forum is closed to certain speech activity. In cases cited by the Plaintiffs, it was the fact that *all* public *fora* were closed that made the challenged regulations unconstitutional.

  Plaintiffs, on the other hand, have public fora to which they might turn (including public areas where they can place news boxes; the Internet; and pedestrian sales on sidewalks). Because Plaintiffs have failed to show the proffered alternatives are inadequate, we conclude that the Ordinance leaves open adequate alternative channels of communication.

The other circuits

Decisions from federal courts outside the Sixth Circuit also justify restrictions on solicitations from occupants of vehicles. In the 1980's, the City of Baton Rouge, Louisiana was sued by followers of the International Krishna

Consciousness movement who were ordered to stop distributing literature and soliciting contributions from occupants of motor vehicles that were stopped at traffic lights. A Baton Rouge ordinance prohibited solicitation "from the occupant of any vehicle" by persons on any roadway, the shoulder of any roadway or any "neutral ground" (i.e., median.) The Fifth Circuit held the ordinance was content-neutral and did not violate the First Amendment.[13] In doing so, the appellate court affirmed a district court decision holding that "[i]t requires neither towering intellect nor an expensive 'expert' study to conclude that mixing pedestrians and temporarily stopped motor vehicles in the same space at the same time is dangerous."[14]

Similarly, in 1991, the Eighth Circuit held that municipal governments "need not wait for accidents to justify safety regulations."[15] The Association for Community Organizations for Reform Now ("ACORN") had a practice of posting solicitors at intersections with traffic lights. When the lights were red, the solicitors would approach drivers with literature about ACORN and ask for donations. ACORN challenged a St. Louis County, Missouri traffic code section prohibiting standing "in a roadway for the purpose of soliciting a ride, employment, charitable contribution or business from the occupant of any vehicle." The appellate court upheld the ordinance as narrowly tailored to the governmental interest in public safety and a valid time, place and manner restriction on First Amendment activities.

More recently on the other hand, in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, the Ninth Circuit struck down a Redondo Beach, California anti-solicitation ordinance that barred individuals from "stand[ing] on a street or highway and solicit[ing], or attempt[ing] to solicit, employment, business, or contributions from an occupant of any motor vehicle."[16] In ruling for the day-laborer organizations that brought the lawsuit, the court held the ordinance was "geographically overinclusive" because Redondo Beach had failed to justify extending the solicitation ban citywide to all streets and sidewalks. Accordingly, the opinion holds, the ordinance "burdened substantially more solicitation speech than is reasonably necessary to achieve its purpose."[17] While this 2011 decision is arguably in conflict with previous decisions from other circuits, the U.S. Supreme Court denied the petition for writ of certiorari filed by the City of Redondo Beach. In distinguishing the *Redondo Beach* case from *The Contributor v. City of Brentwood*, the Sixth Circuit pointed out that the plaintiffs in *Redondo Beach* had a particular intended audience – potential employers of day laborers, who were likely to be in the area where the day laborers were soliciting employment. In contrast, the intended audience for *The Contributor* is the general public.

The outcome of First Amendment litigation challenging safety regulations imposed by a government entity will always depend on the particular facts and the particular regulations that are at play and how those facts and regulations interact with each other. In addition, case law indicates that the federal circuit in which the litigation is brought might play a major role in the outcome.

Is public safety really the issue?

Soon after *The Contributor* lawsuit was filed against Brentwood, a columnist for Nashville's daily newspaper, *The Tennessean*, offered this assessment in a piece captioned "Brentwood cares more about its own looks than for the homeless":

Brentwood officials claim they issued citations to the newspaper vendors for safety's sake. It's far more likely that Brentwood officials don't want homeless people hanging in their neighborhood. Poverty does make people uncomfortable, doesn't it?"[18]

The column, along with nearly every newspaper piece and television feature covering the lawsuit, generated significant responses on the Internet –some castigating Brentwood for what was perceived as a heartless attitude toward homelessness, and others supporting Brentwood's stand on public safety. City Commissioners were bombarded with e-mails and voice mails from within and outside Brentwood, taking the City to task or applauding the City's actions. Just as the City had numerous supporters and detractors, so did *The Contributor*. In response to public statements made by *The Contributor* and the ACLU-TN when the lawsuit was filed, the City issued its own statement that was widely quoted among Nashville area media. The statement emphasized that the City's primary concern in the matter was public safety; that the City's regulations were applied equally to everyone; and that it was not the City's intention to prohibit the sale of newspapers or to discriminate against anyone, including persons who happen to be homeless.

The Contributor maintains that its vendors are trained to refrain from entering the roadway to sell their newspapers, but during the trial court proceedings it conceded that vendors may take "a few steps" into the roadway in order to approach a vehicle stopped at a stop sign or traffic light. Vendors are also instructed that they are not to work from medians in the roadway. *The Contributor* alleged Brentwood never sought any information from Nashville or other cities concerning Contributor activities or operations before passing the challenged ordinance. Yet members of the City's Board of Commissioners testified they had seen *Contributor* vendors in Nashville and elsewhere working from narrow medians and stepping well into traffic lanes to sell newspapers.

Video footage obtained by the City and filed as an exhibit to the City's motion for summary judgment showed *Contributor* vendors selling newspapers from medians in heavily trafficked commercial areas and repeatedly entering the roadway, even cutting across traffic lanes to conduct sales. Since the lawsuit was filed in 2011, at least three *Contributor* vendors have been struck by automobiles, with one being fatally injured.

In a 2011 newspaper interview, Brentwood Police Chief Ricky Watson said his officers had no choice but to issue citations to *The Contributor* vendors because they were walking out into traffic to collect money from motorists for their newspapers. "We warned them numerous times prior to issuing any citation," Watson said. "They refused to comply, so they were cited. It's not only their safety. It's the safety of the public in general. These cars were stopping unexpectedly at intersections. It's

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just a safety concern. The citizens of Brentwood are a very generous people. But the first time somebody gets hurt, we're going to be accused of failing to act. We're kind of in a no-win situation here."[19] As the City saw it, *The Contributor's* unwillingness and/or inability to direct its vendors to conduct their newspaper sales without endangering themselves and the motoring public left Brentwood no choice but to impose regulations that prohibit distribution of newspapers and other materials to vehicle occupants on the street. Brentwood's ordinance not only prohibits solicitations by persons who step into the street, but also prohibits sidewalk-to-vehicle transactions. Robert Murphy, the City's traffic consultant who initially advised the City while its new ordinance was under consideration, subsequently issued a more detailed expert opinion that addressed this type of transaction. Even if sales could be accomplished by a vendor remaining on the sidewalk and reaching out to a vehicle occupant on the street, Mr. Murphy cautioned that such sales are dangerous because:

- A driver of a moving vehicle could come to a sudden stop in order to buy a newspaper from a vendor on a sidewalk and then be rear-ended by a vehicle following behind.
- A driver in a moving vehicle following behind another vehicle that has suddenly come to a stop in order to buy a paper from a vendor on a sidewalk could swerve into an adjacent lane of traffic to avoid the stopped vehicle, thereby causing a crash in the adjacent lane.
- While going through the process of paying for a paper, collecting change and putting change away, a driver of a stopped vehicle may not be able to complete the purchase before the signal turns green and could then be rear-ended by other approaching traffic.
- A vendor trying to make a sale could distract a driver, thereby causing the driver to run off the road or crash into another vehicle.

The preamble of Brentwood's new ordinance, along with backup material provided to the Board of Commissioners by City staff, stresses the need for regulations that attempt to balance the rights of *The Contributor* and its vendors with the City's interests in public safety and traffic flow. (In ruling for the City, the District Court found that passage of the ordinance was based, at least in part, upon an opinion letter from the City's traffic consultant, a memo and analysis from the City Attorney, and the personal traffic safety experiences of the members of the Board of Commissioners.)

Practical aspects of defending The Contributor lawsuit (or what local governments should know about First Amendment litigation)

At no point did the City of Brentwood consider backing down and adopting further amendments to its ordinance to avoid further litigation. However, it was important for City staff and counsel to engage in frank discussions with the City's Board of Commissioners both at the onset of *The Contributor* lawsuit and throughout as the lawsuit proceeded. The considerations faced by the City included:

Defense cost – From the filing of the lawsuit to the oral arguments at the Sixth Circuit Court of Appeals, more than two years passed. While the City's insurance policy initially covered defense costs, that coverage was subject to a cap that was reached before the first year of the litigation was over. All costs from that point forward have been paid by the City.

Depositions – As mentioned previously, each member of the Board of Commissioners was deposed by counsel for Plaintiffs (as were the City Manager, the City Attorney and the traffic consultant retained by the City.) For most of the Commissioners, giving a deposition was a new and potentially intimidating experience. Commissioners were asked extensively about their understanding of the process that led to adoption of the new ordinance, along with their personal reasons for voting in favor of the ordinance. Plaintiffs' counsel was presumably hoping to find a "smoking gun" that would show the City had ulterior motives for passing the ordinance aside from public safety and traffic flow.

Publicity –*The Contributor* lawsuit was the subject of numerous print media articles and television news stories. Some plaintiffs in First Amendment lawsuits garner more sympathy than others. Relatively few people would take the side of the KKK, for example, in a First Amendment lawsuit against a local government. The publicity generated by *The Contributor* lawsuit generated public opinion that was somewhat divided between those who applauded Brentwood's stand and those who bashed Brentwood for what they perceived as classism and intolerance. As much as City Commissioners might have wanted to come to the City's defense publicly, it was agreed that all interview requests would be forwarded to the City Manager or City Attorney. As discussed above, the City issued a statement to the media asserting its position that public safety was the real issue.

E-discovery – The task of responding to discovery requests for e-mails that had some bearing on the challenged ordinance and the enforcement actions was enormous. In order to avoid any question that the City was making anything less than a good faith effort to be responsive, an outside technology consultant was hired at a significant cost. Many of the e-mails provided in response to discovery requests were between City Commissioners and citizens who had expressed support, contempt or concern. City Commissioners understood that e-mail correspondence dealing with City business was already part of the public record, but were not accustomed to such intense scrutiny of messages received from or sent to citizens.

Staff time – While the City was represented by outside counsel, defense of the lawsuit nonetheless necessitated a substantial amount of time from staff members, including the City Attorney, the City Manager, and members of the Police Department and Technology Department. Staff members participated in depositions, assisted in responding to discovery requests and assembled information to aid in the defense of the lawsuit. Time spent by City staff to defend litigation took away from time that could have been spent more productively on other efforts.

Risk of paying Plaintiffs' costs – The lawsuit asked the court to award attorney's fees to Plaintiffs as authorized by 42 U.S.C. § 1988. That statute provides that the court may award prevail-

ing parties their reasonable attorney's fees in various civil rights actions. City Commissioners were made aware from the beginning that a ruling against the City could result in the City being forced to pay the Plaintiffs' legal fees. After more than two years of intense litigation, it can only be assumed that those fees would be very significant.

Conclusion

When public safety regulations tangle with First Amendment rights, those imposing regulations should strive to find the middle ground between accommodating those who wish to exercise their rights and the need to provide for the safety of the public at large. In enacting and enforcing regulations that might affect the exercise of free speech and expression and/or freedom of the press, governmental entities should:

- Know the traditional public *fora* (i.e., streets, sidewalks, parks) within the governmental entity's jurisdiction.
- Make sure the regulations that apply to those *fora* can be described as:

  -Content-neutral neutral-Are the regulations justified without reference to the content of the regulated speech? (If content-based, the regulations must be capable of passing a "strict scrutiny" test by the courts.)
  -Narrowly tailored to serve a significant governmental interest inte the regulations promote a significant governmental interest that would be achieved less effectively absent the regulation?
  -Leaving open ample alternative means of communication.

Despite its best efforts, a local governmental entity may become a defendant in a First Amendment lawsuit. If so, it is crucial that stakeholders know what they are in for. Governing body members and administrators should be made aware of the implications of each of the considerations listed in the above section as they might apply, along with any other considerations that might need to be addressed. A "gut check" may be needed in order to determine how secure the governing body and administrators feel about their position and the extent to which they wish to defend that position. Nonetheless, the overall needs of the community and the government's critical role in providing for the safety and well-being of citizens should not be abandoned.

1. 491 U.S. 781, 791 (1989).
2. 468 U.S. 288, 293 (1984).
3. The Contributor v. City of Brentwood, ~ F.3d ~, 20 WL 4081905 (6th Cir. 20).
4. Phelps-Roper v. Strickland, 539 F.3d 356, 372 (6th Cir. 2008).
5. The Contributor v. City of Brentwood, 2012 WL 5331261 (M.D. Tenn. 2012).
6. Ordinance 2011-09 deals with more than the sale of newspapers. In addition to addressing the sale and distribution of merchandise and materials in the right-of-way, the ordinance prohibits solicitation of donations from vehicle occupants. The ordinance deals directly with persons who might otherwise stand at intersections and elsewhere within the street to ask for donations. It also prohibits the use of public rights-of-way to alert vehicle occupants to any commercial activity by the use of signs or other devices. And it specifically addresses advertising gimmicks such as "sign spinners" on sidewalks and elsewhere in the right-of-way who distract drivers from staying focused on safe driving.
7. Although beyond the scope of this article, the complaint also alleged denial of plaintiffs' rights to freedom of speech, expression and the press under Article I, Section 19 of the Tennessee Constitution.
8. Ater v. Armstrong, 961 F.2d 1224, 1227 (6th Cir. 1992).
9. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).
10. *Id.* at 798.
11. *Phelps-Roper*, 539 F.3d at 372 (6th Cir. 2008) (citing Heffron v. Int'l Soc. for Krishna Consciousness, Inc. 452 U.S. 640, 647 (1981)).
12. Docket # 12-6598, 6th Cir.
13. Int'l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge, 876 F.2d 494 (5th Cir. 1989).
14 Int'l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge, 668 F. Supp. 527, 530 (M.D. La. 1987) aff'd, 876 F.2d 494 (5th Cir. 1989).
15. ACORN v. St. Louis County, 930 F.2d 591, 596 (8th Cir. 1991).
16. 657 F.3d 936 (9th Cir. 2011).
17. *Id.* at 949.
18. Gail Kerr, *Brentwood cares more about its own looks than for the homeless*, THE TENNESSEAN, July 3, 2011.
19. Jeff Woods, *Brentwood tries to recast image amid 'Contributor' legal challenge*, THE CITY PAPER, July 17, 2011. ML

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racial group over another, so long as there is a "strong basis in evidence" to conclude that a disparate impact exists.

In turn, a group of white firefighters sued, asserting that the termination of the test created an equal protection violation. The lower court and intermediate appellate court agreed. The City appealed.

IMLA supports the City's position. The *amicus* brief was written by Prathima Reddy, in private practice in Buffalo, New York.

***Wood v. Moss*, No. 13-155** (merits-stage *amicus* brief filed January 17, 2014). Here, the Supreme Court will decide whether Secret Service agents engaged in unconstitutional viewpoint discrimination when they moved anti-Bush protesters about one block further from the President than pro-Bush demonstrators and whether the agents should be granted qualified immunity.

IMLA joined the SLLC's *amicus* brief, which encourages the Court to tour downtown Jacksonville, Oregon using Google Maps Street View. The brief advises that Justices will discover a parking lot adjacent to the Jacksonville Inn's outdoor patio where President Bush was dining--which the anti-Bush protesters would have had direct access to had they not been moved a block away. Pro-Bush demonstrators had no direct access to the Inn where they were gathered because the side of the Inn they were facing was totally blocked by another building. The SLLC's brief also argues that when the safety of the President is a stake, police may consider the content of speech. Finally, the brief argues that the lower court evaluated the qualified immunity question in this case without consideration of the facts.

The *amicus* brief was written by Bennett Cohen of the Polsinelli PC firm in Denver, Colorado. The case will be argued March 26, 2014. ML