

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

SCOTT A. ROSS,	:	
	:	Case No. 09-369
STEPHEN H. DAPPER,	:	
	:	
DANIEL P. REGENOLD,	:	Judge _____
	:	
and	:	Magistrate Judge _____
	:	
COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES (a/k/a COAST),	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CITY OF CINCINNATI,	:	
	:	
CINCINNATI CENTER CITY DEVELOPMENT CORPORATION,	:	
	:	
FOUNTAIN SQUARE MANAGEMENT GROUP,	:	
	:	
and	:	
	:	
THE CORPORATION FOR FINDLAY MARKET.	:	
	:	
Defendants.		

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT,
TEMPORARY RESTRAINING ORDER, PRELIMINARY
AND PERMANENT INJUNCTION AND NOMINAL DAMAGES**

Now come Plaintiffs, SCOTT A. ROSS, STEPHEN H. DAPPER, DANIEL P. REGENOLD and COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES (“COAST”), and for their Complaint against the CITY OF CINCINNATI (“City”),

CINCINNATI CENTER CITY DEVELOPMENT CORPORATION (“3CDC”), and FINDLAY MARKET, INC. (“Findlay”) allege as follows:

INTRODUCTION

1. This is an action for declaratory judgment, temporary restraining order, preliminary and permanent injunction, and compensatory relief under Section 1983 of the United States Code arising from the unconstitutional policies and practices of the City. 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 1, Article II of the Ohio Constitution. The harm may only be remedied by a ruling from this Honorable Court. Plaintiffs file this Complaint contemporaneously with a Motion for a Temporary Restraining Order challenging Defendants’ unconstitutional patterns, practices, policies, and conduct.

2. 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.

3. 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”).

4. To qualify for ballot access, Plaintiffs must submit 6,150 valid signatures no later than early September 4, 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.

5. As a result of the City's policies and conduct, Plaintiffs have suffered and will continue to suffer irreparable harm unless the City is immediately enjoined from this discriminatory prohibition against their speech.

PARTIES

6. Plaintiff Scott A. Ross is a citizen and taxpayer of the State of Ohio and is a member and supporter of COAST. Ross regularly engages in a variety of expressive activities and expects and intends in the future to continue his community involvement and concomitant expressive activity. Furthermore, Ross intends to engage in the same or similar advocacy in the future to promote other initiatives, referenda and Charter Amendments, and other petitions to redress grievances against the Federal, State, and local governments. In such efforts, Ross desires to avail himself of the use of traditional public fora throughout the City.

7. Plaintiff Stephen H. Dapper is a citizen and taxpayer of the State of Ohio and is a member and supporter of COAST. Dapper regularly engages in a variety of expressive activities and expects and intends in the future to continue his community

involvement and concomitant expressive activity. Furthermore, Dapper intends to engage in the same or similar advocacy in the future to promote other initiatives, referenda and Charter Amendments, and other petitions to redress grievances against the Federal and State and local governments. In such efforts, Dapper desires to avail himself of the use of traditional public fora throughout the City.

8. Plaintiff Daniel P. Regenold is a citizen and taxpayer of the State of Ohio and is a member and supporter of COAST. Regenold regularly engages in a variety of expressive activities and expects and intends in the future to continue his community involvement and concomitant expressive activity. Furthermore, Regenold intends to engage in the same or similar advocacy in the future to promote other initiatives, referenda and Charter Amendments, and other petitions to redress grievances against the Federal, State, and local governments. In such efforts, Regenold desires to avail himself of the use of traditional public fora throughout the City.

9. Plaintiff Coalition Opposed to Additional Spending & Taxes (“COAST”) is an unincorporated association of individuals organized as a political action committee under the laws of the State of Ohio. COAST advocates publicly in favor of sound fiscal policy, and frequently engages in ballot issue efforts and campaigns. At all relevant times hereto COAST has been involved in and supportive efforts to engage in an initiative effort restricting the ability and authority of the council of the City in Cincinnati to spend monies on the construction of a trolley system in Cincinnati. COAST brings this action on behalf of itself and its supporters.¹ Furthermore, COAST intends to engage in the same or similar advocacy in the future to promote other initiatives, referenda and Charter Amendments, and other petitions to redress grievances against the Federal, State

¹ References to COAST include both the organization as an entity and its individual supporters and members.

and local governments. In such efforts, COAST desires to avail itself of traditional public fora throughout the City.

10. Defendant City of Cincinnati is a municipal corporation, capable of being sued and organized and existing under of the Ohio Revised Code. Defendant City of Cincinnati is responsible for the adoption and implementation of some or all of the policies or customs at issue in this case, resulting in the denial to Plaintiffs of the access to the traditional public fora referenced in this case for the exercising of Plaintiffs' political free speech rights. Furthermore, the real property on which the various subject fora are located and which is the subject of this lawsuit is owned by the City of Cincinnati and/or dedicated to public use by the City of Cincinnati.

11. Defendant 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."

12. 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.

13. 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.”

14. All actions by the Defendants were undertaken under color of state law which caused the deprivation of a rights protected by the United States Constitution.

JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as this action arises under the First and Fourteenth Amendments to the United States Constitution; under 28 U.S.C. § 1343(a)(3), in that it is brought to redress deprivations, under color of state law, of rights, privileges and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that it seeks to recover damages and secure equitable relief under an Act of Congress, specifically, 42 U.S.C. § 1983, which provides a cause of action for the protection of civil and constitutional rights; under 28 U.S.C. § 2201(a), to secure declaratory relief; under 28 U.S.C. § 2202, to secure preliminary and injunctive relief and damages; and under 42 U.S.C. § 1988, to award attorneys fees.

16. Venue is proper within this judicial district and division pursuant to 28 U.S.C. § 1391(b) and Local Rule 82.1, as (i) the Defendants are situated within this judicial district and division; and (ii) all of the claims asserted by Plaintiffs arose within this judicial district and division.

FACTUAL ALLEGATIONS

Conduct at Issue

17. 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, Dapper was on a dedicated sidewalk. 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.

18. Specifically, Robert J. Pickford, the “President and CEO” of CFFM, ordered Dapper to stop collecting signatures. Also, the “assistant marketing director” of Findlay Market, a woman who identified herself only as “Cheryl,” ordered Dapper to stop collecting signatures, or in the alternative, confine his collection efforts to a small stationary area by (1) actively attempting to dissuade Findlay Market patrons from signing Mr. Dapper’s petition, and (2) applauding those who refrained from doing so.

19. On May 2, 2009, and also at Findlay Market, the same individuals stopped Plaintiff Daniel P. Regenold from gathering signatures on the public sidewalks of Findlay Market.

20. 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 A. Ross attempted to circulate petitions on a dedicated public sidewalk in front of Millions Café at 2133 Linwood Ave., Cincinnati, Ohio.

21. As Ross approached the building (Millions Café), a City of Cincinnati police officer, Officer Root, badge number P542, informed Ross that he was not free to

gather signatures on the dedicated public sidewalk in front of Millions Café, and ordered Ross not to collect signatures at that location. Officer Root's order was stern and non-negotiable.

22. Officer Root further instructed Ross to leave the area on the dedicated public sidewalk in front of Millions Café entirely. The officer then demanded that Ross produce a "Solicitor's License," and informed Ross that he was required to have a Solicitor's License if he wished to gather signatures in the City of Cincinnati.

23. 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.

24. Debbie Branscom, "On-Site Manager of Fountain Square," informed Regenold that he was not permitted to gather signatures at Fountain Square. She further ordered 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.

25. 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 Regenold to leave the premises if he intended to continue collecting signatures.

26. In aggregate, these instances demonstrate a 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.

Fora at Issue

27. Defendant City of Cincinnati owns certain real property within the City of Cincinnati commonly known as “Fountain Square” and “The Findlay Market.”

28. In particular, significant portions of Findlay Market are themselves dedicated public streets and sidewalks.

29. Defendant City of Cincinnati has entered into a lease agreement for the management of the aforesaid property with, respectively, 3CDC/FSMG and CFFM.

30. The City also owns and exercises control over the dedicated public sidewalks on Linwood Avenue.

i. Fountain Square

31. Defendant 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.”

32. 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.

33. 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.

34. 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.”

35. 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.”

36. 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.

37. 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.

38. 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.

39. 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.

40. Section 713-4 further requires “equal access” for all lawful uses of Fountain Square.

41. 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.

42. 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.

43. No more than three permits may be issued for the use of Fountain Square at the same date and time.

44. 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

45. 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.”²

46. 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.”

47. 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”).³

48. 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.

49. Streets and sidewalks in and around Findlay Market are regularly used to access other retail businesses in the vicinity. Other than the market house and a covered shed, Findlay Market consists almost entirely of dedicated public streets and sidewalks.

50. 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

² City of Cincinnati Municipal Code, 845-3.

³ All facts in this section are taken directly from information provided by CFFM on its website, www.findlaymarket.org.

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.”

51. 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.”

52. 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 Avenue Sidewalks

53. 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.

54. Million’s Cafe faces Linwood Avenue, and serves as a popular gathering place on evenings and weekends.

55. 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.

56. The actions of Defendants described above, both generally and specifically as applied to Plaintiffs, were taken under color of state law.

57. The actions of Defendants described above, both generally and specifically as applied to Plaintiffs, constitute an official policy, practice, custom or usage of the City of Cincinnati.

COUNT I

DECLARATORY JUDGMENT AND INJUNCTION (28 U.S.C. § 2201, *et seq.*)

58. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

59. The dedicated public streets and sidewalks in the City of Cincinnati are traditional public fora under First Amendment analysis.

60. The exterior areas of Findlay Market (outside of the markethouse and not under the other roofed structure or structures) are public streets and sidewalks and are also traditional public fora under First Amendment analysis.

61. The entirety of Fountain Square is also traditional public fora under First Amendment analysis.

62. The City's policy, practice and custom of closing off these traditional public fora to expressive activities and petitioning under the First Amendment is unconstitutional and violates the First and Fourteenth Amendments to the United States Constitution.

63. The City's policy, practice and custom of threatening, harassing, intimidating, and impeding Plaintiffs in their efforts to collect signatures for a petition in areas that are traditional public fora is unconstitutional and violates the First and Fourteenth Amendments to the United States Constitution.

64. The City's policy, practice and custom of allowing its agents or other authorized individuals unbridled discretion in determining which speakers and speech will be permitted to take advantage of these traditional public fora the City violates Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

65. As a proximate result of Defendants' actions as described above, Plaintiffs have suffered irreparable injury and will continue in the future to suffer irreparable injury, in that they have and will be deprived of their right of free speech and right to petition government for the redress of grievances as guaranteed by the First Amendment to the Constitution.

66. As a further proximate result of Defendants' actions, Plaintiffs have suffered additional compensable injury in the nature of constitutional deprivations.

67. In order to prevent further violation of Plaintiffs' constitutional rights by Defendants, it is appropriate and proper that a declaratory judgment be issued, pursuant to 28 U.S.C. § 2201 and FED. R. CIV. P. 57, declaring unconstitutional the City's policies and practices of prohibiting access to these traditional public fora within the City of Cincinnati.

68. Furthermore, pursuant to 28 U.S.C. § 2202 and FED. R. CIV. P. 65, it is appropriate and hereby requested that this Court issue a preliminary and permanent

injunction enjoining the City from enforcing its prohibition on Plaintiffs' advocacy in the fora at issue, and that the Court award nominal damages to Plaintiffs as a result of the City's violation of their constitutional rights.

COUNT II

VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)

69. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

70. All acts alleged herein of the City, its designees, members, officers, agents, servants, employees, or persons acting at its behest or direction, were done and are continuing to be done under the color and pretense of state law.

71. The City's policy, practice and custom of closing off these traditional public fora to expressive activities and petitioning under the First Amendment is unconstitutional and violates the First and Fourteenth Amendments to the United States Constitution.

72. The City's policy, practice and custom of threatening, harassing, intimidating, and impeding Plaintiffs in their efforts to collect signatures for a petition in areas that are traditional public fora is unconstitutional and violates the First and Fourteenth Amendments to the United States Constitution.

73. The City's policy, practice and custom of allowing its agents or other authorized individuals unbridled discretion in determining which speakers and speech will be permitted to take advantage of these traditional public fora the City violates

Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

74. Defendants' denial of access to these traditional public fora violates the First Amendment of the United States Constitution in that it (i) constitutes an invalid prior restraint on speech, (ii) allows arbitrary and discretionary suppression of protected speech, (iii) permits municipal administrators and agents to make standardless decisions based on their own excessive and unfettered discretion, about which the speech should be permitted and which should not, and (iv) allows content and viewpoint censorship of speech that can easily be used to prevent expression of a particular point of view.

75. As a proximate result of Defendants' actions, Plaintiffs have been irreparably injured, and will continue in the future to be irreparably injured, in that they have been and will be deprived of his right to free speech and association under the First Amendment to the Constitution.

76. As a direct result of the City's violation of the Plaintiffs' constitutional rights, Plaintiffs have suffered additional compensable injury in the nature of constitutional deprivations.

77. As a direct result of the City's violation of the Plaintiffs' constitutional rights, Plaintiffs are perpetually threatened with an incapacity to collect sufficient signatures to place their issues on the ballot.

78. As a legal consequence of the City's violation of Plaintiffs' First and Fourteenth Amendment rights, as alleged above, Plaintiffs are entitled to recover nominal damages.

WHEREFORE, Plaintiffs pray for judgment against Defendants and that the

Court:

- A. Declare the streets and sidewalks of the City of Cincinnati, and the Linwood Avenue sidewalks at issue in particular, to be traditional public fora, subject to full First Amendment limitations on the City's ability to restrict public access thereto for expressive purposes.
- B. Declare Fountain Square to be a traditional public forum, subject to full First Amendment limitations on the City's ability to restrict public access thereto for expressive purposes.
- C. Declare the exterior areas of Findlay market (outside of the market house and not under the other roofed structure or structures) to be traditional public fora, subject to full First Amendment limitations on the City's ability to restrict public access thereto for expressive purposes.
- D. Preliminarily and permanently enjoin the City of Cincinnati from threatening, harassing, intimidating, and impeding Plaintiffs in their efforts to collect signatures for a petition in areas that are traditional public fora or from other expressive activity.
- E. For compensatory and nominal damages.
- F. Pursuant to 42 U.S.C. §1988 and other applicable law, award Plaintiffs' their costs and expenses incurred in bringing this action, including their reasonable attorneys' fees; and

G. Grant such other and further relief as the Court deems equitable, just and proper.

Respectfully submitted,

/s/ Maurice A. Thompson

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