International Municipal Lawyers Association
2013 Annual Conference
San Francisco, California

Work Session VI
First Amendment Issues

First Amendment vs. Public Safety
The Contributor v. City of Brentwood Story

Robert M. Burns
Member
Howell & Fisher, PLLC
Nashville, Tennessee

Roger A. Horner
City Attorney
City of Brentwood, Tennessee

©2013 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2013 Annual Conference, held September 29 – October 2, 2013 in San Francisco, CA. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

FIRST AMENDMENT VS. PUBLIC SAFETY

The Contributor v. City of Brentwood Story

> *[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, et al v. City of Brentwood*[3], quoting *Phelps-Roper v. Strickland*[4]

The parties

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. founded in 2003. 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 similar "street newspapers" which claims 23 members in the United States and eight in Canada. Members of NASNA include newspapers in cities such as San Francisco, Los Angeles, Chicago and Vancouver, B.C., as well as smaller cities like Ashland, Oregon.

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* from its parent corporation for 25 cents each and resell them on the street for $1.00 (or such additional amount as purchasers wish to pay.) Rather than simply selling their newspapers, however, vendors are encouraged to use the point of sale exchange and interaction with customers as opportunities to share their personal stories and educate the public about homelessness. Initially, ten vendors sold *The Contributor*, with sales being confined to Nashville/Davidson County. The number of vendors grew significantly, and vendors began to appear in new areas. Eventually, vendors began selling in areas outside Davidson County. *The Contributor* has had as many as 550 vendors, but currently tries to operate with a cap of approximately 400. The newspaper went from being published every other month to monthly, and is now published 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 who began selling *The Contributor* in Brentwood, Tennessee. Brentwood is a city of over 38,000 residents, located in Williamson County, adjacent to the southern boundary of Metropolitan Nashville/Davidson County. Although most of Brentwood is residential, office and retail developments at the northern and southern ends cause the City's estimated daytime population to swell to over 60,000.

Unlike downtown Nashville, opportunities to sell newspapers to pedestrians are limited in Brentwood. So when Harrington, Hart and the other vendors came to Brentwood, they were seen stepping onto busy arterial streets to sell their newspapers to vehicle occupants. Traffic counts average nearly 25,000 vehicles a day at the Franklin Road/Maryland Way intersection where Harrington and Hart were both witnessed selling *The Contributor*. The Brentwood Police Department attempted to inform the vendors that their activities were in violation of a local ordinance prohibiting sales of newspapers in this manner. Efforts to convince the vendors to discontinue sales on Brentwood streets were unsuccessful. 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 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.*

Even if the vendors had only sold their newspapers on Brentwood's sidewalks, the sales would have been in violation of § 58-1 as it read at the time. However, police officers testified in Brentwood's Municipal Court that they had only issued the citations after seeing each of the vendors step into the roadway to sell their newspapers to vehicle occupants. The Municipal Judge found the vendors to be in violation of the Municipal Code. The seven vendors, represented by pro bono counsel, appealed the Municipal Judge's finding to Williamson County Circuit Court.

A new ordinance and a lawsuit

Although the vendors' counsel had not addressed the constitutionality of § 58-1 in Municipal Court, the City began to explore ways to amend the section to avoid questions of constitutionality going forward. City staff wanted to deal with the ordinance's complete preclusion of activities protected by the First

Amendment in areas considered to be traditional public fora. After reviewing ordinances from other parts of the country and gathering input from outside attorneys, including a recently retired constitutional law professor from Vanderbilt University, City staff submitted a completely rewritten version of § 58-1 (hereinafter, "the new ordinance") to Brentwood's Board of Commissioners for consideration. As drafted, the new ordinance *expanded* the activities that would be allowed in the public right-of-way. Language in the "old ordinance" that prohibited the distribution of newspapers and similar materials on sidewalks was removed. However, the new ordinance still imposed restrictions on the street itself.

Meanwhile, 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 now be representing the vendors. Phone calls and e-mails were exchanged between a representative of the City and the legal director for the ACLU-TN about both the pending appeal and the City's efforts to amend and improve the ordinance. The City hoped to reach a resolution with the ACLU-TN and enact a new ordinance that would address the City's concerns about safety but also satisfy the ACLU-TN's goal of preserving the First Amendment rights of the vendors. A draft of the new ordinance was sent to the ACLU-TN for its input. During the course of these negotiations between the City and the ACLU-TN, the seven *Contributor* vendors withdrew their appeal of the Municipal Judge's ruling in mid-June 2011. The City continued to communicate with the ACLU-TN and hoped the withdrawal of the appeal was an acknowledgement of the City's good faith efforts. Those hopes were dashed when, without warning to the City, 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 Contributor* and two of its vendors, Andrew Harrington and Calvin Hart[5].

Since the ACLU-TN was aware of the City's plans to consider the new ordinance, City staff was mystified by the timing of the lawsuit, which challenged the old ordinance. The City proceeded with formal consideration of the new ordinance. On July 7, 2011, a regularly scheduled briefing was held with the Board of Commissioners, during which the agenda for the Board's July 11 business meeting was discussed. The new ordinance, now known as Ordinance 2011-09, was scheduled for first reading on the July 11 agenda. An agenda package, which included the new ordinance and a staff memorandum explaining the need for the ordinance, had been delivered to the Board of Commissioners two days prior to the briefing. The rationale for the ordinance was discussed with the Board at the briefing. Members of the Board were familiar with *The Contributor* and expressed concerns about media coverage of the lawsuit, along with hopes that the new ordinance would bring an end to the litigation.

City staff again explained the need for the new ordinance at the Board's regular business meeting on July 11, 2011. As explained by the staff, the ordinance had been drafted to meet the dual purposes of (1) promoting public

safety on City thoroughfares, and (2) recognizing 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 who had been retained to advise the City on the matter. A letter from the consultant included these findings:

- Having people sell goods, merchandise or other materials to motorists in the street creates unexpected distractions to drivers, thereby increasing the risk of crashes between vehicles or between vehicles and the people attempting to make the sales.
- Disruptions to traffic flow due to people entering the street at unexpected locations, or stopping moving vehicles in order to make a sale, can seriously hamper traffic flow and result in increased congestion.
- In addition to creating additional delay for motorists, increased congestion is typically associated with higher potential for traffic crashes.

The ordinance was passed on first reading without discussion or debate by the members of the Board of Commissioners. On July 25, 2011, the Board passed the new ordinance on the second of two required readings, again without discussion or debate by the Board's members. With publication of a notice of passage on July 29, 2011, the ordinance went into effect.

Upon being asked why there was no public deliberation about the ordinance, Board members later testified that they were hesitant to publicly discuss the matter for fear that their words would be used against them in the lawsuit proceedings. However, Board members also testified that their reasons for voting in favor of the ordinance included obvious and common sense-based traffic safety concerns. Several of the 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 Board members testified that their decision to enact the new ordinance was in part based on consideration of personal experiences with acquaintances who had lost family members due to fatal motor vehicle accidents caused by distracted drivers.

The new ordinance (see Ordinance 2011-09, attached as Appendix A) includes a one-page preamble detailing the City's intent to guard against safety hazards associated with solicitors in the public right-of-way. As subsequently quoted in the Federal District Court's memorandum opinion (see Appendix B), the preamble reflects 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 retains 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 is not conducted within the street itself and materials are not handed to vehicle occupants. Under this exemption, the sale of newspapers on public sidewalks is protected. Furthermore, the new ordinance does not regulate or restrict the sale of newspapers on private property, although newspaper vendors would need the property owner's permission[6].

After passage of the new ordinance, the ACLU-TN attorneys filed an amended complaint of behalf of *The Contributor*¸ Harrington and Hart in August, 2011. As with the original complaint, the amended complaint alleged a denial of the plaintiffs' rights of free speech, expression and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the United States Constitution[7]. No damages were requested, but the plaintiffs sought preliminary and permanent injunctions to prevent Brentwood from enforcing the new ordinance, along with attorney's fees and costs.

Trial court proceedings

Trial was set for December 18, 2012. Meanwhile, the discovery process 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 another significant and costly component of the discovery process. After key word searches initially 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, providing those that were relevant and withholding e-mails 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 with the federal district court. The plaintiffs argued in their motion that the timing and specificity of Brentwood's amended ordinance made it a content-based restriction on protected speech that is not necessary to serve a compelling governmental interest. Furthermore, the plaintiffs claimed, even if the ordinance were to be considered content-neutral, Brentwood failed to establish that the ordinance is narrowly tailored to serve a significant governmental interest. *The Contributor* maintains that an integral part of its message is its method of distribution, which encourages face-to-face interaction between homeless and formerly homeless vendors and members of the community. Accordingly, the plaintiffs' motion contended that Brentwood's ordinance left no appropriate alternative means for *The Contributor* to communicate its message.

The City, in its motion, argued that that its amended ordinance: (1) is justified without reference to the content of the regulated speech; (2) is narrowly tailored to serve a significant governmental interest; and (3) leaves open ample alternative means of communication for vendors of *The Contributor*.

Content-neutrality. While recognizing that *The Contributor's* vendors exercise First Amendment rights in selling the newspaper, and that the streets and sidewalks of Brentwood amount to traditional public fora, the City argued that its ordinance was content-neutral. The United States Court of Appeals for the Sixth Circuit, which includes Tennessee, 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]. Similarly, the City argued, Brentwood's amended ordinance applied evenhandedly to all who wish to solicit or engage in commerce with individuals on roadways in the City. The ordinance applies equally to all organizations or corporations, whether for-profit or non-profit, and is, on its face, indifferent to any specific message or viewpoint. The ordinance further makes no reference to the content of any speech prohibited, or to the nature or makeup of any group. Indeed, the City's motion asserted, the ordinance is aimed at the "non-communicative impact" of vendors or others selling newspapers, engaging in transactions, and/or handing out printed material to drivers and passengers of cars on roadways in Brentwood. The ordinance was aimed at nothing else, the City reasoned, but 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's motion further argued that its amended ordinance is 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, are 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 is 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 ordinance bans only vendor interaction with motorists and individuals in cars on roadways in Brentwood, Tennessee, the City argued that *The Contributor* and its vendors have innumerable further means of communication. The City's motion for summary judgment pointed out that the plaintiffs are free to sell the newspaper door-to-door, to vend from newspaper vending machines, to distribute via a subscription service, 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* prohibits its vendors from selling its newspapers in convenience stores or other places of business has nothing to do with the City of Brentwood. *The Contributor* itself had restricted the "means of communication" available for distributing the publication. Brentwood's ordinance merely prohibits sales of *The Contributor*, or distribution of any other item by any other individual, from occurring in the street. Plaintiffs in First Amendment lawsuits are not entitled to their "best means of communication[11]."

The trial court's decision

On October 25, 2012, both sides argued for their motions for summary judgment at the U.S. District Court in Nashville. Four days later, on October 29, Judge Todd Campbell issued a memorandum opinion granting the City's motion and denying the Plaintiffs' motion. (See Appendix B.) In reaching this decision, Judge Campbell found as follows:

- Both *The Contributor* newspaper and any solicitation of charitable contributions by *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 <u>any</u> 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.*

- 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 their protected 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.*

- 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.)*

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. Selling newspapers or anything else to vehicle occupants on public streets creates a safety risk. It was never the City's intention to prohibit the sale of newspapers or to exclude anyone from Brentwood."

<u>On to the Court of Appeals</u>

After Judge Campbell issued a final order dismissing Plaintiffs' claims, *The Contributor* and the two individual plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the Sixth Circuit[12]. The sole issue presented for review by the Plaintiffs/Appellants 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 in their appellate brief 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 *Contributor* customers."

Brentwood, in its appellee's brief, maintained that the District Court did not err in finding that Plaintiffs admitted the existence of alternative means of communication, and that Plaintiffs merely 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 are not entitled to ignore other available means of communication in favor of their "best" means.

The Sixth Circuit's decision

Oral arguments were heard by a panel of three judges in Cincinnati, Ohio on July 26, 2013. Less than three weeks later, on August 14, the Court issued a unanimous decision affirming the trial court's dismissal of the lawsuit. (See Appendix C.) The opinion, authored by Judge David McKeague, includes the following findings:

- 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 *The Tennessean*, Nashville's daily newspaper, 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 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 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 have 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 publicly come to the City's defense, 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 leading up to the lawsuit 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 citizens who had expressed support, contempt or concern and City Commissioners. 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 various 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 takes away from time that could be spent more productively on other efforts.

Risk of paying Plaintiffs' costs – The lawsuit asked the court to award the Plaintiffs' their attorney's fees, as authorized by 42 U.S.C. § 1988. That statute provides that the court may award prevailing 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 a very significant amount.

Conclusion

When public safety regulations tangle with First Amendment rights, those imposing the 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 – 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 – Do 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 et al v. City of Brentwood,* --- F.3d ---, 2013 WL 4081905 (6th Cir. 2013)
[4] *Phelps-Roper v. Strickland*, 539 F.3d 356, 372 (6th Cir., 2008)
[5] *The Contributor et al v. City of Brentwood*, 2012 WL 5331261 (M.D. Tenn. 2012).
[6] Ordinance 2011-09 (see Appendix A) deals with more than the sale of newspapers. In addition to dealing with the sale and distribution of merchandise and materials in the right-of-way, the ordinance prohibits solicitation of donations from vehicle occupants. The ordinance directly deals with persons who might otherwise stand at intersections and elsewhere within the street to ask for donations for various causes. The ordinance also prohibits the use of public right-of-way to alert vehicle occupants to any commercial activity by the use of signs or other devices. As amended, the Brentwood Municipal Code 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. The restrictions in the new ordinance do not apply to persons who have a legitimate reason for occupying and storing materials in the public right-of-way, such as emergency workers, public works employees, utility workers or franchisees such as Comcast. Nor does the ordinance apply to public streets that have been closed for festivals or other events and activities permitted by the City.
[7] Although beyond the scope of this paper, 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. (See Appendix D.)

AUTHORS' NOTE: At the time this paper was submitted, deadlines had not passed for the Plaintiffs in *The Contributor* lawsuit to request a rehearing, request an *en banc* hearing, or file a petition with the U.S. Supreme Court for writ of certiorari.

Special thanks to Tiffani Pope for her assistance in preparing the presentation materials accompanying this paper.

First Amendment vs. Public Safety
The Contributor v. City of Brentwood Story

Index of Appendices

APPENDIX A	City of Brentwood Ordinance 2011-09
APPENDIX B	*The Contributor, et al. v. City of Brentwood,* District Court Memorandum Opinion
APPENDIX C	*The Contributor, et al. v. City of Brentwood,* Sixth Circuit Court of Appeals Opinion
APPENDIX D	"Brentwood tries to recast image amid 'Contributor' legal challenge," Jeff Woods, *The City Paper*, July 17, 2011

APPENDIX A

ORDINANCE 2011-09

AN ORDINANCE OF THE CITY OF BRENTWOOD, TENNESSEE PROVIDING THAT THE CODE OF ORDINANCES OF THE CITY OF BRENTWOOD BE AMENDED BY REVISING SECTION 58-1, IN REGARD TO USE OF THE PUBLIC RIGHT-OF-WAY FOR ACTIVITIES INCLUDING SOLICITATION OF DONATIONS AND STORAGE, SALE OR EXHIBITION OF MERCHANDISE

WHEREAS, Section 58-1 of the Code of Ordinances of the City of Brentwood establishes regulations for the use of the public right-of-way for storing, selling or exhibiting goods, merchandise or materials; and

WHEREAS, such regulations are necessary in order to prevent dangers to persons and property, and to prevent delays and interference with vehicular traffic flow; and

WHEREAS, use of the public right-of-way for solicitation of donations or for the storage, sale or exhibition of merchandise and materials can pose significant hazards to the solicitors, other pedestrians and motorists; and

WHEREAS, such hazards can be created by the actions of either solicitors or occupants of vehicles who want to interact with solicitors; and

WHEREAS, 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

WHEREAS, distraction of motorists occasioned by solicitations or by the storage or exhibition of goods and materials in the right-of-way 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; and

WHEREAS, distracted drivers pose a significant risk of physical injury to motorists and pedestrians; and

WHEREAS, public health, safety and welfare requires the imposition of reasonable manner and place restrictions on solicitation and the storage and exhibition of goods and other materials in the public right-of-way, while respecting the constitutional right of free speech for all citizens; and

WHEREAS, it is necessary and appropriate to amend section 58-1 of the Code of Ordinances to address the concerns identified herein.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF BRENTWOOD, TENNESSEE, AS FOLLOWS:

SECTION 1. That 58-1 of the Code of Ordinances of the City of Brentwood shall be amended to read as follows:

Sec. 58-1. Use for solicitations and displaying, selling, etc., goods and merchandise.

(a) Except as permitted by other portions of this Code, no person shall use or occupy any portion of the public right-of-way, including any public street, median, alley or sidewalk for the purpose of:

(1) Storing or exhibiting any goods, merchandise or other materials.

(2) Selling or attempting to sell any goods, merchandise or other materials or any services.

(b) No person shall stand on or otherwise occupy any portion of the public right-of-way, including any public street, median, alley or sidewalk for the purpose of soliciting or accepting a donation of money or any other item from the occupant of any vehicle.

(c) No person shall, by means of a sign or other device of any kind, use or occupy any portion of the public right-of-way, including any public street, median, alley or sidewalk, to attempt to alert the driver or any occupant of a motor vehicle that is on a street to any commercial activity.

(d) Nothing in this section shall be construed to apply to:

(1) Licensees, lessees, franchisees, permittees, employees or contractors of the city, county or state authorized to engage in inspection, construction, repair or maintenance or in making traffic or engineering surveys.

(2) Any of the following persons while engaged in the performance of their respective occupations: firefighting and rescue personnel, law enforcement personnel, emergency medical services personnel, health care workers or providers, military personnel, civil preparedness personnel, emergency management personnel, solid waste or recycling personnel; public works personnel or public utilities personnel.

(3) Use of public streets, alleys, sidewalks or other portions of the public right-of-way in areas which have been closed to vehicular traffic for festivals or other events or activities permitted by the city.

(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.

SECTION 2. If any section, subsection, clause, provision or portion of this ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, subsection, clause, provision or portion of this ordinance.

SECTION 3. That this ordinance shall take effect from and after its final passage and publication thereof, or fifteen days after its first passage, whichever occurs later, the general welfare of the City of Brentwood, Williamson County, Tennessee, requiring it.

PASSED: 1st reading 7/11/11

2nd reading 7/25/11

PUBLIC HEARING
Notice published in: n/a
Date of publication:
Date of hearing:

PLANNING COMMISSION n/a

NOTICE OF PASSAGE
Notice published in: Williamson AM
Date of publication: 7/29/11

EFFECTIVE DATE 7/29/11

Paul S. Webb
MAYOR Paul L. Webb

Deborah Hedgepath
RECORDER Deborah Hedgepath

Approved as to form:

Roger A Horner
CITY ATTORNEY Roger A. Horner

2012 WL 5331261
Only the Westlaw citation is currently available.
United States District Court,
M.D. Tennessee,
Nashville Division.

The CONTRIBUTOR, et al.
v.
CITY OF BRENTWOOD.

No. 3–11–0624. | Oct. 29, 2012.

Attorneys and Law Firms

Irwin Bruce Venick, Dobbins & Venick, Susan Laurie Kay, Vanderbilt Legal Clinic, Nashville, TN, for Plaintiff.

Robert M. Burns, Charles M. Harrod, Howell & Fisher, Nashville, TN, for Defendant.

Opinion

MEMORANDUM

TODD J. CAMPBELL, District Judge.

***1** Pending before the Court are Plaintiffs' Motion for Summary Judgment (Docket No. 46) and Defendant's Motion to Dismiss for Failure to State a Claim or, Alternatively, Motion for Summary Judgment (Docket No. 50). For the reasons stated herein, Plaintiffs' Motion for Summary Judgment (Docket No. 46) is DENIED, and Defendant's Motion for Summary Judgment (Docket No. 50) is GRANTED. Defendant's Motion to Dismiss is denied as moot.

FACTS

The Contributor is a non-profit, tax-exempt corporation which produces a street newspaper to educate citizens about homelessness and poverty and to give job skills, meaningful work and a micro-business to persons who have experienced homelessness. The Contributor is sold by street vendors at various locations in Nashville and surrounding communities. Plaintiffs Hart and Harrington are vendors of The Contributor who were issued citations by Defendant for violation of Brentwood's former Ordinance 58–1.

The former Ordinance 58–1 provided that no one could use or occupy any portion of the city street, alley, sidewalk or the public right-of-way to sell any goods or materials. Following the citations of Hart and Harrington, the City of Brentwood revised Ordinance 58–1, because of concerns about its unconstitutionality. The revised Ordinance 58–1 provides:

(a) Except as permitted by other portions of this Code, no person shall use or occupy any portion of the public right-of-way, including any public street, median, alley or sidewalk for the purpose of:

(1) Storing or exhibiting any goods, merchandise or other materials.

(2) Selling or attempting to sell any goods, merchandise or other materials or any services.

(b) No person shall stand on or otherwise occupy any portion of the public right-of-way, including any public street, median, alley or sidewalk for the purpose of soliciting or accepting a donation of money or any other item from the occupant of any vehicle .

(c) No person shall, by means of a sign or other device of any kind, use or occupy any portion of the public right-of-way, including any public street, median, alley or sidewalk, to attempt to alert the driver or any occupant of a motor vehicle that is on a street to any commercial activity.

(d) Nothing in this section shall be construed to apply to:

(1) Licensees, lessees, franchisees, permittees, employees or contractors of the city, county or state authorized to engage in inspection, construction, repair or maintenance or in making traffic or engineering surveys.

(2) Any of the following persons while engaged in the performance of their respective occupations: firefighting and rescue personnel, law enforcement personnel, emergency medical services personnel, health care workers or providers, military personnel, civil preparedness personnel, emergency management personnel, solid waste or recycling personnel, public works personnel or public utilities personnel.

(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:

***2 (1) Such activity shall be prohibited on any portion of any street within the City.**

(2) Such material 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 Ordinance 58–1 (emphasis added).

The fundamental issue presented in this case is whether Sections (b) and (e) violate the First Amendment as applied to The Contributor. The parties agree that this case raises issues of first impression regarding the constitutionality of Brentwood banning the sale of The Contributor from sidewalks to occupants of vehicles on the roadway.

It is undisputed that if Plaintiffs were to engage in the sale of The Contributor newspapers to drivers and/or occupants of vehicles traveling or stopped on roadways within the city limits of Brentwood from the sidewalk, without entering the street, they would be in violation of this Ordinance. Plaintiffs do not challenge the legitimacy of the Ordinance to the extent that it seeks prohibition against vending while standing in the street. Plaintiffs' counsel represented that this dispute is not about being in the street or running in and out of traffic. *See also* Plaintiffs' Responses to Defendant's Statement of Undisputed Material Facts (Docket No. 62), ¶¶ 285 and 471.

Plaintiffs allege that this Ordinance, as it prohibits the sale of The Contributor from the public right-of-way or sidewalk to drivers of occupants of vehicles on the public streets, violates Plaintiffs' First Amendment rights to freedom of speech, expression and the press. Plaintiffs contend that the Ordinance is a content-based restriction on protected speech that is not necessary to serve a compelling governmental interest. Moreover, Plaintiffs argue that the Ordinance is not narrowly tailored to serve a significant governmental interest and does not leave ample alternative channels for communication of The Contributor's message.

Defendant asserts that the Ordinance is a content-neutral time, place and manner restriction based upon the significant governmental interests of traffic safety and flow, narrowly tailored and allowing ample alternative means of communicating The Contributor's message.

SUMMARY JUDGMENT

Summary judgment is appropriate where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Pennington v. State Farm Mut. Automobile Ins. Co.*, 553 F.3d 447, 450 (6th Cir.2009). The party bringing the summary judgment motion has the initial burden of informing the Court of the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts. *Rodgers v. Banks*, 344 F.3d 587, 595 (6th Cir.2003). The moving party may satisfy this burden by presenting affirmative evidence that negates an element of the non-moving party's claim or by demonstrating an absence of evidence to support the nonmoving party's case. *Id.*

***3** In deciding a motion for summary judgment, the Court must review all the evidence, facts and inferences in the light most favorable to the nonmoving party. *Van Gorder v. Grand Trunk Western Railroad, Inc.*, 509 F.3d 265, 268 (6th Cir.2007). The Court does not, however, weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question. *Id.* The mere existence of a scintilla of evidence in support of the nonmoving party's position will be insufficient to survive summary judgment; rather, there must be evidence on which the jury could reasonably find for the nonmoving party. *Rodgers*, 344 F.3d at 595.

DISCUSSION

Plaintiffs claim that the First Amendment issues herein are "hybrid" in that they are claiming rights to the protected speech of the newspaper and also the protected speech related to soliciting for charitable contributions, which they have referred to as "pan-handling." The solicitation of money and the distribution of literature are two different categories of speech, each of which enjoys protection under the First Amendment. *Ater v. Armstrong*, 961 F.2d 1224, 1228 (6th Cir.1992).

In analyzing First Amendment claims to free speech, the Court must first determine whether the speech is protected.

Saieg v. City of Dearborn, 641 F.3d 727, 734 (6th Cir.2011). Defendant does not dispute that vendors of The Contributor exercise First Amendment rights in selling The Contributor newspaper. The Court finds that The Contributor is not only protected speech but also an important voice against homelessness in the Nashville area. The Court also finds that any solicitation of charitable contributions that occurs in conjunction with the vending of The Contributor is protected speech.

Secondly, in analyzing Plaintiffs' claims, the Court must identify the nature of the forum. *Id.* Defendant acknowledges that the sidewalks and streets of the City of Brentwood are traditional public fora.

Third, the Court must determine whether the justifications for the restriction satisfy the requisite standard. *Id.* In making that determination, the Court must consider whether the restriction on the protected speech is content-based or content-neutral. Whether the restriction is content neutral has substantial bearing on the constitutionality of the restriction because the government is held to a very exacting and rarely satisfied standard when it disfavors the discussion of particular subjects or particular viewpoints within a given subject matter. *Id.*

Government regulations of speech are content neutral if they are justified without reference to the content or viewpoint of the regulated speech. *Bays v. City of Fairborn*, 668 F.3d 814, 821 (6th Cir.2012). A government restriction is content-based if it was adopted because of disagreement with the message the speech conveys. *Id.*

***4** Defendant agrees that the subject Ordinance was drafted and enacted in response to and immediately following the citations of Plaintiffs Hart and Harrington under the old Ordinance. Defendant asserts, however, that the old Ordinance was reviewed and a revised Ordinance written in response to constitutional issues being raised by Plaintiffs in the appeals of their citations. *See e.g.*, Docket No. 53–4, p. 23. Plaintiffs have admitted that the revision of the Ordinance was not intended to restrict The Contributor's rights. Docket No. 62, ¶ 28. City Attorney Roger Horner stated that he attempted to balance the rights of The Contributor and its vendors with the City's interests in public safety and traffic flow and traffic safety issues. *Id.*, ¶ 30.

Passage of the Ordinance was based, at least in part, upon an opinion letter from a transportation engineer, Bob Murphy (Docket Nos. 53–11), a memo and analysis from Horner (Docket No. 53–4) and the personal traffic safety experiences of the members of the Board of Commissioners. *See, e.g.*, Docket No. 62, ¶¶ 624, 640, 643, and 679. Murphy opined that there are safety and traffic flow problems associated with vendors who are on the sidewalk and making sales to motorists. Docket No. 62, ¶ 571–72; Docket No. 53–11, pp. 1–2.

The "Whereas" section of the Ordinance reflects that it was enacted, in part, because "solicitors create a safety hazard for themselves and the motoring public when entering upon public street, 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." Docket No. 53–4, p. 19. Horner's Memo to the Brentwood City Commission describes the purpose of the Ordinance as "to prevent accidents and other safety hazards to motorists and pedestrians and to avoid interference with the safe and efficient flow of traffic on busy streets." Docket No. 53–4, pp. 17–18.

The Court finds that the restriction at issue here is content-neutral and was enacted with a sufficient factual basis before the Commission. 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.

The government may impose reasonable time, place and manner, content-neutral restrictions on protected speech so long as the restriction is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication of the information. *Ater*, 961 F.2d at 1227; *Bays*, 668 F.3d at 822. A restriction on speech can satisfy the time, place and manner test if the restriction promotes a substantial government interest that would be achieved less effectively absent the regulation. *Saieg*, 641 F.3d at 738.

***5** In other words, the government may employ the means of its choosing so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation and the restriction is narrowly tailored so as not to burden substantially more speech than is necessary to further that interest. *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n.,* 520 U.S. 180, 213, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997); *Saieg,* 641 F.3d at 738. Plaintiffs do not dispute that traffic safety and flow are significant governmental interests. Plaintiffs argue that the City of Brentwood did not appropriately balance the governmental interest with the burden upon Plaintiffs' speech.

In this case, achievement of the goals of traffic safety and flow would be significantly less effective without this regulation. The Court finds that Brentwood appropriately balanced its interest with the burden upon Plaintiffs' speech and narrowly tailored its Ordinance so as not to burden substantially more speech than necessary. This is not to say that Brentwood, or any city, *must* enact such a restriction. The Court only finds that Brentwood may do so without violating the Constitution, based on the facts in this case.

The cases cited by Plaintiffs are not to the contrary. For example, the statute struck down in *News and Sun–Sentinel Co. v. Cox,* 702 F.Supp. 891 (S.D.Fla.1988) banned all commercial activity (including newspaper sales) to occupants of all motor vehicles located anywhere on public property, regardless of whether the cars were moving, standing, parked or not in traffic lanes. The ban included sidewalks, rest areas and other traffic-neutral locations. *Id.* at 901; *see also Houston Chronicle Pub. Co. v. City of Houston,* 620 S.W.2d 833 (Tex.Civ.App.1981) (ban on sales to vehicles on all public property, not just roadways). In *Dominguez v. State,* 902 S.W.2d 5 (Tex.App.-El Paso 1995), the ordinance at issue banned solicitation, sales or distribution from the roadway itself, but not from the sidewalk, to vehicle occupants. The *Dominguez* court acknowledged, however, the dangers of distracting a motorist from the primary business of driving and the safety and traffic flow issues of searching for money and receiving change. *Id.* at 8. Such dangers are not remedied by requiring the vendor to stand on the sidewalk and reach into traffic to make his sales.

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. *See Denver Pub. Co. v. City of Aurora,* 896 P.2d 306, 315 (Col.1995). In addition, Plaintiffs have stated that part of their protected 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. Plaintiffs do not dispute that obstructing traffic can cause a safety risk for drivers. Docket No. 62, ¶¶ 315 and 500. Other cases cited by Plaintiffs do not involve ordinances prohibiting the vending of newspapers from sidewalks to motorists in the street. *Sun–Sentinel Co. v. City of Hollywood,* 274 F.Supp.2d 1323 (S.D.Fla.2003); *Houston Chronicle Pub. Co. v. City of League City,* 488 F.3d 613 (5th Cir.2007); *Times–News Pub. Co. v. City of Burlington,* 2008 WL 2622995 (M.D.N.C.2008).

***6** The restriction must also leave open ample alternative channels of communication. *Saieg,* 641 F.3d at 735. When a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the government's goal. *Id.* at 739.

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.

As the court stated in *Dominguez,* just 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. *Dominguez,* 902 S.W.2d at 8–9. The Court finds that the Ordinance leaves open ample alternative channels of communication for the Plaintiffs.

For instance, Plaintiffs admit that door-to-door sales of The Contributor would be possible (Docket No. 62, ¶ 299), that The Contributor considered distribution through newspaper boxes and elected not to pursue that method (*Id.,* ¶¶ 301 and 454), that The Contributor makes the newspaper available through subscriptions and by mail on a limited basis (*Id.,* ¶¶

370 and 453), and that The Contributor makes some copies available at speaking engagements (*Id.*, ¶ 371).

Thus, for these reasons, the Court finds that the Brentwood Ordinance at issue, as applied to the Plaintiffs, is constitutional. Accordingly, Defendant's Motion for Summary Judgment is granted, and Plaintiffs' Motion for Summary Judgment is denied.

The parties have raised other issues regarding the scope and constitutionality of the Ordinance but have not fully briefed those issues. Therefore, by November 14, 2012, the parties shall identify any remaining claims, and the Court will establish a further briefing schedule if necessary.

CONCLUSION

For all these reasons, Plaintiffs' Motion for Summary Judgment (Docket No. 46) is DENIED, and Defendant's Motion for Summary Judgment (Docket No. 50) is GRANTED. Plaintiffs' First Amendment claims regarding subsections (b) and (e) of Ordinance 58–1 are dismissed.

IT IS SO ORDERED.

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

2013 WL 4081905
Only the Westlaw citation is currently available.
United States Court of Appeals,
Sixth Circuit.

The CONTRIBUTOR; Calvin Hart; Andrew Harrington, Plaintiffs–Appellants,
v.
CITY OF BRENTWOOD, TENNESSEE, Defendant–Appellee.

No. 12–6598. | Argued: July 26, 2013. | Decided and Filed: Aug. 14, 2013.

Synopsis

Background: Newspaper written and sold by homeless and formerly homeless persons, as well as two street vendors who had been issued citations while attempting to sell issues of paper from city sidewalk, brought action against city, challenging constitutionality of revised ordinance prohibiting sale or distribution of newspapers, magazines, handbills, and the like on city streets and to the occupants of motor vehicles. On the parties' cross-motions for summary judgment, the United States District Court for the Middle District of Tennessee, Todd J. Campbell, Chief Judge, 2012 WL 5331261, ruled in favor of defendant, and plaintiffs appealed.

[Holding:] The Court of Appeals, McKeague, Circuit Judge, held that the ordinance left open adequate alternative channels of communication and, thus, comported with the First Amendment.

Affirmed.

West Headnotes (6)

[1] Constitutional Law
Justification for Exclusion or Limitation

Content-neutral time, place, and manner restriction of a traditional public forum comports with the First Amendment if: (1) it serves a significant government interest, (2) it is narrowly tailored to that interest, and (3) it leaves open adequate alternative channels of communication for the information. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law
Justification for Exclusion or Limitation

Alternative channel of communication can be adequate, as required for a content-neutral time, place, and manner restriction of a traditional public forum to comport with the First Amendment, even when the speaker is denied its best or favored means of communication. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law
Justification for Exclusion or Limitation

Key, for purposes of the adequate-alternatives analysis used in determining whether a content-neutral time, place, and manner restriction of a traditional public forum comports with the First Amendment, is whether the proffered alternatives would allow the speaker to reach its intended audience. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law
Streets and Highways

Constitutional Law
Government Property, Use Of

Constitutional Law
Distribution of Materials in Public Places

Municipal Corporations
Prohibitory Ordinances

Ordinance prohibiting sale or distribution of newspapers, magazines, handbills, flyers, or similar materials on city streets and to the occupants of motor vehicles left open adequate alternative channels of communication and, thus, this content-neutral time, place, and manner restriction of a traditional public forum comported with the First Amendment; intended audience of newspaper and newspaper vendors challenging ordinance was the general citizenry of the city, plaintiffs could easily reach this audience by going door-to-door, by seeking out people on sidewalks, or by distributing the paper

via the mail, email, and news boxes, plaintiffs offered no reason to suggest they could not reach their intended audience by employing these proffered alternatives, and plaintiffs could also interact with motor-vehicle occupants from the sidewalk, so long as they did not step into the road to sell a newspaper or otherwise violate ordinance. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law

Justification for Exclusion or Limitation

Alternative channel of communication is not "inadequate," for purposes of determining whether a content-neutral time, place, and manner restriction of a traditional public forum comports with the First Amendment, simply because the speaker must change its tactics. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law

Freedom of Speech, Expression, and Press

Municipality whose ordinance is challenged on First Amendment grounds need not prove the adequacy of alternative channels of communication; instead, it is only required to proffer a list of potential alternative avenues of communication that are reasonable and made in good faith, after which the party challenging the ordinance may counter the municipality's proof by showing that the remaining avenues of communication are inadequate. U.S.C.A. Const.Amend. 1.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 3:11–cv–00624—Todd J. Campbell, Chief District Judge.

Attorneys and Law Firms

ARGUED: Irwin B. Venick, Dobbins, Venick, Kuhn & Byassee, PLLC, Nashville, Tennessee, for Appellants. Robert M. Burns, Howell & Fisher, PLLC, Nashville, Tennessee, for Appellee. **ON BRIEF:** Irwin B. Venick, Dobbins, Venick, Kuhn & Byassee, PLLC, Nashville, Tennessee, Susan L. Kay, Nashville, Tennessee, Thomas H. Castelli, Amercian Civil Liberties Union Foundation of Tennessee, Nashville, Tennessee, for Appellants. Robert M. Burns, C. Mark Harrod, Howell & Fisher, PLLC, Nashville, Tennessee, for Appellee.

Before KEITH and McKEAGUE, Circuit Judges; WATSON, District Judge . *

Opinion

OPINION

McKEAGUE, Circuit Judge.

***1** Calvin Hart and Andrew Harrington were vendors for *The Contributor*, a newspaper written and sold by homeless and formerly homeless persons. While standing on the sidewalk in Brentwood, Tennessee, attempting to sell issues of *The Contributor*, Hart and Harrington were issued citations by City of Brentwood police officers. Fearing the ordinance was unconstitutional, the City revised it. The revisions did not satisfy Plaintiffs. They contend that the revised ordinance is unconstitutional because it does not leave open adequate alternative channels of communication for their speech. The district court disagreed. We now affirm.

I.

A.

The facts in this case are not in dispute. *The Contributor* produces a street newspaper to educate people about homelessness and poverty. The newspaper also helps develop job skills for homeless and formerly homeless persons by employing them as street vendors of *The Contributor*. Plaintiffs Calvin Hart and Andrew Harrington are two such vendors.

In January 2011, Hart and Harrington attempted to sell issues of the newspaper in the streets and on the sidewalks of Brentwood, Tennessee. They were issued citations by Brentwood police officers for violating Brentwood Municipal Code section 58–1. At the time, ordinance 58–1 provided that no person could use or occupy any portion of the city street, alley, sidewalk or the public right-of-way to sell any goods or materials. Hart and Harrington were each fined $125.

Fearing that this particular version of the ordinance was unconstitutional, the City revised it. As relevant here, the revised ordinance ("the Ordinance") provides as follows:

> (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 Municipal Code Ordinance 58–1.

In enacting the Ordinance, the City relied on a letter from its attorney explaining the changes, a letter from a traffic consultant, and a summary of the revisions, as well as common sense and personal experience. The Ordinance went into effect on July 29, 2011.

Hart and Harrington have not sold issues of *The Contributor* in Brentwood since the Ordinance took effect because they fear that they will be fined under the Ordinance. They allege that they would sell issues directly to motor-vehicle occupants but for the Ordinance. *The Contributor* alleges that it would like to expand sales into Brentwood but has not done so out of fear that its vendors will be cited under the Ordinance. Plaintiffs brought suit to enjoin the enforcement of the Ordinance, claiming that the law violates their First Amendment rights.

B.

***2** In the court below, Plaintiffs alleged that the Ordinance was a content-based restriction on protected speech that was not necessary to a compelling government interest. They argued in the alternative that if the court found the law was a content-neutral regulation, the law was not narrowly tailored to serve a significant governmental interest and did not leave open adequate alternative channels of communication.

On cross-motions for summary judgment, the district court ruled in favor of the City. The district court found that the ordinance was a content-neutral regulation of a traditional public forum. Further, the court found that the ordinance was enacted with a sufficient factual basis and was a reasonable time, place, and manner restriction promoting a substantial government interest. The court determined that the law was narrowly tailored because the City's "achievement of the goals of traffic safety and flow would be significantly less effective without this regulation." The court concluded that the law left open adequate alternative channels of communication. The court found that *The Contributor* could sell its newspapers "door-to-door, through subscriptions, on private property with permission, to pedestrians on sidewalks, or in appropriately placed news racks." This appeal followed.

II.

We review the district court's grant of summary judgment *de novo*. *Jacob v. Twp. of W. Bloomfield*, 531 F.3d 385, 388 (6th Cir.2008). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

[1] On appeal, Plaintiffs have abandoned most of the arguments they made below. They concede that the law is a content-neutral time, place, and manner restriction of a traditional public forum. Such a law comports with the First Amendment if (1) it serves a significant government interest; (2) it is narrowly tailored to that interest; and (3) it leaves open adequate alternative channels of communication for the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (internal quotation marks omitted). Plaintiffs concede that the law serves a significant public interest and is narrowly tailored to that interest. Our review is therefore limited to determining whether the law leaves open adequate alternative channels of communication.

Plaintiffs make three points in arguing it does not. Primarily, they argue that the alternatives are inadequate because the Ordinance acts as a "*de facto* forum closure and leaves open only alternatives that are not used by a unique publication such as *The Contributor*." In other words, they argue that street sales to motor-vehicle occupants are the only adequate form of communication for a unique publication such as *The Contributor*. Second, they argue that the City was required to present evidence that the proffered alternatives would be adequate. Third, they argue that because the

Ordinance completely closes a public forum, it does not leave open adequate alternative channels of communication. We consider each argument in turn.

A.

***3** The City suggested five alternative avenues of communication in the court below: mail subscriptions; email distribution; news boxes; sales to pedestrians on sidewalks; and door-to-door sales. During oral argument before this Court, it offered two more: sales in city parks and in front of churches. We have previously held that pedestrian sales and door-to-door solicitation are adequate alternative channels of communication. *See Jobe v. City of Catlettsburg,* 409 F.3d 261, 270 (6th Cir.2005). Plaintiffs do not contend that they could not use news boxes, mail subscriptions, or email distribution. These alternatives are therefore potential alternative avenues of communication. But are they adequate?

[2] **[3]** 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. *Id.* (discussing ability to reach intended audience); *Prime Media, Inc. v. City of Franklin,* 181 F. App'x at 536, 541 (6th Cir.2006). Plaintiffs rely upon cases that illustrate this point.

In *Weinberg v. City of Chicago,* 310 F.3d 1029 (7th Cir.2002), the Seventh Circuit struck down a law prohibiting the distribution of written material within 1000 feet of the United Center, the site of the Chicago Blackhawks' home games. Weinberg wanted to sell copies of his book—which excoriated the Blackhawks' former CEO—at the United Center before hockey games. The Seventh Circuit held that the law did not leave open adequate alternative channels of communication—Weinberg wanted to target Blackhawks' fans specifically, and they represent "a fundamentally different market than the market for bookstore readers or Internet users." *Id.* at 1042. The alternatives were inadequate because they "require[d] Herculean efforts by Weinberg or his customers to complete the sale." *Id.* That is, because the alternatives did not allow Weinberg to reach his intended audience without tremendous effort, the law did not leave open adequate alternative channels of communication.

In *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 956 (9th Cir.2011) (en banc), the ordinance at issue effectively barred day laborers from congregating anywhere in the city for the purpose of obtaining temporary employment. The majority in *Redondo Beach* did not address whether the ordinance left open adequate alternative channels of communication. But in two concurrences, Judges Gould and Smith contended that it did not. Judge Gould believed that the City of Redondo Beach needed to designate a permissible area for day laborers to congregate. *Id.* at 951. Judge Smith, joined by Judge Thomas, concluded that the city had to provide evidence establishing that the proffered alternatives were adequate and would not substantially increase the costs of obtaining employment. *Id.* at 955. Soliciting pedestrians and door-to-door canvassing were simply inadequate. *Id* . at 956. In dissent, Judge Kozinski, joined by Judge Bea, argued that there were adequate alternatives: day laborers could advertise via newspaper or on Craigslist and could go to day-laborer centers. Judge Kozinski concluded that the inconvenience of these alternatives did not render them inadequate. *Id.* at 967.

***4** **[4]** The key distinction between *Weinberg* and *Redondo Beach* and this case is the speakers' ability to reach the intended audience. A day laborer wants to find a person who will hire him. Absent an area to meet with potential employers, the day laborer is potentially left going door-to-door or soliciting pedestrians on a needle-in-a-haystack search for work. A person selling a book decrying the reign of the Blackhawks former CEO wants to find other Blackhawks' fans who dislike the person or those that might be so persuaded. Absent an opportunity to meet with Blackhawks' fans where they congregate—the arena where the Blackhawks play—it would be difficult to reach the intended audience.

Plaintiffs' intended audience, on the other hand, 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. Plaintiffs can also interact with motor-vehicle occupants from the sidewalk, so long as they do not step into the road to sell a newspaper or otherwise violate the Ordinance.

Instead, Plaintiffs argue that door-to-door sales are inadequate for two reasons. First, Plaintiffs argue that door-to-door sales provide an inadequate alternative because of the City's Peddler Ordinance. Specifically, Plaintiffs argue that the Peddler Ordinance is unduly restrictive because it requires *inter alia* two references to attest to the peddlers moral reputation and business responsibility; proof that the person has not been convicted of a municipal ordinance; and payment of a $1000 bond. If the Peddler Ordinance applied, door-to-door sales might not be an adequate alternative means of communication.

But it does not apply. Ordinance 18.84 exempts "newsboys" and "bona fide charitable ... organizations" from the Peddler Ordinance. *The Contributor* is a charitable organization: it is listed as a 501(3)(c) charitable organization. Its street vendors are newsboys: "one who delivers or sells newspapers at retail." *Webster's Third New Int'l Dictionary* 1524 (1984). Therefore, by its terms the Peddler Ordinance does not apply to Plaintiffs, and they cannot contend that door-to-door sales are an inadequate alternative means of communication based on the Peddler Ordinance.

[5] Second, Plaintiffs argue that door-to-door sales is an inadequate alternative because it would require a change in sales tactics and require Plaintiffs to foist themselves upon people. But an alternative is not inadequate simply because the speaker must change its tactics. If this were so, then 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.

***5** Because Plaintiffs can easily reach their intended audience, the Ordinance leaves open adequate alternative channels of communication.

B.

[6] Plaintiffs' other arguments merit little discussion. They argue that the city must offer proof that the alternatives will be adequate. But we 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. *See Prime Media, Inc.*, 181 F. App'x at 541 ("intended audience ... can be reached through newspapers, radio, television, smaller signs ..., and other traditional means of communication (such as leafletting)"); *Jobe*, 409 F.3d at 270. A plaintiff may then counter the government's proof by "showing that the remaining avenues of communication are inadequate." *Ward*, 491 U.S. at 802; *see also Prime Media, Inc.*, 181 F. App'x at 541 ("Prime Media has presented no evidence that these alternatives are inadequate to convey its messages"). Plaintiffs have wholly failed to offer any evidence to make this showing. Instead, they argue that face-to-face interaction is intertwined with the newspaper's message and therefore traditional modes of distribution are inadequate. But this is simply a rehash of their argument above that the only adequate means of communication is their preferred means of communication, an argument we rejected.

Plaintiffs also argue that when an entire forum is closed to certain speech activity, a government restriction does not leave open adequate alternative means of communication. The cases cited by Plaintiffs do not support such a broad statement. In those cases, it was not the fact that *a public forum* was closed that made the law unconstitutional; instead, it was the fact that *all public fora* were closed to the plaintiffs. *Loper v. New York City Police Dept.*, 999 F.2d 699, 701–03 (2d Cir.1993); *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir.1996). 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 that the proffered alternatives are inadequate, we conclude that the Ordinance leaves open adequate alternative channels of communication.

III.

It might be easier for *The Contributor* and its street vendors to return to its practice of selling to motor-vehicle occupants, but "there has been no showing that the remaining avenues of communication are inadequate." *Ward*, 491 U.S. at 802. We therefore **AFFIRM** the decision of the district court.

* The Honorable Michael H. Watson, United States District Judge for the Southern District of Ohio, sitting by designation.

APPENDIX D

Brentwood tries to recast image amid 'Contributor' legal challenge

Sunday, July 17, 2011 at 9:05pm

By Jeff Woods



Jude Ferrara (SouthComm)

In the summer drama pitting *The Contributor* street newspaper and its ragged salespeople against the city of Brentwood, the citizens of this largely Republican Nashville suburb say they have been unfairly typecast as heartless snobs. They insist their police gave tickets to seven salespeople not to chase the unsightly homeless from the city's sidewalks, but to head off inevitable accidents on their car-clogged streets.

Whether a judge believes that claim is the key question in a federal civil rights lawsuit filed this month against Brentwood by *The Contributor* and the ACLU of Tennessee.

Brentwood Police Chief Ricky Watson said his officers had no choice but to write the tickets because *The Contributor* salespeople were walking out into traffic to collect dollars 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 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."

The controversy started an argument between newspaper columnists in Nashville and its suburb to the south. *The Tennessean*'s Gail Kerr accused Brentwood of running *The Contributor*'s salespeople out of town because they are homeless.

"Poverty does make people uncomfortable, doesn't it?" Kerr asked in a recent column.

That brought a scathing rebuke from Susan Leathers, editor of the online Brentwood Home Page newspaper.

“[A] Girl Scout selling cookies would be cited as quickly as a *Contributor* salesperson if local authorities deemed the action dangerous,” she wrote, then turned to “something that makes my blood boil.”

“It’s the stereotype that paints Brentwood as a snobby, prejudiced place that refuses to let its streets paved with gold be tainted by those considered less desirable than the people who live here.”

An “amazing number of volunteers” in Brentwood help the homeless, she added.

“My church, as well as many others in Brentwood, welcome Room in the Inn ‘residents’ on an ongoing basis. Habitat for Humanity in Williamson County — yes, there is a huge need for affordable homes here — knows that many of its homes were constructed with the generosity of and volunteer labor provided by Brentwood churches, businesses and residents, starting with our high school Habitat High clubs.”

In the lawsuit, Brentwood officials already have conceded the city’s ordinance won’t stand up in court. Part of Brentwood’s original municipal code, it bans the sale of any merchandise from sidewalks, streets or public rights-of-way. The city might persuade a judge to allow an infringement on *The Contributor*’s free-press rights, but only if Brentwood is advancing a legitimate interest in doing so, i.e., the safety of its streets. The prohibition in the ordinance obviously is too broad.

So last week, the Brentwood City Commission began amending the ordinance to permit newspaper sales on sidewalks but not on streets. The amended ordinance passed on first reading and should become the new law by the end of this month.

City Attorney Roger Horner, who had been negotiating with the ACLU, said he thought the changes would appease *The Contributor* and head off the lawsuit.

“We assumed at that time that the ACLU was satisfied with the measures we were taking, and they didn’t wish to pursue the matter any further,” Horner told the City Commission. “We invited their input. Instead of providing that input, they filed their lawsuit in federal court.”

With the amendments to the ordinance, Horner said he’s confident the city will win the lawsuit. “Frankly, we’re a bit puzzled as to what the lawsuit seeks to accomplish,” he said.

But Tricia Herzfeld, ACLU-Tennessee legal director, said *The Contributor*’s salespeople need to be able to step off curbs and onto the streets to hand their newspapers to motorists.

“It shuts down *The Contributor* completely” to limit sales to sidewalks, she said. “There’s not any pedestrian traffic in Brentwood, right?”

Tom Wills, one of *The Contributor*’s founders, said salespeople are trained to make transactions safely. One vendor once refused sell a newspaper to none other than Mayor Karl Dean until he pulled over his car to the side of the street, Wills said.

“It’s not a dangerous activity. We have standards,” Wills said. “Our own vendors are not supposed to be in the street. Our position is that vendors are allowed to sell to cars that are stopped. We do not want vendors flagging down cars that are driving down the road to make sales.”

The Contributor is wildly successful. Since starting in 2007, according to Wills, sales have grown from 5,000 copies in the first year to 500,000 last year. That has made it the largest-circulation street newspaper in the country. There are a couple dozen publications in the genre — the *Oregon Vagabond*, the *Spare Change News* in Cambridge, Mass., Chicago’s *StreetWise*, the *Denver Voice*, just to name a few. All address issues of poverty and homelessness and are distributed by poor or homeless vendors.

Nashville’s goes for $1, and the 400 salespeople pocket 75 cents from each sale. One-third of those who were homeless when they started selling these newspapers now are off the streets, Wills said.

The Contributor is growing so fast that salespeople have been forced to branch out to Nashville’s suburbs. In Franklin, Wills said, they have encountered trouble from police, but no tickets have been issued yet. He said he hopes the lawsuit against Brentwood will set the parameters for what his salespeople can and cannot do.

In Nashville, police at first insisted they had to obtain permits to sell the paper. That was even though newspapers are exempt from the Metro ordinance regarding the sale of merchandise on the street. So *The Contributor* printed signs with the ordinance’s citation number and gave them to their salespeople to educate police. The police don’t bother them anymore.

“It’s fine and dandy that Davidson County is constitutionally friendly with us,” Wills said. “But when the other communities run our vendors off repeatedly, whether that be in Brentwood or Franklin or other communities outside of Nashville, it does really hurt the bottom line of our vendors. Our vendors are out there trying to create a small business. They go into these communities and they are told, ‘No you can’t do this, no you can’t do that.’ At some point we have to be able to say, ‘No, we do have the right to do this.’

“It’s not just principle,” Wills continued. “It’s a practical concern for us. We’re not in this to start a class war. We had to take action to give our vendors hope and make sure they understand that we’ve got their back, and to basically settle this issue once and for all.”