RECORD NO. 21-2158

In The

United States Court Of Appeals

For The Fourth Circuit

ST. MICHAEL'S MEDIA, INC.,
Plaintiff – Appellee,

v.

THE MAYOR AND CITY COUNCIL OF BALTIMORE;
JAMES SHEA, in his personal and official capacities;
BRANDON SCOTT, in his personal and official capacities,
Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

BRIEF OF *AMICUS CURIAE*
THE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF
APPELLEE ST. MICHAEL'S MEDIA, INC. FOR AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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No. 21-2158 Caption: St. Michael's Media, Inc. v. Mayor and City Council of Baltimore, et al.

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(name of party/amicus)

who is amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/ Joshua Wallace Dixon Date: 11/3/2021

Counsel for: Center for American Liberty

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INTEREST OF AMICUS CURIAE

The Center for American Liberty is a non-profit law firm dedicated to protecting the civil liberties of all. To this end, the Center for American Liberty has represented litigants across the county, including in this Circuit and the Supreme Court. The Center for American Liberty has an interest in ensuring that this Circuit applies the correct legal standard in cases involving the First Amendment.

No party's counsel authored this brief, in whole or in part, and no one other than Amicus contributed money that was intended to fund preparing or submitting the brief. Counsel for Appellant and Appellees consented to the filing of this amicus brief.

ARGUMENT

As St. Michael's Media, Inc. ("St. Michael's") has ably explained in its Answering Brief, this Court should affirm the order of the district court granting St. Michael's a preliminary injunction to hold its prayer rally and conference at the MECU Pavilion (the "Pavilion") on November 16, 2021. As St. Michael's has shown, the Pavilion is a designated public forum, and the City of Baltimore (the "City") has not demonstrated that its efforts to prevent the event from going forward satisfy strict scrutiny. Moreover, the district court correctly found that, regardless of the type of forum at issue here, the City engaged in impermissible viewpoint discrimination against St. Michael's. That factual finding was not clearly erroneous, nor was it based on any error of law.

The Center for American Liberty submits this Amicus Brief in support of St. Michael's to highlight three points. First, the Pavilion is a designated public forum or, in the alternative, a limited public forum in which St. Michael's is among the class for whom use is reserved. Both of these conclusions trigger strict scrutiny, and the City has made no effort to justify its actions under that legal standard. Second, the City is not entitled to any deference or relaxation of the legal standard based on its status as proprietor of the Pavilion. Deference to a government proprietor may be warranted when the impairment on speech is incidental to the business enterprise, but, here, the enterprise is the forum itself. Moreover, the City was manifestly acting as a regulator—

not a proprietor—when it denied St. Michael's use of the Pavilion here. Thus, no deference is warranted. Third, the City impermissibly reserved unbridled discretion to itself to withhold use of the Pavilion, a fact that defeats any claim of viewpoint neutrality.

In short, based on St. Michael's Answering Brief, along with the above points, the Court should affirm the order of the district court granting St. Michael's a preliminary injunction.

I. THE PAVILION IS A DESIGNATED PUBLIC FORUM. IN THE ALTERNATIVE, THE PAVILION IS A LIMITED PUBLIC FORUM AND ST. MICHAEL'S IS A MEMBER OF THE CLASS FOR WHOM USE WAS RESERVED.

The Supreme Court has conceptualized individuals' First Amendment rights to speak on property owned or operated by the government under a forum analysis. Under this analysis, government-owned or -operated property falls into one of three general categories: a traditional public forum, a designated public forum, or a nonpublic forum. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Warren v. Fairfax County*, 196 F.3d 186, 190-91 (4th Cir 1999) (*en banc*). In determining the type of forum that exists in any given case, courts have looked to the "physical characteristics of the property . . ., the objective use and purposes of the property, and government intent and policy with respect to the property, which may be evidenced by its historic and traditional treatment." *Warren*, 196 F.3d at 190-91 (cleaned up).

Traditional public fora are those places that have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). The paradigmatic examples of traditional public fora are "streets and parks." *Id.* In traditional public fora, the government may enact content-neutral "time, place, and manner" restrictions on speech if it can satisfy intermediate scrutiny. *Id.* Content-based restrictions on speech, by contrast, are only permissible if the government can satisfy strict scrutiny. *Id.*

Designated public fora are those places that the government has designated for use by the "public at large for assembly and speech." *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45. This type of forum is created by government action of "intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. While the government is not required to create a designated public forum on property it owns or operates, once it does, "it is bound by the same standards that apply in a traditional public forum." *Id.*

Designated public fora can also be opened, not to the public at large, but "for a limited purpose such as use by certain groups or for the discussion of certain subjects." *Perry*, 460 U.S. at 45 n.7 (cleaned up); *see also Warren*, 196 F.3d at 193; *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*,

457 F.3d 376, 382 (4th Cir. 2006) ("*CEF*"). Courts refer to this subset of designated public fora as a "limited public forum." *Warren*, 196 F.3d at 193; *CEF*, 457 F.3d at 382. In a limited public forum, two levels of First Amendment scrutiny apply. First, the "internal standard" applies when "the government excludes a speaker who falls within the class to which a . . . [limited] public forum is made . . . available." *Warren*, 196 F.3d at 193 (cleaned up). If the government excludes such a speaker, the exclusion is subject to strict scrutiny. *Id.* Second, the "external standard" limits the government's power to restrict the class to whom the property is opened in the first place. *Id.* Specifically, the government may not exclude speakers of a "similar character" to the class of speakers to whom access is given. *Id.* (quoting *Perry*, 460 U.S. at 48). Moreover, the government's exclusion of certain classes of speakers or topics must be "reasonable in light of the purposes of the forum" and viewpoint neutral. *Id.*

Nonpublic fora are those places that are "not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46. "To maintain a nonpublic forum, the government must employ selective access policies, whereby forum participation is governed by individual, non-ministerial judgments." *CEF*, 457 F.3d at 381 (cleaned up). Further, a nonpublic forum exists where "opening the . . . forum to expressive conduct [would] interfere with the objective use and purpose to which the property has been dedicated." *Warren*, 196 F.3d at 193. As with the external

standard applicable to limited public fora, restrictions on speech in nonpublic fora are evaluated according to whether they are reasonable and viewpoint neutral. *Id.*

Here, the Pavilion is a designated public forum. First, the physical characteristics of the property—a tented, open-air concert hall on a pier in the Inner Harbor—are consistent with its use as a designated public forum. Unlike cases in which the Supreme Court has found a designated public forum not to exist, the property is not a government enclave isolated from society. *E.g. Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Adderly v. Florida*, 385 U.S. 39 (1966) (prison). Second, the property has been used as a venue for musical and other artists and as a forum for protected speech for years. This historical use is strong evidence that the property is a designated public forum. *See Southeastern Promotions v. Conrad*, 420 U.S. 546, 555 (1975) (holding that municipal theaters were "public forums designed for and dedicated to expressive activities"). Third, the property's use as a forum for protected speech is consistent with the government's intent that the property be a designated public forum. This case is thus unlike cases where the primary purpose of the property was for things other than expressive activity. *E.g. International Society for Krishna Consciousness, Inc. v. Le*e, 505 U.S. 672, 682 (1992) (noting that the "purpose of [an airport] the "facilitation of passenger air travel, not the promotion of expression"); *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion) (sidewalk leading into post office). Fourth, treating the property

as a designated public forum "would not interfere with the objective use and purpose to which the property has been dedicated." *Warren*, 196 F.3d at 193. Indeed, the property's sole purpose is to house musical and other performances and to serve as a forum for protected speech. Based on these factors, the Pavilion is a designated public forum.

The City argues that the Pavilion is a nonpublic forum, primarily because, it claims, permission to use the Pavilion "is only granted to a carefully selected group of performers/events." (Appellants' Opening Br. at 11.) The City, however, does not cite a *single instance* where another speaker was actually denied permission to use the Pavilion since it opened in 1981. For this reason, the record establishes that access to the Pavilion is neither limited nor based on individualized judgments. Thus, it cannot be a nonpublic forum. *See Americans United For Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1541 (6th Cir. 1992) (concluding that property was a public forum where "[n]o group has ever been denied use of the [property]").

The City also points to the contract between it and SMG, which provides, among other things, that SMG will not book musical artists that have not previously performed at another Live Nation venue. (S.A. Vol. 1 at 413.) The City, however, has not demonstrated that SMG actually enforced that provision of the contract, and the fact that the City failed to identify any musical artist that has been excluded from

the Pavilion indicates that, as a matter of actual practice, that provision is a nullity. On these facts, the contract is insufficient to limit the forum in any material way. *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985) (noting that public forum was created, despite contractual limitations, when access was "virtually guaranteed to anyone willing to pay the fee").

More importantly, the contract does not have a similar limitation—or, indeed, *any* limitation—on the use of the Pavilion by non-musical artists or groups like St. Michael's, and the record is crystal clear that the contractual provision regarding Live Nation does not apply to groups like St. Michael's. Indeed, St. Michael's held a prayer rally at the Pavilion in 2018 despite the fact it has never previously performed at another Live Nation venue. Accordingly, the record establishes that there is no limitation on the type of speakers (or the type of speech) that may access the Pavilion.

The City argues that the contract between it and SMG gives it the discretion to deny permission to any third party to use the Pavilion, but the contract most certainly does not say that. Instead, it provides only that the City will notify SMG about complaints it receives regarding a public event previously held at the Pavilion and that SMG must provide the City "assurances" that the circumstances that led to the complaints will be rectified before any repeat of that event can occur. (S.A. Vol.

1 at 413.) The contract does not give the City authority to disallow any public event. Regardless, the City does not take the position that it received any complaints about St. Michael's 2018 event, so this provision—like the Live Nation provision—is simply not applicable.

Finally, the City asserts that it has unbridled discretion—outside of the contract—to withhold approval for any event at the Pavilion, but this assertion is insufficient to convert the Pavilion into a nonpublic forum. Instead, on the facts here, the assertion of such unbridled discretion is good evidence that a constitutional violation has occurred. *Christ's Bride Ministries, Inc. v. Se. Pennsylvania Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998) ("[T]he fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum. If anything, we must scrutinize more closely the speech that the government bans under such a protean standard.").

In the alternative, if the Court concludes that the Pavilion is not a designated public forum, the Court should conclude that the Pavilion is a limited public forum. Moreover, regardless of the precise contours of the class of those for whom use of the Pavilion is reserved, one thing is clear—by virtue of the fact that St. Michael's held an almost identical event at the Pavilion just three years ago, St. Michael's is necessarily in that class. *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 693

(2d Cir. 1991) (noting that "prior use . . . will result in a forum designated for the limited category exemplified by the prior permitted use" (cleaned up)). In other words, because St. Michael's was in the class of permitted users just three years ago, and because the City hasn't materially changed its policies, it must also be in that class today.

It is true, as the City points out, that the 2021 rally will likely have more attendees than the 2018 rally. The projected 2021 attendance, however—3,000 people—is still well short of the Pavilion's capacity (4,600 people). (S.A. Vol. 1 at 498.) Thus, this is not a sufficient basis to distinguish between the 2021 and 2018 events. It is also true that the 2021 event will have several different individual speakers than the 2018 event. The overall content of the 2021 event, however, will be the same—a protest of the Catholic church's handling of sexual abuse by priests and related financial corruption. Accordingly, these minor differences between the 2021 event and 2018 event do not somehow remove St. Michael's from the class of speakers for whom use of the Pavilion is reserved. *Warren*, 196 F.3d at 193 (noting that, in a limited public forum, the government may not exclude speakers of a "similar character" to the class of speakers to whom access is given).

Because the Pavilion is a designated public forum, the City must satisfy strict scrutiny to justify its exclusion of St. Michael's. *Perry*, 460 U.S. at 45. But even if the Court were to conclude that the Pavilion is a limited public forum, strict scrutiny

would still apply because St. Michael's is within the class of those to whom use of the Pavilion was reserved. *Warren*, 196 F.3d at 193 (discussing the "internal standard" applicable to limited public fora). The City, however, does not argue that its actions comply with strict scrutiny. Accordingly, the Court should enter an order affirming the district court's entry of a preliminary injunction but clarifying that the Pavilion is a designated public forum or, in the alternative, a limited public forum in which St. Michael's is in the class of speakers for whom use is reserved.

II. THE CITY IS NOT ENTITLED TO ANY SPECIAL DEFERENCE AS A PROPRIETOR.

The City argues that the district court erred by "ignoring the City's proprietary role" in managing the Pavilion. (Appellants' Opening Br. at 14.) According to the City, the district court should have applied a less searching legal standard because it was acting as a proprietor and not a regulator.

To put it bluntly, this argument is mystifying. In its opinion, the district court noted that the City operated the Pavilion on a "proprietary" basis, (A.A. at 148), and stated that "it is appropriate to impose a more lenient standard of scrutiny on the government when it acts as a proprietor, rather than a lawmaker or regulator," (A.A. at 149). Thus, the district court plainly took account of the City's asserted "proprietary role."

To the extent the City is arguing that the district court simply didn't give it *enough* deference based on its proprietary status, this argument also fails, and for two reasons.

First, the cases where the Supreme Court has applied a less searching First Amendment standard to a government acting as a proprietor involve situations where the limitation on speech was merely incidental to the government's business. In *Lehman v. City of Shaker Heights*, for example, the Supreme Court upheld a city's restriction on political advertising in its public transit system. 418 U.S. 298 (1974). The Supreme Court noted that the case involved "no open spaces, no meeting hall, park, street corner, or other public thoroughfare." *Id.* at 304. Instead, the public transit system was a "commercial venture," and any decision with respect to what advertisements would be allowed on the transit system were merely "incidental" to the venture. *Id.* at 304. Because the city was engaged in a proprietary function when it restricted political advertisements, the Court concluded that the city should be treated more like a private company engaged in the same enterprise. *Id.*

Similarly, in *Kokinda*, the Supreme Court upheld a United States Postal Service regulation that prohibited solicitation on a non-thoroughfare sidewalk that led to a post office. 497 U.S. 720. A plurality of the Court noted that "governmental actions are subject to a lower level of First Amendment scrutiny when the governmental function operating is not the power to regulate or license,

as lawmaker, but, rather, as proprietor, to manage its internal operations." *Id.* at 725 (cleaned up). The plurality concluded that "Congress has made it clear that it wished the Postal Service to be run . . . like a business" and that the incidental burden on solicitation was appropriate because "[s]olicitation impedes the normal flow of traffic" and, thus, could "delay" postal transactions. *Id.* at 733-34.

Lehman and *Kokinda* are inapposite here. In both of those cases, the restriction on speech was incidental to the government's enterprise. In *Lehman*, the Court specifically noted that the restriction on advertisements was "incidental" to the enterprise of transporting people. 418 U.S. at 304. In *Kokinda*, the restriction on solicitation was only ancillary to the enterprise of mail delivery. 497 U.S. at 736. Here, by contrast, *the enterprise is the operation of the forum itself.* In this situation, the justification for measuring the government-proprietor's action according to a more lenient legal standard falls away—when the restriction on speech is direct, as opposed to incidental, it is more likely to be the product of a conscious choice to restrict speech rather than the ancillary effect of a business decision. Indeed, the Court in *Lehman* itself observed that the facts of that case did not involve the operation of a "meeting hall." Here, because the government is operating a venue whose sole purpose is

to facilitate protected First Amendment activity, *Lehman* and *Kokinda* do not apply. [1]

Second, the City was acting as a regulator, not a proprietor, when it denied St. Michael's access to the Pavilion. The rationale for applying a less searching legal standard when the government acts as a proprietor is the notion that the government, as proprietor, should be allowed to compete in the marketplace on something close to equal footing with private entities, who are not bound by constitutional limitations. (Appellants' Opening Br. at 16 (quoting *Gilles v. Blanchard*, 477 F.3d 466, 470 (7th Cir. 2007) (noting that "[c]ourts hesitate to impose in the name of the Constitution extravagant burdens on public [entities] that private [entities] do not bear")).) For this rationale to apply, however, the government must be acting *qua* proprietor—not regulator—in connection with the restriction on speech at issue. Otherwise, courts will be deferring to the government in connection with its *regulatory* decisions that impact speech, an outcome that is plainly antithetical to the principles that underlie the First Amendment.

[1] The other cases the City cited in its brief are inapposite. *National Aeronautics and Space Admin. v. Nelson* has no bearing here because did not arise in the forum context. 562 U.S. 136, 148-49 (2011). *Wisconsin Interscholastic Athletic Assoc. v. Gannett* involved a claim of viewpoint discrimination against publicly owned television broadcasters in their programming decisions, which implicated the government speech doctrine. 658 F.3d 614, 622 (7th Cir. 2011). Like *Nelson*, *Gannett* has no application here.

In *Lehman*, for example, the government's restriction on political advertisements was permissible because (1) "[r]evenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue oriented advertisements be displayed," (2) "there could be lurking doubts about favoritism" if political ads were accepted, and (3) the public's transit experienced would be diminished because they, as a "captive audience," would be forced to engage in political issues. 418 U.S. at 304. All of these considerations related to the way government operated its business, and not to any regulatory purpose. *Id.* Similarly, in *Kokinda*, the government acted to limit solicitation "because solicitation is inherently disruptive of the Postal Service's business." 497 U.S. at 732. This limitation, the plurality observed, involved the proprietary decision regarding the Postal Service's "internal operations" and "not the power to regulate or license, as lawmaker." *Id.* at 725 (cleaned up).

Here, by contrast, the City's stated justifications for denying St. Michael's the ability to use the Pavilion involved the "power to regulate or license, as a lawmaker." *Id.* Indeed, the City candidly admits, on the first page of its Opening Brief, that it "elected not to rent the [Pavilion] to St. Michael's because it fears the planned rally will result in violence, property damage, and the expenditure of already-scarce public safety resources." (Appellants' Opening Br. at 1.) These justifications, however, are regulatory, and not proprietary, insofar as they pertain to governance

of Baltimore *at large* and not any proprietary interest in running *the Pavilion*. (S*ee also id.* at 4 (asserting that the City instructed SMG to cease discussions with St. Michael's "because of the impact that . . . event could have on [Baltimore]" and noting the City's "concerns regarding disruptions and violence that could result in Baltimore City from the event"); *id.* at 5 (noting that "the City chose not to host the event due to the fact that guest speakers could incite disruption and violence in [Baltimore]" and "out of . . . fear that it would incite violence in the heart of downtown Baltimore"); *id.* at 20 (noting that the City's "concerns [are] rooted in . . . public safety".) Unlike the limitations on speech in *Lehman* and *Kokinda*, which were the result of the governmental decisions based on the best way to run the businesses at issue, the City's concerns here were based on regulatory concerns regarding the alleged impact of the event on the city of Baltimore. As such, the City's concerns here were regulatory, not proprietary, and the City is owed no special deference under the First Amendment.[2]

In sum, although the district court erroneously relaxed the First Amendment standard based on the City's argument that its actions should be judged as a proprietor, the district court ultimately reached the correct result based on its finding

[2] Moreover, as St. Michael's explained in its Answering Brief, the City's regulatory concerns were based on a "heckler's veto," which constitutes impermissible viewpoint discrimination under the First Amendment. (Appellee's Answering Br. at 44-48.)

that the City engaged in viewpoint discrimination. This Court should enter an order affirming the district court's order but clarifying that, on the facts here, the City is not entitled to any deference under the First Amendment as a proprietor.[3]

III. THE CITY IMPERMISSIBLY EXERCISED UNBRIDLED DISCRETION.

The City also argues that the district court erred in concluding that its exercise of unbridled discretion in denying St. Michael's access to the Pavilion revealed that it had not implemented adequate safeguards to ensure viewpoint neutrality in its decision-making processes. The City presents this argument on two fronts. First, the City argues that the district court erred because, in applying the unbridled discretion doctrine, the district court failed to account for the fact that the City was a proprietor, not a regulator. (Appellants' Opening Br. at 22.) This argument can be dispensed with quickly. As discussed in Section II above, the City was acting in a regulatory capacity—not a proprietary capacity—when it denied St. Michael's the ability to use the Pavilion. Thus, the City's argument suffers from a failed premise.

[3] In addition to the argument noted in the text, the City seems to suggest that it should be permitted to engage in viewpoint discrimination because it is a proprietor. (Appellants' Opening Br. at 16 ("The role of the government in a nonpublic forum can effect and/or lessen the need for viewpoint neutrality.").) That argument, however, is foreclosed by *Kokinda*, where the government was engaged in a proprietary function (operating the Postal Service) and the Court nevertheless evaluated the restriction on speech according to whether it was viewpoint neutral. 497 U.S. at 730 (plurality opinion); *id.* at 739 (Kennedy, J., concurring in the judgment).

Moreover, even if the City's premise were correct, its conclusion would still be wrong. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the government was a proprietor—it operated privately owned theaters pursuant to a lease with the owner—but that fact did not give the Supreme Court a moment's pause in holding that the government's exercise of unbridled discretion in denying a production company the ability to put on a play rendered the government's action unconstitutional. *Id.* at 548. Notably, moreover, the City does not cite a single case in support of its contention that because it is a proprietor it is somehow relieved of the constitutional duty to apply clear standards to its decisions over access to fora.

Second, the City argues that the district court erred in applying the unbridled discretion doctrine beyond the context of traditional or designated public fora. While this argument requires more discussion than the first, it fares no better.

It is beyond dispute that the City's scheme—requiring those who wish to speak at the Pavilion enter into a contract with SMG—constitutes a prior restraint on free expression. *Conrad*, 420 U.S. at 554 (holding that regulatory scheme in which government was "empowered to determine whether the applicant should be granted permission—in effect, a license or permit" constituted a prior restraint). Prior restraints that are granted or denied based on the government's exercise of unbridled discretion present at least two threats to protected expression. First, when the government has unbridled discretion to grant or deny permission to speak, it

"intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988). Second, "'the absence of express standards' makes it difficult"—for both courts and voters—"to differentiate between a legitimate denial of access and an 'illegitimate abuse of censorial power.'" *CEF*, 457 F.3d at 387 (quoting *City of Lakewood*, 486 U.S. at 758). Because of these threats, a system of prior restraint "comes to [court] bearing a heavy burden against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

In *CEF*, this Court considered—and rejected—the precise argument the City raises here. There, a school district created a method for distributing information to parents through a take-home flyer system. 457 F.3d at 378-79. The district reserved absolute discretion to approve or deny a third-party's use of the system. *Id.* at 380. Based on that discretion, the district denied a non-profit ministry access to the system, and the ministry sued, alleging that the system was a limited public forum. *Id.* at 379. The district argued that the flyer system was a nonpublic forum.

In resolving the dispute, the Court noted that whether the flyer system was a limited public forum or a nonpublic forum, the legal standard was the same—the government may only prohibit access if doing so is "reasonable in light of the purposes served by the forum" and the prohibition is "viewpoint neutral." *Id.* at 384 (quoting *Cornelius*, 473 U.S. at 806). In addition, the Court held, "viewpoint neutrality requires

. . . that a government . . . provide adequate safeguards to protect against the improper exclusion of viewpoints." *Id.* A government fails to provide adequate safeguards when it retains "unbridled discretion" to deny access to the forum. *Id.* at 386. Importantly, this conclusion is true *regardless of the type of forum* at issue. As the Court held, "the dangers posed by unbridled discretion . . . are . . . present in [all types of] forums. [E]ven in limited public and nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment." *Id.* at 386.

To be sure, on first glance, the unbridled discretion doctrine appears to be in some tension with the concept of nonpublic fora insofar as one of the characteristics of a nonpublic forum is "selective . . . access" that is based on "non-ministerial judgments." *Warren*, 196 F.3d at 193. Upon a moment's reflection, however, it becomes apparent that the tension is more superficial than real. This is so because a government may give officials sufficient discretion to make "non-ministerial judgments"—and thereby create a nonpublic forum—without giving them such "unbridled discretion" that their decision making presents the dual threats associated with standardless prior restraints—censorship and unreviewable government action. *CEF*, 457 F.3d at 387. While courts will allow "more official discretion in a nonpublic forum than would be acceptable in a public forum," the government may not enact a policy that "permits officials to deny access for any reason" or otherwise "does not provide sufficient criteria to prevent viewpoint discrimination." *Id.*

Based on this reasoning, the Court in *CEF* concluded that, regardless of the type of forum the flyer system was, it failed to contain adequate safeguards to prevent viewpoint discrimination. *Id.* at 387-88. Indeed, the policy's only limitation on the district's discretion to grant or deny access was a provision stating that the district would not grant access when doing so would "undermine the intent of the policy." *Id.* at 388. The Court concluded that this limitation "actually provides no limitation at all, *i.e.*, no meaningful restraint on [the district's] discretion to [deny] approval of a flyer for any reason it chooses, including viewpoint discrimination." *Id.* In sum, the Court held that "[b]ecause the policy offers no protection against the discriminatory exercise of [the district's] discretion, it creates too great a risk of viewpoint discrimination to survive constitutional scrutiny." *Id.* at 389.[4]

Applying *CEF* here leads inexorably to the conclusion that the City's decision to deny St. Michael's access to the Pavilion was a constitutionally impermissible exercise of unbridled discretion, regardless of the type of forum at issue. Indeed, the City has not even attempted to identify a policy—written or otherwise—under which it assumed the authority to deny St. Michael's access. In the absence of such a policy, the City's decision making necessarily lacked any guidelines or standards

[4] Here, the district court plainly appreciated the subtleties in applying the unbridled discretion doctrine to the nonpublic forum context. In fact, the district court quoted *CEF* extensively in concluding that "in the context of a nonpublic or limited public forum, the unbridled discretion analysis is not identical to the analysis in a public forum." (A.A. at 160-61.)

that could have served to cabin its discretion. *City of Lakewood*, 486 U.S. at 770 (holding that the unbridled discretion 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); *OSU Student All. v. Ray*, 699 F.3d 1053, 1064 (9th Cir. 2012) (holding that policy that was previously "unannounced," "had no history of enforcement," and "materialized like a bolt out of the blue" violated the unbridled discretion doctrine); *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1207 (11th Cir. 1991) (holding that the government "simply cannot continue to take an utterly discretionary, 'seat of the pants' regulatory approach towards activity that is entitled to first amendment protection"); *see also Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (observing that prior restraints on speech require "narrowly drawn, reasonable and definite standards" to "guid[e] the hand" of the government).

The City seeks to avoid the clear application of *CEF* here by arguing that "the contract [between it and SMG] affords [it] very little discretion at all in how it may interfere with [the] selection process for event bookings." (Appellants' Opening Br. at 24.) This argument is too cute by half. The City doesn't seek to justify its decision to exclude St. Michael's exclusively by resort to the contract between it and SMG, presumably because it knows full well that the contract doesn't give it that authority. Thus, the quantum of discretion the City has *under the contract* is irrelevant. Rather,

the question is whether the City's decision to exclude St. Michael's was adequately cabined. Because the City has failed to identify any policy it applied in making that decision, it necessarily follows that it was not.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court granting St. Michael's a preliminary injunction.

Respectfully submitted this 3rd day of November 2021 by

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