STATE OF WISCONSIN MUNICIPAL COURT CITY OF MADISON

City of Madison,

Plaintiff,

v. Case No.: 09-MOR-3330

Benjamin Ratliffe,

Defendant.

DEFENDANT'S MOTION TO DISMISS
WITH SUPPORTING MEMORANDUM OF LAW

The Defendant, Benjamin Ratliffe, by his attorneys, the Jeff Scott Olson Law Firm, by Andrea J. Farrell, while reserving all objections to the jurisdiction of the court, respectfully moves the Court to dismiss Citation A061814. In support of this motion, Mr. Ratliffe asserts that Ordinance § 10.25(1) was not intended to regulate Mr. Ratliffe's First Amendment protected activity, it is an unconstitutionally vague ordinance, and that it would be unconstitutional to apply the ordinance to him for using a small table to aid in his dissemination of political speech on the terrace of State Street.

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BACKGROUND

On Saturday, March 21, 2009 at 1:05 p.m., Mr. Ratliffe received a $676.00 citation from a Madison police officer for violating Madison Ordinance No. 38.01 for vending alcohol without a permit on the corner of State Street and Gorham Street. (¶1, Ex. 1.)[1] This was a mistake on the part of the officer. (¶19, lines 14-15.) Hence, the citation was amended (by unopposed motion) to reflect a violation of Madison General Ordinance 10.25(1), "Placing Articles on Sidewalk or Terrace." (¶1, Ex. 1.) Mr. Ratliffe was cited for publicly displaying and distributing literature with the aid of a portable table on behalf of the International Socialist Organization to educate the public about Socialism and to garner donations for his organization. (¶10; *see also* ¶¶1 and 19.)

Madison General Ordinance §10.25 reads:

> **10.25 MERCHANDISE, ETC., NOT TO BE PLACED ON SIDEWALK OR TERRACE.**
>
> (1) Unlawful to place articles on sidewalk. Except as permitted in other provisions of these ordinances, no person shall place or deposit on any sidewalk or terrace or in any roadway any cask, box, crate, wood, stone, plank, boards, goods, wares, merchandise, ashes, bottles, cans or other substances or materials.
>
> (2) Merchandise not to be left on sidewalk. It shall be lawful, however, for any person to place and leave for a period not exceeding two (2) hours of the twenty-four (24) on the outer edge of the sidewalk in front of his store or building, dry

[1] All citations to ¶ numbers and exhibits are referring to the paragraph numbers and exhibits in the Stipulated Facts submitted by the parties by letter dated July 21, 2009.

goods, wares or merchandise for purposes of loading and unloading, such exception to be applicable only to premises in business districts, in actual use for merchandizing purposes.

(3) Planting of shrubbery on terraces prohibited. No person shall plant or maintain or cause to be planted or maintained on any terrace between the sidewalk and curb on any street in the City of Madison any plant or shrub in excess of twenty-four (24) inches in height or within a distance of twenty-four (24) inches from the back of the curb unless necessary to control erosion of the soil. Any plants or shrubbery planted or maintained on any terrace contrary to the provision of this ordinance shall be removed. The enforcement of this ordinance shall be under the supervision of the Police Department and the Neighborhood Preservation and Inspection Division of the Department of Planning and Community and Economic Development. Upon default of any person ordered to remove said plants or shrubbery, the Department of Planning and Community and Economic Development may cause said plants or shrubbery to be removed. The cost of removal shall be assessed against the lot adjoining the terrace upon which the plants or shrubbery were located as provided in Section 28.04(12)(e)4. of the Madison General Ordinances. Prosecution under this section shall not bar the City from causing the plants or shrubbery to be removed, nor shall the City's removal of the plants or shrubbery bar prosecution hereunder.

MGO § 10.25 was not intended to apply to Mr. Ratliffe's activities, as it was clearly meant to regulate storefronts and business owners, and to apply it to Mr. Ratliffe would require an absurd reading of the ordinance. Moreover, MGO § 10.25(1) is unconstitutionally vague on its face in violation of the Due Process Clause of the Fourteenth Amendment, and further, is unconstitutionally applied to Mr. Ratliffe in violation of his First Amendment and Fourteenth Amendment rights, as the application is overbroad and discriminatory.

ARGUMENT

I. Applying the normal rules of statutory construction, Ordinance §10.25 was clearly not intended to apply to Mr. Ratliffe's tabling activities.

In discerning the intent of the legislature, "a statutory provision must be read in the context of the whole statute to avoid an unreasonable or absurd interpretation." ***In re Commitment of Morford***, 2004 WI 5, ¶21, 268 Wis. 2d 300, 647 N.W.2d 349. "Statutes relating to the same subject matter should be read together and harmonized when possible." *Id*. "A cardinal rule in interpreting statutes is to favor an interpretation that will fulfill the purpose of a statute over an interpretation that defeats the manifest objective of an act," and a court must consider "the consequences of alternative interpretations." *Id*.

MGO §10.25(1) is being applied in this case to prohibit Mr. Ratliffe from publicly displaying and distributing literature with the aid of a portable table on behalf of the International Socialist Organization. (¶10.) When MGO §10.25's three sections are read as a whole, and read to avoid absurd results, the ordinance clearly was not meant to regulate such activity.

MGO §10.25(1) makes it unlawful for any person to place articles on the sidewalk, including "any substances or materials," but is specifically lists "wares" and "merchandise" and other items that restaurant and store fronts commonly send in and out, such as boxes, bottles, cans, and perhaps more common in the past when old fashioned coal and wood ovens were used, ashes,

wood, and stone. MGO §10.25(2) creates an exception, allowing any person to place "dry goods, wares or merchandise" on the sidewalk "in front of his store or building" in a business district for the purposes of loading and unloading for merchandising purposes, and for no longer than 2 hours. MGO §10.25(3) regulates the planting of shrubbery in the area between the sidewalk and the street, and threatens the cost of removal "against the lot adjoining the terrace upon which the plants or shrubbery were located."

Read as a whole, MGO §10.25 appears to regulate only the conduct of persons owning a store front or other building. While the first section does not specifically limit its provisions to a store or building, the second and third sections do. Moreover, as stated above, the first section's listed examples of "substances or materials" as items such as wares, merchandise, boxes, bottles, cans, and ashes, are most commonly associated with store fronts.

In fact, it is necessary to construe MGO §10.25(1) as regulating persons who own a store or a building to avoid absurd results. If simply read literally and in isolation from its counterparts, MGO §10.25(1) permits no articles on the sidewalk whatsoever, and specifically no "substances or materials" including "any cask, box, crate, wood, stone, plank, boards, goods, wares, merchandise, ashes, bottles, [or] cans." Hence, the ordinance would prohibit children from playing hopscotch on the sidewalk, as that requires both leaving a chalky "substance" on the sidewalk to draw the boxes and numbers, not to mention requiring the placement of a "stone" on the sidewalk to land inside the chalk-

drawn boxes. The ordinance would prohibit a traveling mother from setting down a "box" of diapers on the sidewalk to adjust the position of her baby in her arms. The ordinance would prohibit a shopper from setting down recently purchased "goods" and "merchandise" on the terrace to free up his hands to hug a friend he greets on the street. A person walking down the sidewalk while smoking a cigar or cigarette would be violating this ordinance when some "ashes" fell to the sidewalk. A person taking a rest on a terrace bench would be violating this ordinance if he placed a "can" of soda or his wooden walking stick on the sidewalk, leaning up against his knee. What if one's sandal slipped off while traveling? Would a citation be due for depositing that shoe on the sidewalk? Would it be more reasonable to issue a citation if the sandal was made of wood? Moreover, the City bike racks would constitute entrapment, inviting people to place their bikes on the terrace in violation of the ordinance. The applications are limitless, and such results would be absurd.

When considering the consequences of alternative interpretations, the ordinance should be read to apply to the regulation of store and building fronts. If this Court wishes to avoid constitutional issues, Mr. Ratliffe's citation may simply be dismissed because the ordinance does not encompass regulation of his free speech activities on the terrace.

II. If the legislature intended the ordinance to prohibit Mr. Ratliffe's political speech with the aid of table in a traditional public forum, then it is unconstitutional on its face and as applied.

The City has the burden of establishing that the ordinance is constitutional. ***City of Watseka v. Illinois Public Action Council***, 796 F.2d 1547, 1551 (7th Cir. 1986).

a. The ordinance is vague on its face and invites official arbitrariness and discrimination in enforcement.

"When a statute or regulation is challenged under the due process doctrine of vagueness, a court must look at the enactment from two angles: (1) whether it provides sufficient notice of what may not be done, and (2) whether it contains reasonably clear guidelines so as to prevent official arbitrariness or discrimination in its enforcement." ***International Soc. for Krishna Consciousness v. Rochford***, 585 F.2d 263, 267 (7th Cir. 1978). When an ordinance's "meaning is too indefinite" and "the provisions are not drafted in a manner sufficiently precise to avoid the possibility of improper application by officials. . . the 'chilling effect' which may result from the mere existence of the[] provisions is sufficient to justify invalidation." *Id*. at 270.

i. The ordinance does not provide sufficient notice of what conduct is prohibited.

An ordinance is too vague when "[p]ersons of common intelligence would be required to guess at the phrase's meaning and differ as to how the regulations should be enforced." ***International Soc. for Krishna Consciousness v. Rochford***,

585 F.2d 263at 268. Many persons of reasonable intelligence would read MGO § 10.25 as applicable only to store fronts and building owners and as regulating deliveries and storage of merchandise, as described in the previous section. Would people of ordinary intelligence tell their children to refrain from playing hopscotch because it requires drawing some squares and numbers with chalk, which leaves a substance on the sidewalk in violation of this ordinance? Has everyone in a non-business district been violating this ordinance every week when garbage is left on the terrace for the City's removal? Clearly, persons of common intelligence would be required to guess at this ordinance's meaning and differ as to how the ordinance should be enforced.

ii. The ordinance invites official arbitrariness and discrimination in enforcement.

"A statute may also be unconstitutionally vague when an ambiguity allows for arbitrary enforcement of the law beyond what Congress intended. A statute is vague in this sense when 'there is a lack of clarity … that would give law enforcement officials discretion to pull within the statute activities not within Congress' intent.'" ***U.S. v. Calimlim***, 538 F.3d 706, 711-712 (7th Cir. 2008). (citation omitted.) "[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." ***City of Chicago v. Morales***, 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

When an ordinance reaches "a substantial amount of innocent conduct," courts must determine if the ordinance "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." ***City of Chicago v. Morales***, 527 U.S. 41 at 60. As illustrated in the previous section, the ordinance reaches a substantial amount of innocent conduct. Ordinance § 10.25(1) improperly provides absolute discretion to police officers to decide what items constitute "other substances or materials." *See id*. at 61. It is simply not feasible that no person should ever be permitted to place anything on any sidewalk. Nor is there a conceivable legitimate interest in curtailing the placement of things on sidewalks that are not permanent fixtures, do not obstruct, do not create an eye-sore, and do not lower property values.

However, as the ordinance does not limit itself to any of these categories or other potential hazards, police have total discretion. Police officers may choose to ticket a political speaker who sets his poster next to him on the terrace, but ignore an athlete who places his basketball on the sidewalk next to him. Officers may choose to ticket a college student writing a chalk message about a political meeting taking place that evening on a sidewalk, but ignore the young girls drawing out a hopscotch game with chalk on the sidewalk. Officers may choose to ticket a political speaker with a back pack of political pamphlets on the terrace next to him, but ignore the University student who places his back pack on the terrace next to him so that he can drink a cup of coffee and read his

chemistry book. Police may chose to allow bikes to be placed on the terrace, cigar ashes to be deposited on the sidewalks, empty boxes to be placed on the sidewalk for a juggler to collect tips, guitar cases to be placed on the sidewalk for the street musician to collect tips, and buckets placed upside-down on the terrace for another street musician to use and play as a percussion instrument. Then, the police may cite the political speaker for using a small portable table to disseminate speech. One officer might routinely ticket persons placing on the terrace a box filled with free kittens seeking adoptive homes, another officer might not find that this is the type of "box" the ordinance regulates and routinely leave that person be. Such wide discretion in the hands of the police, based on nothing other than what the police officer finds pleasing, renders this ordinance unconstitutional. *See id*.

b. Mr. Ratliffe's political speech with the aid of a table in a traditional public forum is highly protected under the First Amendment.

i. Mr. Ratliffe was engaging in the highest run of activities protected by the First Amendment.

Mr. Ratliffe was publicly displaying and distributing literature on behalf of the International Socialist Organization to educate the public about Socialism and to garner donations for his organization. (¶10.)

"[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." ***Connick v. Myers***, 461 U.S. 138, 103 S.Ct. 1684,

1689 (1983). Clearly, distributing leaflets with political messages, solicitation by a political organization, and the sale of merchandise which carries a political message are protected by the First Amendment. ***American Civil Liberties Union of Nevada v. City of Las Vegas***, 333 F.3d 1092, 1107-08 (9th Cir. 2003); *see also* ***Murdock v. Pennsylvania***, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). To restrict protected activities such as these, the Court "will need to determine [ ] whether the City is able to show that the restriction is narrowly tailored to serve a significant government interest without 'burdening substantially more speech than is necessary to further the government's legitimate interests.'" *Id*. at 1108. Whether or not the use of a table to display the literature and merchandise is protected by the First Amendment is dependent on the specific factual context. *Id*. at 1109.

ii. Mr. Ratliffe was speaking in a traditional public forum particularly well suited for the dissemination of political speech.

Mr. Ratliffe's table was placed on the 400 block of State Street, a traditional public forum (¶ 13) where laypersons' cars are not allowed, and where the land is dedicated to entertainment, recreation, and speech. *See* ***City of Madison v. Baumann***, 162 Wis. 2d 660, 666, 470 N.W.2d 296, 298 (Wis. 1991); *see also* MGO § 12.915 (restricting traffic on State Street, in part because the City found that traffic "severely erode[d] the purpose of State Street, which is to serve as a mall for the citizens and guests of Madison," and because the City wished to "maintain the pedestrian-friendliness and esthetic qualities of the mall. . .").

In the early 1980's, State Street was converted to use as a pedestrian mall, and motor vehicle use is limited to buses, taxis, service deliveries, and emergency vehicles. ***City of Madison v. Baumann***, 162 Wis. 2d 660, 666, 470 N.W.2d 296 (Wis. 1991).

> The sidewalks are broad, and the declared municipal purpose is to create a business and shopping area and, in addition, to dedicate an area for all persons to use for recreation and entertainment. The vending of food and crafts on the mall is encouraged. The city, in some cases, subsidizes artistic performances. It decorates the area with banners and lights in a manner consistent with the seasons. There is nothing which prohibits street musicians from placing a hat or some other container near them, so members of the public may deposit money in appreciation of the performance.

Id. at 666-67; *see also* ¶¶ 16-18. State Street mall is a "speaker's platform, an area for crowds to gather and a central location in Madison [which] make it ideal for gatherings, political or otherwise." *Id*. at 667, citing ***Stokes and Goldstein v. City of Madison***, 930 F.2d 1163, 1170 (7th Cir. 1991).

iii. Mr. Ratliffe's table was an important tool aiding his dissemination of political speech, and as such was protected by the First Amendment.

The Seventh Circuit has stated in dicta that a provision prohibiting the erection of a table in an airport (a provision that was not challenged by the plaintiffs) did not *facially* restrict the exercise of guaranteed rights. ***International Soc. For Krishna Consciousness v. Rochford***, 585 F.2d 263, 270 (7th Cir. 1978); *see also* ***International Caucus of Labor Comms. v. City of Chicago***, 816 F.2d 337, 339 (7th Cir. 1987). At the same time, the Seventh Circuit noted that the same

provision could be an unconstitutional restriction of the exercise of guaranteed rights *as applied*. ***International Caucus of Labor Committees v. City of Chicago***, 816 F.2d 337, 339 ("they have pleaded no facts to show that the restriction on tables and other structures has been applied to them in a discriminatory fashion, they have not claimed that [it] is vague or overbroad.") Perhaps more importantly for our purposes, the Seventh Circuit did assume that tabling is protected speech under the First Amendment, as it was not contested, and hence the Seventh Circuit utilized the higher scrutiny of the time, place, and manner test. *Id*.

More recent cases have specifically held that erecting a table on the sidewalk is constitutionally protected speech. *See e.g.,* ***American Civil Liberties Union of Nevada v. City of Las Vegas***, 466 F.3d 784, 786 (9th Cir. 2006); ***One World Family Now v. City of Miami Beach***, 175 F.3d 1282, 1285-86 (11th Cir. 1999); ***One World One Family Now, Inc. v. State of Nevada***, 860 F.Supp. 1457, 1462 (D.Nev. 1994). Even United States Supreme Court Justice Thomas, joined by Justice Scalia, recognized that erecting tables on the sidewalk was protected by the First Amendment, in the dissenting opinion in ***Nixon v. Shrink Missouri Government PAC***, 528 U.S. 377, 411-412, 120 S.Ct. 897, 917 (2000), where the majority upheld the constitutionality of a Missouri statute limiting campaign funds because it was sufficiently tailored to serve its purpose. Justice Thomas stated:

> For nearly half a century, this Court has extended First Amendment protection to a multitude of forms of "speech," such as making false defamatory statements, filing lawsuits, dancing nude, exhibiting drive-in movies with nudity, burning flags, and wearing military uniforms. Not surprisingly, the Courts of Appeals have followed our lead and concluded that the First Amendment protects, for example, begging, shouting obscenities, **erecting tables on a sidewalk**, and refusing to wear a necktie.

Id. (emphasis added.) In any event, the Supreme Court has stated that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." ***Weinberg v. City of Chicago***, 310 F.3d 1029, 1041 (7th Cir. 2002), (quoting ***Riley v. National Fed'n of the Blind of N.C., Inc.***, 487 U.S. 781, 790-91, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988)).

Mr. Ratliffe's small, portable table which he was using to display literature so that onlookers could pick and choose among the available items was an important tool in his protected speech activities. *See* ***Wexler v. City of New Orleans***, 267 F.Supp.2d 559, 568 (E.D.La. 2003) ("It is impractical and borderline absurd to consider that 'an ample alterative' would be for plaintiffs to carry their books in a bag or sell them out of a van. In fact, the use of a table may be the only reasonable method for this form of expression to take place."); *see also* ***American Civil Liberties Union of Nevada v. City of Las Vegas***, 333 F.3d 1092, n.15 (9th Cir. 2003) ("tables often are used in association with core expressive activities, such as gathering signatures, distributing informational leaflets, proselytizing, or selling message-bearing merchandise. . . Tables facilitate these

activities by enabling the display of multiple pamphlets or other items, as well as the distribution of a greater amount of material. Additionally, the use of a table may convey a message by giving an organization the appearance of greater stability and resources than that projected by a lone, roaming leafleteer."). Mr. Ratliffe's table's location was specifically chosen to reach his desired audience. (¶19, lines 11-12.)

c. The ordinance is unconstitutionally applied to Mr. Ratliffe.

"Although First Amendment freedoms are precious and must be jealously guarded, they may be subject to restriction if necessary to further important governmental interests." ***International Soc. for Krishna Consciousness v. Rochford***, 585 F.2d 263, 271 (7th Cir. 1978).

> When regulating First Amendment activity in a public forum the government has a difficult burden to carry. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). We have noted that "[g]iven their greater importance to the free flow of ideas, public fora receive greater constitutional protection from speech restrictions." *Grossbaum v. Indianapolis-Marion County Bldg. Auth.,* 100 F.3d 1287, 1297 (7th Cir.1996).

Weinberg v. City of Chicago, 310 F.3d 1029, 1035 (7th Cir. 2002). Mr. Ratliffe's claims should be considered through this lens. *Id*.

The government may impose time, place, or manner restrictions on protected speech in a public forum as long as the restriction is "justified without reference to the content of the regulated speech … narrowly tailored to serve a

significant governmental interest, and … leave[s] open ample alternative channels for communication of the information." ***American Civil Liberties Union of Nevada v. City of Las Vegas***, 333 F.3d 1092, 1106 (quoting ***Ward v. Rock Against Racism***, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

"In the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification," and mere conjecture is not enough. ***Weinberg v. City of Chicago***, 310 F.3d 1029, 1038-39. The regulation cannot burden more speech than necessary to satisfy the government's needs. *Id*. at 1040.

i. The ordinance is overbroad as applied to Mr. Ratliffe.

As applied, the ordinance has been and would be used to restrict the exercise of the First Amendment freedoms of Mr. Ratliffe and the International Socialist Organization, and hence, as applied, the ordinance "bears a heavy presumption against its validity." ***International Soc. for Krishna Consciousness v. Rochford***, 585 F.2d 263, 270 (7th Cir. 1978).

The ordinance is unconstitutionally overbroad as applied to Mr. Ratliffe because, as it has been enforced against him, it has swept into Mr. Ratliffe's constitutionally protected speech activities. "A statute is overbroad when its language, taken at its common meaning, is written in such broad terms that it proscribes conduct which is constitutionally protected, as well as that which may

be regulated, and thereby deters citizens from exercising their protected constitutional freedoms." ***State v. Ruesch***, 214 Wis. 2d 548, 556-57, 571 N.W.2 898, 902 (Wis. App. 1997).

Even though Ordinance § 10.25 may have been intended to merely regulate the placement of merchandise on the terrace and the landscaping of the terrace, the language of the ordinance, if applied to Mr. Ratliffe, would have to be construed so broadly that it would also proscribe conduct protected by the First Amendment. The ordinance was not meant to reach First Amendment activities on State Street, as State Street is a "speaker's platform" where "vending is encouraged" and where nothing is to prohibit a street musician from placing a hat or other container on the sidewalk or street near him or her. *See* ***City of Madison v. Baumann***, 162 Wis. 2d 660, 666-67. The ordinance, as applied here, to prohibit Mr. Ratliffe from leafleting, would also prohibit street musicians from placing hats or containers on the sidewalk to collect tips, activities which the Wisconsin Supreme Court has stated are encouraged on State Street (*id*.) and which are activities that everyone knows occur on State Street (¶17).

Ordinance § 10.25 regulates deliveries, the storage of merchandise, and landscaping, and it seems its purpose is to regulate store fronts. The ordinance does not mention tables. The ordinance as applied in this case would not regulate the storing of merchandise, deliveries, or the landscaping of the terrace. If permitted to be enforced as applied in this case, the ordinance would be used to prohibit Mr. Ratliffe from participating in protected speech activities in a

public forum. Hence, the ordinance as applied to Mr. Ratliffe would be unconstitutionally overbroad.

ii. The ordinance does not leave open ample alternative channels.

As applied, the ordinance does not leave open ample alternative channels for Mr. Ratliffe's speech. "Whether a restriction leaves untouched ample alternatives for communication is not a formulaic inquiry, but depends on the nature of the forum sought, the nature of alternative for a, and the impact of the regulation on the ability of the regulated person or persons to get their message out. At minimum, this requires the availability of an alternative public forum." ***Beal v. Stern***, 194 F.3d 117, 130 (2nd Cir. 1999).

The ordinance, as applied, prohibits any political speaker from placing any table, or box of pamphlets, etc., on any sidewalk or any terrace in the City of Madison. While the police officer suggested that Mr. Ratliffe would be left alone if he distributed information off State Street (¶19, line 11), this sort of from-the-hip distinguishing by the police merely underscores the vast availability for deviations in enforcement that the ordinance affords individual officers, while it offers no safe haven speakers could reasonably rely upon. To prohibit Mr. Ratliffe from enjoying his highest rung of First Amendment rights on all of the sidewalks and terraces, the most traditional public forums, is too restrictive. As applied, Mr. Ratliffe would not even be able to use the sidewalk or terrace in

front of his own home, where people regularly hold garage sales, lemonade stands, and use the sidewalks and terraces for other purposes such as playing games and the like.

Moreover, the only way Mr. Ratliffe could use a state street sidewalk or terrace to disseminate political speech is by obtaining a Street Use Permit under MGO § 10.056.[2] (¶ 14.) This would require Mr. Ratliffe to apply approximately two weeks in advance, and would require the closing down of the whole 400 block of State Street. MGO § 10.056(4)(b). If Mr. Ratliffe wanted to use a sidewalk in front of his house, he would have to obtain a petition signed by at least 75% of all residential dwelling units and nonresidential occupancies with a street address on his block. MGO § 10.056(4)(c). Mr. Ratliffe would not be able to disseminate speech quickly in an emergency situation (such as the Government's declaration of war) or in multiple locations to meet his desired audiences, as MGO § 10.056 requires a separate permit for each event, unless the permit is for identical street closures for more than one occasion, which can appear on a single permit. MGO §10.056(5)(b)(4).

An application for street use would cost Mr. Ratliffe $50 for one day, or $150 for several days of speech, even if his application were denied. MGO § 10.056(7)(a). Mr. Ratliffe would have to pay a $3,000 deposit to speak on the

[2] MGO § 10.056 contemplates not a political speaker wanting to use the sidewalk, but a "special event;" and because there was not "special event" on State Street on the date in question, no permits or licenses were issued allowing for the placement of a table or any display on the sidewalk of the 400 block of State Street. (¶ 15.)

Capitol Square. MGO §10.056(7)(b). Moreover, Mr. Ratliffe would be held responsible to pay any bills sent by the City, such as for additional barricades or trash barrels, "if the street use results in more than the minimal use of any City equipment or any City services, whether or not such use was requested or expected." MGO §10.056(7)(c). On top of these costs, Mr. Ratliffe would have to obtain a million dollar insurance policy. MGO § 10.056(8)(c).

Moreover, even if Mr. Ratliffe could plan in advance when and where his speech would need to be disseminated, obtain a million dollar insurance policy, afford all of the required fees, have enough money in the bank to cover any unexpected fees the City might spring on him, and was able to obtain the approval of 75% of his neighbors when applicable, it is unlikely that the City would even grant a street use permit for his activities, as the City denies applications where the "estimated number of participants or the size or type of event equipment is not sufficient to close a street." MGO § 10.056(6)(c). It is unlikely that several members of the International Socialist Organization wanting to distribute literature will be considered large enough to justify closing down a block of State Street.

Prohibiting Mr. Ratliffe from using any sidewalk or terrace in the entire City of Madison, except in the unlikely event that Mr. Ratliffe could secure a special event street use permit for the closure of a city block for one or several days out of the year, does not provide Mr. Ratliffe with "alternatives to the

prohibited activities [which] are ample and adequate." ***City of Watseka v. Illinois Public Action Council***, 796 F.2d 1547, 1553; ***Beal v. Stern***, 194 F.3d at 130.

III. The ordinance is applied in a discriminatory fashion to Mr. Ratliffe in violation of the Equal Protection Clause of the Fourteenth Amendment.

It has been clearly established since the 19th century that applying a facially neutral ordinance in a discriminatory fashion is prohibited by the Constitution. ***Yick Wo v. Hopkins***, 118 U.S. 356, 373-74, 6 S.Ct. 1064 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.") "[J]ust as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or . . . as a member of a group unpopular with the government." ***U.S. v. Falk***, 479 F.2d 616, 620 (7th Cir. 1973). Even when the illegal activity is not itself protected by the First Amendment, if the law is applied in a discriminatory fashion with the effect of dissuading the defendant's First Amendment protected activities, the application is unconstitutional. *Id.* at n.5.

Mr. Ratliffe must show that he "has been singled out for prosecution while others similarly situated have not (discriminatory effect) and that the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion or another arbitrary classification (discriminatory purpose)." ***State v. Kramer***, 2001 WI 132, ¶ 18, 248 Wis. 2d 1009, 637 N.W.2d 35. Others are "similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making prosecutorial decision with respect to them," or in other words, the Court must determine whether people engaged in the same wrongdoing were not prosecuted. *Id*. at ¶ 20. "Courts must be careful [ ] not to define who is similarly situated too narrowly." *Id*. at ¶ 20.

a. Others similarly situated have not been prosecuted.

As discussed in the previous sections, there are obviously many people placing many items on the sidewalks all around Madison – from a child's game of hopscotch or lemonade stand to an elderly man's wooden cane. The City cannot encourage food vendors, arts and crafts vendors, and street musicians with hats and containers for collecting tips (*see* ***City of Madison v. Baumann***, 162 Wis. 2d 660, 666-67), but ban a political speaker from setting up a small table to display political literature. The city cannot subsidize artists (s*ee id*.), but issue citations to political speakers. A small, portable table containing political literature is no less aesthetically pleasing and no more traffic restricting than a

vendor's table, a bench, a tree, a large planter, clothing racks, a street artist's easel, a bike rack with bikes next to it, or a street musician with a open guitar case for colleting tips. All these things are regularly found on State Street. *See Id.*; *see also* ¶17; ¶¶5-6, Ex.s 4-11. Mr. Ratliffe was positioned right next to a poster kiosk. (¶5, Ex.s 4-9.) Clearly, a poster kiosk invites passersby to stop and view the contents. Why can Mr. Ratliffe not invite passersby to stop and view his political literature?

b. Mr. Ratliffe was subjected to discriminatory enforcement based on his First Amendment protected speech promoting Socialism.

The police officer did not attempt to contact Mr. Ratliffe until after she recognized "the group as the 'socialist' group." (¶19, lines 1-7.) When the officer recognized the group as the Socialist group, she specifically tried to refrain from contact until she could obtain a video tape to record the contact. (¶19, lines 1-7.) Despite the fact that the group voluntarily, and prior to police conduct, gathered up their literature and table, the officer approached them and cited Mr. Ratliffe. (¶19, lines 1-13.) The police officer was not even aware of what law the Socialists were breaking, as she cited Mr. Ratliffe for vending alcohol without a license, yet she caused the group to be fined and removed from State Street. (¶19, lines 1-16; ¶1, Ex. 1.) The officer later amended the citation to placing articles on the sidewalk. (¶1, Ex. 1.) The officer even asked Mr. Ratliffe to distribute off State Street, implying that she would use her wide latitude of discretion under the

vague ordinance to refrain from prosecuting the group if they would speak on a street other than State Street. (¶ 19, lines 11-12.)

Moreover, there is a pattern of targeting the International Socialist Organization. The Organization's members have received four recent citations, three of them for placing articles on the sidewalk in violation of MGO §10.25(1). ***City of Madison v. Noah D. Callagan***, 08 MOR 2788, Citation No. A041000 issued on March 8, 2008 for a violation of MGO §10.25; ***City of Madison v. Noah D. Callagan***, 08 MOR 11360, Citation No. A063161 issued on November 8, 2008 for a violation of MGO § 10.25; ***City of Madison v. Benjamin Ratliffe***, 09 MOR 3330, Citation No. A061814 issued March 21, 2009 amended to a violation of MGO § 10.25; ***City of Madison v. Christopher A. Dols***, 09 MOR 4894, Citation No. A061967 issued May 28, 2009 for a violation of MGO § 9.13. All this, despite the fact that others routinely place articles on the sidewalk without prosecution. (*See e.g.*, ¶ 17.)

c. It is the City's burden to prove that the charging decision reflects a valid exercise of prosecutorial discretion.

Once a defendant has presented a prima facie showing of discriminatory prosecution, the City must prove that the charging decision reflects a valid exercise of prosecutorial discretion**.** ***State v. Kramer***, 2001 WI 132, ¶ 15. The City must "rebut the prima facie showing of selective prosecution," and "is required to put forth compelling evidence to meet its burden." *Id*. ¶ 25.

"The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government." ***U.S. v. Falk***, 479 F.2d 616, 624. (citation omitted.) As is perhaps obvious, Courts "need not check [their] common sense at the door." ***Gil v. Reed***, 381 F.3d 649, 662 (7th Cir. 2004). Mr. Ratliffe begs this Court for protection now.

CONCLUSION

Defendant Ratliffe respectfully requests that his citation for the violation of Ordinance § 10.25 be dismissed with prejudice and any other just relief.

Dated this 10th day of August, 2009

Respectfully submitted:

BENJAMIN RATLIFFE, Defendant

By

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