STATE OF MINNESOTA COUNTY OF STEARNS

DISTRICT COURT SEVENTH JUDICIAL DISTRICT

City of St. Cloud, Administrative Citation 2010-00005

Plaintiff,

vs.

S[redacted] A[redacted] E[redacted],

MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS ON CONSTITUTIONAL GROUNDS AND SELECTIVE PROSECUTION

Defendant.

TO: MR. [redacted], HEARING OFFICER, P.O. BOX 1756, ST. CLOUD, MN 56302; RENEE COURTNEY, ST. CLOUD CITY ATTORNEY'S OFFICE.

INTRODUCTION

On January 22, 2010, S[redacted] A[redacted] E[redacted] ("Mr. E[redacted]") was served with a "major" violation of the City of St. Cloud Administrative Citation No. 2010-00005, for alleged violations of City Code Section 600:05, Subd. 3, after he posted cartoon materials depicting his viewpoints on the Muslim faith. Specifically, he was cited with one "major" violation for an Illegal Posting at 10 Block of 2nd Ave NE, and an additional "major" violation for an allegedly Illegal Posting at 300 Block of 5th Ave. South. In the comment section of the two violations were listed the city's opinion on the explicit nature of the materials, which the city deemed "inappropriate for public display." The ordinance, although content neutral, is not narrowly tailored to serve an important government interest because it is an outright ban on written materials in a traditionally important public forum, i.e., the streets and sidewalks of St. Cloud. As such, the ordinance is in violation of Mr. E[redacted]'s freedom of speech as protected by the First Amendment of the United States Constitution.

Further, the ordinance is void for vagueness as it clearly promotes arbitrary enforcement by city officials, as highlighted by its discriminatory and selective enforcement against Mr. E[redacted]'s political expression. Despite the thousands of ordinance violations throughout St. Cloud, is undisputed that the St. Cloud City Attorney's Office has never issued this particular citation in the past. Of the citations the city has issued, it has never issued a similar citation without a prior warning letter to the alleged violator. There is no dispute that the city is littered with thousands of various postings ranging from "Support the Troops" signs, "Lost Kitten" posters, and "Garage Sale" advertisements. Consequently, this case is a per se example of discriminatory enforcement.

In that the evidence in this case overwhelmingly supports the argument that the city disapproved of Mr. E[redacted]'s cartoons, and the city makes no argument to the contrary, the crux of the first amendment issue here is whether he had a right to post them. The right to offend is, in fact, at the heart of religious freedom in America. The landmark case defining the free exercise of religion in the United States, *Cantwell v. Connecticut*, 126 Conn. 1; 8 A.2d 533 (1940), centered around the right of one faith to offend another. In *Cantwell*, Jesse Cantwell, a Jehovah's Witness, was cited with an ordinance because he played a phonograph record on the street that offended two Catholic men (the record had some especially nasty things to say about the Roman Catholic Church). The issue was whether the city's "breach of the peace" ordinance violated Cantwell's right to free speech. The U.S. Supreme Court overturned Cantwell's conviction, ruling that religious liberty and free speech protects the right to offend. Writing for the Court, Justice Owen J. Roberts stated the issue this way:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification … But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses

> and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy.
>
> In describing the first amendment, Justice Roberts stated:
>
> The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.

In *Cantwell*, the State used a far-sweeping ordinance to charge Cantwell. Justice Roberts described what the state cannot do:

> … a state may not unduly suppress free communication of views, religious or other, under the guise of conserving *desirable conditions*. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Like *Cantwell*, the St. Cloud City Attorney's Office is using a general and facially neutral ordinance to censor the free speech rights of Mr. E[redacted]. On its face, it appears the city is using the ordinance just as it should, however, when viewing the evidence as a whole, (and the face of the ordinance itself) what St. Cloud is really doing is using the ordinance to prosecute Mr. E[redacted] because of the political pressure to do so. Justice Roberts made it clear that although protecting the First Amendment is always messy and often painful, only a society that protects the right of all voices to be heard, however offensive or unpopular, can claim itself a free nation.

FACTS

The evidence in this case establishes while searching the internet and newspapers, Mr. E[redacted] found nine images of caricatures, cartoons, and doctored photographs demeaning the Muslim faith. Mr. E[redacted] printed these materials and created a five-page pamphlet which he then copied and posted at numerous public locations in Stearns and Benton Counties. Mr. E[redacted] was identified by witnesses and interviewed by police. During his interview, Mr. E[redacted] maintained that he was not racist however the cartoons represented his personal opinions about the violence

of the Muslim faith, and that he wanted to distribute the materials to inform people that the Muslim faith was not peaceful. The posted materials caused uproar in the Muslim/Islamic Community in St. Cloud, resulting in protests and extensive media coverage, both locally and nationally. The postings inspired extensive political, social, and religious discussion, online, in the local community and throughout the nation. Although many haled Mr. E[redacted]'s decision to exercise his constitutionally protected speech rights as heroic and brave, others dismissed the postings as offensive and obscene. Still others demonized Mr. E[redacted] and protested loudly in favor of criminal prosecution and even imprisonment. The city was inundated with complaints and certainly was aware by the media's exposure of the events.[1]

Both the Benton and Stearns County Attorney immediately investigated the case and considered charging Mr. E[redacted] at a gross misdemeanor or felony level for his dissemination of the documents. Shortly thereafter, however, both counties declined to press charges. Evaluating the images under Minnesota's obscenity statute, J[redacted] P. K[redacted], Stearns County Attorney noted that although at least one of the images depicts patently offensive sexual conduct, the state could not overcome the third prong of *Miller v. California*, 413 U.S. 15 (1973), that is, that the pamphlet, as a whole, lacks literary, artistic, political or scientific value. Ms. K[redacted] concluded that "[r]egardless of the community reaction, the State cannot criminalize a political message." R[redacted] J. R[redacted], Benton County Attorney, also noted that the images represented a "crude attempt to convey [Mr. E[redacted]'s] derision of [the Muslim faith], rather than an attempt to appeal to a prurient interest in sex." Declining, therefore, to press charges under Minnesota's obscenity statute, Mr. R[redacted] considered the application of Minn. Stat. §609.765, the criminal defamation

[1] However, the media exposure was largely due to the actions of the police department investigating the case. Although Mr. E[redacted] specifically requested that the matter remain private, the St. Cloud Police Department disseminated the materials to the entire metro area news affiliates. Attached to this memorandum is St. Cloud Police Department's Critical Incident Report, dated December 11, 2009, distributing information about the case by fax to KSTP, TV 13, WJON, UTVS, WCCO, KCLD, KVSC, KNSI, KCCO, KSAX, and Chronicle.

statute, which criminalizes communicating defamatory matter. The statute defines defamatory matter as anything which exposes a person, class or association to hatred, contempt, ridicule, degradation, or disgrace in society. Mr. R[redacted] noted that although Mr. E[redacted]'s actions likely fell under the purview of the law, the "statute itself is probably unconstitutional and void." For these reasons, he declined charging Mr. E[redacted] under any Minnesota Statute.

Despite the declination of charges citing the First Amendment, on January 22, 2010, the St. Cloud City Attorney's Office cited Mr. E[redacted] for two separate violations of St. Cloud City Ordinance 600.05, subd. 3:

Section 600:05. Unlawful Acts. It will be unlawful for any person to do, perform, or cause to be performed any of the following acts or cause any of the following conditions:

Subd. 3. Bill Posting. To place or cause to be placed any bills, advertisements, posters, signs, notices or advertising matter of any kind on any tree, telephone, or light pole, post or fixture in the streets or public ways of the City, or to place or post any such bills, advertisements, or posters on any building, fence, or property adjacent to such streets or public places, without the consent of the owner or person in control of such buildings or property; provided that such bills or advertisements may be removed by any officer of the City or the owner of such property without notice to the person posting or placing such bills or advertisements.

The violation also stated that the "posted material contained sexually explicit depictions of beastiality and sodomy. The posting were placed in high pedestrian area and were placed to target local Muslim citizens."[2] Further, the City noted that the "sexual nature of some of the depictions was inappropriate for public display, especially in areas where children are present."

The ordinance's statutory language, however, does not place any restrictions on the content of the postings. The administrative hearing established that the ordinance has never been

enforced, and a tour of the City of St. Cloud reveals hundreds of current bills, advertisements and posters that violate the terms of the ordinance.[3]

Pursuant to St. Cloud City Code Section 1100:00, Subd. 9, via letter Mr. E[redacted] requested a hearing to address constitutional issues related to this matter. After serving the administrative citation, St. Cloud held a town-hall meeting to discuss the case. The St. Cloud Mayor, Police Chief and St. Cloud City Attorney's Office, expressed their viewpoint on the "prosecution." The meeting, which was open to the public, aired on St. Cloud Somali TV and also posted on YouTube, and was viewed by thousands of individuals (See attached DVD). During the Town Hall Meeting chaired by the Mayor on January 31, 2010, both the Police Chief and the City Attorney spoke about the postings. In his initial remarks the St. Cloud Mayor stated that the material that Mr. E[redacted] posted was obscene and offended the Mayor and the community.

At the meeting, the Police Chief also stated that he was offended by the cartoons and believed that they were also obscene. Emphasizing the "importance of treating all citizens as fairly as possibly can," he stated that he supported prosecuting Mr. E[redacted].
St. Cloud City Attorney M[redacted] S[redacted] also spoke at the Town Hall Meeting about the so-called offensive postings, noting specifically that the city "seeks justice under the guidance of the Constitution." He spoke of the limitations in our justice system preventing Mr. E[redacted] from being charged. He noted that the City Attorney's office spent many hours reviewing the case, trying to find a Minnesota Statute with which to charge him. Although the City Attorney's Office ultimately determined that "criminal" prosecution under the Minnesota Criminal Code failed, the St. Cloud City Attorney's Office decided to charge him under the city ordinances. Mr. S[redacted] specifically noted in front of a live audience, that the city ordinance certainly was not as punitive as they hoped, but they were left with no other choice with which to prosecute Mr. E[redacted]. He

[3] Numerous examples of materials violating the ordinance are attached.

concluded by saying that he would like to take measures to educate Mr. E[redacted] about his actions and further enlighten him on his viewpoints.[4]

THE ADMINISTRATIVE HEARING

At the administrative hearing, the St. Cloud City Attorney's office offered an exhibit list and presented the sworn affidavits of (1) Police Officer T[redacted] H[redacted], (2) G[redacted] K[redacted], (3) Assistant Chief Deputy S[redacted] S[redacted] and (4) M[redacted] G[redacted]. No direct testimony was taken due to the fact that Mr. E[redacted]'s attorney stipulated to the introduction of the affidavits. The cross-examination at the administrative hearing established four crucial facts:

1. That the St. Cloud City Attorney's Office drafted Mr. E[redacted]'s ordinance as well as the language on the face of the ordinance expressing disapproval of the cartoon's content;
2. That despite thousands of past and ongoing violations throughout St. Cloud, the St. Cloud City Attorneys Office has never issued a major or minor criminal or civil citation using the authority stated under city ordinance 600.05, subd. 3;
3. That although a similar sign statute has been cited in the past, specifically Article 18, Section 18.2, St. Cloud has never issued a civil or criminal citation without a compliance (warning) letter beforehand;
4. That Mr. E[redacted] was issued a "major" violation by Officer T[redacted] at the order of the St. Cloud City Attorney's Office without a compliance (warning) letter, approximately a month and a half after the cartoons were removed;

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At the hearing, on cross examination, Officer T[redacted] testified that the St. Cloud City Attorney's Office ordered him to serve the two city sign violations to Mr. E[redacted] and that he did not write the substantive material disapproving of its content in the violations itself. He testified

[4] A DVD of the videos which were posted on YouTube is attached.

that when he picked up the citations to deliver them to Mr. E[redacted], they were already drafted by the St. Cloud City Attorney's Office. He testified that in all of his years as a police officer, he had never cited anyone for this ordinance, either criminally or civilly. Officer T[redacted] testified that when he spoke with Mr. E[redacted] after the images were posted, Mr. E[redacted] was cooperative, candid and honest. He also testified that Mr. E[redacted] offered to retrace his steps and remove the rest of the cartoons immediately. Mr. E[redacted] told Officer T[redacted] that he was not racist against the Somolia people but rather had issue with the violence of the Muslim religion. During the interview, Mr. E[redacted] also stated that he retrieved these pictures from the internet and a newspaper, and that the purpose of posting the cartoons was to make a statement about his beliefs concerning the violence of the Muslim religion. Finally, Officer T[redacted] admitted that, at the direction of the city attorney's office, he served Mr. E[redacted] the citation a month and a half after the postings were removed, and without a warning or correction letter beforehand.

Chief Deputy S[redacted] S[redacted] testified that she had worked for the city of St. Cloud in law enforcement since 1989, and in her full 26 years of law enforcement work the city had never issued a criminal or civil citation using St. Cloud City Ordinance 600.05, subd. 3. She testified that it is common to receive complaints of sign ordinance violations, and when the city receives a complaint a policy exists to remove the sign from its location and attempt to contact the owner. She testified that even with repeat complaints and offenses, where the violator did not remove the sign or put up a new sign in disregard of the officer's first warning, the city had *never* issued a criminal or civil violation. In essence, even with multiple repeat offenders, a citation has never been issued.

Mr. K[redacted] testified that he had worked for the city since 2001, and that his staff has been informed to remove signs such as garage sale signs, job advertising, signs, etc. He testified that

on average he estimates that his department had removed approximately 1500 signs over the course of his employment and not in one incident has his department issued a citation to any violator. Mr. K[redacted] testified that one in five sign complaints are from a citizen, and even with citizen complaints he was not aware of any criminal or administrative citations being issued to the violator. He testified that even when hundreds of flyers are littered throughout the St. Cloud downtown area, and even when gangs vandalize city property, citations are not administered; rather, the government's policy involved issuing warnings to the violators if discovered. He also testified that even when the former city attorney became involved with hazardous violations, a warning, not a citation, was always issued to the violator requesting that the sign be removed.

M[redacted] G[redacted] testified that he drafted a procedure to deal with sign violators, and the procedure was put in place to make sure that every potential violator was dealt with in the same and fair manner, with uniform compliance. First, with that procedure, if a sign violation was discovered, a reasonable compliance order (warning letter) is issued to the violator requesting that the sign be removed from the property. He testified that major violations are reserved for a pattern of *frequent violations*, and only with frequent violations would a major violation be issued. He also testified in all of his experience in dealing with sign violations, not once has a major violation been issued. Even with repeat offenders, as outlined in the packet of information provided to the hearing officer, the offenders were issued a minor violation and always with a warning letter first. Mr. Glaesman testified that he was not aware of any situation where an individual was issued a criminal or civil citation without a prior warning letter beforehand.

At the conclusion of the hearing, after testimony established exactly the context of a "major violation", the city realized that it had incorrectly issued the major violations and dismissed both major violations against Mr. E[redacted].

ARGUMENT

I.) ST. CLOUD CITY ORDINANCE 600.05, SUBDIVISION 3 IS BEING DISCRIMINATORILY ENFORCED AGAINST MR. E[redacted].

Since its inaction, the ordinance at question in this case has never been issued to any citizen, either criminal or civilly. Similar ordinance violations have been issued, but never without a warning letter beforehand. The fact that the St. Cloud City Attorney's Office chose to use this ordinance, supported by the comments cited in the specific ordinance, establishes prima facie discriminatory enforcement.

To prove discriminatory enforcement the defendant must establish prima facie: (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right. *Thul v. State*, 657 N.W.2d 611 (Minn. Ct. App. 2003); *State v. Hyland*, 431 N.W.2d 868 (Minn. Ct. App. 1988).

Here, it is abundantly clear considering the testimony of the State's witnesses at the hearing that others situated in similar circumstances as Mr. E[redacted] have not been proceeded against by the city of St. Cloud. Minnesota and United Sates Supreme Court precedent establish that the administration of an ordinance, while on its face appears neutral, can be unconstitutional by the government's application of its terms. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court reversed an ordinance conviction, not because the ordinance specifically discriminated against Chinese -- it did not -- but because it was administered in a discriminatory fashion. *Yick Wo v. Hopkins* is the first instance of the United States Supreme Court inferring the existence of discrimination from data about a law's application, a technique that would be

used again in the 1960s to strike down statutes discriminating against African Americans. Like *Hopkins*, the St. Cloud City Attorney's Office used a face-neutral ordinance and applied it in a discriminatory fashion. Despite the thousands of ordinance violations throughout the city, and the tens of thousands throughout the city's past, Mr. E[redacted] is the only individual to have ever been cited. Unlike every other individual cited with the similar ordinance, Article 18, Section 18.2, Mr. E[redacted] was issued the ordinance after every other available prosecution failed, and was cited in disregard of the city's memorandum to the mayor suggesting that a compliance (warning) letter be sent to the resident beforehand.

A classification of persons against whom the law is enforced must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *City v. Buschette*, 307 Minn. 60, 64, 240 N.W.2d 500, 502 (1976), *quoting Royster v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 562 (1920); *Reed v. Reed,* 404 U.S. 71, 76, 92 S.Ct. 251, 254 (1971); *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); *McCoy v. Court of Appeals of Wisconsin,* 486 U.S. 429, 108 S.Ct. 1895 (1988); *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480 (1996); *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996). Some selectivity in prosecution is generally not adequate to prove a deliberate policy of discrimination. *See State v. Woodard,* 378 N.W.2d 32 (Minn. App. 1985).

Note that this defense challenges the actual enforcement of a law which may be valid and non-discriminatory on its face, but the courts generally engage in the same inquiries and apply the same standards, so far as applicable, to determine if the equal protection guarantee has been infringed. *McCoy v. Court of Appeals*, 486 U.S. 429, 108 S.Ct. 1895 (1988); *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480 (1996).

Equal protection may also be asserted to challenge statutes on their faces, and in Minnesota the scrutiny is stricter then under federal equal protection law. *Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713 (Minn. 2007); *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Here, although code is content neutral on its face, the ordinance is clearly being discriminatorily enforced against Mr. E[redacted] supported by the fact that the city has never issued this citation and has ignored all other violations, such as "support the troops" signs and "lost kitty" posters. There is no dispute that the actual violation in this case contains comments disapproving of the cartoons. There is also no dispute that the St. Cloud City Attorney's office drafted the opinion comments on the face of the actual ordinance. Further, there is no dispute that this particular ordinance has never been enforced despite the thousands of violations that currently litter the city. Moreover, both the Benton and Stearns County Attorneys declined charging Mr. E[redacted] under state obscenity laws because they believed his actions clearly fell within the province of free speech. Because they were unable to charge him with a violation of criminal law, the St. Cloud City Attorney's Office instead issued an "administrative citation" to Mr. E[redacted] pursuant to St. Cloud Ord. Section 600.05, Sub. 3. The issuance of the citation was clearly a reaction to the media and local uproar created by the images, and in no way related to the city's interest in the aesthetics of its streets.

The citation in this case states:

> The posted material contained sexually explicit depictions of bestiality and sodomy. The postings were placed in high pedestrian areas and were placed to target local Muslim citizens. The postings were designed to harass and they had that effect. The postings had a significant negative impact on the St. Cloud community.

The citation also noted that:

> the postings were also placed in close proximity to schools and churches, places where children and adults are present. The sexual nature of some of the

depictions were inappropriate for public display, especially in areas where children are present.

Further, at a town hall meeting on the issue on January 31, 2010, City Attorney M[redacted] S[redacted] explained that the City Attorney's office spent many hours reviewing the case, trying to find a Minnesota Statute with which to charge him. Although they ultimately determined that criminal prosecution under the Minnesota criminal code failed, the St. Cloud City Attorney decided to charge him under the city ordinance. Mr. S[redacted] specifically noted in front of a live audience that was also video recorded (see exhibit) that the city ordinance certainly isn't as punitive as they hoped, but they were left with no other choice. In analyzing Mr. E[redacted]'s claim of selective prosecution, the hearing officer in this case must "read between the lines." It is clear by the city attorney and mayors' comments at the city hall meeting that they were determined to prosecute Mr. E[redacted] at any cost, and it was not based on the violations of posting a cartoon on a telephone pole (in fact that was not even mentioned at the town hall meeting), rather, it was because of their disapproval of his message.

There certainly can be no argument that the City of St. Cloud is under political pressure to punish Mr. E[redacted] for his actions. No doubt the city received hundreds of complaints about the cartoon postings. However, the comments on the face of the citation suggest that the city is misusing the ordinance to convey a message that such speech will not be tolerated, when it is certainly not up to the city to censor the political messages of its citizens. The government may not prohibit speech or expression merely because society deems something to be offensive or disagreeable. *Virginia v. Black*, 538 U.S. 343, 358 (2003). The city attorney's comments that he wished to take measures to educate Mr. E[redacted] about his actions and further enlighten him on his viewpoints was completely unwarranted given the alleged violation. Prosecution and citation under ordinance 600.05, Subd. 3 should never take into account the nature of the material posted

because the nature of the material is completely irrelevant; the ordinance applies equally to advertisements for garage sales, notices for lost pets, requests for roommates, and sexually graphic political cartoons. The city is literally littered with thousands of violations of the ordinance, yet this is the first time the city has used this particular law to prosecute one of its citizens without a prior warning, and it is clear why – to muzzle a dissenting voice.

Stearns County Attorney J[redacted] K[redacted] was correct in concluding: "[r]egardless of the community reaction, the State cannot criminalize a political message." It is clear from the comments contained in Mr. E[redacted]'s citation that the city is targeting Mr. E[redacted], not because he posted materials on public property, but because he posted what the city deems to be politically repugnant materials. Mr. E[redacted] is being singled out and charged with this ordinance because the City of St. Cloud was offended by his speech. The freedom of speech encompasses precisely the freedom to annoy, to ridicule, and to offend and without these rights, the First Amendment is empty. The moment that any person or religious ideology is considered "off-limits" for critical examination and even ridicule, is the moment freedom of speech has died.

II.) AS APPLIED IN THIS CASE, ST. CLOUD CITY ORDINANCE 600.05, SUBDIVISION 3 VIOLATES MR. E[redacted]'S FIRST AMENDMENT RIGHTS.

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech...." There is no doubt that as a general matter that leafleting, and posting materials in public areas are expressive activities involving "speech" protected by the First Amendment. *See Carey v. Brown*, 447 U.S. 455, 460, 100 S.Ct. 2286, 2290 (1980); *Gregory v. Chicago*, 394 U.S. 111, 112, 89 S.Ct. 946, 947 (1969); *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669 (1943); *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736 (1940); *Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666.

It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954 (1983). *Carey v. Brown*, 447 U.S. 455, 460, 100 S.Ct. 2286, 2290(1980); *Hudgens v. NLRB*, 424 U.S. 507, 515, 96 S.Ct. 1029, 1034 (1976); *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 765 (1941); *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 964 (1939). In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn.*, supra, at 44, 103 S.Ct., at 955. *See e.g., Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640, 647, 654, 101 S.Ct. 2559, 2563, 2567(1981); *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302 (1972); *Cox v. Louisiana (Cox II*), 379 U.S. 559, 85 S.Ct. 476 (1965). Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest. *See, e.g., Perry Education Assn., supra, at* 45, 103 S.Ct., at 955; *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269 (1981).

The ordinance at issue here clearly implicates freedom of speech. Justice Cardozo long ago observed that freedom of speech is "the indispensable condition ... of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149 (1937). But even so precious a freedom must, in particular iterations, be balanced against the government's legitimate interests in protecting public health and safety. *See*, e.g., *Schenck v. United States*, 249 U.S. 47,

52, 39 S.Ct. 247 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre.") (Holmes, J.).

Even when a law does not favor one particular viewpoint over another, governmental restrictions on the content of speech may be impermissible. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42, 114 S.Ct. 2445 (1994). At this stage of the continuum, a reviewing court must start with a presumption that such a content-based regulation is constitutionally suspect. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S.Ct. 2538 (1992); *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir.1995). That presumption can be rebutted by a showing that the regulation is both necessary to the furtherance of a compelling state interest and narrowly tailored to the achievement of that interest. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 99 (1988).

Further along the continuum are laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur. Because such time-place-manner restrictions are by definition content-neutral, they tend to burden speech only incidentally; that is, they burden speech for reasons unrelated to either the speaker's viewpoint or the speech's content. See *Turner Broad.*, 512 U.S. at 642, 114 S.Ct. 2445. Regulations of this type will be upheld as long as "they are justified without reference to the content of the regulated speech ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989) (*quoting Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065 (1984)). This more relaxed standard, familiarly known as "intermediate scrutiny," is justified because the fact that a regulation is both content-neutral and viewpoint-neutral helps to ensure that government is not using the regulation as a sub

rosa means of interfering in areas to which First Amendment protections pertain. *See Turner Broad*., 512 U.S. at 642, 114 S.Ct. 2445.

A.) The Ordinance is Content Neutral on Its Face.

As discussed supra, there certainly is no argument as a general matter peaceful picketing and leafleting are expressive activities involving "speech" protected by the First Amendment. It is also true that streets and sidewalks are traditional public forum, places that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 964 (1939). The First Amendment does not, however, guarantee an absolute right to anyone to express their views any place, any time, and in any way that they want. *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563 (1981). Even protected speech in public places may be subject to content-neutral time, place and manner restrictions if they are narrowly tailored to serve significant government interests and preserve ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45, 103 S.Ct. at 954.

The key inquiry in determining content neutrality is whether the government adopted a regulation of speech without reference to the content of the speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753 (1989). Thus the government's purpose is the threshold consideration. A regulation that serves purposes unrelated to the content of speech is deemed neutral even if it has an incidental effect on some speakers or messages but not others. *Id*. at 791, 109 S.Ct. at 2753 (*citing City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 928-29 (1986)).

Although the application of the ordinance appears to be far from content neutral, the ordinance, on its face, regulates any bills, advertisements, posters, signs, notices or advertising matter of any kind without regard for the message of these postings. Thus, although the government has not proffered any evidence that it adopted this regulation of speech without reference to the content of the speech, on its face it appears to be content neutral.

B.) The Ordinance Does Not Serve A Legitimate State Interest.

"To justify any intrusion at all [on speech] there must be a threshold showing that the factual situation demonstrates a real need for the government to act to protect its interest." *ACORN v. St. Louis County*, 930 F.2d 591, 595 (8th Cir.1991).

Arguably, the City of St. Cloud's concern is preserving the aesthetics of its public streets and walkways. A city may, consistent with prevailing constitutional standards, protect legitimate aesthetic and safety interests through indirect regulations that impose some burden on speech. However, to do so, the city must demonstrate the existence of a "reasonable fit" between their asserted goal and the means that they have selected to accomplish it. *Discovery Network*, 507 U.S. at 416, 113 S.Ct. 1505 ("It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests."). Thus, in *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir.1991), involving a First Amendment free speech and free exercise challenge to a city's zoning ordinance, the Eighth Circuit reversed the district court's grant of summary judgment in favor of the defendant city because there was insufficient evidence that the city had studied the issues or found reliable evidence regarding the effect of the regulated activity (in that case, the location of churches in the central business district) upon the governmental interest presumably being harmed (economic revitalization).

Here the ordinance does not set forth a justification for the outright ban on all postings. Although St. Cloud may have an interest in controlling the aesthetics of its city, it is clear in the case at hand that the city is unable to establish a factual basis for concluding that a cause-and-effect relationship actually exists between the outright ban on posting on public property and adjacent private property, and litter that impacts the health, safety, or aesthetic well-being of the city, if that is indeed what the ordinance purports to protect. Because the ordinance allows for the posting of any materials with the permission of the property owner, it doesn't appear to legitimately serve the interest of preserving the aesthetics of the city, because an individual can post as many materials as they would like if they have the permission of a property owner. Moreover, any argument by the city that the ordinance is necessary to preserve the aesthetics of St. Cloud is without merit – the city has never issued the citation to any violator! As such, it is unclear what the City of St. Cloud intended by enacting this ordinance, and thus no legitimate state interest should be found because there is no reasonable fit between the city's alleged interest and the ordinance.

C.) St. Cloud Ordinance 600.5, Subd. 3 is not narrowly tailored to serve an important government interest.

> [A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but ... it need not be the least restrictive or least intrusive means of doing so.
> . . . .
> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward, 491 U.S. at 798 & 800, 109 S.Ct. at 2757 & 2758 (footnote and internal quotations omitted). *See Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906 (restrictions on the time, place, or

manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech.").

In *Schneider*, 308 U.S. at 162-63, 60 S.Ct. 146, the Supreme Court held that the governmental interest in preventing litter was insufficient to justify an ordinance that would have prohibited individuals from handing out literature to those willing to receive it. The Court in *Schneider* went on to note that a city has the power to punish individuals who throw leaflets on the ground, as opposed to those who hand leaflets out. *Id.; accord Jews for Jesus, Inc. v. MBTA*, 984 F.2d 1319, 1324 (1st Cir.1993) ("littering is the fault of the litterbug, not the leafletter"). The Supreme Court then concluded in *Schneider* that "**the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution**." 308 U.S. at 163, 60 S.Ct. 146.

Not long after *Schneide*r was decided, the Supreme Court considered the constitutionality of an ordinance which made it unlawful in Struthers, Ohio, for any person to distribute to a person within a residence a handbill, circular, or advertisement, by knocking on the door or ringing the bell of the residence. *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862 (1943). The appellant in *Martin*, a follower of the Jehovah's Witnesses, was convicted of violating the Struthers ordinance and was ordered to pay a fine after she knocked on the door and summoned the resident of the home for the purpose of distributing religious literature. *Id.* at 142, 63 S.Ct. 862.

The City of Struthers asserted that its ordinance advanced its legitimate governmental interests in protecting citizens from being disturbed in their homes and preventing burglars or other criminals from using such acts as a pretense for criminal activity. *Id.* at 144, 63 S.Ct. 862.

The Supreme Court declared the Struthers ordinance facially invalid because it was not narrowly tailored to serve the city's legitimate goals. The Supreme Court observed: "While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." *Id*. at 145, 63 S.Ct. 862. The Supreme Court observed: "[t]raditionally the American law punishes persons who enter onto property of another after having been warned by the owner to keep off." *Id.* at 147, 63 S.Ct. 862. Similarly, the Supreme Court suggested, a regulation could make it unlawful to ring the bell of a householder who has indicated a desire not to be disturbed. *Id*. at 147-48, 63 S.Ct. 862. The Supreme Court concluded:

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.
>
> ....
>
> A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home.

Id. at 146-47, 63 S.Ct. 862 (footnote omitted); *accord Rowan v. United States Post Office Dep't*, 397 U.S. 728, 90 S.Ct. 1484 (1970) (upholding as constitutional under the First Amendment a federal statute, enforceable by the Postmaster General, which allows householders to notify senders of pandering advertisements that future mailings are not wanted).

Outright bans on written materials is generally disfavored, if the evil to be regulated can be disentangled from the medium of expression, or when it is not certain that the evil will

emanate from the medium, the Court has insisted that the government rely upon a regulatory device less devastating than a total ban to protect its significant interests. *See, e.g., United States v. Grace*, 461 U.S. 171, 181, 183-84, 103 S.Ct. 1702, 1709, 1710-11(1983) (invalidating absolute ban on picketing and leafletting on public sidewalks surrounding Supreme Court building, but condoning the imposition of reasonable time, place, and manner restrictions); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 158, 89 S.Ct. 935, 942-43 (1969) (finding an outright prohibition on public marches constitutionally infirm, but noting that time, place, and manner of marches could be regulated); *Schneider v. State*, 308 U.S. 147, 162-65, 60 S.Ct. 146 (1939) (invalidating complete bans on handbill distribution and on unlicensed door-to-door communication, but indicating that imposing penalties on those who littered raised no constitutional problem); *Martin v. Struthers*, 319 U.S. 141, 145-49, 63 S.Ct. 862, 864-66 (1943) (invalidating complete ban on door-to-door solicitation, while noting that laws against fraud and trespass did not raise constitutional concerns); *Jamison v. Texas*, 318 U.S. 413, 415-16, 63 S.Ct. 669, 671-72(1943) (invalidating complete ban on handbill distribution in public streets and rejecting city's contention that it possessed the power "absolutely to prohibit the use of the streets for the communication of ideas"); *Amalgamated Food Employees Union 590 v. Logan Valley Plaza, Inc*., 391 U.S. 308, 316, 88 S.Ct. 1601, 1607 (1968) ("That the manner in which handbilling, or picketing, is carried out may be regulated does not mean that either can be barred under all circumstances...."), *overruled on other grounds, Hudgens v. NLRB*, 424 U.S. 507, 517-19, 96 S.Ct. 1029 (1976); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52, 58 S.Ct. 666 (1938) (invalidating ordinance that completely banned unlicensed pamphlet distribution within city limits).

More recently, the Supreme Court reiterated that complete bans are constitutionally disfavored, admonishing that "such measures can suppress too much speech." *City of LaDue v. Gilleo*, 512 U.S. 43 114 S.Ct. 2038, 2039 (1994) (invalidating ordinance that completely banned noncommercial signs conveying political, religious, or personal messages in residential areas).

As further example, in *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702 (1983), the Supreme Court held that a statute prohibiting displaying "in the Supreme Court building, or on its grounds, any flag, banner, or device designed to bring into public notice any party, organization, or movement," was an unreasonable place restriction on the exercise of free speech and was unconstitutional. The Court found particularly troubling the fact that the statute's ban applied to the public sidewalks surrounding the Court building, because sidewalks are traditional public fora. *See id*. at 178-79, 103 S.Ct. 1702. The Court did not opine on whether the statute was unconstitutional as applied to the building and grounds inside the sidewalks, however, but instead relied on its observation that "the sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently." *Id.* at 179, 103 S.Ct. 1702.

It is clear from even the most perfunctory reading that the St. Cloud city ordinance is not narrowly tailored and thus fails under a constitutional analysis. The ordinance is not a reasonable place restriction on the exercise of free speech. Not only does the ordinance regulate posting or placing any bills, advertisements, or posters on any tree, telephone, or light pole, post or fixture in any public area, it also prohibits the posting on "any building, fence, or property adjacent to such streets or public places, without the consent of the owner or person in control of such buildings or property." The ordinance closes off virtually every public surface from any written material or pictorial depictions.

Furthermore, the ordinance provides that "such bills or advertisements may be removed by any officer of the City or the owner of such property without notice to the person posting or placing such bills or advertisements." The restriction of posting on public property or private property adjacent to public property is not a legitimate time/place/manner restriction as it is an outright ban on all written materials. Further, streets, sidewalks and parks constitute traditional public forums. *See Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983). A government cannot choose to entirely close these forums to the public. *See Id.* at 45. It is clear that this ordinance purports to do just that.

Finally, by allowing for enforcement, for any reason, and by any officer of the city, the ordinance has gone beyond merely regulating the aesthetics of its public places, but allows any city official to control the content of any speech, even on private property, without regards for any standards for removal. This provision effectively allows a city official to close off entire public forums if a citizen chooses to exercise political, religious, or scientific speech that is deemed distasteful. This is especially problematic in light of individual biases amongst city employees (in this case, see the face of Mr. [redacted]'s ordinance for the city's bias). For example, a city official running for reelection is free to remove any competitor's campaign posters from any public property, or any private property adjacent to public property, without having to justify such action. It is clear that this ordinance has the potential effect of quelling an enormous amount of protected political speech, and these potential side effects cannot be saved by the city's possible interest in maintaining the aesthetics of its public streets.

D.) The Ordinance Does Not Leave Ample Alternative Channels of Communication.

If significant governmental interests are indeed at stake, the court considers whether the restriction is narrowly tailored to serve those interests and leaves open ample alternative

channels of communication. *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753. The validity of time, place, or manner restrictions does not turn on the court's "agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted. *U.S. v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2907, 86 L.Ed.2d 536 (1985). Rather, the requirement of narrow tailoring is satisfied so long as the restriction promotes a substantial government interest that would be achieved less effectively absent the restriction and the means chosen are not substantially broader than necessary to achieve that interest. *Ward*, 491 U.S. at 799, 109 S.Ct. at 2758).

Here, it is entirely unclear what alternative channels of communication exist. St. Cloud is a college town, and as such, a place traditionally host to political activism and the free exchange of ideas. The streets and sidewalks of the city, by their very nature, are public fora and subject to the highest level of scrutiny in First Amendment analysis. By placing an outright ban on posting materials on essentially any public surface, on every public sidewalk and speech, the ordinance quells vast amounts of speech without leaving any clear directives where a person can freely post such ideas in what are public fora without fear of prosecution. Further, it does not leave open alternative channels of communication even on private property, because it purports to regulate any private property that is adjacent to a public sidewalk, building or street. Although the ordinance may be rarely enforced, on its face it effectively blocks all channels of communication in public places, and it puts an enormous strain on channels of communication on private property. As such, the ordinance in this case is clearly unconstitutional, and the administrative citations must be dismissed.

III.) ST. CLOUD CITY ORDINANCE 600.05, SUBDIVISION 3 IS VOID FOR VAGUENESS.

Minn. Const. art. I, § 7 provides that no person "shall be held to answer for a criminal offense without due process of law . . . ." And it has been held that due process requires that criminal statutes be sufficiently clear and definite to warn a person of what conduct is punishable. *State v. Simmons,* 258 N.W.2d 908, 910 (Minn.1977). The goal is to prevent arbitrary, standardless enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

The court must also determine whether any imprecision in the statute promotes arbitrary and discriminatory enforcement. This is the more important element of our vagueness analysis. *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1858. A statute must offer guidance to law enforcement officials limiting their discretion as to what conduct is allowed and what is prohibited. *State v. Newstrom,* 371 N.W.2d 525, 528 (Minn.1985).

An ordinance may be unconstitutionally vague "if it defines the forbidden or required act or acts in terms so vague that individuals must guess at its meaning, or it defines an act in a manner that encourages arbitrary and discriminatory enforcement." *Humenansky v. Minn. Bd. Med. Exam'rs,* 525 N.W.2d 559, 564 (Minn.App.1994), review denied (Minn. Feb. 14, 1995) (emphasis added). An ordinance is not vague because it uses general language and the party attacking its validity must show that it is vague as to its own behavior. *Hard Times Cafe*, 625 N.W.2d at 171-72.

Although a litigant is normally limited to constitutional challenges based on the facts at issue, a claim of first amendment overbreadth and void for vagueness extends to potentially unconstitutional applications of a statute. *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348 (1982); *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 2914 (1973). This broader scope of review is a necessary counter balance when criminal sanctions restrict the ordinary

review process available to determine legally protected expression. *State v. Krawsky*, 426 N.W.2d 875, 878 (1988). It is clear that this ordinance is overly broad because the potentially unconstitutional applications of the law.

For example, in *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532 (1931), the Supreme Court struck down as facially invalid a state law that prohibited peaceful display of a symbol of opposition to organized government. *Id*. at 369, 51 S.Ct. 532. The court held that such a statute "is so vague and indefinite as to permit the punishment of the fair use of [the opportunity for free political discussion]" and therefore "is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Id.* Similarly, in *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666 (1938), the Court struck down as facially invalid a local ordinance that required a license to distribute any literature and gave the chief of police the power to deny a license. 303 U.S. at 451-52, 58 S.Ct. 666. The Court held that the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id*. at 451, 58 S.Ct. 666.

Here, the ordinance reads as follows:

> Subd. 3. Bill Posting. To place or cause to be placed any bills, advertisements, posters, signs, notices or advertising matter of any kind on any tree, telephone, or light pole, post or fixture in the streets or public ways of the City, or to place or post any such bills, advertisements, or posters on any building, fence, or property adjacent to such streets or public places, without the consent of the owner or person in control of such buildings or property; provided that such bills or advertisements may be removed by any officer of the City or the owner of such property without notice to the person posting or placing such bills or advertisements.

St. Cloud Ordinance, Section 600.05, subd. 3.

Here, the ordinance clearly fails to give law enforcement officials sufficient guidance on when or whether they can remove violating bills or advertisements, or when a person will be prosecuted under the law. As in *Stromberg*, this ordinance "is so vague and indefinite as to

permit the punishment of the fair use of [the opportunity for free political discussion]" and therefore "is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *See Stromberg*, 283 U.S. at 359, 51 S.Ct at 532. Because any city official can remove any handbill, posing advertisement, or sign, from either public property or any private property adjacent to public property, the ordinance also lends itself to censorship by city officials, which is exactly what happened in this case. For example, if a city official is running for reelection, this statute encourages him or her to remove materials relating to opponents from both public and private property, without any repercussion for such actions. Further, the ordinance also allows any city official to remove any political message that he or she may find distasteful from any private property adjacent to any public property without notice to any property owner.

Further, it is clear that this ordinance lends itself to arbitrary and discriminatory enforcement as applied in the current case. The ordinance is clearly being used to censor Mr. [redacted]'s constitutionally protected political and religious views on the Muslim faith. The state is unable to point to any other instances where the ordinance has been enforced. If Mr. E[redacted] had posted a flyer for a lost dog, or a notice inquiring about roommates, the city would never have bothered scrutinize such activities. It is only when the city deems that a particular posting is distasteful that it utilizes an ordinance enacted against activities that normally escape such public muster. As such, the ordinance is unconstitutionally void for vagueness, both on its face, and as applied in the current case. Both citations in this case must therefore be dismissed as a matter of law.

CONCLUSION

For the above-stated reasons, Mr. E[redacted] respectfully requests that both citations against him be dismissed.

Respectfully submitted,

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