UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JAMES DEFERIO,

Plaintiff,

v.

CASE NO.: 5:08cv1211 GTS-GJD

CITY OF ITHACA; EDWARD VALLELY, individually and in his official capacity as Chief of Police for the City of Ithaca; J. NELSON, individually and in his official capacity as a police officer for the City of Ithaca police department; SCOTT GARIN, individually and in his official capacity as a police officer for the City of Ithaca police department; A. NAVARRO, individually and in his official capacity as a police officer for the City of Ithaca police department; and RICHARD NIEMI, individually and in his official capacity as a police officer for the City of Ithaca police department,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff James Deferio ("Deferio") challenges City of Ithaca's on-going policy that prohibits any noise that can be heard 25 feet away from the source in Ithaca Commons and other public areas, and the underlying ordinances, Ithaca Municipal Code §§ 240-4 and 157-8, facially and as applied to Deferio's religious expression. These ordinances and policy – that have been previously ruled unconstitutional by the United States Court of Appeals for the Second Circuit and enjoined by this Court in *Deegan v. Ithaca* – prevent Deferio from expressing his religious message in public ways in the City of Ithaca ("Ithaca"), thereby violating his fundamental rights

operating at the core of the First and Fourteenth Amendments to the United States Constitution. For this reason, Deferio seeks immediate relief in the form of a preliminary injunction.

STATEMENT OF FACTS

Deferio is a professing evangelical Christian and a traveling evangelist for his religious beliefs. (James Deferio Affidavit, attached to Motion for Preliminary Injunction as Exhibit "D," "Aff.," ¶ 2). As a tenet of his faith, Deferio goes to public areas and publicly proclaims his faith and convictions to others. (Aff.,¶ 2).

Because Deferio believes that his faith offers an accurate conception of God and reality, he attempts to evangelize and witness to others about the benefits of his faith. (Aff.,¶ 5). Deferio also addresses current social and political topics from his particular religious perspective. (Aff.,¶ 5). For this purpose, Deferio preaches, that is, he speaks with a raised voice. (Aff., ¶ 4; Verified Complaint "Compl.," ¶ 19). The preaching allows him to be heard and it helps facilitate further discussion. (Aff.,¶ 4).

Deferio does not seek monetary gain from his expressive activity; he merely wants others to be exposed to his ideas (Aff.,¶ 6). He has no intention of forcing anyone to listen to him, nor does he have any intention of interfering with pedestrian traffic. (Aff.,¶ 7).

In furtherance of his religious beliefs, Deferio wishes to convey his message in public areas in Ithaca, New York, particularly, an area known as Ithaca Commons (also known as Commons) (Aff.,¶ 8). Ithaca Commons is a pedestrian mall subject to much commotion and noise, and is frequented by pedestrians, including college students from nearby Cornell. (Aff.,¶ 10). As such, Ithaca Commons is an ideal place for Deferio's preaching (Aff.,¶ 10).

Deferio knows Kevin Deegan, the plaintiff in *Deegan v. Ithaca*, a case that was brought in the Northern District of New York (Aff.,¶ 11; Compl.,¶ 26). Deegan visited Ithaca commons

in 1999 to express his religious beliefs, but was stopped by Ithaca police officers because he was supposedly too loud. (Compl.,¶ 27). Ithaca ordinances and policy prohibited sound that could be heard 25 feet from its source anywhere in Ithaca, including the Ithaca Commons area. (Compl.,¶ 27). Deegan brought suit challenging the prohibition and eventually appealed the case to the Second Circuit Court of Appeals. That Court --- in *Deegan v. City of Ithaca*, 444 F.3d 135 (2d Cir. 2006) --- ruled that Ithaca's 25-foot noise rule violated the First and Fourteenth Amendments. (Compl.,¶ 28). Following the opinion, Deegan obtained civil judgment against Ithaca from the Northern District of New York, dated December 14, 2006, that, among other things, permanently enjoined Ithaca from "enforcing and/or applying City of Ithaca Municipal Code 240-4 and 157-18 so as to preclude legally protected speech that can be heard at a distance of twenty-five feet on public streets, sidewalks or ways, in the City of Ithaca…" (Compl.,¶ 28) (Copy of civil judgment in case of *Deegan v. City of Ithaca*, et al, attached to Motion for Preliminary Injunction as Exhibit "A"). Being aware of this decision, Deferio anticipated that Ithaca would no longer enforce its 25-foot noise rule. (Aff.,¶ 12; Compl.,¶ 30).

On August 5, 2008, Deferio went to the Ithaca Commons area in order to express his religious beliefs. (Aff.,¶ 13). Upon situating himself in the Commons, Deferio began preaching about his beliefs. (Aff.,¶ 13). Subsequently, Ithaca police officer J. Nelson approached Deferio and warned him to stop speaking because an Ithaca ordinance prohibited noise that could be heard 25 feet away. (Aff.,¶ 14). Officer Nelson went on to explain that, because Deferio's voice could be heard 25 feet away, Deferio would have to lower his voice or stop speaking. (Aff.,¶ 15).

In response, Deferio told Officer Nelson that he would try to speak so as not to violate the noise ordinance. (Aff.,¶ 15). Deferio stopped preaching, and lowered his voice, but he still tried to speak about his religious beliefs. (Aff.,¶ 16). However, a few minutes later, a woman walking

on a sidewalk about 30 feet away yelled to Deferio that she could not hear him. (Aff.,¶ 16). So as to be heard, Deferio raised his voice again. (Aff.,¶ 16).

Soon thereafter, another Ithaca Police Officer, Officer Scott Garin, approached Deferio and ordered him to lower his voice. (Aff.,¶ 17). According to Officer Garin, if "you are being heard 25 feet from the source and get a complaint, you are in violation." (Aff.,¶ 17). Deferio explained to Officer Garin that a lawsuit involving Kevin Deegan had already settled this exact issue, but Officer Garin demanded that Deferio comply with the 25-foot noise rule. (Aff.,¶ 18).

Deferio attempted to comply with the 25-foot noise rule, but his message was substantially hindered. (Aff.,¶ 19). Because he could not be heard without violating the 25-foot noise rule, Deferio left the Ithaca Commons for fear of citation and arrest. (Aff.,¶ 19).

Deferio decided to go back to Ithaca Commons and bring Kevin Deegan with him. (Aff.,¶ 21). Deferio thought Deegan's presence would assure him of his right to speak. (Aff.,¶ 21). Upon Deegan agreeing to do this, on August 9, 2008, Deferio and Deegan, along with some other friends, went to the Ithaca Commons to express their religious beliefs. (Aff. ¶ 22).

Subsequently, Deferio began preaching to those in the Commons Area. (Aff.,¶ 23). But he was soon approached by two Ithaca Police Officers --- Officer A. Navarro and Officer Richard Niemi. (Aff.,¶ 23). Deegan stepped forward and conferred with the two officers about their concerns. (Aff.,¶ 24). Officer Navarro asked Deegan if they had a noise permit, and Deegan replied that they did not. (Aff.,¶ 25). Officer Navarro then said that a specific noise ordinance applied to them, and it regulated their volume. (Aff.,¶ 25). Officer Navarro went on to explain how the police evaluated volume under the noise policy: "The way we gauge it is by 25 feet from the source of the noise. If we could still hear the noise 25 feet from the source, then it's a violation of the noise ordinance." (Aff.,¶ 25). Officer Navarro then issued a warning for

violating the 25-foot noise rule. ((Aff.,¶ 25).

Deegan asked Officer Navarro if the officer was aware of the order issued by federal court on the 25-foot noise rule. (Aff.,¶ 26). Officer Navarro responded no. (Aff.,¶ 26). Deegan proceeded to show Officer Navarro a copy of the civil judgment entered in favor of Deegan against the City of Ithaca (Ex. "A"), but to no avail. (Aff.,¶¶ 26-27). Officer Navarro retorted that the judgment and order named two people who no longer worked for the City of Ithaca. (Aff.,¶ 27). Officer Navarro added that if they continued to violate the 25-foot rule, the police officers would begin to issue tickets for violation of the ordinance. (Aff.,¶ 27).

Deegan pointed out that Ithaca was also enjoined in the order and judgment, not just Ithaca employees. (Aff.,¶ 28). Deegan asked Officer Navarro if he was willing to disobey an order and judgment issued by a federal judge. (Aff.,¶ 28). Officer Navarro was nonplussed. He disregarded the judgment, saying "as far as I know you could have written that up on your home computer." (Aff.,¶ 28). Officer Navarro reiterated that the police officers would begin to issue tickets if speech could be heard from a distance of 25 feet (Aff. ¶ 29).

As a result of the conversation between Officer Navarro and Deegan, and the other actions of the Ithaca police officers, Deferio immediately refrained from engaging in any expressive activity in the Ithaca Commons area for fear of arrest and of citation. (Aff.,¶ 30). In fact, Deferio and his friends immediately left the area. (Aff.,¶ 30).

Deferio still has a desire to express his Christian message in Ithaca. (Aff.,¶ 32). He wants to go to public ways, sidewalks, and parks (including the Ithaca Commons area) and convey his beliefs via preaching. (Aff.,¶ 32). But Deferio is chilled and deterred from sharing his message anywhere in Ithaca for fear of citation and/or arrest. (Aff.,¶ 32).

Ithaca Code § 240-4 reads:

§ 240-4. Unreasonable noise prohibited.
[Amended 8-4-2004 by Ord. No. 2004-12]

A. No person shall intentionally cause public inconvenience, annoyance or alarm or recklessly create a risk thereof by making unreasonable noise or by causing unreasonable noise to be made.

B. For the purpose of implementing and enforcing the standard set forth in Subsection A of this section, "unreasonable noise" shall mean any sound created or caused to be created by any person which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of the public or which causes injury to animal life or damages to property or business. Factors to be considered in determining whether unreasonable noise exists in a given situation include but are not limited to any or all of the following:

(1) The intensity of the noise.

(2) Whether the nature of the noise is usual or unusual.

(3) Whether the origin of the noise is associated with nature or human-made activity.

(4) The intensity of the background noise, if any.

(5) The proximity of the noise to sleeping facilities.

(6) The nature and the zoning district of the area within which the noise emanates and of the area within 500 feet of the source of the sound.

(7) The time of the day or night the noise occurs.

(8) The time duration of the noise.

(9) Whether the sound source is temporary.

(10) Whether the noise is continuous or impulsive.

(11) The volume of the noise.

(12) The existence of complaints concerning the noise from persons living or working in different places or premises who are affected by the noise.

C. This section shall not be interpreted to prevent the issuance of permits pursuant to § 240-14 that will authorize particular sound sources.

D. "Person" defined. For the purposes of this section:

(1) For an offense that occurs on any public property where permission was obtained to use that public property, a "person" shall include the person or persons who obtained permission to utilize that property for that event.

(2) For an offense that occurs on private property, a "person" shall

include any adult person or persons who live in or on the property that is involved in the offense.

(3) For an offense that occurs after granting of a permit pursuant to Article III of this chapter, a "person" shall include the person or persons who are listed on the permit.

(Copy of ordinance is attached to Motion for Preliminary Injunction as Exhibit "B"). Section 157-8 states:

Amplified sound, lights and other electrical equipment.

A. Except by special permit issued by the Commons Advisory Board or its designee, no person shall operate or cause to be operated on the Ithaca Commons any boom box, tape recorder, radio or other device for electronic sound amplification in a loud, annoying or offensive manner such that noise from the device interferes with conversation or with the comfort, repose, health or safety of others within any building or at a distance of 25 feet or greater.

B. Except by special permit issued by the Commons Advisory Board or its designee, no person shall operate or cause to be operated any boom box, stereo system, tape recorder, radio or other device from on or inside any building on the Ithaca Commons, the sound from which is directed outside towards the pedestrian mall.

C. The provisions of Subsections A and B above shall not apply to emergency warning devices, sirens, alarms or other devices being used solely for public safety purposes.

D. Amplified sound may be used between 11:00 a.m. and 2:00 p.m., and between 5:00 p.m. and 10:00 p.m., Monday through Friday, and between 10:00 a.m. and 10:00 p.m., Saturday and Sunday, upon approval of a noise permit by the Commons Advisory Board or its designee. Sound levels should be kept low and subject to immediate volume reduction when requested by any City official, staff member of the Ithaca Downtown Partnership, or member of the Commons Advisory Board.

E. The use of supplemental lighting, movie and slide projectors and any other type of electrical equipment or display will be carefully reviewed by the City Clerk, City Electrician, and the Commons Advisory Board so as to minimize nuisance or hazard conditions.

(Copy of ordinance is attached to Motion for Preliminary Injunction as Exhibit "C").

Because of the past actions of the Ithaca police officers in implementing these ordinances, Deferio is afraid that the officers will enforce the 25-foot noise rule. (Aff.,¶ 33). The impact of chilling and deterring his speech constitutes irreparable harm to Deferio. (Compl.,¶ 58). Deferio does not have an adequate remedy at law for the loss of his constitutional rights.

(Compl.,¶ 59).

ARGUMENT

To obtain a preliminary injunction, a party must show (1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004). *See also Mastrovincenzo v. City of New York*, 435 F.3d 78, 89-90 (2d Cir. 2006) (distinguishing between prohibitory and mandatory injunctions). Deferio wishes to prohibit the continued enforcement of Ithaca ordinances and policy banning speech that can be heard 25 feet from the source. Given the binding precedent in *Deegan v. Ithaca*, and the injunction issued by this Court concerning this very matter, Deferio will succeed on the merits of this case. If injunction is not granted, Deferio will suffer deprivation of constitutional rights and irreparable harm. Accordingly, Deferio is entitled to injunctive relief.

I. DEFERIO WILL SURELY SUCCEED ON THE MERITS

In the face of the Second Circuit opinion, and Order of this Court in *Deegan*, Ithaca continues to interpret and enforce their ordinances to ban speech that can be heard 25 feet away from its source. As has been previously determined, this ban lacks narrow tailoring and is premised on vague laws. The 25-foot noise rule violates the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

A. Deferio's Desired Speech is Protected by the First Amendment

Deferio wants to communicate his religious beliefs through preaching and subsequent dialogue. These means of communication constitute protected speech. *See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (oral and written dissemination of

religious viewpoint are protected speech). And this protection does not fade away because Deferio's message is religious or deemed controversial. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

B. Deferio Desires to Speak in a Traditional Public Forum

Ithaca's ability to regulate speech on public property depends "on the character of the property at issue." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). There are three types of public property for speech purposes: traditional public fora, designated public fora, and nonpublic fora. *Id*. Deferio desires to speak in Ithaca Commons, an area that constitutes traditional public fora:

> The record…clearly establishes that the [Ithaca] Commons is a classic public forum, as the term has developed in First Amendment jurisprudence, because it is the type of area traditionally available for public expression and the free exchange of ideas….

Deegan, 444 F.3d at 141. This classification is significant because "'[s]peech finds its greatest protection in traditional public fora' like Ithaca Commons." *Id*. at 142 (citation omitted).

C. Ithaca's 25-foot Noise Rule Lacks Narrow Tailoring in Violation of the First Amendment

To satisfy the First Amendment, a regulation on speech in a traditional public forum must be (1) content-neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) permit alternative channels for expression. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *Accord Deegan*, 444 F.3d at 142. The narrow tailoring requirement means that regulations cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 798. A restriction is "narrowly tailored" only if it eliminates no more evil than it seeks to remedy. *Frisby*, 487 U.S. at 485.

This burden is not satisfied with the proclamation of abstract goals. Rather, "the First Amendment demands that municipalities provide tangible evidence that speech-restrictive

regulations are necessary to advance the proffered interest in public safety." *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 863 (9th Cir. 2001) (quotations omitted). And, while not dispositive, availability of less burdensome alternatives signals a lack of tailoring. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Thus, a substantial burden rests on Ithaca to prove that its ordinances and policy are narrowly tailored. *Deegan*, 444 F.3d at 142.

With the 25-foot speech ban, Ithaca cannot hope to meet its burden in this case. The proscription is simply too broad. And, the overbreadth of the restriction cannot be legitimately disputed. For this exact issue has been conclusively decided by the Second Circuit in *Deegan, supra*. In *Deegan*, Ithaca interpreted its ordinances, §§ 240-4 and 157-18, to ban noise heard 25 feet away from its source, and then applied these ordinances to prevent a religious speaker --- Kevin Deegan --- from preaching in Ithaca Commons. The Second Circuit spent little time invalidating the 25-foot noise rule for lack of narrow tailoring:

> By targeting noise that is "unreasonable," Ithaca's noise regulations evince an intent to reach noise that exceeds what is usual and customary in a particular setting. The stipulated facts reflect that in addition to being a commercial center, the Commons is used regularly for festivals, performing events, exhibitions, political demonstrations, and recreational activities. These are not quiet pursuits that require a quiet atmosphere. Defendants interpret "unreasonable noise" as sound that "can be heard" 25 feet from its source. Construed in this broad manner, the regulatory proscriptions of the Noise Ordinance and the Sound Amplification Rule embrace not only Deegan's protected speech, but the sounds that typify the Commons and the activities it is meant to facilitate. For example, the expert's factual findings, adopted by the District Court, show that the decibel level of speech that would comply with the 25-foot rule was often lower than the decibel level generated by the footsteps of a person in high heeled boots, conversation among several people, the opening and closing of a door, the sounds of a small child playing on the playground, or the ring of a cell phone. These facts so vividly illustrate that the regulations as applied restrict considerably more than is necessary to eliminate excessive noise that we need hardly say more. Quite simply, a noise regulation that prohibits "most normal human activity," including a spirited conversation by only two people, is not narrowly tailored to serve the City's interest in maintaining a reasonable level of sound, at least in a public forum like the Commons.

Id. at 143 (citation omitted).

The *Deegan* case is factually and legally indistinguishable from the case before this Court. Since it involved the same rule applied here (25-foot noise rule), the same place (Ithaca Commons), the same type of speech (religious preaching), and the same Defendants (Ithaca). The *Deegan* case even involved the same ordinances at issue in the present case. The only difference is the number assigned to one of the ordinances. In *Deegan*, Ithaca applied §§ 240-4 and 157-18. *Id*. at 138-39. And here, Ithaca has applied §§ 240-4 and 157-8. (Ex. "B"; Ex. "C"). Section 240-4 applied to Deferio is the exact same § 240-4 applied in *Deegan*. *Compare* Ex. "B" *with id*. at 139. And comparison reveals that § 157-8 reads precisely the same as § 157-18 applied in *Deegan*. *Compare* Ex. "C" *with id*. at 139.

After the Second Circuit ruled §§ 240-4 and 157-18 unconstitutional, and this Court issued its Injunction, Ithaca did not bother to repeal or amend the ordinances, or even reinterpret the ordinances, so as to stop continued application of the 25-foot noise rule. Ithaca just changed the number of one of its ordinances and kept enforcing them in the same unconstitutional manner. In so doing, Ithaca has blatantly disregarded a binding published opinion from the Second Circuit and binding Order of this Court.

Ithaca cannot plead mistake here. This is not a matter of a lone Ithaca police officer misapplying an Ithaca ordinance due to some oversight. Indeed, multiple Ithaca police officers have referenced, explained, and enforced Ithaca's 25-foot noise rule. These incidents reveal an on-going policy and practice stubbornly held by Ithaca, knowing full well that this policy and practice violates a Second Circuit opinion and this Court's injunction.

It is generally the duty of the government to become aware of the law and to educate its officers and employees regarding the law. This principle especially holds in this case since Ithaca

was the very party who participated and is subject to an injunction in *Deegan v. Ithaca*. Here, Ithaca has no excuse for circumventing the law.

Kevin Deegan--the very plaintiff in the *Deegan v. Ithaca*--accompanied Deferio to the Ithaca Commons, with a copy of the judgment from his civil case in tow. Yet, the police officers still applied Ithaca's unconstitutional 25-foot noise rule, accusing Deegan of fabricating the judgment. Their refusal to accept this Court's Judgment is indefensible. This case cannot be distinguished from *Deegan v. Ithaca*, and the holding of *Deegan* should be applied with even greater force here:

> Taking into account the "nature and purposes of the [Commons], along with its ambient characteristics," we hold that the City of Ithaca Municipal Code Sections 240-4 and 157-18, as interpreted and applied by Defendants, unreasonably burden protected speech and therefore cannot withstand Deegan's constitutional challenge.

Id. at 144 (citation omitted).

D. Ithaca's 25-foot Noise Rule is Vague in Violation of the Fourteenth Amendment

A law or policy is unconstitutionally vague if it fails to define an offense with sufficient definiteness such that ordinary people can understand the prohibited conduct or it fails to establish standards that permit law enforcement personnel to enforce the law in a non-arbitrary, non-discriminatory manner. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). When a vague law regulates expressive conduct, speakers engage in self-censorship because they do not have sufficient notice to determine what speech is permitted, and officials engage in viewpoint discrimination because nothing limits their regulatory discretion. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). For these reasons, laws that impinge on speech require linguistic precision. *Hynes v. Mayor and Council of the Borough of Oradell*, 425 U.S. 610, 620 (1976).

In this case, Ithaca ordinances §§ 240-4 and 157-8 are vague because neither ordinance by its language actually bans unamplified noise that can be heard 25 feet away. Ithaca, instead, construes and enforces these ordinances contrary to their express language, creating an untenable situation for Deferio and others who are unable to rely on laws according to their written terms.

Ithaca ordinance § 240-4 prohibits "unreasonable noise" and then provides a list of factors by which to evaluate unreasonable noise. (Ex. "B"). None of those factors, though, specifies a 25-foot noise rule (Ex. "B"). *See Deegan*, 444 F.3d at 145 (interpreting Ithaca ordinance § 240-4). Likewise, Ithaca ordinance § 157-8 deals with amplified noise, not bare speech. (Ex. "C"). *See Deegan*, 444 F.3d at 145 (interpreting Ithaca ordinance § 157-18). The *Deegan* Court provides a binding interpretation of these ordinances with respect to Ithaca's 25-foot noise rule: "Nothing in either ordinance indicates that they are to be applied as bright line proscriptions of any sound that can be heard at a distance of 25 feet from its source, anywhere, at any time." *Id*. at 145.

Despite the holding, Ithaca persists in applying and enforcing two ordinances (§§ 240-4 and 157-8) to create a bright line rule banning all noise heard 25 feet away from its source. This interpretation and application is evidenced by the fact that multiple police officers on multiple occasions warned Deferio – under threat of criminal penalty – that Ithaca ordinances ban all noise heard 25 feet away. There is an obvious disconnect between the policies as written and the policies as interpreted and applied. As a result, Ithaca's actions violate due process.

In confronting this precise issue, the Second Circuit held:

> The Ithaca noise regulations indicate that a number of factors are relevant to determining whether a violation has occurred, but they do not give fair notice that speaking in a voice that can be heard at a distance of 25 feet, without more, constitutes "unreasonable noise." Nevertheless, the City has stipulated that reasonableness is determined solely on that basis. Like the vending ordinances in *Chalmers*, the ordinances at issue in this case do not necessarily violate due process. Rather, it is Defendants' unpredictable construction and application of the ordinance that deprived Deegan of his right to understand what conduct violated

> the law. The manner in which the Ithaca noise ordinances are enforced makes them constitutionally infirm.

Id. at 146. Just as in *Deegan*, Ithaca has continued the same "unpredictable construction and application" of their ordinances. *Id*. And, just as in *Deegan*, Ithaca continues to violate basic principles of due process.

II. DEFERIO IS SUFFERING IRREPARABLE HARM

Deferio is presently and continually prevented from exercising his First Amendment rights in Ithaca, specifically, in Ithaca Commons. Deferio desires to speak as soon as possible, but the fear of punishment prevents him from doing so. This loss of the constitutional right to speak is both actual and imminent, and such loss of First Amendment freedoms results in irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

CONCLUSION

For reasons set forth herein, Deferio respectfully requests that this Court grant his Motion for Preliminary Injunction.

Respectfully submitted,

ROBERT E. GENANT
NDNY Bar Roll#: 105257
Genant Law Office
3306 Main Street
P.O. Box 480
Mexico, NY 13114
(315) 963-7296 telephone
(315) 963-8274 fax

Attorneys for Plaintiff

s/Nathan W. Kellum
NATHAN W. KELLUM
NDNY Bar Roll#: 302459
TN BAR #13482; MS BAR # 8813
JONATHAN SCRUGGS*
TN Bar # 025679
Alliance Defense Fund
699 Oakleaf Office Lane, Suite107
Memphis, TN 38117
(901) 684-5485 telephone
(901) 684-5499 fax

Attorneys for Plaintiff

*motion for admission pro hac vice forthcoming

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, along with the Complaint and Summons, has been delivered to a process server for service on defendants, this 12th day of November, 2008.

s/Nathan W. Kellum