

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

BRIAN BECKER,)	
)	
Plaintiff,)	
)	
v.)	No. 1:12-CV-190
)	
CITYOF POPLAR BLUFF, MISSOURI,)	
)	
Defendant.)	
)	

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF,
AND NOMINAL DAMAGES PURSUANT TO 42 U.S.C. § 1983**

Plaintiff, Brian Becker, for his Complaint against Defendant, City of Poplar Bluff, Missouri, challenging the constitutionality of City of Poplar Bluff Code of Ordinances § 605.440(E), states as follows:

INTRODUCTION

1. Plaintiff is a Missouri citizen who is actively involved in public debate on issues of public concern in Poplar Bluff, Missouri.
2. One effective and efficient way Plaintiff has found to spread his messages is by securely placing handbills on the windshields of unoccupied vehicles.
3. Section 605.440(E) provides that “[i]t shall be unlawful for any person to distribute or cause to be distributed any circulars, handbills or other written or printed material for advertising, promotion or announcement purposes by attaching any such items to the windshield or any other part of a vehicle without first having obtained a permit therefor from the City Council and the prior written consent of the operator of said vehicle to do so.”

4. Although no municipal proceedings have been initiated against Plaintiff for an alleged violation of § 605.440(E), Plaintiff reasonably fears imminent arrest and imposition of a fine or jail sentence and is chilled from engaging in expressive activity protected by the First Amendment.

5. Upon learning that Defendant's police and prosecutor had investigated Plaintiff for an alleged violation of § 605.440(E) for securely placing handbills on unoccupied vehicles, Plaintiff's counsel wrote the Defendant's Prosecutor, on November 9, 2012, who responded that Plaintiff has not yet been charged with violating § 605.440(E) and that no charging decision has yet been made.

6. On that same date, in a subsequent phone call, during which Plaintiff's counsel sought assurances that no charges would be brought against Plaintiff, the Prosecutor refused to provide such assurances and would not say when he would make a decision whether to charge Plaintiff with a violation of § 605.440(E).

7. Section 605.440(e) impermissibly infringes upon Plaintiff's rights as set forth in the Free Speech Clause of the First Amendment to the Constitution of the United States and incorporated to the states and their municipalities by the Fourteenth Amendment.

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to 42 U.S.C. § 1983 over Plaintiff's claims of a deprivation of a right, privilege, or immunity secured by the Constitution under color of state law.

9. In addition, this Court has original jurisdiction pursuant to 28 U.S.C. § 1331 over Plaintiff's civil action arising under the Constitution of the United States.

10. In addition, this Court has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States.

11. In addition, this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over Plaintiffs' cause of action arising under the Constitution of the State of Missouri.

12. Venue lies in the United States District Court for the Eastern District of Missouri because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in the Butler County, Missouri. 28 U.S.C. § 1391(b)(2).

13. Divisional venue is in the Southeastern Division because the events leading to the claim for relief arose in Butler County and the single Defendant is located in Butler County. E.D.MO. L.R. 2.07(A)(3), (B)(1).

PARTIES

14. Plaintiff Brian Becker is resident of the State of Missouri.

15. Defendant, the City of Poplar Bluff, Missouri, is a municipal corporation and political subdivision of the State of Missouri.

ORDINANCE AT ISSUE

16. Defendant has enacted and enforces a Code of Ordinances, which includes § 605.440(E).

17. The chapter within which § 605.440 appears is titled "Business Licenses and Regulations."

18. Section 605.440 is titled "Distribution of Handbills," and in its entirety reads:

DISTRIBUTION OF HANDBILLS

A. Distribute Defined. The word "*distribute*", for the purposes of this Article, shall mean and include the scattering, throwing, handing out or any other means of dispensing circulars, handbills or other printed matter.

B. *Exceptions To Article Provisions.* The provisions of this Article shall in no way affect the usual and customary sales and delivery of newspapers and periodicals and shall not prevent the distribution of advertising matter in business buildings or private residences.

C. *Scattering Prohibited.* No person shall promiscuously distribute handbills or advertisements of any kind by placing or throwing the same on any street or lot or otherwise.

D. *Permit Required.* It shall be unlawful for any person to distribute or cause to be distributed any circulars, handbills or other written or printed matter for advertising purposes upon the streets or sidewalks of the City without having first obtained a permit therefor from the City Council.

E. *Persons Acting For Others.* It shall be unlawful for any person to distribute or cause to be distributed any circulars, handbills or other written or printed matter for advertising purposes on behalf of any other person unless such other person shall have first obtained a permit therefor. It shall be the duty of any person making such distribution to inform himself/herself as to whether or not the proper permit has been obtained by such other person.

F. *Attachment To Vehicles Prohibited.* It shall be unlawful for any person to distribute or cause to be distributed any circulars, handbills or other written or printed material for advertising, promotion or announcement purposes by attaching any such items to the windshield or any other part of a vehicle without first having obtained a permit therefor from the City Council and the prior written consent of the operator of said vehicle to do so. (R.O. 2007 §§3-18--3-23; Ord. No. 4778 §1, 11-7-83)

19. The cost of a permit or license for “bill, circular and other advertising matter” distributors is \$26.00. Code of Ordinances § 605.040.

20. Section 605.040 provides this fee is waived if the content of circulars pertains to the distributor’s own business.

21. The penalty for a violation of § 605.440(E) is a fine of as much as \$500.00, imprisonment in the City or County Jail for a period of as many as ninety days, or both. Code of Ordinances § 100.150.

22. An officer of Defendant’s police department “may arrest on view, and without a warrant, any person the officer sees violating or who such officer has reasonable grounds to

believe ... has violated any ordinance over which such officer has jurisdiction.” MO. REV. STAT. § 544.216.

23. In enacting and enforcing § 605.440, Defendant and its agents act under color of state law.

24. Section 605.440 represents the policy of Defendant toward the distribution of leaflets on unoccupied vehicles.

FACTUAL ALLEGATIONS

25. Brian Becker is a citizen of Missouri who is active in the public debate of issues of public concern in Poplar Bluff, Missouri.

26. Most recently, Plaintiff was actively opposed to a local \$20 million bond initiative for sewer upgrades, which was supported by Defendant.

27. One method Plaintiff has found to spread his message on issues of public concern is the placement of handbills on unoccupied vehicles.

28. The spreading of messages by placing handbills on unoccupied vehicles is an efficient and cost-effective method of reaching a large number of persons living or found in an area, in a short period of time, for which no comparative alternative exists.

29. Requiring advance written consent of each vehicle’s owner before a handbill could be placed on an unoccupied vehicle would impair the ability of an individual to win the attention of drivers and vehicle owners who do not object to receiving his material and message.

30. When Plaintiff has placed handbills on unoccupied vehicles, he has done so after spending money to print the leaflets and for the purpose of communicating ideas to others.

31. Plaintiff’s intent in placing a handbill on unoccupied vehicles is to communicate a message on an issue of public concern.

32. Leafleting unoccupied vehicles also allows individuals to maintain anonymity and reach their intended audience while avoiding conflict.

33. When Plaintiff has placed handbills on unoccupied vehicles, he has done so securely, for example by placing the handbill under the blade of a windshield wiper.

34. In Plaintiff's experience, when handbills are placed securely on unoccupied automobiles, they remain securely on the automobile, regardless of weather conditions until the driver returns.

35. In Plaintiff's experience, few, if any, drivers who receive a handbill on their unoccupied vehicle throw the handbill to the ground.

36. On November 6, 2012, an officer of Defendant's police department issued to Plaintiff a uniform citation alleging that he violated § 605.440(E) by placing handbills on vehicles without a permit on November 4, 2012.

37. Although the citation lists a court date of December 18, 2012, Plaintiff has not been charged with a violation of § 605.440(E). No proceedings related to Plaintiff's alleged violation of § 605.440(E) have been initiated.

38. The officer who issued the citation asked Plaintiff who provided him the handbills that were found secured to unoccupied vehicles.

39. When Plaintiff declined to answer, the same or another officer of Defendant's police department on the same date went to the local Office Depot seeking evidence that could identify the person who printed the handbills.

40. Upon information and belief, Office Depot employees refused to voluntarily turn over any records.

41. Later that evening, an officer returned to Office Depot with a warrant and seized a note with the name and cell phone number of the person who copied that handbills opposed to Defendant's initiative, a receipt, two proofs of the handbills, and a thumb drive with digital images of the original design for the handbills.

42. On November 9, 2012, Plaintiff's counsel drafted and sent a letter to Defendant's Prosecutor, discussing the case law on vehicle leafleting and demanding that the Prosecutor agree to dismiss any charge against Plaintiff for any alleged violation of § 605.440(E).

43. On November 15, 2012, the Prosecutor responded that, while a court date was listed on the citation, Plaintiff has not yet been charged with violating § 605.440 and that no charging decision had yet been made.

44. On that same date, during a phone call in which Plaintiff's counsel sought assurances that no charges would be brought, the Prosecutor refused to provide such assurances and would not say when he would make such a decision whether to charge Plaintiff with a violation of § 605.440(E).

45. Plaintiff reasonably fears that he will be arrested and punished for constitutionally protected expression absent intervention by this court.

46. As a result of the threatened enforcement of § 605.440(E), Plaintiff is chilled from distributing handbills regarding issues of public concern by placing them on unoccupied vehicles within the City of Poplar Bluff.

COUNT I

*Popular Bluff Code of Ordinances § 605.440(E) is
Unconstitutional under the Free Speech Clause of the First Amendment*

47. Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

48. Section 605.440(E) is an unconstitutional prior-restraint on speech.

49. Section 605.440(E) is a content-based restriction on speech in that it imposes a permit requirement in which the cost of the permit is determined by the content of the message.

50. Section 605.440(E) is not narrowly tailored to achieve any significant government interest.

51. Section 605.440 fails to leave open ample alternatives for Plaintiff's to convey his message to those who want to receive it, or who do not object to receiving it.

COUNT II

*Poplar Bluff Code of Ordinances § 605.440(E) Violates the
Free Speech Guarantee of Article I, § 8 of the Constitution of the State of Missouri*

52. Plaintiff repeats, re-alleges, and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as fully set forth herein.

53. Section 605.440 impermissibly infringes on free speech rights guaranteed by the Constitution of the State of Missouri.

WHEREFORE Plaintiff prays this Court:

- A. Enter declaratory judgment pursuant to 42 U.S.C. § 1983 finding Poplar Bluff Code of Ordinances § 605.440 unconstitutional;
- B. Issue a preliminary and permanent injunctions and, if necessary, a temporary restraining order enjoining Defendant, its officers, agents, servants, employees, attorneys, and all persons acting in concert with them, or in connection with them, from enforcing or threatening to enforce § 605.440(e);
- C. Award Plaintiff's costs, including reasonable attorneys' fees, pursuant to 42 U.S.C. §1988; and
- D. Allow such other and further relief to which Plaintiff may be entitled.

Respectfully submitted,

/s/ Anthony E. Rothert
ANTHONY E. ROTHERT, #44827MO
GRANT R. DOTY, #60788MO
AMERICAN CIVIL LIBERTIES
UNION OF EASTERN MISSOURI
454 Whittier Street
St. Louis, Missouri 63108
Phone: 314/652-3114
Fax: 314/652- 3112

Attorneys for Plaintiff

Verification

I have studied the allegations of the Verified Complaint and, pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based upon my personal knowledge.

/s/ Brian Becker
Brian Becker