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Participating Attorney for the Plaintiff on behalf of The
Rutherford Institute

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KENNETH J FLECK, : CIVIL ACTION NO.
 :
 Plaintiff, :
 :
 v. :
 :
 BOROUGH OF MANASQUAN, :
 :
 :
 Defendant : COMPLAINT

_____Plaintiff, by way of complaint against defendant, hereby
avers:

PARTIES, JURISDICTION AND VENUE

1. The plaintiff, Kenneth J. Fleck, is an individual who
resides at 118 18th Ave. Belmar, New Jersey.

2. The defendant, Borough of Manasquan, is a governmental
entity created under the laws of the State of New Jersey and
maintains a principal place of business at 201 East Main Street,
Manasquan, Monmouth County, New Jersey.

3. This suit arises under the United States Constitution and the laws of the United States and is brought pursuant to 42 U.S.C. §1983, together with pendent state constitutional claims.

4. The Court has jurisdiction over plaintiff's federal claims pursuant to 38 U.S.C. §1331, as an action arising under the Constitution of the United States, and 28 U.S.C. §1343(A)(3), to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States; and over plaintiffs pendent state law claims pursuant to 28 U.S.C. §1367.

5. The Court has authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201 et seq.

6. Venue is properly laid pursuant to 28 U.S.C. §1391(b) in the District of New Jersey, because defendant is located in this district, and the events giving rise to the claim occurred in this district.

FACTUAL ALLEGATIONS

7. Kenneth Fleck is an evangelical minister who regularly preaches the Christian Gospel in public forums including public boardwalks and beaches, public sidewalks and public parks.

8. Prior to January 7, 2012, the defendant Borough enacted Ordinance Ord. No. 2051-09 § 3, which provided in part that:

"It shall be unlawful for any person to make, cause; suffer or permit to be made or to be continued any behavior or loud, unnecessary or unusual noise or any noise or act which either

annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of any other person within the corporate limits of the Borough of Manasquan. Such conduct shall be considered a nuisance."

9. The aforesaid Ordinance then further provided that:

"The following acts, among others, are declared to be nuisances in violation of this section, when the noise emanating from such acts is clearly audible from at least one hundred (100) feet from the actor, source, or device, within the corporate limits of the Borough of Manasquan. The enumeration shall not be deemed to be exclusive:....(b) **Yelling, Shouting, Etc.** Yelling, shouting, hooting, whistling, or singing on the public streets or yelling, shouting, hooting, whistling or singing at any other place, whether public or private, in such a manner and in such volume and intensity to disturb the peace and quiet of the neighborhood, so as to annoy or disturb the quiet, comfort or repose of persons in any office or dwelling, hotel or any other type of residence or of any persons in the vicinity."

10. In addition the aforesaid ordinance further provided that:

"Persons Affected. This section is intended to apply and to bind the owners, tenants, occupants, guests and all other persons as heretofore defined, within the corporate limits of the Borough of Manasquan. This section shall not apply to representatives and employees of the Borough of Manasquan performing tasks on official business of the Borough of Manasquan, or for specific activities authorized by Mayor and Council."

11. Finally the ordinance provided that:

"Enforcement. It shall be the duty of the Police Department and the Code Enforcement Department of the Borough of Manasquan to determine whether or not this section has been

and is being complied with and to enforce the provisions of this section against any person violating the same."

12. On January 7, 2012, at approximately 1:15 in the afternoon, Kenneth Fleck utilizing a small amplifier began preaching on the public sidewalk at the intersection of Main Street and State Highway 71, in the Borough of Manasquan.

13. All of the properties adjoining said sidewalk, where he was preaching, were of a business nature and the location of his preaching was diagonally across the intersection from Borough Hall.

14. While he was preaching he was approached by Sergeant Nicholas Tumminelli of the Manasquan Police Department.

15. Sergeant Tumminelli, in his official capacity as a police officer employed by the Borough, had been observing Kenneth Fleck and based upon his observations he had determined, pursuant to the duty imposed upon him by the ordinance, that Kenneth Fleck was violating the aforesaid ordinance.

16. The basis for this determination was that the sound of Kenneth Fleck's preaching was exceeding 100 feet from its source and was of a manner so as to cause a disturbance.

17. As a result of such determination Sergeant Tumminelli, in his official capacity as a police officer employed by the Borough, issued Kenneth Fleck a citation for a violation of the aforesaid ordinance.

18. In issuing the citation Sergeant Tumminelli was

implementing the official policies of the Borough as set forth in the aforesaid ordinance.

19. As a result of the issuance of this citation Kenneth Fleck terminated his preaching.

20. As a result of the issuance of this citation Kenneth Fleck was required to retain counsel and defend against the charges made against him on account of his preaching.

21. On March 21, 2012, the aforesaid charges against Kenneth Fleck proceeded to trial before the Municipal Court of the Borough of Manasquan.

22. At the conclusion of the prosecution's case the charges were dismissed due to a failure of the State to produce evidence that the manner of Kenneth Fleck's actions were of a disturbing nature.

23. In rendering the aforesaid decision the court relied solely upon the lack of proofs presented and did not make any determination as to the constitutionality of the ordinance or find it necessary to give the ordinance a limiting interpretation in order for it to survive constitutional scrutiny.

24. Since the issuance of the charges Kenneth Fleck has not attempted to preach in Manasquan and because of the existence of the aforesaid ordinance, the fact that the decision of the Municipal Court did not invalidate or limit the reach of the ordinance and the threat of future charges, Kenneth Fleck is unable

to preach again in Manasquan.

25. As a result of the aforesaid charges Kenneth Fleck sustained pecuniary losses in the form of costs associated with his defense.

26. As a result of the aforesaid charges Kenneth Fleck sustained non-pecuniary losses in the form of emotional distress including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and such other non-pecuniary losses as maybe disclosed in discovery.

FIRST COUNT
(First Amendment Violation)

27. On its face, the aforesaid Ordinance No. 2051-09 § 3 violates the First Amendment of the United States Constitution in that it restricts, restrains and inhibits unlawfully a substantial amount of expressive activity, that is protected by said Amendment.

28. On its face, the aforesaid Ordinance No. 2051-09 § 3 violates the First Amendment in that it lacks objective standards to guide officials, such as Sergeant Tumminelli, and speakers, such as the plaintiff, as to what constitutes noise, including speech, that "annoys" or "disturbs... any other person" or what constitutes speech made in "a manner and in such volume and intensity [as] to disturb the peace."

29. On its face, the aforesaid Ordinance No. 2051-09 § 3 violates the First Amendment in that it permits without any objective standards "Mayor and Council" by executive action to

exempt such "specific activities" as they deem appropriate from the constraints of the ordinance.

30. As applied to the plaintiff Ordinance No. 2051-09 § 3 violates the First Amendment in that it restricts, restrains and inhibits the plaintiff from engaging in expressive activity, fully protected by the First Amendment, in areas that are public and free and open to the public access.

31. As a proximate result of the passage and application of this ordinance, the plaintiff has suffered, and will continue to suffer, irreparable injury, in that he has been and will continue to be, deprived of his right of free expression as guaranteed by the First Amendment to the Constitution, and has been, and will continue to be, "chilled" or discouraged in the exercise of those rights.

32. As a proximate result of the passage and application of this ordinance, the plaintiff has sustained the pecuniary and non-pecuniary damages previously set forth.

33. Pursuant to 42 U.S.C. §1988 plaintiff is entitled to attorney's fees and expert fees in connection with the bringing of the claims alleged in this count.

Wherefore, plaintiff, demands judgement against the defendant Borough of Manasquan for:

- a. Compensatory damages;
- b. Nominal damages in the event no compensatory damages are

allowed;

- c. Injunctive relief declaring null and void Ordinance No. 2051-09 § 3 and permanently enjoining its enforcement;
- d. Costs of the action;
- e. Reasonable attorney's fees and costs; and,
- f. Such other and further relief as this Court may deem appropriate and just.

SECOND COUNT
(Due Process and Equal Protection Violation)

34. On its face, the aforesaid Ordinance No. 2051-09 § 3 violates due process as guaranteed by the Fourteenth Amendment in that it fails to provide a person of ordinary intelligence fair warning as to what conduct will constitute a violation of its provisions.

35. On its face, the aforesaid Ordinance No. 2051-09 § 3 violates equal protection as guaranteed by the Fourteenth Amendment in that without a compelling governmental interest and without any rational basis it permits Mayor and Council to create a class of speakers subject to the ordinance and another class not subject to it.

Wherefore, plaintiff, demands judgement against the defendant Borough of Manasquan for:

- a. Compensatory damages;
- b. Nominal damages in the event no compensatory damages are allowed;

- c. Injunctive relief declaring null and void Ordinance No. 2051-09 § 3 and permanently enjoining its enforcement;
- d. Costs of the action;
- e. Reasonable attorney's fees and costs; and,
- f. Such other and further relief as this Court may deem appropriate and just.

**THIRD COUNT
(State Constitution Violations)**

36. Both on its face and as applied to the plaintiff, and for the reasons set forth above, the provisions of Ordinance No. 2051-09 § 3 violate rights of speech and association, due process and equal protection as guaranteed by Article 1, of the New Jersey Constitution.

37. As a proximate result of the passage and application of this ordinance, the plaintiff has suffered, and will continue to suffer, irreparable injury, in that he has been and will continue to be, deprived of his right of free expression as guaranteed by constitution of New Jersey, and has been, and will continue to be, "chilled" or discouraged in the exercise of those rights.

38. As a proximate result of the passage and application of this ordinance, the plaintiff has sustained the pecuniary and non-pecuniary damages previously set forth.

Wherefore, plaintiffs, demand judgement against the defendant Borough of Manasquan for:

- a. Compensatory damages;

- b. Nominal damages in the event no compensatory damages are allowed;
- c. Punitive damages;
- d. Injunctive relief declaring null and void Ordinance No. 2051-09 § 3 and permanently enjoining its enforcement;
- e. Costs of the action;
- f. Reasonable attorney's fees and costs; and,
- g. Such other and further relief as this Court may deem appropriate and just.

F. MICHAEL DAILY, JR., LLC
Participating Attorney for the Plaintiff
on behalf of The Rutherford Institute

BY: /s/ F. Michael Daily, Jr.
F. Michael Daily, Jr.

Jury Demand

Plaintiff herewith demands a jury trial as to all issues which are triable by jury.

F. MICHAEL DAILY, JR., LLC
Participating Attorney for the Plaintiff
on behalf of The Rutherford Institute

BY: /s/ F. Michael Daily, Jr.
F. Michael Daily, Jr.

Dated: May 4, 2012.