

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

COUNTRY MILL FARMS, LLC and  
STEPHEN TENNES,

Plaintiffs,

Case No. 1:17-cv-00487-PLM-RSK

v.

HON. PAUL L. MALONEY

CITY OF EAST LANSING,

Defendant.

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**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION**

**ORAL ARGUMENT REQUESTED**

**STATEMENT OF FACTS**

Country Mill Farms is owned by Steve Tennes. (Amended Complaint, ¶ 3). Country Mill has participated in the East Lansing Farmer’s Market since 2010. (Amended Complaint, ¶ 4). The City adopted a Policy for the 2017 Farmers’ Market that incorporated the language of the City’s Human Relations Ordinance by reference and required all 2017 Farmer’s Market vendors to comply with the Ordinance and its “public policy against discrimination . . . while at the [Market]” and in the vendors’ “general business practice[s].” (Amended Complaint, ¶ 14). Plaintiffs created the following Facebook post:

“The Country Mill engages in expressing its purpose and beliefs through the operation of its business and it intentionally communicates messages that promote its owners’ beliefs and declines to communicate messages that violate those beliefs. . . . It remains our deeply held religious belief that marriage is the union of one man and one woman and Country Mill has the First Amendment Right to express and act upon its beliefs. For this reason, Country Mill reserves the right to deny a request for services that would require it to communicate, engage in, or host expression that violates the owners’ sincerely held religious beliefs and conscience.” (Amended Complaint, Ex. 1). The City informed plaintiffs in writing in a letter dated March 15, 2017 that they appeared to be in violation of the Policy. (Amended Complaint, Ex. 1).

When applications opened for the 2017 Market season, the City did not invite Country Mill to apply. (Amended Complaint, ¶ 16). When Country Mill applied through the non-invitational process the City excluded Country Mill from the Market for violating its Policy. (Amended Complaint, ¶¶ 17, 18).

Plaintiffs have filed an Amended Complaint and a Motion for Preliminary Injunction. The motion seeks to require the City of East Lansing to allow plaintiff LLC to sell its goods at the East Lansing Farmers Market. The City has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) in response of the Amended Complaint.

### **ARGUMENT**

#### **THE PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS AND ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION.**

##### **A. Standard**

In determining whether to exercise discretion to grant a preliminary injunction, the district courts consider the following four factors: (1) whether the movant has a “strong” likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass’n, Inc.*, 119 F.3d 453, 459 (6th Cir.1997) (en banc) (quoting *Sandison v. Michigan High Sch. Athletic Ass’n, Inc.*, 64 F.3d 1026, 1030 (6th Cir.1995)). These factors are not prerequisites to the issuance of an injunction but factors to be balanced. See *Unsecured Creditors’ Comm. of DeLorean Motor Co. v. DeLorean (In re DeLorean Motor Co.)*, 755 F.2d 1223, 1229 (6th Cir.1985); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 347–48 (6th Cir. 1998). See also, *Audi AG v. D’Amato*, 469 F.3d 534, 550 (6th Cir. 2006).

“The failure to show any likelihood of success on the merits—let alone a strong or substantial likelihood of success—is enough, by itself, to warrant denial of preliminary

injunctive relief. *See Abney v. Amgen, Inc.*, 443 F.3d 540, 547 (6th Cir.2006) (“a finding of no likelihood of success ‘is usually fatal’”) (quoting *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 625 (6th Cir.2000)).” *Essroc Cement Corp. v. CPRIN, Inc.*, 593 F. Supp. 2d 962, 969 (W.D. Mich. 2008).

The City of East Lansing will readily acknowledge 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. With regard to the factor of irreparable injury, “it is well-settled that ‘loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.’ *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989) (“The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.”) (citing *Elrod* ). Thus, to the extent that [plaintiff] can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir.1995).” *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)

Similarly, the determination of where the public interest lies is also dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because “‘it is always in the public interest to prevent the violation of a party’s constitutional rights.’ *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir.1994); *see also Dayton Area*, 70 F.3d at 1490 (‘the public as a whole has a

significant interest in ... protection of First Amendment liberties’). Furthermore, although the government presumably would be substantially harmed if enforcement of a *constitutional* law . . . were enjoined, this determination, too, first requires a review of the merits of the claim.” *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998).

Thus, the issue the Court must determine is whether plaintiffs have demonstrated a strong likelihood of success on the merits. If the Court finds the plaintiffs have made such a showing, the Sixth Circuit decisions require the issuance of the injunction. On the other hand, if the plaintiff cannot make that showing, the injunction must be denied.

For the reasons discussed at length in the City’s Brief in Support of Motion to Dismiss, the plaintiffs have not demonstrated they have a strong likelihood of success on the merits. The defendant will not repeat those arguments in detail, but will rely on the Brief in Support of Motion to Dismiss. The defendant does believe, however, that a summary of those arguments is appropriate.

#### **B. Free Exercise Clause**

The plaintiffs have not shown a strong likelihood of success on the merits of their Free Exercise Clause claim, as the City’s policy is facially neutral toward religion and generally applicable to all vendors at the Farmers’ Market. “In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577, 2017 WL 2722410, at \*7 (June 26, 2017). Although the plaintiffs argue they have been singled out for disfavored treatment, such a contention is not supported by the facts alleged in the Amended Complaint. The City’s

policies applies to all vendors. The fact that the plaintiffs were the only ones to announce they would discriminate against a protected class of persons in the operation of their business does not mean they were singled out. Similarly, the City's adoption of a policy that applied an Ordinance that was enacted in 1974 to the business practices of all the vendors at the Farmer's Market does not demonstrate the plaintiffs were singled out for anti-religious treatment. What plaintiffs' argument ignores is the fact that the City is not focused on the plaintiffs' religious beliefs, but on their conduct. The motivation for their conduct is irrelevant to the City and irrelevant from a constitutional standpoint. "Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute. . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986). The City of East Lansing is not required to allow the plaintiffs to participate in a City sponsored commercial event on City property if the plaintiffs choose to engage in discriminatory conduct that violates the City's policy.

Plaintiffs allege that the City's Policy "substantially burdens Plaintiffs' religious exercise by excluding Plaintiffs from the East Lansing Farmer's Market because they publicly stated their religious beliefs about marriage, imposing severe coercive pressure on them to surrender their religious beliefs and expression in order to participate in the Market." (Amended Complaint, ¶ 322). The plaintiffs' contention the policy substantially burdens their free exercise of religion is fallacious. The Ordinance and Policy are addressed only to **conduct**. The genesis of the plaintiffs' discriminatory practices is of no concern whatsoever to the City. The plaintiffs could renounce Catholicism/Christianity and declare

themselves to be agnostic or atheists tomorrow and they still will be precluded from participating in the Farmer's Market if they persist in their **action** of discriminating on the basis of sexual orientation. It is not the plaintiffs' beliefs that the City has any interest in; it is the plaintiffs' actions. The fact this discriminatory conduct is based on sincerely held religious beliefs does not insulate that conduct from anti-discrimination laws. . "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), *overturned due to legislative action* (Nov. 16, 1993). The Supreme Court has explicitly held anti-discrimination laws cannot be avoided based on religious beliefs. "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy." *Bob Jones Univ. v. United States*, 461 U.S. 574, 596, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983). Since the Supreme Court has also recognized States (including their political subdivisions) may validly include sexual orientation as a protected class in anti-discrimination legislation, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 571-572, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), the holding in *Bob Jones Univ.*, applies with equal force to this case. The City of East Lansing is not constitutionally required to forego enforcement of its policy of nondiscrimination because plaintiffs' religious beliefs inform them to engage in discriminatory conduct. Plaintiffs are free to engage in that discriminatory conduct outside the City of East Lansing. However, the Constitution does not require the City to accommodate that conduct by allowing plaintiffs to use the City's property to sell their produce.

### C. Establishment Clause

Plaintiffs' Establishment Clause claim fares no better. "The long-standing (but not always applied) test for determining whether government action violates the Establishment Clause was first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under the *Lemon* test, government action is upheld unless it is shown not to satisfy any of three elements: 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion. *Id.* at 612-613 (citations and quotation marks omitted).'" *Am. Civil Liberties Union of Kentucky v. Grayson County, Ky.*, 591 F.3d 837, 844 (6th Cir. 2010).

*Lemon* requires that the government action must have "a secular ... purpose," 403 U.S., at 612; *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005). "Purpose is determined from the perspective of an objective observer. *Id.* at 862. "The 'objective observer' is credited with knowledge of 'readily discoverable fact,' including 'the traditional external signs that show up in the "text, legislative history, and implementation of the statute"' or comparable official act." *Id.* (quoting *Santa Fe*, 530 U.S. at 308). "The evidence of purpose must be external; it cannot involve 'any judicial psychoanalysis of a drafter's heart of hearts.' *Id.*" *Grayson County, supra*, 591 F.3d at 848. However, the challenged action need not be exclusively secular; all *Lemon* requires is that the action have a secular purpose. *Lynch v. Donnelly*, 465 U.S. 668, 724, n. 6, 104 S. Ct. 1355, 1386, 79 L. Ed. 2d 604 (1984).

It is clear East Lansing's purpose in adopting the Ordinance and Policy was not to inhibit **religion**, but to inhibit **discrimination**. The City's purpose was clearly not

“motivated wholly by religious considerations,” nor do the facts alleged support a conclusion that religious considerations were a predominant reason for the City’s actions. To state the proposition is to dismiss it as absurd. When an “objective observer” reviews the “objective evidence” and the history of the City’s anti-discrimination enactments, there is no reasonable conclusion to reach other than that there was a secular purpose for the City’s actions. Neither the Ordinance nor the Policy mentions religion or religious beliefs. They are what they purport to be by their explicit language: secular enactments prohibiting discrimination. The plaintiffs cannot demonstrate the City’s purpose in enacting or enforcing the Ordinance and Policy was wholly or predominantly religious.

Also contained within the Establishment Clause is “the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general,” *Church of the Lukumi Babalu Aye, Inc., supra*, 508 U.S. at 532, because the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *Epperson v. State of Ark.*, 393 U.S. 97, 104, 89 S. Ct. 266, 270, 21 L. Ed. 2d 228 (1968)(Footnote omitted). If either the purpose or the effect of the government activity is to endorse or disapprove of religion, the activity is unconstitutional. *Smith v. Jefferson County Bd. of Sch. Comm’rs, supra*, at 587. This “purpose” or “effect” must be its principal or primary effect. *Id.* at 586-587. There is simply no principled argument that can be advanced that the facts alleged in the Amended Complaint would allow an objective observer to conclude the principal or primary effect of the City of East Lansing’s actions was to convey a message of disapproval of religion. The City’s correspondence to plaintiffs makes no reference to religion or religious beliefs. While the plaintiffs explained the rationale for the discriminatory manner in which they chose to operate their business,

the City made no comment on their rationale – only on their actions. Given these facts – coupled with the fact that the City has included sexual orientation as a protected class in its Ordinance since 1974 – no reasonable observer could conclude the principal or primary effect of the City’s action was to convey a message of disapproval of religion.

**D. Free Speech/Press**

Although the plaintiffs have brought two separate claims alleging violation of freedom of speech and freedom of the press, the two claims merge under the facts as alleged in the Amended Complaint. The plaintiffs have asserted three distinct claims under the Speech Clause: (1) content and viewpoint based discrimination; (2) overbreadth; and (3) speech retaliation.

The plaintiffs allege the City’s Ordinance and Policy are content-based on their face and as applied to plaintiffs’ conduct “because [they] regulate[ ] speech about a handful of topics—specifically ‘religion, race, color, national origin, age, height, weight, disability, sex, marital status, sexual orientation, gender identity or expression, student status, or because of the use by an individual of adaptive devices or aids’— while leaving unregulated speech on the virtually unlimited number of other topics not listed in the Policy. East Lansing, Michigan, Mun. Code § 22-31, 22-35.” (Amended Complaint, ¶ 238). The problem that plaintiffs face is that their conclusory assertions do not comport with the actual facts they are forced to acknowledge in their Amended Complaint.

In spite of attaching the Ordinance and Policy to the Amended Complaint, the plaintiffs refuse to acknowledge that neither addresses speech in the constitutional sense; they both address conduct. Plaintiffs have not been denied a spot in the Farmers’ Market because of what they **say** (our religion requires us to discriminate), but because of what

they **do** (discriminate in the operation of their business). The plaintiffs' attempt to turn conduct into speech has been repeatedly rejected by the Supreme Court for decades. In *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), with language directly applicable to this case the Supreme Court explained: "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' **hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.**" *Id.* at 62 (Emphasis added). The City of East Lansing did not, and does not seek to regulate speech – only conduct the City has determined to be injurious to the public welfare. The fact that speech is used as a means of carrying out that conduct does not transmogrify this case into a Speech Clause case.

Plaintiffs allege the City's Policy violates the overbreadth prohibition of the First Amendment because "in many instances it bans protected speech, particularly speech on controversial topics, like Plaintiffs' statement of the religious belief that marriage is a union between one man and one woman." (Amended Complaint, ¶ 251). As has just been discussed, the Policy does not ban any speech at all; it is directed at conduct, not speech. In a First Amendment case, "a law may be invalidated as overbroad if 'a **substantial number** of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). Plaintiffs do not allege any facts that address their burden of demonstrating the Policy "criminalizes a substantial amount of protected expressive activity." This is probably due to the fact that the Policy does not criminalize, penalize or otherwise address **any** protected

activity. As has been repeatedly demonstrated, the policy addresses **conduct**, not **speech**. Moreover, there is no constitutionally protected right to engage in discriminatory practices that conflict with laws prohibiting such practices. “As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, **such practices are entitled to no constitutional protection.**” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

Contrary to the plaintiffs’ rote repetition that the City acted in response to their speech, that contention is demonstrably untrue. The City acted in response to the plaintiffs’ stated intent to **act** in violation of the City’s Ordinance and Policy. The City is constitutionally entitled to do so. To demonstrate the fallacy of plaintiffs’ argument consider the following situation. The plaintiffs have announced they are unwilling to accommodate same sex couples in their business practices because same sex marriage is contrary to their religious beliefs. Another vendor announces she is unwilling to accommodate same sex couples in her business practices due to her belief that same sex marriage is scientifically unsound and therefor “unnatural.” Under the plaintiffs’ view of the Constitution the City could apply the Ordinance and Policy to the other vendor, but not to plaintiffs. It simply cannot be the law that when two people discriminate in violation of legislation and one announces he does it for religious reasons that person gains a constitutional safe haven for his conduct while the secular discriminator does not. If this

were the law everyone could legally commit discrimination by simply announcing, “God made me do it.” (Or in the case of a Satanist, “The devil made me do it.”)

The plaintiffs’ only allegation regarding other protected conduct is the allegation that “in many instances [the Policy] bans protected speech, particularly speech on controversial topics, like Plaintiffs’ statement of the religious belief that marriage is a union between one man and one woman.” (Amended Complaint, ¶ 251). But the Policy, of course, does no such thing. It bans no speech at all. It is addressed to conduct.

There are three elements to a retaliation claim: (1) the plaintiff was engaged in a constitutionally protected activity; (2) the defendant’s adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) the adverse action was motivated at least in part as a response to the exercise of the plaintiff’s constitutional rights. *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 585–86 (6th Cir. 2008).

The plaintiffs’ claims of retaliation fail on the first element: plaintiffs did not engage in a constitutionally protected activity, as discussed at length in the preceding arguments. “Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, **such practices are entitled to no constitutional protection.**” *Roberts v. U.S. Jaycees, supra*, 468 U.S. at 628. The plaintiffs have not met their burden of demonstrating they have a strong likelihood of succeeding on the merits of their First Amendment claims.

#### **E. Unconstitutional Conditions**

An overarching principle, known as the unconstitutional conditions doctrine, vindicates the Constitution’s enumerated rights by preventing the government from

coercing people into surrendering those constitutional rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594, 186 L. Ed. 2d 697 (2013). The plaintiffs allege that the City “has violated the unconstitutional conditions doctrine by pressuring Plaintiffs to give up their constitutional rights to free speech and free exercise of religion by conditioning Plaintiffs' receipt of the benefit of continuing to participate in the East Lansing Farmer's Market on Plaintiffs' willingness to relinquish their free speech, free press, and free exercise of religion by publishing Plaintiffs' religious viewpoint on marriage.” (Amended Complaint, ¶ 287). The most obvious response to the plaintiffs' contention is the City of East Lansing is not providing a “benefit” to any vendor at the Farmers' Market. It is engaging in a commercial transaction. On that basis alone, the plaintiffs' claim fails.

The City has not “pressured” the plaintiffs to do anything. The City has no interest in what plaintiffs believe or what plaintiffs say. The City's only concern is compliance with its nondiscrimination policy. Prohibiting a vendor from utilizing City property because the vendor violates the City's nondiscrimination Ordinance does not impose an unconstitutional condition. “The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. . . . **As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not say.** *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. supra*, 547 U.S. at 60 (Emphasis added).

The plaintiffs continue to misconstrue the nature of the City's actions – and the nature of their own. The City is refusing to enter into a commercial relationship with the plaintiffs because the plaintiffs refuse to comply with the City's nondiscrimination Ordinance. The City is constitutionally permitted to do so. The doctrine of unconstitutional conditions does not strip state and federal governments of the right to place conditions on a commercial transaction. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007, 104 S.Ct. 2862, 2875, 81 L.Ed.2d 815 (1984).

As a general matter, if a party objects to a condition on the receipt of government funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights. See, e.g., *United States v. American Library Assn., Inc.*, 539 U.S. 194, 212, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 546, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328, 186 L. Ed. 2d 398 (2013). Here, no benefit or funding is being withheld from plaintiffs; the City is simply enforcing its Ordinance by refusing to enter into a commercial relationship with the plaintiffs because they refuse to abide by the City's nondiscrimination policy. The plaintiffs' cannot demonstrate a strong likelihood of success on the merits of their claim of unconstitutional conditions.

#### **F. Equal Protection**

Plaintiffs allege they are similarly situated to other vendors (Amended Complaint, ¶ 342) and they have been treated differently than other vendors, "For example, Defendant permits East Lansing Farmer's Market vendors like Good Bites to express messages promoting LGBT issues, including same-sex marriage." (Amended Complaint, ¶ 344).

Plaintiffs are not similarly situated to other vendors. Moreover, plaintiffs have never been prohibited from expressing any message whatever.

“The Equal Protection Clause of the Fourteenth Amendment protects against invidious discrimination among similarly-situated individuals or implicating fundamental rights.” *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012). Contrary to plaintiffs’ continued protestations to the contrary, this is not a case implicating fundamental rights. The City’s actions were the result of the plaintiffs’ conduct of announcing they would discriminate in violation of the City’s Ordinance. Committing acts of discrimination is not protected conduct and does not implicate fundamental rights. *Roberts v. U.S. Jaycees, supra*, 468 U.S. at 628. In typical equal protection cases, plaintiffs “generally allege that they have been arbitrarily classified as members of an ‘identifiable group.’” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). When plaintiffs do not claim membership in a group the Supreme Court has recognized a “class-of-one” theory of equal protection. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). In “class-of-one” claims, the plaintiff simply “alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Olech*, 528 U.S. at 564. “[T]he hallmark of [a ‘class-of-one’] claim is not the allegation that *one individual* was singled out, but rather, the allegation of arbitrary or malicious treatment not based on membership in a disfavored class.’ *Aldridge v. City of Memphis*, 404 Fed.Appx. 29, 42 (6th Cir.2010).” *Davis v. Prison Health Servs. supra*, 679 F.3d at 441. In order to prevail on a class-of-one claim the plaintiffs must show (1) the City treated them differently from a similarly situated party, and (2) the City had no rational basis to do so. *EJS Properties, LLC v. City of Toledo*, 698 F.3d

845, 864-865 (6th Cir. 2012). “When evaluating whether parties are similarly situated, ‘courts should not demand exact correlation, but should instead seek relevant similarity.’ *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir.2000).” *EJS Properties*, 698 F.3d at 866.

The plaintiffs have not identified any similarly situated parties for purposes of the equal protection claim. The plaintiffs are the only vendor that announced it would discriminate in violation of the City’s Ordinance. If the plaintiffs could identify another vendor that discriminates but has not been excluded from the Farmers’ Market, they might have a colorable claim. However, they have not done so and cannot do so.

Finally, the City has what all courts have recognized to be a compelling interest in prohibiting discrimination on the basis of sexual orientation. The plaintiffs’ cannot demonstrate a strong likelihood of prevailing on the merits of their equal protection claim.

#### **G. Substantive Due Process**

In *Kiser v. Kamdar*, 831 F.3d 784, 791 (6th Cir. 2016), the Sixth Circuit held that a substantive due process claim failed as a matter of law where a particular amendment “provides an explicit textual source of constitutional protection” against a particular sort of government behavior, “that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing such a claim. The plaintiffs’ claims are based on the First Amendment, and they have asserted those claims. They are not allowed to regurgitate them as substantive due process claims. In any event, the claim would fail as a matter of law for the reasons the plaintiffs’ overbreadth claim fails.

#### **H. Home Rule City Act**

The plaintiffs allege the City’s action of enforcing its nondiscrimination Ordinance violated the Home Rule City Act, M.C.L. 117.1, *et. seq.* This claim is based on what the

plaintiffs characterize as the limited authority granted to cities under the Home Rule City Act. The plaintiffs' claim is based on an unsupportable syllogism: (A) The City cannot legally act outside its geographic boundaries; (B) the plaintiffs' will violate the City's nondiscrimination policy while operating their business outside the City's geographic boundaries; (C) therefore the City has illegally acted outside of its geographic boundaries by enforcing its nondiscrimination policy against the plaintiffs. Once again, while the plaintiffs' syllogism has surface appeal, it is not valid.

The plaintiff's syllogism is based on either one of two false premises: (1) the City's action takes place outside the City's geographic boundaries, or (2) the City cannot take action inside the City for conduct that occurs outside of the City. Both of these premises are false and therefore the plaintiffs' entire syllogism is false. The first alternative premise is false on its face. The City has never taken action outside its geographic boundaries. Presumably the plaintiffs will concede that irrefutable point. That would mean the plaintiffs are relying on the second alternative premise: the City cannot take action inside the City for conduct that occurs outside the City. There is no law to support this contention and common sense and decades of real-life experience refute it. As discussed above, the City can place conditions on its commercial endeavors. One of the conditions the City placed on the vendors at the Farmers' Market was that they comply with the City's nondiscrimination ordinance in their general business practices. When plaintiffs failed to do so they were not issued a citation by the City; the City did not come to their property; the City did not direct plaintiffs to alter their speech or their beliefs. All the City did was to refuse to allow plaintiffs to make use of the City's property to sell its produce – and at the same time forgo any fee from the plaintiffs for the use of the City's property. Everything the City has done is

constitutional, legal and permissible under Federal and State law. The plaintiffs have not met their burden of showing a strong likelihood of success on the merits of this claim.

### **I. Michigan Constitution**

The City does not dispute that “The Michigan Constitution also contains its own guarantee of religious freedom, see Const. 1963, art. 1, § 4, which ‘is at least as protective of religious liberty as the United States Constitution.’ *People v. DeJonge (After Remand)*, 442 Mich. 266, 273 n. 9, 501 N.W.2d 127 (1993).” *Winkler by Winkler v. Marist Fathers of Detroit, Inc.*, \_\_\_ Mich. \_\_\_, (No. 152889, 2017 WL 2800040 June 27, 2017) at \*6. However, all of the shortcomings that apply to the plaintiffs’ claims under the United States Constitution apply with equal force to the claims under the Michigan Constitution. Simply put: the City of East Lansing was responding to plaintiffs’ conduct. It did not attempt to alter plaintiffs’ beliefs. It did not regulate plaintiffs’ speech. It did not burden plaintiffs’ religious practices. It did what the government has always been empowered to do: enforce its lawfully enacted ordinances and policies for the protection and well-being of its citizens.

The plaintiffs cannot demonstrate a strong likelihood of success on the merits of any claim they have alleged. Their motion for preliminary injunction must be denied.

**RELIEF REQUESTED**

The City of Lansing respectfully requests the Court deny the plaintiffs' motion for preliminary injunction.

Respectfully submitted,

DATED: July 17, 2017

PLUNKETT COONEY

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