IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

SCOTT A. ROSS, et al.	)	**Case No.**
Plaintiffs,	)	**Judge**
-vs-	)	
CITY OF CINCINNATI	)	**MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, WITH MEMORANDUM IN SUPPORT**
Defendants.	)	

MOTION FOR TEMPORARY RESTRAINING ORDER

Now come Plaintiffs, Scott A. Ross, , Stephen H. Dapper, and the Coalition Opposed to Additional Spending & Taxes ("COAST"), and hereby move this Court, pursuant to Federal Rule of Civil Procedure 65(b), for a Temporary Restraining Order and Preliminary Injunction enjoining the unconstitutional pattern, practice, and policy of Defendants City of Cincinnati, Cincinnati Center City Development Corporation, and Findlay Market, Inc., which serve to deprive Plaintiffs of their constitutional rights to, *inter alia*, engage in free political speech, petition their government, and collect signatures in support of a petition to amend the charter of the City of Cincinnati, as guaranteed by the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, Section 11, Article I of the Ohio Constitution, and Section 1, Article II of the Ohio Constitution.

In the absence of immediate injunctive relief, Plaintiffs will suffer irreparable harm. Specifically, Plaintiffs are engaged in efforts to collect enough signatures to place, on the November 2009 ballot, a proposed amendment to the City of Cincinnati charter that would do the following: "prevent the expenditure of monies by the City for right-of-way acquisition or

construction of improvements for passenger rail transportation (e.g. a trolley or streetcar) without first submitting the same to a vote of the electorate and receiving a majority affirmative vote for the same."

In the absence of injunctive relief, Plaintiffs' ability to collect sufficient signatures to place this measure on the November 2009 ballot is imperiled, and Plaintiffs will continue to operate under unlawful threat of deprivation of their aforesaid constitutional rights.

Plaintiffs respectfully request that the requirement that they provide security pursuant to Rule 65(c) be waived. A Memorandum in Support of Plaintiffs Motion is attached hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER

This is an action for a declaratory judgment, a temporary restraining order, preliminary and permanent injunctive relief, and compensatory relief under Section 1983 of the United States Code. Due to Defendants' conduct, Plaintiffs have suffered, and will continue to suffer irreparable harm to their rights under the First Amendment to the United States Constitution, Section 11, Article I of the Ohio Constitution and Section I, Article II of the Ohio Constitution. The harm may only be remedied by a ruling from this Honorable Court.

Plaintiffs file this Motion for a Temporary Restraining Order contemporaneously with their Verified Complaint challenging Defendants unconstitutional patterns, practices, policies, and conduct. Specifically, in the last month alone, Defendants have used their control over public property, to threaten, harass, intimidate, and impede Plaintiffs in their efforts to collect signatures for a petition. Specifically, Plaintiffs are engaged in efforts to collect enough signatures to place, on the November 2009 ballot, a proposed amendment to the City of Cincinnati charter that would do the following: "prevent the expenditure of monies by the City for right-of-way acquisition or construction of improvements for passenger rail transportation (e.g. a trolley or streetcar) without first submitting the same to a vote of the electorate and receiving a majority affirmative vote for the same." (hereinafter "the trolley issue").

To qualify for ballot access, Plaintiffs must submit 6,150 valid signatures no later than early September, 2009, 60 days prior to the November, 2009 elections. At the time of this filing, Plaintiffs have gathered approximately 4,500 signatures, 3,000 of which have been validated. Accordingly, at the time of this filing, Plaintiffs have a little more than three months to gather just over 3,000 valid signatures. Given this deadline, on each occasion where Plaintiffs are

unlawfully forced to stop collecting signatures, not only does a violation of their constitutional rights take place, but the likelihood that Plaintiffs petition will gain ballot access is imperiled.

I. FACTS.

A. Conduct at Issue.

On May 2, 2009, and in Cincinnati, Ohio, a state actor stopped Stephen H. Dapper of Cincinnati, Ohio from gathering signatures at Findlay Market, in Cincinnati, Ohio. At that time, Mr. Dapper was on a dedicated public sidewalk. Mr. Dapper is a member of COAST, and was gathering signatures to put the trolley issue on the ballot. Findlay Market is managed by The Corporation for Findlay Market ("CFFM"), but is entirely owned by the City of Cincinnati, and is thus public property.

Specifically, Robert J. Pickford, the "President and CEO" of CFFM, ordered Mr. Dapper to stop collecting signatures. Also, the "assistant marketing director" of Findlay Market, a woman who identified herself only as "Cheryl," ordered Mr. Dapper to stop collecting signatures, or in the alternative, confine his collection efforts to a single six foot square area. "Cheryl" also harassed Mr. Dapper and hindered his efforts by (1) actively attempting to dissuade Findlay Market patrons from signing Mr. Dapper's petition, and (2) applauding those who refrained from doing so.

On that same day, Daniel P. Regenold was also told by these same persons to cease petitioning on the public sidewalks at Findlay Market.

On April 19, 2009, and in Cincinnati, Ohio, a state actor again interfered with a COAST member's efforts to gather signatures for the trolley issue. On that date, COAST member Scott Ross attempted to circulate petitions on a dedicated public sidewalk in front of Millions Cafe at 2133 Linwood Ave., Cincinnati, Ohio. As Mr. Ross approached the building (Millions Cafe), a

City of Cincinnati police officer, Officer Root, badge number P542, informed Mr. Ross that he was not free to gather signatures on the dedicated public sidewalk in front of Millions Cafe, and ordered Mr. Ross to not collect signatures at that location. Officer Root's order was stern and non-negotiable. Officer Root further instructed Mr. Ross to leave the area on the dedicated public sidewalk in front of Millions Cafe entirely. The officer then demanded Mr. Ross to produce a "Solicitor's License," and informed Mr. Ross that he was required to have a Solicitor's License if he wished to gather signatures in the City of Cincinnati.

On April 15, 2009, and in Cincinnati, Ohio, a state actor again unlawfully interfered with a COAST member's efforts to gather signatures for the trolley issue. On that date, COAST member Daniel P. Regenold attempted to gather signatures at Fountain Square in downtown Cincinnati. Debbie Branscom, "On-Site Manager of Fountain Square," informed Mr. Regenold that he was not permitted to gather signatures at Fountain Square. She further ordered Mr. Regenold to stop collecting signatures, and ordered him to leave the premises entirely. Ms. Branscom cited the City of Cincinnati Charter in support of her position. When Mr. Regenold began to ask questions about applicable law, Ms. Branscom procured the services of a City of Cincinnati police officer, Steve Givens. Officer Givens asked Mr. Regenold to leave the premises if he intended to continue collecting signatures.

In aggregate, these instances demonstrate a growing hostility by Defendants, all agents of the City of Cincinnati, towards Plaintiffs' increasingly successful efforts to harness the will of the electorate to challenge the policies of Cincinnati's elected and unelected officials. Accordingly, Defendants' conduct must be immediately enjoined.

B. Fora at Issue

Defendant City of Cincinnati owns certain real property within the City of Cincinnati commonly known as "Fountain Square" and "The Findlay Market." In particular, significant portions of Findlay Market are themselves dedicated public streets and sidewalks. Defendant City of Cincinnati has entered into lease agreement for the management of the aforesaid property with, respectively, 3CDC/FSMG and CFFM. The City also owns and exercises control over the dedicated public sidewalks on Linwood Avenue.

i. *Fountain Square*

Defendant Cincinnati Center City Development Corporation ("3CDC") is a private, non-profit corporation organized under the laws of the State of Ohio. According to its website, 3CDC (1) "works collaboratively with the City [of Cincinnati] and the Port of Greater Cincinnati Development Authority;" and (2) plans and executes "large scale public-private real estate development projects." Defendant Fountain Square Management Group LLC ("FSMG") is a private, non-profit organization established by 3CDC in 2006 for the *sole purpose* of managing "events, programming, maintenance and security" for Fountain Square.

Pursuant to Section 713-2 of the Cincinnati Municipal Code, "Fountain Square" includes the area between Fifth Street, Walnut Street, Sixth Street and Vine Street, and all adjacent public ways and walkways that are open to the public, regardless of whether the property is public or private. The Managing Director of FSMG is also an employee of 3CDC, and for all intents and purposes, 3CDC and FSMG are the same entity. FSMG proclaims, on its website, to further the very *public* mission of ensuring that "Fountain Square represents the very best our city has to offer, instilling a renewed sense of pride."

On August 6, 2006, the City of Cincinnati passed Emergency Ordinance No. 224-2006 (Ordinance 224) "to allow for the efficient administration of the permit process for the use of Fountain Square." Ordinance 224 promulgated a "permit and regulation process" for the use of Fountain Square, and, in Cincinnati Municipal Code Chapter 713, Section 1, reserves that permit and regulation process to the City of Cincinnati, but permits the city manager to designate a third party who has lawfully entered into an agreement for the management of Fountain Square to administer the Fountain Square permitting process. Thus, to the extent that, pursuant to the enabling language of Section 713-1, 3CDC and or FSMG regulate conduct at Fountain Square, 3CDC and FSMG act as designee of the City of Cincinnati.

Further, Section 713-3 preserves the use of Fountain Square "for the peaceful and orderly enjoyment of the square," and provides that any other uses of Fountain Square is not permitted, except in accordance with the terms of a permit issued by the director of public services or the city manager's designee, 3CDC and/or FSMG. Sections 713-3(a), (b), (c), and (d) require a permit before a person or group erects a display, exhibit, structure, or sign, or holds an event, protest, rally, meeting or other use of greater than 50 participants.

Section 713-4 governs the permitting process for use of Fountain Square, and provides that either the City of Cincinnati or 3CDC and/or FSMG may issue a permit. Such permits may contain conditions of use, and must be displayed by permitted speakers or participants at all times. Section 713-4 further requires "equal access" for all lawful uses of Fountain Square. Section 713-5 expressly forbids citizens from displaying, offering to sell, selling, or bartering merchandise, but does not expressly forbid any other type of speech.

To obtain a permit, a group or individual must provide his name, address, phone number, and "present documented authority," present corporate documents, present a detailed description

of the use to be made of Fountain Square, a detailed plan or drawing of any structure or display, an application fee, and a permit fee. No more than three permits may be issued for the use of Fountain Square at the same date and time.

Concomitantly, the Rules and Regulations for the Use of Fountain Square indicate that Fountain Square will be allocated for the following purposes: "Peaceful Enjoyment" and "General Use." While the Rules and Regulations state that "any person or group seeking to use Fountain Square for an activity which includes less than 50 persons, and which does not involve placement of any structure, display or exhibit on Fountain Square, will not be required to obtain a permit," 3CDC and/or FSMG agents regularly order petition circulators to cease and desist.

ii. *Findlay Market*

The Findlay Market is an open air market primarily located on dedicated public streets and sidewalks. It is officially described as "Elder Street, from the west line of Vine Street to Elm Street; together with the Findlay Market House."[1] According to the Market's website, "[o]n Saturdays and Sundays from April to November the Market also hosts a thriving farmers market, dozens of outdoor vendors, numerous street performers, and lots of special events. Findlay Market is a gathering place for people from all over the city."

Unlike a traditional market, Findlay Market is entirely government-owned-- it is owned by the City of Cincinnati, and managed by "The Corporation for Findlay Market" ("CFFM").[2] A pedestrian walking along Race Street in Cincinnati may freely wander into the market: there is a sign designating the entrance to Findlay Market, but there is no gate, admittance fee, or other impediment to entry. Sidewalks in and around Findlay Market are regularly used to access other retail businesses in the vicinity.

[1] City of Cincinnati Municipal Code, 845-3.

[2] All facts in this section are taken directly from information provided by CFFM on its website, www.findlaymarket.org.

Defendant CFFM is a non-profit corporation founded for the sole and specific purpose of managing Findlay Market. Since 2004, the City of Cincinnati and CFFM have maintained a lease agreement that grants CFFM exclusive rights to manage the market. However, CFFM fails to function as a self-sustaining operation, and its losses are covered by operating funds from the City of Cincinnati. Meanwhile, the City of Cincinnati Department of Community Development and Planning is "involved with supporting, promoting, and operating" the market. Accordingly, Findlay Market self-identifies as a "public market."

Cincinnati Municipal Code Chapter 845, Section 3 ("845-3") vests Findlay Market management with the authority to carry out all federal, state, and city laws on and related to the premises, and further requires that, when at Findlay Market, citizens obey lawful orders of the market's management. 845-17, 845-21, and 845-23 establish a permitting process for "vendors, non-profits, musicians, and street performers."

All Findlay Market regulations are directed at vendors, rather than visitors such as petition circulators, and no Cincinnati Municipal Code section addresses the circulation of petitions at Findlay Market. However, based upon Plaintiffs' experiences, CFFM enforces the aforementioned provisions as though a permit, whether *per se* or *de facto*, is required to circulate petitions at Findlay Market.

iii. *Linwood Ave. Sidewalks*

The sidewalks of Linwood Avenue, in Cincinnati, Ohio, are, by all measures, typical commercial/retail-district sidewalks. They are dedicated to public use and accepted for that purpose. Million's Cafe faces Linwood Avenue, and serves as a popular gathering place on evenings and weekends. On the night of April 19, 2009, Million's Cafe utilized portions of public sidewalks for its patrons to (1) wait in line to enter the café; and (2) stand outdoors to

congregate and smoke. On that evening, velvet ropes separated Million's Cafe's use of the sidewalk from regular pedestrian use. A fully-uniformed City of Cincinnati police officer regularly patrols the sidewalks in front of and around Million's Café on weekend evenings.

II. LAW AND ARGUMENT

In determining whether to grant this Motion, the Court must consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the issuance of a TRO would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a TRO.[3] These factors are to be balanced against one another and should not be considered prerequisites to the granting of a TRO.[4]

A. Strong Likelihood of Success on the Merits

Plaintiffs are highly likely to succeed on the merits because Defendants' conduct clearly violates well-established constitutional rights. First, all actions of Defendants specified in this Motion are state action. Secondly, Plaintiffs clearly have the right to circulate petitions and gather signatures in traditional public fora. Thirdly, all forums at issue in this case are government owned and are traditional public fora. Defendants' conduct is not content neutral. Even if it were, Defendants' curtailments do not survive strict scrutiny analysis, as they (1) serve no compelling interest; (2) are not narrowly tailored; and (3) are not reasonable restrictions on the time, place, and manner of political speech.

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[3] *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc), quoting *Sandison v. Michigan High Sch. Athletic Ass'n,* 64 F.3d 1026, 1030 (6th Cir. 1995). See also *Southwest Williamson County Cmty. Assoc. Inc. v. Slater*, 243 F.3d 270, 277 (6th Cir. 2001). See *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir. 1998).

[4] See *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir. 1998).

i. *All Conduct is State Action*

Each infringement on Plaintiffs' rights outlined heretofore is the product of state action. Accordingly, constitutional safeguards apply to each incident outlined in this case. When the conduct is performed by a non-governmental entity, the conduct is deemed to be state action where the entity's relationship with the government is such that the entity is an agent or instrumentality of the government;[5] where the relationship between the entity and the government is "deeply symbiotic;"[6] or where the entity "is performing a function that is traditionally the exclusive prerogative of the state."[7]

This Sixth Circuit illustrated the aforementioned principles in *U.C.C. v. Gateway Econ. Dev. Corp.*, a case concerning whether the private owner of a public forum is a state actor for First Amendment purposes. Gateway outlined three independent bases upon which such a private owner could be a state actor: (1) that the owner was an instrumentality of the state and that a "deeply symbiotic" relationship existed between the owner and the state; (2) a high degree of control exercised by the government over the property; and (3) the private owner's performance of a public function.[8]

As to the third, i.e. that the private owner was "performing a function that is traditionally the exclusive prerogative of the state," the Court stated that it "ask[s] whether the 'private entity exercise[s] powers which are traditionally exclusively reserved to the state.'"[9] As an example of a public function, the court cited *Evans v. Newton*,[10] a case in which the U.S. Supreme Court

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5 *United Church of Christ v. Gateway Econ. Development Corp. of Greater Cleveland, Inc.* (6th Cir. 2004), 383 F.3d 449, 454, 2004 Fed.App. 0291P (citing *Lebron v. Nat'l R.R. Passenger Corp.* (1995), 513 U.S. 374, 400, 115 S.Ct. 961.)

6 *Gateway*, supra., at 454.

7 Id.

8 Id.

9 Id., quoting *Lansing v. City of Memphis*, 202 F.3d 821, 828, 2000 Fed.App. 0042P, (6th Cir. 2000),

10 382 U.S. 296, 302, 86 S.Ct. 486 (1966).

stated "the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."[11] Because the court had determined the area "constitutes a public forum, Gateway's operation therein serves as a public function."[12] "[O]ur holding today means only that Gateway is a *public actor* when performing the public function of regulating the public's access to the Gateway Sidewalk."[13]

When the relationship between an entity and the government is such that the actor's "history, mandate, and leadership are so tied up with the government," or such that the entity and the government have a "deeply symbiotic" relationship, the entity is a state actor.[14] In *Lebron v. Nat'l RR Passenger Corp.*, the U.S. Supreme Court considered whether Amtrak's conduct amounted to state action. The Court noted that Amtrak was created by the United States; Amtrak was given governmental powers; the United States owned all of the voting stock; the United States appointed the Board; the Board approved the challenged policy; the United States kept Amtrak solvent by annually subsidizing its losses; and the Pennsylvania Station was purchased for Amtrak by the United States.[15] In light of these observations, the Court rendered the following observations:

> That Government-created and -controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, *Plessy v. Ferguson,* can be resurrected by the simple device of having [a State] operate segregated trains through a state-owned Amtrak.[16]

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11 *Gateway*, supra., at 454 (quoting *Evans*, 382 U.S. at 302).
12 *Gateway*, supra., at 454.
13 Id.
14 Id.
15 513 U.S. at 380.
16 Id. at 397 (internal citation omitted).

The Court then held that where "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[17] These rules of law apply to the analyses below, and they illuminate that the conduct of CFFM, 3CDC, FSMG, and uniformed police officers constitute state action.

a. *CFFM is a state actor.*

CFFM is a state actor because it is an instrumentality of the City and because it has a "deeply symbiotic"[18] relationship with the City. CFFM's sole purpose is to manage the Findlay Market, a government-owned property, while the City supports, promotes, and operates the Market. Further, the City has granted CFFM the authority to enforce federal, state and city law, and requires citizens to obey the lawful orders of the market's management. Similar to Amtrak in *Lebron*, "The City of Cincinnati continues to provide operating funds" for CFFM.[19] CFFM, by having a sole purpose of management a specific government property and having the authority to enforce the law of the federal, state, and city governments, is an instrumentality of, and has a very deep symbiotic relationship with, the City, and is therefore a state actor with respect to its conduct within the public forum.

Even if the Court determines that CFFM is not an instrumentality of or in a deep symbiotic relationship with the City, CFFM is a state actor because it performs public functions of the City when it regulates the exercise of speech in Findlay Market, a public forum. Similar to

[17] Id. at 400.
[18] *Gateway*, supra., 383 F.3d at 454.
[19] http://www.findlaymarket.org/corporation.htm

the Gateway Economic Development Corp. in *U.C.C.*, CFFM regulates the access of the public to Findlay Market, "in other words, the operation of a public forum."[20]

To this end, Robert Pickford, President and CEO of CFFM, acted in his official capacity to prohibit the collection of signatures at the Findlay Market. "Cheryl," the "assistant marketing director," directed that signatures could not be gathered at Findlay Market, or if they could, then the signatures could only be gathered from within a six foot square area. Such conduct, in the operation of a public forum, e.g. the regulation of speech, "serves a public function," and is therefore state action.[21]

CFFM is also a state actor because it is an instrumentality of the City, it has a deep symbiotic relationship with the City and because it performs public functions. As such, the constitutional proscriptions are applicable to its conduct.

b. 3CDC is a state actor.

3CDC is a state actor because it is in a "deeply symbiotic"[22] relationship with the city and performs a public function. 3CDC was formed "as part of the overall system to increase the effectiveness and efficiency of development activities in the City as recommended by The Cincinnati Economic Development Task Force."[23] The Economic Development Task Force, prior to the creation of 3CDC, recommended in a report to the City that a non-profit 501(c)(3) organization be created with the purpose of being "responsible for enhancing downtown Cincinnati's position as a regional center of high value employment, housing, as well as arts,

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20 *Gateway*, supra., at 454.

21 Id. at 455 (citing *Lee v. Katz* (9th Cir. 2002), 276 F.3d 550, 555 ("The particular public function that the plaintiffs allege the [defendant] performed was the regulation of free speech within the Commons, a public forum. Previous courts have found this function to be a traditional and exclusive public function.").

22 *U.C.C.*, 383 F.3d at 454.

23 http://www.3cdc.org/content.jsp?sectionId=2

culture, and entertainment."[24] The "[p]rimary focus will be on the implementation/facilitation of projects and programs that strengthen core assets of downtown," with the Fountain Square as a designated precinct.[25] These responsibilities identified by the City are being performed by 3CDC.[26]

Meanwhile, 3CDC, through FSMG, has been granted authority from the City to regulate and issue permits for the use of Fountain Square on behalf of the City.[27] Similar to Amtrak, 3CDC has been created at the urging of the government, here the City of Cincinnati, and the City's decision to use it to "facilitate projects of regional significance throughout the City."[28] This combination of public and private entities amounts to a deep symbiotic relationship between the City and 3CDC, such that 3CDC is dependent upon the City for its continued existence. This renders 3CDC a state actor with respect to its conduct within the public forum

Even if there were no deep symbiotic relationship with the City, 3CDC would still be a state actor because it performs public functions of the City when it regulates the exercise of free speech in Fountain Square, a public forum. 3CDC created FSMG "to manage events, programming, maintenance and security for Fountain Square and the Fountain Square North Garage. FSMG supports 3CDC's public mission.[29]

Further, FSMG is authorized to (1) promulgate rules and regulations regulating the use of Fountain Square; and (2) carry out the duties of the director of public services as provided for in the Cincinnati Municipal Code Chapter 713.[30] Thus, through its regulation of a public forum,

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24 "Economic Development in the City of Cincinnati, Public Private Partnerships." April 23, 2003. http://www.cincinnati-oh.gov/cmgr/downloads/cmgr_pdf4403.pdf at 6.

25 Id.

26 http://www.3cdc.org/content.jsp?sectionId=2

27 Cincinnati Municipal Code Chapter 713, Section 1.

28 "Economic Development in the City of Cincinnati, Public Private Partnerships" at 6.

29 http://www.myfountainsquare.com/management

30 Cincinnati Municipal Code Chapter 713, Section 3.

3CDC is a state actor with respect to its conduct within the public forum. Moreover, 3CDC is a state actor because it has a deep symbiotic relationship with the City and because it performs public functions in a public forum. As such, constitutional proscriptions are applicable to its conduct.

c. *FSMG is a state actor.*

FSMG is a non-profit corporation created by 3CDC. Its *sole* purpose is to manage Fountain Square, a *government*-owned property. Through Chapter 713-3, FSMG regulates the use of Fountain Square. It also enforces all city codes that are applicable within Fountain Square.[31]

The mission of FSMG is very public-oriented, with FSMG working to ensure that "Fountain Square represents the very best our city has to offer, instilling a renewed sense of pride."[32] Due to this extremely close relationship between FSMG and the City, FSMG's public purpose, and FSMG's role as a stand-in for the City in enforcing all City codes applicable in the area, FSMG is clearly an instrumentality of the City and in a deep symbiotic relationship with the City. Consequently, FSMG is a state actor with respect to its conduct within the public forum.

Moreover, even if FSMG were not an instrumentality of or in a deep symbiotic relationship with the City, FSMG would be a state actor because it is performing a public function. FSMG is tasked with regulating the use of Fountain Square, as well as managing the permit process for this public forum. Similar to 3CDC and CFFM, by operating in this manner in a public forum, FSMG is a state actor. As such, constitutional proscriptions are applicable to its conduct.

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[31] http://www.myfountainsquare.com/rules

[32] http://www.myfountainsquare.com/management

d. *Uniformed police officers are state actors.*

Regardless of whether a uniformed officer is on duty, he acts under color of state law when he purports to exercise official authority.[33] The Sixth Circuit has stated that "[s]uch manifestations of official authority include flashing a badge, identifying oneself as a police officer, [or] placing an individual under arrest."[34] In *Parks v. City of Columbus*, the police officer at issue was off-duty, dressed in his police uniform, wore his police badge, identified himself as a police officer, and threatened to arrest the plaintiff.[35] The Sixth Circuit concluded that the officer was a state actor when he commanded Parks to leave the public area.[36]

Here, on April 15, 2009, Mr. Regenold was instructed by Cincinnati Police Officer Steve Givens to leave the premises, after Mr. Regenold was prohibited from circulating petitions at the instruction of Ms. Branscom. On April 19, 2009, Mr. Ross was told by Cincinnati Police Officer Root, in a stern, non-negotiable manner that he was not permitted to circulate petitions on the public sidewalk outside of 2133 Linwood Ave., Cincinnati, Ohio.

These officers, in uniform, and self-identifying as police officers, acted under color of state law by purporting to exercise official authority. While the officers did not threaten Mr. Regenold or Mr. Ross with arrest, the Officers' tone and demeanor were such that the threats of arrest were implicit. By acting in this manner under color of state law, these City of Cincinnati police officers' conduct constituted state action, and the constitutional proscriptions are applicable to their conduct.

ii. *The Constitutional right to circulate petitions*

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[33] *Parks v. City of Columbus* (6th Cir. 2005), 395 F.3d 643, 652 (quoting *Memphis, Tenn. Area Local Am. Postal Workers Union AFL-CIO v. City of Memphis* (6th Cir. 2004), 361 F.3d 898, 903).

[34] 395 F.3d at 652.

[35] Id.

[36] Id.

The First Amendment to the Constitution provides that "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people ... to petition the Government for a redress of grievances." The First Amendment's guarantee of "the freedom of speech, or of the press" prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the "evils" of the printing press in 16th- and 17-century England.[37] The Printing Act of 1662 had "prescribed what could be printed, who could print, and who could sell." It punished the publication of any book or pamphlet without a license and required that all works be submitted for approval to a government official, who wielded broad authority to suppress works that he found to be "heretical, seditious, schismatical, or offensive.'"[38] The English licensing system expired at the end of the 17th century, but the memory of its abuses was still vivid enough in colonial times that Blackstone warned against the "restrictive power" of such a "licenser"-an administrative official who enjoyed unconfined authority to pass judgment on the content of speech.[39]

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[40] The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[41]

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37 *Thomas v. Chicago Park District* (2002), 534 U.S. 316, 122 S.Ct. 775; Mayton, Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L.Rev. 245, 248 (1982).

38 *Thomas*, supra, citing F. Siebert, Freedom of the Press in England, 1476-1776, p. 240 (1952).

39 *Thomas*, supra, citing 4 W. Blackstone, Commentaries on the Laws of England 152 (1769).

40 *Id.*, at 101-102, 60 S.Ct., at 744.

41 *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957)

To this end, there is no question that "the solicitation of signatures for a petition involves protected speech."[42] Indeed, this kind of speech "is at the core of our electoral process and of the First Amendment freedoms-an area of public policy where protection of robust discussion is at its zenith."[43] The reasons for this are clear:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."[44]

In *Meyer v. Grant*, the Supreme Court struck down Colorado's prohibition of payment for the circulation of ballot-initiative petitions.[45] Petition circulation, the Court held, is "core political speech," because it involves "interactive communication concerning political change."[46]

Meanwhile, in *Buckley*, the Court assailed "restrictions [that] significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions.[47] However, Buckley's concerns ring even more true in cases involving petition circulation: "ballot initiatives do not involve the risk of *'quid pro quo'* corruption present when money is paid to, or for, candidates.[48] In addition, as we stated in *Meyer*, "the risk of fraud or

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42 *Meyer v. Grant*, 486 U.S. 414, 422 n. 5, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988).
43 *Id.* at 425, 108 S.Ct. 1886 (citation and internal quotation marks omitted).
44 *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)
45 *Meyer*, supra.
46 *Id.*, at 422, 108 S.Ct. 1886
47 *Buckley*, supra.
48 See *Meyer*, supra., at 427-428, 108 S.Ct. 1886 (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 790, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ("The risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue.")); *McIntyre*, 514 U.S., at 352, n. 15, 115 S.Ct. 1511.

corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting."[49]

Here, there is no dispute that Mr. Dapper, Mr. Regenold, and Mr. Ross were circulating petitions for the trolley issue when multiple state actors impeded their continued circulation. There is also no contention that these three were engaging in any objectionable conduct beyond collecting signatures. Consequently, the aforementioned constitutional safeguards applied to their conduct at all times while they were gathering signatures.

iii. Traditional Public Forums

Plaintiffs may freely exercise their right to gather signatures at Fountain Square, Findlay Market, and City of Cincinnati public sidewalks because all three are traditional public fora. The fact that petitioning constitutes protected speech "merely begins [the] inquiry."[50] The Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[51] Under that analysis, "the extent to which the Government can control access depends on the nature of the relevant forum."[52]

Certain public property is so historically associated with the exercise of First Amendment rights that it cannot be totally closed to protected expression. Streets, public sidewalks and parks fall within this category.[53] To this end, the Supreme Court has developed a tripartite categorization of public spaces: (1) traditional public forum; (2) designated public forum; and (3)

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49 *Meyer*, supra., at 427.
50 *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).
51 Id., at 800.
52 Id.
53 *Hague v. CIO*, 307 U.S. 496 (1939).

nonpublic.[54] Given that none of the forums here are nonpublic, the Court's analysis should center on the first two categorizations.

"Traditional" public forum analysis is as follows: "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums."[55] Traditional public forum property occupies a special position in terms of First Amendment protection: the more a forum resembles a traditional public forum, the greater an interest the state must show to justify restricting access.[56] A traditional public forum is a forum which "by long tradition or by governmental fiat [has] been devoted to assembly and debate."[57]

In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.[58]

The second category is the "designated" public forum, "public property which the state has opened for use by the public as a place for expressive activity."[59] Restrictions on expression in such forums are evaluated under the same standard as that applicable to traditional public

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54 *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 746 (6th Cir.2004).

55 Id.

56 *Student Government Assoc. v. Board of Trustees of University of Massachusetts*, 676 F.Supp. 384, 386 (D.Mass.1987) (Tauro, J.), aff'd 868 F.2d 473 (1st Cir.1989).

57 Id.

58 *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (citations omitted) (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

59 *Perry Education Ass'n*, supra., 460 U.S. at 45, 103 S.Ct. 948.

forums.[60] Meanwhile, only places like jailhouse grounds,[61] areas immediately surrounding a courthouse,[62] military bases,[63] and areas immediately surrounding a school[64] are not considered public forums.

Through the lens of the aforementioned criteria, the three forums in question, Findlay Market, Fountain Square, and Cincinnati public sidewalks in front of Millions Café, will each be considered in sequence.

a. *Findlay Market*

Findlay Market is a traditional public forum because it is a "public place historically associated with the free exercise of expressive activities." This much is evident from Findlay Market's self-description as "a gathering place for people from all over the city."

Further, the market is located on public streets and sidewalks, which, as noted above, "have been used for public assembly and debate, the hallmarks of a traditional public forum."[65] A pedestrian walking along Race Street in Cincinnati may freely wander into the market: there is a sign designating the entrance to Findlay Market, but there is no gate, admittance fee, or other impediment to entry. Sidewalks in and around Findlay Market are regularly used to access other retail businesses in the vicinity.

Finally, Courts have characterized similar public markets as traditional public forums. *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.,*[66] concerned, as is the case here, a public market owned by the city and leased by a private party.

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60 *Id.* at 46, 103 S.Ct. 948.
61 *Adderly v. Florida*, 385 U.S. 39 (1966).
62 *Cox v. Louisiana*, 377 U.S. 288 (1965).
63 *Greer v. Spock*, 424 U.S. 828 (1976).
64 *Grayned v. City of Rockford*, 408 U.S. 104 (1972).
65 *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).
66 *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65 (D. Mass. 1990).

The Court in that case enjoined the market from curtailing the distribution of leaflets, reasoning that the market was a traditional public forum.[67]

As in *Citizens*, streets, sidewalks, and lanes around Findlay Market are "continually open, often uncongested, and constitute not only a necessary conduit in the daily affairs of locality's citizens, but also a place where people could enjoy the open air or the company of friends and neighbors in a relaxed environment."[68] In fact, given Findlay Market's self-description, the aura of a traditional public forum is precisely the type of aura that it seeks to create.

Meanwhile, there is no justification that renders the property incompatible with expressive activity, as is the case with Jailhouses, military bases, etc.[69] Consequently, Findlay Market is a traditional public forum, Plaintiffs may exercise free speech there, and their right to do so is entitled to the utmost scrutiny.

b. *Fountain Square*

Given Defendants' sordid history of constitutional deprivations at Fountain Square, the Sixth Circuit has, twice in the last fifteen years, been required to perform public forum analysis with respect to Fountain square. On each occasion, it has designated Fountain Square as a traditional public forum.[70]

c. *The Sidewalks of Linwood Ave.*

The Supreme Court has said that from "time out of mind public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum."[71]

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67 Id.

68 *Citizens to End Animal Suffering and Exploitation, Inc.*, supra., at 651.

69 *International Society for Krichna Consciousness v. Lee*, 505 U.S. 672, 681 (1992) (Chief Justice Rehnquist remarked in the majority opinion, "the relevant unit for our inquiry is an airport, not 'transportation nodes.'" generally.).

70 *Congregation of Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164 (6th Cir. 1993); *Chabad of Southern Ohio & Congregation of Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004) (noting that "the City [of Cincinnati] has a long history of trying to regulate speech in Fountain Square, enacting a parade of ordinances that have attempted to prohibit unpopular or controversial speech on that prime real estate.")

71 *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

Accordingly, the sidewalks in front of Millions Café on Linwood Avenue are traditional public forum, and a place in which the "right to limit protected expressive activity is sharply circumscribed."[72] Meanwhile, no exceptions applies to this sidewalk-- it looks and feels like a typical public sidewalk, blends into the urban grid, borders the road, and is not private property.[73] Consequently, the sidewalks in front of Millions Café are clearly public sidewalks.

iv. Content Neutrality

Defendants' conduct is not content neutral. One commentator has described the import of this issue as follows:

> The characterization of law as content-based or content neutral is enormously important, for it often effectively determines the outcome of First Amendment litigation. Content-based laws generally trigger heightened scrutiny in one of its manifestations, and when heightened scrutiny is applied, the odds are quite high that the law will be struck down. The "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech."[74]

Accordingly, "[o]nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."[75]

Here, the circulation of petitions itself is a class of speech. It is the absence of a specific and formal, written policy, and the discretionary curtailment of Plaintiffs' speech that rises to a lack of content-neutrality. Defendants' conduct appears to discriminate against petition

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72 *Chabad of S. Ohio v. City of Cincinnati*, 363 F.3d 427, 434 (6th Cir. 2004).

73 See *United States v. Grace*, 461 U.S. 171 (1983) (reasoning that "there is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalk that serve as the perimeter of the Court grounds that they have entered some special type of enclave.")

74 *Madsen v. Women's Health Ctr., Inc.* (1994), 512 U.S. 753, 763, 114 S.Ct. 2516, 2523, 129 L.Ed.2d 593, 606, quoting *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 675.

75 *Mosley*, 408 U.S. at 95-96, 92 S.Ct. at 2290, 33 L.Ed.2d at 216-217.

circulation by either (1) treating it as unequal to other forms of expressive communication; or (2) treating it as equal to lesser-protected forms of expressive communication. As noted in *Meyer*:

> [t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.

This language implies that circulation of petitions is not only a *manner* of protected speech; it is also a *type* of protected speech that necessarily consists of an overarching purpose: bypassing election political officials in favor of taking issues directly to the general populace. Such a type of speech is deserving of greater protection from state actors, given that it is ostensibly the will of these same state actors that initiative and referendum efforts seek to bypass.

Defendants have consistently interfered with Plaintiffs' gathering of signature. This interference is at least partially attributable to the nature of Plaintiffs' work: in at least one incident noted above, Defendants actively encouraged pedestrians not to sign Plaintiffs' petition, and actually applauded and cheered those who abstained from signing the petition. However, Defendants need not frown upon Plaintiffs views on the issues. Under applicable law, the mere facts that Defendants have singled out and attacked petition circulation is demonstrative of a pattern of practices that is not content neutral.

v. *Unreasonable time, place and manner restrictions*

Even if Defendants could advance a significant, content-neutral interest in support of its curtailment of Plaintiffs' solicitation of signatures for petitions, the Defendants' conduct is not narrowly tailored to effectuate that interest. While a content-neutral regulation may impose

reasonable restrictions on the time, place, or manner of speech, any such restrictions must be justified without reference to the content of the speech, narrowly tailored to serve a significant governmental interest, and leave open alternative channels for communication of the information.[76]

To be narrowly tailored, a regulation "need not be the least restrictive or least intrusive means" of serving the government's interests.[77] Nonetheless, it must not "burden substantially more speech than is necessary to further the government's legitimate interests."[78] A "statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[79]

In *Ward v. Rock Against Racism,* the Court explained why a total prohibition of handbilling would be unconstitutional:

> A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion, or noise. For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it.[80]

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76 *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 675.

77 Id.

78 *Id.* at 799, 109 S.Ct. 2746.

79 *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

80 *Rock Against Racism,* 491 U.S. at 799 n. 7, 109 S.Ct. 2746. The Supreme Court has found the same problem in other government efforts to restrict speech in public forums. In *Community for Creative Non-Violence v. Turner,* for example, we held invalid a regulation, promulgated by the Washington Metropolitan Area Transit Authority (WMATA), that required permits for organized free speech activities at above-ground areas of WMATA stations. The requirement was not narrowly tailored, we said, because "[w]hile the Regulation arguably eliminates the 'sources of evil' that allegedly threaten WMATA's ability to provide a safe and efficient transportation system, it does so at too high a cost, namely, by significantly restricting a substantial quantity of speech that does not impede WMATA's permissible goals." 893 F.2d 1387, 1392 (D.C.Cir.1990). Likewise, in *Lederman v. United States,* we declared unconstitutional a ban on demonstrations on the sidewalk on the U.S. Capitol's East Front. 291 F.3d 36, 39 (D.C.Cir.2002). Although we recognized that the ban accomplished the legitimate purpose of reducing pedestrian traffic and decreasing security risks, we concluded that "[s]ome banned activities," such as "a single leafleteer standing on the East Front sidewalk," were "no more likely [to] block traffic or threaten security" than were ordinary pedestrians. *Id.* at 45. "[T]he Constitution does not tolerate," we said, "regulations that, while serving their purported aims, prohibit a wide range of activities that do not interfere with the Government's objectives." *Id.* at 44 (quoting *Community for Creative Non-Violence v. Kerrigan,* 865 F.2d 382, 390 (D.C.Cir.1989)

Further, it is not enough that one "may seek to gather signatures on their initiatives and referenda in numerous other places * * *." The Supreme Court has stressed the importance of providing access "within the forum in question."[81] "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[82]

Indeed, the United States made the same argument, to no avail, in *Grace*. There, the government asserted that "the inquiry should not be confined to the Supreme Court grounds but should focus on 'the vicinity of the Supreme Court' or 'the public places of Washington D.C.'"[83] "Viewed in this light," the government contended, there were "sufficient alternative areas within the relevant forum, such as the streets around the Court or the sidewalks across those streets[,] to permit [the statute] to be considered a reasonable 'place' restriction."[84] The Court rejected the argument, holding that the statutory ban on displaying flags or banners on the Supreme Court's perimeter sidewalk was unconstitutional.[85]

Meanwhile, the requirement that a citizen obtain a permit to engage in protected speech in a public forum is not a narrowly-tailored solution to any compelling state interest. In *Community for Creative Non-Violence v. Turner,* the Supreme Court has held that a Washington Metropolitan Area Transit Authority (WMATA) regulation, which required permits for organized free speech activities at Metro stations, failed the ample alternatives prong because

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81 *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

82 *Reno v. ACLU*, 521 U.S. 844, 880, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939)).

83 *Grace*, 461 U.S. at 180, 103 S.Ct. 1702

84 *Id.*

85 *See id.* at 181, 103 S.Ct. 1702.

there were "no WMATA areas not covered by the permit requirement" and hence "no intra-forum alternative[s]."[86]

Moreover, restriction on the circulation of petitions is unique from restrictions on other types of speech. Although in the context of bans on soliciting funds it is possible to separate the protected speech involved in the solicitation from the related conduct of actually collecting funds,[87] "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"[88] That interactive communication comprises both the request for the signature and the signature itself, because the circulation of an initiative petition not only involves the "expression of a desire for political change," but also is a means of "plac[ing] the matter on the ballot, [and thus making] the matter the focus of statewide discussion,"[89] As such, "the circulation of a petition involves an element of speech beyond leafleting or sign-holding, because the collection of signatures-particularly for an initiative or referendum ballot-is essential to accomplishing the circulator's purpose."[90]

Given this sacrosanct role and unique nature of petition circulation, the Supreme Court has held that restrictions thereof can impermissibly impede protected speech even if they do not ban signature collection outright. In *Meyer v. Grant*, the Court struck down a state law regulating the initiative process that made it a felony to pay petition circulators.[91]

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86 *Community for Creative Non-Violence v. Turner* 893 F.2d 1387, 1393 (D.C.Cir.1990).

87 See *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495, 497 (D.C.Cir.1997) ("The cases protecting the right to solicit contributions in a public forum do so not because the First Amendment contemplates the right to raise money, but rather because the act of solicitation contains a communicative element."); see also ISKCON v. Lee, 505 U.S. at 704-05, 112 S.Ct. 2701 (Kennedy, J., concurring in the judgments) (stating that, although a ban on "all speech that requested the contribution of funds" would be unconstitutional, a prohibition that reached "only personal solicitations for immediate payment of money" was permissible because it was "directed only at the physical exchange of money, which is an element of conduct interwoven with otherwise expressive solicitation").

88 *Meyer*, supra., at 421-22.

89 Id.

90 Id.

91 Id., at 416.

In *Meyer*, the state argued there that, "even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open to" the plaintiffs.[92] Rejecting this argument, the Court held:

> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. [The] prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression.[93]

Consequently, the requisite capacity to initiate one-on-one conversations with fellow citizens may not be infringed.

Here, like the state law in *Meyer*, each of Defendants' curtailments of Plaintiffs' signature solicitations "limits the size of the audience" Plaintiffs can reach, and thus "makes it less likely that [they] will garner the number of signatures necessary to place the matter on the ballot."[94] Based upon their conversations with the various state actors, Plaintiffs' were informed that they must do anything from obtain a solicitor's license for public sidewalks, to purchase and maintain a stationary booth position at Findlay Market, and/or register ahead of time or avoid crowds at Fountain Square.

Due to the unlawful positions taken by Defendants, whether intentionally or mistakenly, (1) Defendants prohibited Mr. Dapper from moving freely about Findlay Market to initiate the contact and conversation necessary to explain to other citizens why they should consider signing his petition; (2) Defendants prohibited Mr. Regenold from moving freely about Fountain Square to initiate the same; and (3) Defendants prohibited Mr. Ross from circulating his petition on the

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92 Id., at 424.
93 Id.
94 Id., at 423.

busiest part of a public sidewalk – the place where is likely initiate the most conversation, and to gather the most signatures. In all cases, Plaintiffs were ordered to leave. Defendants' conduct thus "trenches upon an area in which the importance of First Amendment protections is 'at its zenith,'"[95] and without adequate substitute. Accordingly, Defendants' curtailments violate Plaintiffs' right to petition their government, and must be enjoined.

While it is unclear what harm Defendants were seeking to address by interfering with Plaintiffs' rights to freely circulate petitions, it is irrelevant: it is clear that the conduct at issue is not narrowly-tailored to address *any* compelling interest. Federal courts have held that conduct tantamount to Defendants is not justified where it serves to "adequately protect the esthetic interest in avoiding litter without abridging protected expression merely by penalizing those who actually litter;"[96] to "effective[ly] promote safety and orderly traffic flow,"[97] or to "bar disruptive conduct and obstructing passage."[98]

Instead the "ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner,"[99] or that the speech is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[100] There is simply no reasonable argument that engaging the pedestrians in conversation about a ballot measure, whether at Findlay Market, on Fountain Square, or on the public sidewalks of Linwood Avenue, poses a "clear and present danger of a

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95 Id., at 425.

96 *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808-09, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)

97 *Lederman v. United States* 291 F.3d 36, 45-46 (D.C.Cir.2002)

98 Id.

99 *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-10, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (quoting *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)).

100 *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

serious substantive evil." Accordingly, Defendants' abridgments constitute clear violations of Plaintiffs' well-defined constitutional rights.

Finally, by abridging petition circulation rights without a valid regulation directly on point, Defendants unlawfully aggrandize their own discretion. When a law predicates expressive activity on the prior acquisition of a permit, the law must contain narrow and precise standards to control the discretion of the permitting authority.[101] In Parks, the language of the regulation does not literally prohibit activity in the absence of a permit, but instead makes the Capitol grounds *available* for use by the public for the purpose of governmental business, public meetings for free discussion of public questions, or for activities of a broad public purpose, provided the authorized procedure has been followed and appropriate approvals have been received.[102] Such a policy raised the obvious negative inference that the public forum was *unavailable* for certain named activities without a permit.

Here, the combined dearth of directly applicable law and Defendants' course of conduct raises a similar inference: Findlay Market, Fountain Square, and Cincinnati's public sidewalks are generally unavailable to petition circulators absent some prior affirmative undertaking on their parts.

Consequently, under this set of facts, Defendants simply cannot demonstrate a compelling interest that justifies their conduct. Even if they could, they simply could not demonstrate that their conduct is narrowly tailored to address that compelling interest. Accordingly, Defendants conduct is blatantly violative of Plaintiffs' constitutional rights.

B. Irreparable Injury.

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[101] *Parks v. Finan*, 385 F.3d 694, 2004 Fed.App. 0331P (6th Cir. 2004); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Section 128-4-02(A),

[102] *Parks*, supra.

Even a temporary deprivation of First Amendment freedom of expression rights is generally sufficient to prove irreparable harm.[103] Thus, satisfaction of the first prong of the preliminary injunction standard—demonstrating a strong likelihood of success on the merits—also satisfies the irreparable injury standard.[104] Plaintiffs have demonstrated a substantial likelihood of success on the merits. Thus, Plaintiffs will suffer irreparable injury if Defendants are not immediately enjoined from enforcing its unconstitutional policy.

Moreover, to qualify for ballot access, Plaintiffs must submit 6,150 valid signatures no later than early September, 2009, 60 days prior to the November, 2009 elections. At the time of this filing, Plaintiffs have gathered approximately 4,500 signatures, 3,000 of which have been validated. Accordingly, at the time of this filing, Plaintiffs have a little more than three months to gather just over 3,000 valid signatures. Given this deadline, on each occasion where Plaintiffs are unlawfully forced to stop collecting signatures, not only does a violation of their constitutional rights take place, but the likelihood that Plaintiffs petition will gain ballot access is imperiled.

C. Public Interest and Private Harm.

The Defendants will not suffer any harm if they are enjoined from enforcing its unconstitutional policy against Plaintiffs. The unconstitutional character of these policies leaves the Defendants with no legitimate interest in its continued application. Plaintiffs, on the other

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103 *National People's Action v. Village of Wilmette*, 914 F.2d 1008, 1012 (7th Cir. 1990).

104 See *Elrod v. Burns*, 427 U.S. 347, 373 (1973) (holding that if a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated); Connection Distributing Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998) (finding that "when a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

hand, desire to participate in imminent political campaigns, and will suffer irreparable harm if the Defendants unconstitutional activity is not immediately enjoined.[105]

III. CONCLUSION

Defendants have unconstitutionally interfered with Plaintiffs' rights to engage in fundamental speech. Resultantly, Plaintiffs have suffered, and are in continuous and imminent threat of suffering irreparable injury. Meanwhile, public interests at stake always mitigate in favor of ameliorating constitutional infirmities. For the foregoing reasons, Plaintiffs request that the Court issue a Temporary Restraining Order and Preliminary Injunction that does the following:

(1) Enjoin all agents of the City of Cincinnati, including all police officers, government employees and employees of quazi-governmental organizations including but not limited to 3CDC, FSMG, and CFFM from interfering with Plaintiffs' constitutional rights to gather signatures on City of Cincinnati property.

(2) Order the City of Cincinnati to conduct a court-supervised training course on petition rights for all police officers, government employees and employees of quazi-governmental organizations including but not limited to 3CDC, FSMG, and CFFM.

[105] See *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights").

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