UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

MARGARET L. SLINGLUFF, *et al.*,	:	**Case No. 1:10-CV-2023**
	:	
	:	**Judge Nugent**
Plaintiffs,	:	**Magistrate Judge Vecchiarelli**
	:	
v.	:	
	:	**MEMORANDUM IN SUPPORT OF**
ANDOVER TOWNSHIP,	:	**PLAINTIFFS' MOTION FOR TEMPORARY**
ASHTABULA COUNTY, OHIO, *et al.*,	:	**RESTRAINING ORDER AND**
	:	**PRELIMINARY INJUNCTION, WITH**
Defendants.	:	**MEMORANDUM IN SUPPORT**

MEMORANDUM IN SUPPORT

This civil rights action is brought pursuant to 42 U.S.C. 1983. The Andover Township Trustees have (1) adopted Resolution 06-104 which is unconstitutional, both facially and as applied to Plaintiffs; and (2) denied Plaintiffs their constitutional right engage in political speech on the Andover Public Square, a traditional public forum, based solely upon the subject matter of such speech. Unless Defendants are immediately enjoined, Plaintiffs have and will continue to suffer immediate irreparable harm to their rights under the First Amendment to the United States Constitution (made directly applicable to the Defendants via the Fourteenth Amendment).

I. FACTS[1]

Plaintiff The Andover Tea Party is an association of individuals formed in May 2010 and is concerned about fiscal responsibility and adherence to constitutional limits on government. Plaintiffs Margaret Slingluff, Emily Kobialko and Scott Bankston were the organizers and founders of The Andover Tea Party. The Andover Tea Party advances its cause through grass roots activities, including rallies and educational events.

[1] The facts stated herein are support and developed in the Verified Complaint (Doc. No. 1).

Plaintiffs, together with others associated with The Andover Tea Party, plan to hold a rally on the Andover Public Square to commemorate Constitution Day. Conveyed to the Andover Township Trustees in 1824 "for use . . . as a Public Square," the Andover Public Square consists three acres located at the center and heart of the Village of Andover. Improvements within the Andover Public Square include a raised pavilion with permanent wood benches facing the stage and which would appear to seat approximately one hundred or more people.

The Andover Public Square historically been used for a variety of events sponsored by private groups and organizations. Just this year, the events held or scheduled to be held include a charitable drive for school supplies for underprivileged children, an Easter Egg Hunt, an annual Fall Festival, a Memorial Day Parade, "Christmas on the Square," as well as music concerts.

In May 2010, The Andover Tea Party requested and obtained permission from the Andover Township Trustees to use the Square for a rally to commemorate Constitution Day on September 17, 2010. The rally would include speakers on various public policy issues, as well as singers performing patriotic songs. However, on July 19, 2010, Defendant Rose (one of the trustees) informed Ms. Slingluff that the prior permission to use the Sqaure would be rescinded. As reflected in a letter dated August 25, 2010, the trustees' declared reason for the rescission was: "[d]ue to your group's political affiliation." In denying the requested rally, the trustees made no inquiry into secondary effects associated with the Plaintiffs' proposed activity on the Square, *e.g.*, size, duration, or decibel-level of the rally. Instead, they simply cited to a 2006 Andover Township Resolution 06-104 which "prohibit[ed] any for-profit advertising or political signs on the Andover Square" and declared that "permission to use the square is made by the trustees on case-by-case bases."

In light of the Andover Township Trustees' formal denial of permission to Plaintiffs to hold such a rally in the Andover Public Square based on the Plaintiffs' political affiliation, Plaintiffs faced the Hobson's choice of not holding the rally (or having to find an alternative venue which would diminished the Plaintiffs' communicative message) or to proceed with the rally in the Andover Public Square but to do so in defiance of the trustees' unconstitutional policy and decision, and, thus, face the potential of arrest. In order to vindicate the important First Amendment rights at stake, immediate relief from this Court is necessary.

II. LAW AND ARGUMENT

Plaintiffs are entitled to an immediate order enjoining the Andover Township Trustees from prohibiting the rally commemorating Constitution Day on Andover Public Square on September 17, 2010. In determining whether to grant this Motion, the Court must balance:[2] (1) whether Plaintiffs have a strong likelihood of success on the merits; (2) whether Plaintiffs would suffer irreparable injury; (3) whether the issuance of a TRO would cause substantial harm to others; and (4) whether the public interest is served by the issuance of a TRO.[3]

A. Strong Likelihood of Success on the Merits

Plaintiffs' strong likelihood of prevailing on the merits is attributable to the manifest unconstitutionality of the Andover Township Trustees' conduct and policy. In analyzing the constitutional protections that are afforded free speech rights, courts ordinarily use a three-step analysis: (1) a determination of whether the speech is protected speech; (2) a determination of the nature of the forum in which the speech would be presented; and (3) an analysis of whether

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[2] See *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir. 1998)(the factors are to be balanced against one another and should not be considered prerequisites to the granting of a TRO).

[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)).

the justification presented by the government satisfies the relevant standard.[4] Such an analysis must also proceed with an appreciation that '[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."[5] In the context of First Amendment violations and efforts to obtain preliminary injunctive relief, the "likelihood of success" factor frequently is determinative.[6]

1. The Andover Township Trustees' Policies and Action Relative to the Use of the Public Square Violate Plaintiffs' First Amendment Rights

a. *The speech at issue is protected by the First Amendment*

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[7] For "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[8]

The speech at issue in this case is indisputably protected by the First Amendment, as is Plaintiffs' selection of the venue for that speech. Plaintiffs seek to present a message to the public on a matter at the core of our government – fiscal responsibility and adherence to constitutional limits. "The freedom of speech … guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous

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[4] *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 797 (1985).,

[5] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

[6] *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

[7] *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[8] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)(quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

restraint or fear of subsequent punishment."[9] A primary purpose of the First Amendment protections is "to protect the free discussion of governmental affairs."[10] The communication of such messages through rallies is one of the traditional methods of speaking and is particularly effective at reaching a large number of persons with the intended message.

Furthermore, the venue that a party selects to use in exercising his right to freedom of speech may also contain its own communicative message in and of itself and which is protected in its own right by the First Amendment. As the Ninth Circuit explained in *Galvin v. Hay*:[11]

> [i]n common experience, speakers rely upon location to inform the content of their speech. . . . [S]peaking in front of a relevant backdrop gives greater force to the messages conveyed to that audience. In other instances, as here, the significance of the location is primarily relevant to the speakers themselves, affecting the shared meaning of the ceremony for its participants. . . .
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> . . . [I]ndividual choice of both communicative aspects, message and manner of presentation, is critical. . . . .
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> The [Supreme] Court has recognized that location of speech, like other aspects of presentation, can affect the meaning of communication and merit[s] First Amendment protection for that reason.

It cannot be contested or doubted that the speech in which Plaintiffs seek to engage – honoring and discussing the fundamental law of this nation, *i.e.*, the Constitution – is at the core of the speech protected by the First Amendment. And no venue could further reinforce such message as doing so in the center and heart of the community. In this case, the communicative nature of Plaintiffs' proposed activities, as well as the selection of the venue for such speech, are is indisputably protected by the First Amendment.

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[9] *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

[10] *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

[11] 374 F.3d 739, 751 (9th Cir. 2004).

b. The Andover Public Square is a Traditional Public Forum

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."[12] Under that analysis, "the extent to which the Government can control access depends on the nature of the relevant forum."[13]

Pursuant to its forum jurisprudence, the Supreme Court has developed a tripartite categorization of public spaces: (1) traditional public fora; (2) designated public fora; and (3) nonpublic fora.[14] Traditional public fora are those areas on government property which "by long tradition or by governmental fiat [has] been devoted to assembly and debate."[15] Designated public fora are created by "purposeful government action,"[16] and "may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subject."[17]

The Andover Public Square is a quintessential traditional public forum. Examples of a "traditional public fora" are those open spaces – streets, *parks*, and sidewalks – to which the public generally has unconditional access and which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly,

[12] *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983).

[13] *Id; accord Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834, 842 (6th Cir. 2000).

[14] *United Food,* 364 F.3d at 746.

[15] *Id.*

[16] *Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 667 (1998),

[17] *Cornelius*, 473 U.S. at 802.

communicating thoughts between citizens, and discussing public questions."[18] Comparable to Cincinnati's Fountain Square, the Andover Public Square (1) is the geographic, social, and commercial focal point of the community; (2) is an open public plaza; (3) includes seating and platform/stage area; and (4) is easily and freely accessed by pedestrians from any direction, without having to cross through private or otherwise restricted property.[19]

Additionally, the history of the Andover Public Square clearly establishes it as a traditional public forum. In fact, the 1824 deed transfering the property to the Andover Township Trustees contains the explicit proviso that it be used as a "public square." And the Square is the center of significant and regular speech. In addition to its stage and associated permanent seating, the Square has been used for various events sponsored by private groups such as the Chamber of Commerce and the Police Auxiliary. In 2010, events held or scheduled to be held included a charitable drive to solicit school supplies for underprivileged children, an Easter Egg Hunt, a Fall Festival, a Memorial Day Parade, "Christmas on the Square" and various music concerts.

c. The Policy and Actions of the Andover Township Trustees With Respect to the Use of Andover Public Square Are Not Content Neutral

But the Andover Township Trustee's policy and practice of deciding which speakers or groups to allow the use of the Andover Public Square based upon the subject matter of the proposed speech constitutes an impermissible prior restraint on speech based on its content. As noted above, the Andover Township Trustees have permitted a variety of activities with communicative aspects, *i.e.*, speech. Yet, with respect to the Plaintiffs, the Trustees have

[18] *Hague v. Committee for Industrial Organizations,* 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

[19] *See, e.g., Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458 (6th Cir. 1991).

explicitly declared that, because of the subject matter or topic of the forthcoming rally, *i.e.*, political, Plaintiffs may not use the Andover Public Square for their First Amendment activities.

But a government may not regulate speech "because of its message, its ideas, its subject matter, or its content."[20] "Once 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."[21] Invalid content regulation includes not only restrictions on particular viewpoints, but also prohibitions on public discussion of an entire topic or subject matter.[22] In this case, the Andover Township Trustees have declared political discussions and speech forbidden on the Andover Public Square. Such action by a governmental actor constitutes a content-based restriction on protected speech.

d. The Policy and Actions of the Andover Township Trustees Do Not Survive Strict Scrutiny Analysis.

"Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny."[23] Similarly, content-based restrictions on speech – in either a traditional or designated public forum – are also subject to strict scrutiny review.[24] Under strict scrutiny, the government "must show that its regulation is necessary to serve a compelling state interest and that it is

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[20] *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

[21] *Id.* at 95-96.

[22] *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (citing *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980).

[23] *United States v. Kokinda*, 497 U.S. 720, 726 (1990).

[24] *Helms v. Zubaty*, 495 F.3d 252, 256 (6th Cir. 2007).

narrowly drawn to achieve that end."[25] But "it is the rare case in which … a law survives strict scrutiny."[26]

In the present case, the Andover Township Trustees have not put forth nor stated any interest supposedly being served by its prohibition towards politically-related speech in the public square. In fact, it is beyond cavil that the Andover Township Trustees have any legitimate interest (let alone compelling interest) to justify either (i) their policy of excluding all political speech from its town square or (ii) their decision to deny Plaintiffs the opportunity to celebrate the United States Constitution in that same venue. Lacking any compelling interest being served by the township's policy and prohibition, the Defendants have not and cannot meet their burden of justifying the Andover Township Trustees' policies and actions relative to the use of the Andover Public Square, either facially or as applied to the Plaintiffs. Without any legitimate compelling interest to justify its policies and action, *a fortiori* the Andover Township Trustees cannot establish that its prohibition on political speech is narrowly drawn. For, even if, *arguendo*, some compelling interest exists to rationalize the Trustees' policies and action, something other than a total and complete ban, *i.e.*, a less speech-restrictive means, exists to achieve the compelling interest (whatever that compelling interest may be).[27]

2. The Andover Township Policy Relating to the Use of the Public Square is Unconstitutionally Vague and Vest Unbridled Discretion in the Township

The policy of the Andover Township Trustees as it relates to the use of the Andover Public Square has other constitutional infirmities. As the Township Trustees themselves have implicitly acknowledged, their policy relating to activities in the Andover Public Square vests

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[25] *Perry,* 460 U.S. at 45.

[26] *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

[27] *See Reno v. ACLU*, 521 U.S. 844, 874 (1997)(a burden on speech "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve")

unbridled and unabated discretion in them as to who they will and will not permit to use the Square. For as the Trustees indicated in their correspondence of August 25: "permission to use the square is made by the trustees on [a] case by case bases [sic]."

But "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."[28] For the Due Process Clause requires that regulations "provide explicit standards for those who apply them," in order to prevent application "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[29] Similarly, the First Amendment prohibits regulations from giving unfettered discretion to government officials charged with licensing or regulating speakers because it "gives a government official or agency substantial power to discriminate based upon the content or viewpoint of speech by suppressing disfavored speech or disliked speakers."[30]

The Supreme Court has explained that a system of prior restraint is impermissible if it fails to provide "narrow, objective and definite standards to guide the licensing authority."[31] The Court has repeatedly condemned a variety of statutes and ordinances that contain no standards for the exercise of discretion by the officials having the right to grant or deny permits as violative of the First and Fourteenth Amendments.[32]

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[28] *Freedman v. Maryland,* 380 U.S. 51, 58-59 (1965).

[29] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

[30] *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988).

[31] *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969).

[32] *See id.*; *see also Staub v. Baxley*, 355 U.S. 313 (1958)(city ordinance held to violate First and Fourteenth Amendments for making the enjoyment of speech contingent upon the uncontrolled will of municipal authorities); *Niemotko v. Maryland*, 340 U.S. 268 (1951)(ordinance held to violate First and Fourteenth Amendments because it allows municipal officials to exercise unbridled discretion in determining whether to issue license).

Closely related to the foregoing is another constitutional doctrine implicated by the Andover Township Trustee's policy, vagueness. A court is required to strike down a statute, ordinance or resolution "if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion."[33] As the Sixth Circuit has explained:

> First Amendment freedoms [are] too great where officials have unbridled discretion over a forum's use. We will not presume that the public official responsible for administering a legislative policy will act in good faith and respect a speaker's First Amendment rights; rather, the vagueness "doctrine requires that the limits the [government] claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice."[34]

As noted above, in this case, the Andover Township Trustees have granted unto themselves the unbridled and unfettered prerogative to decide who may speak on the Andover Public Square on a "case by case" basis. And while Resolution 06-104 declares it prohibits "for profit advertising or political signs," such undefined terms result in arbitrary application or enforcement due to the discretion afforded the Township Trustees. As the United States Supreme Court has explained:[35]

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

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[33] *United Food,* 163 F.3d at 358-59.

[34] *Id.* at 359 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988)).

[35] *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972).

When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement.[36] The determination of whether a statute is impermissibly imprecise, indefinite, or incomprehensible,[37] must be made in light of the facts presented in the given case and the nature of the enactment challenged.[38]

The term "political" is subject to a plethora of divergent and imprecise meanings. This very case demonstrates as much: while the Andover Township Trustees deem support and advocacy for the United States Constitution to be "political," there are no doubt many who would merely consider such support and advocacy a hallmark of being a citizen of the United States. Indeed, most government officials, regardless of political party or persuasion, take an oath to support the Constitution of the United States.[39] The very fact that there is a "Constitution Day" strongly suggests that of support thereof is not political. *Quaere*, is demonstrating one's support of our Constitution on Constitution Day truly any different, *i.e.*, more political, than honoring fallen veterans on Memorial Day or being thankful for what one has on Thanksgiving. In light of the Township's Resolution and the denial letter of August 25, 2010, a person of ordinary intelligence could conclude that advocacy for principles of limited federal government, as described by Madison when speaking of the federal Constitution may be "political," while a similarly situated person could easily conclude the opposite. There is no precision as to what the

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[36] *Kolender v. Lawson,* 461 U.S. 352, 357 (1983).

[37] *See Buckley v. Wilkins,* 105 Ohio St.3d 350, 2005-Ohio-2166 ¶19; *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).

[38] *Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 495 n7.

[39] *See* Ohio Const., art. XV, sec. 7.

Andover Township Trustees will or will not allow to occur in the Andover Public Square; it is simply a matter of their unbridled discretion. Consequently, even holding other concerns aside, Andover Township must be prohibited from employing this vague and arbitrary standard in determining who may and may not speak on the Andover Public Square.

B. Irreparable Injury

"The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."[40] 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.[41] Moreover, if this Court does not issue the requested preliminary injunction, Plaintiffs will be permanently deprived of their right to rally in support of the United States Constitution on Constitution Day and to express important and potentially influential viewpoints on the state of public affairs.

C. Public Interest and Private Harm.

Furthermore, the Defendants will not suffer any harm if they are enjoined from enforcing their unconstitutional policy against Plaintiffs. The unconstitutional character of the Township's Resolution leaves the Defendants with no legitimate interest in the continued application of a policy and decision clearly in violation of the Constitution. Furthermore, "it is always in the public interest to prevent the violation of a party's constitutional rights". [42]

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[40] *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

[41] *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").

[42] See *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)

III. CONCLUSION

Through Resolution 06-104 and its application to the Plaintiffs' efforts to celebrate the United States Constitution on the forthcoming Constitution Day, the Andover Township Trustees have unconstitutionally infringed upon Plaintiffs' First Amendment rights to engage in free speech, to petition the government for redress of grievances and to peaceably assemble. By their policy and action, the Trustees have banned core political speech in a traditional public forum, while impermissibly allowing other subject matters to be addressed in that same forum. In so doing, the Trustees lack any compelling state interest by which they might even justify the broad and unlimited, *i.e.*, not narrowly tailored, restriction. Instead, the Andover Township Trustees have vested in themselves the unfettered and unbridled discretion to decide who may exercise their constitutional rights in the Andover Public Square and who they will deny the exercise of such a right. To support and promote this unlimited exercise of power, the Township Trustees rely upon standards which are unconstitutionally vague.

As developed more fully above, Plaintiffs' Motion should be granted forthwith and this Court should issue the requested temporary restraining order and preliminary injunction that does the *following:*

(1) enjoins the Defendants, their agents and employees, or another other person, agency or organization acting in concert with or at the behest or direction of the Defendants, from prohibiting or otherwise interfering or restricting the Plaintiffs and those associated with the Plaintiffs from utilizing the Andover Public Square on September 17, 2010;

(2) enjoins the Defendants, their agents and employees, or another other person, agency or organization acting in concert with or at the behest or direction of the Defendants, from

prohibiting or otherwise interfering or restricting the Plaintiffs and those associated with the Plaintiffs from utilizing the Andover Public Square on dates in the future;

(3) enjoins the Defendants, their agents and employees, or another other person, agency or organization acting in concert with or at the behest or direction of the Defendants, from taking any actions to enforce or require compliance by any individual, organization or group with Andover Township Resolution 06-104.

Respectfully submitted,

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