

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CHRISTOPHER WAECHTER and GABRIEL
NOVAK,

Plaintiffs,

vs.

CITY OF SAUGATUCK, a Michigan municipal corporation; KIRK HARRIER, City of Saugatuck City Manager, sued in his official and individual capacities; MICHAEL CLARK, City of Saugatuck Planning Director, sued in his official and individual capacities; and JON BENDER, a Saugatuck-Douglas Police Officer, sued in his individual capacity,

Defendants.

Case No. _____

Hon. _____

_____/

Michael J. Steinberg (P43085)
Kary L. Moss (49759)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814
msteinberg@aclumich.org

Miriam J. Aukerman (P63165)
Marc S. Allen
American Civil Liberties Union Fund of Michigan
1514 Wealthy Street, SE, Suite 242
Grand Rapids, Michigan 49506
(616) 301-0930
mallen@aclumich.org

Attorneys for Plaintiffs

_____/

COMPLAINT

Introduction

1. This civil rights case is filed by two accomplished musicians, Christopher Waechter and Gabriel Novak, who wish to play music on the public sidewalks of Saugatuck and accept tips from passersby. Musical performance is expression that is fully protected by the First Amendment and public sidewalks are a quintessential public forum where First Amendment protections are strongest. Accordingly, the courts have held that individual musicians who play for tips, as well as small groups of people engaged in other expressive activity, cannot constitutionally be required to obtain a permit to express themselves on public sidewalks.

2. Nonetheless, the City of Saugatuck, its city manager, its city planner and a police officer have decided to apply a city public entertainment ordinance regulating businesses to individual street musicians. Under the ordinance, business establishments must obtain a “public entertainment license” before offering entertainment on the premises. Businesses must apply for the license 60 days before the event, secure a liability insurance policy and corporate surety bond, pay a fee, and provide sufficient toilets and off-street parking. The Saugatuck City Council grants or denies the application, but there is no deadline by which it must act. The penalty for violating the ordinance is a misdemeanor punishable by up to 90 days in jail, a \$500 fine, or both.

3. Although the ordinance is clearly directed at business establishments and not individual street musicians, Defendants have used the licensing requirement of the ordinance to halt Mr. Waechter’s and Mr. Novak’s respective performances on the public sidewalk. In fact, Mr. Novak was arrested for performing without a license and imprisoned in the county jail for a weekend. Mr. Waechter was forbidden from exercising his right to express himself on Independence Day.

4. Mr. Waechter and Mr. Novak would like to perform in Saugatuck again. They ask this Court to declare that applying the licensing requirement of the public entertainment ordinance to them violates their First Amendment free speech and expression rights and their Fourteenth Amendment due process rights. They also ask this Court to enter an order enjoining Defendants from requiring them to comply with the licensing requirements, and to award damages and other relief.

Parties, Jurisdiction, and Venue

5. Plaintiff Christopher Waechter is a 21-year-old Hope College student who resides in Holland, Michigan.

6. Plaintiff Gabriel Novak is a 19-year-old college student. He attends the Cleveland Institute of Music in Cleveland, Ohio during the school year and lives with his parents in South Haven, Michigan during the summers.

7. Defendant City of Saugatuck is a municipal corporation in the State of Michigan.

8. Defendant Kirk Harrier is the City Manager for the City of Saugatuck, who, upon information and belief, resides in the Western District of Michigan. He is sued in his official and individual capacities.

9. Defendant Michael Clark is the Planning Director of the City of Saugatuck who, upon information and belief, resides in the Western District of Michigan. He is sued in his official and individual capacities.

10. Defendant Jon Bender is a sworn police officer of the Saugatuck-Douglas Police Department who, upon information and belief, resides in the Western District of Michigan. He is sued in his individual capacity.

11. Jurisdiction is proper under 28 U.S.C. § 1331 because this is a civil action arising under the Constitution and laws of the United States.

12. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred within this judicial district.

Facts

Officer Bender Halts Christopher Waechter's Musical Performance on a Public Sidewalk on Independence Day

13. Plaintiff Christopher Waechter is a 21-year-old student at Hope College in Holland, Michigan. He is an accomplished musician who has been playing viola for over a decade. He has played in several orchestras and quartets and was the first chair viola player in the Hope College Orchestra for two years. Mr. Waechter is the recipient of Hope College's 2012 Instrumental Scholarship.

14. In addition to playing viola in an orchestra, Mr. Waechter performs as a street musician on public sidewalks in towns across western Michigan. While he does not actively seek payment for these performances, people leave tips in his viola case to express appreciation of his music.

15. Mr. Waechter has performed in Grand Rapids, Grand Haven, and Holland without incident.

16. On or before July 4, 2014, Mr. Waechter carefully checked the city of Saugatuck's website and ordinances to determine whether Saugatuck had any special rules for street musicians. He could not find any such rules.

17. On the evening of July, 4, 2014, Mr. Waechter drove from Holland to Saugatuck and began playing his viola on a sidewalk downtown near the intersection of Butler Street and Mason Street at approximately 6:15 p.m.

18. Mr. Waechter left his viola case open near him to accept tips.

19. He did not actively ask pedestrians for tips, and he continued to play whether or not he received tips.

20. Mr. Waechter did not impede sidewalk traffic.

21. No business owners or pedestrians asked him to quiet down or leave.

22. In fact, pedestrians generally indicated that they were pleased with his performance. Several stopped to listen for a few moments and smiled.

23. At approximately 6:30 p.m., Defendant Jon Bender, a Saugatuck-Douglas police officer approached Mr. Waechter.

24. Officer Bender informed Mr. Waechter that he was forbidden from playing his viola without a permit.

25. When Mr. Waechter asked if he was permitted play with his viola case closed, Officer Bender informed him that he could not.

26. Mr. Waechter told the police officers that there was no policy posted on the Saugatuck website suggesting that street musicians were required to obtain a permit before playing music on the sidewalks.

27. At some point during this exchange, two more police officers arrived.

28. One of the newly-arrived officers told Mr. Weachter that he could continue to play in a nearby park with his case closed, but that he could not play on the sidewalks.

29. Officer Bender and the other officers were enforcing the permit requirement of Saugatuck Code of Ordinances § 111.25 *et seq.*

30. Mr. Waechter reluctantly moved into the park and played for a few minutes before packing up and leaving because there were very few people in the park.

31. Mr. Waechter would like to return to Saugatuck to perform music on the sidewalks of Saugatuck, but he does not because he fears arrest.

32. Application of the Saugatuck Ordinance § 111.25 *et seq.* is having a chilling effect on Mr. Waechter's desire to express himself by playing music on the public sidewalks of Saugatuck.

33. In addition to being denied his constitutional right to express himself through music, Mr. Waechter was deprived, and continues to be deprived, of tips that he would have received for performing music.

34. If this Court issues an order enjoining Defendants from banning Mr. Waechter from playing music on the sidewalks without a permit, Mr. Waechter will return to Saugatuck to perform on the first weekend following the injunction.¹

35. Mr. Waechter does not have an adequate remedy at law for the continued violation of his rights.

Officer Bender Arrests and Jails Gabriel Novak for Playing Music on the Public Sidewalk

36. Plaintiff Gabriel Novak is a 19-year-old sophomore at the Cleveland Institute of Music, a highly selective conservatory located in Cleveland, Ohio. He is studying composition, as well as piano and jazz performance. He has composed jazz pieces for piano and flute, and performed in a number of venues including Lincoln Center in New York City, Hill Auditorium in Ann Arbor, and Mixon Hall at the Cleveland Institute of Music. In 2013 Mr. Novak was named a Distinguished Scholar at the Michigan Youth Arts Festival. In 2014 he taught vocal arrangement at the Interlochen Center for the Arts.

¹ If Hope College is on vacation or Mr. Waechter is out of the state, he will perform on the first weekend following his return to college.

37. Starting in mid-June of 2014, Mr. Novak began playing an acoustic guitar and singing on a public sidewalk in downtown Saugatuck. Mr. Novak performed songs by Bob Dylan, Tracy Chapman, John Mayer, and other singer-songwriters.

38. He typically played for a few hours on Saturday afternoons, and usually in the same spot at the intersection of Butler Street and Mason Street.

39. When Mr. Novak played, he would leave his guitar case open near him and accept tips.

40. He did not ask people for tips, and he played whether or not they were provided.

41. Mr. Novak played for his own enjoyment and for the enjoyment of the people in downtown Saugatuck.

42. He was not selling or advertising any products.

43. Until June 27, 2014, police officers, including Defendant Officer Jon Bender, waved at Mr. Novak while he was playing.

44. At no time before June 27, 2014, did any officer, business owner or pedestrian in Saugatuck ask Mr. Novak to stop playing or tell him he was being disruptive.

45. To the contrary, many families would gather around Mr. Novak and listen to him play after buying ice cream at a nearby store. He received numerous compliments and tips.

46. On Friday June 27, 2014, Defendant Michael Clark, the planning director for the City of Saugatuck, approached Mr. Novak and told him that he was not allowed to play on the sidewalk without an entertainment license.

47. Mr. Clark told Mr. Novak that he would not be able to apply for a license until the following Tuesday.

48. Mr. Clark further stated that once Mr. Novak applied for a license, the process would take a long time to complete because it required approval by the city council.

49. Based on Mr. Clark's statements, Mr. Novak packed up his guitar and went home.

50. That night, Mr. Novak researched the rights of street performers and found that several state and federal courts have held that performing music on public sidewalks for tips is protected speech under the First Amendment and that it was unconstitutional to require street musicians to obtain a license.

51. Mr. Novak compiled a list of cases and printed it out along with a short statement he wrote about the First Amendment right to perform music on public sidewalks.

52. Mr. Novak also made a small sign that said, "Music is Expression."

53. On the afternoon of Saturday, June 28, 2014, Mr. Novak returned to his regular spot and began performing. He placed the "Music is Expression" sign, statement on street musicians, and list of cases on open guitar case.

54. Mr. Novak played for a short time.

55. A few families and young adults stopped to listen and eat ice cream.

56. An employee from the nearby ice cream shop stood near Mr. Novak and passed out free samples of fudge.

57. Mr. Novak was not blocking sidewalk traffic or the entryways to any businesses.

58. Defendant Officer Bender approached Mr. Novak and told him that he was not allowed to play on the sidewalk.

59. Officer Bender was enforcing the permit requirement of Saugatuck Code § 111.25 *et seq.*

60. Mr. Novak calmly told Officer Bender that he had a right to play music in a public place and that requiring street musicians to obtain permits before playing on a public sidewalk was unconstitutional.

61. In response, Officer Bender arrested Mr. Novak, transported him to Allegan County Jail and booked him.

62. Although Mr. Novak only asserted his rights verbally and never physically resisted Officer Bender, Mr. Novak was charged with the felony of resisting and obstructing a police officer and disorderly conduct.

63. Despite having no criminal record and having strong ties to the community, Defendants refused to release Mr. Novak on bond.

64. Instead, Mr. Novak was imprisoned in the county jail from Saturday afternoon until Monday afternoon when he was arraigned.

65. On July 23, 2014, the Allegan County Circuit Court took under advisement Mr. Novak's plea to a misdemeanor charge of disturbing the peace and dismissed the other charges. So long as Mr. Novak is not involved in any criminal activity within twelve months from that date, the case will be dismissed and he will have no criminal record.

66. Although Mr. Novak would have liked to perform music on the sidewalks of Saugatuck in July and August of 2014, he refrained from doing so because of fear of being arrested and charged with violating Saugatuck's business regulations on public entertainment.

67. Application of the Saugatuck Code § 111.25 *et seq.* is having a chilling effect on Mr. Novak's desire to express himself by playing music on the public sidewalks of Saugatuck.

68. In addition to being denied his constitutional right to express himself through music, Mr. Novak has been and continues to be deprived of tips that he would have received for performing music.

69. Mr. Novak would like to play his acoustic guitar again on the public sidewalks of Saugatuck, but he will not do so absent an injunction for fear of arrest.

70. If this Court issues an order enjoining Defendants from banning Mr. Novak from playing music on the sidewalks without a permit, Mr. Novak will perform again on the streets of Saugatuck when he returns to the city this spring.

71. Mr. Novak does not have an adequate remedy at law for the continued violation of his rights.

Defendants' Policy of Applying the Saugatuck Public Entertainment Ordinance to Ban Street Musicians from Performing on Sidewalks Without a Permit

72. Defendants have interpreted the Saugatuck Public Entertainment Ordinance (hereafter, "the Ordinance"), Saugatuck Code §§ 111.25 - 111.99, to require street musicians such as Mr. Waechter and Mr. Novak to obtain a permit to play music on public sidewalks.

73. However, the Ordinance, by its terms, is directed at public entertainment offered by businesses, not individual street musicians such as Mr. Waechter and Mr. Novak.

74. The Ordinance falls within Title XI or the "Business Regulations" Title of the City of Saugatuck Code of Ordinances. (Relevant portions of the Business Regulations, including the Ordinance, are attached as Exhibit A.)

75. "Businesses" are defined under Title XI as corporations, organizations, persons and other entities that "**own or rent within a structure permitted by the local zoning ordinance.**" Section 111.01. (Emphasis added.)

76. The licensing provision of the Ordinance, § 111.25, states, “No person shall engage in the business within the city of offering a public amusement, entertainment, exhibition or performance without obtaining a license therefore, except establishments which are already license under the Michigan Liquor Control Act.”

77. To obtain a public entertainment license, the business must submit an application at least 60 days before offering the entertainment by providing such information as the “proposed business location, facilities, maximum capacity to be admitted, business history and responsibility.” Section 111.28(A).

78. Additionally, the applicant must (1) obtain an insurance policy “to insure the applicant, employees and agents against liability for death or injury to persons or damages to property which may result from the conduct of the licensed business”; (2) obtain a “corporate surety bond”; (3) pay a license fee; and (4) “provide toilet facilities for both men and women in the ratio of one toilet for every 200 admissions, and one lavatory for every 300 admissions.” Section 111.28(A).

79. After the City Clerk refers the application to Chief of Police, County Health Department and the State Fire Marshal and/or other public officials the clerk deems appropriate, the application and any reports prepared by public officials are submitted to City Council, which must either approve or deny the application. Section 111.28(B) and (C).

80. The Ordinance does not specify a time by which the City Council must rule upon the application.

81. If more than 499 persons are admitted per day “to the licensee’s place of business,” the City Council may require that police officers be assigned to the business at the expense of the business. Section 111.28(E).

82. The Ordinance also contain numerous requirements for operation including, (1) providing “off-street parking facilities sufficient to accommodate all persons to be admitted to his or her place of business,” and (2) denying “admit[tance] to his or her premises any person who is then under influence of intoxicating beverages or of drugs.” Section 111.29.

83. Violation of any provision of the Ordinance, including the licensing requirement of § 111.25, is a misdemeanor punishable by up to 90 days in jail, a \$500 fine, or both, plus applicable costs. See §§ 111.25, 111.99 and 10.99.

84. In addition to applying the Ordinance to prevent Mr. Waechter and Mr. Novak from playing music on the sidewalks of Saugatuck, Defendants have repeatedly relied upon the Ordinance to prevent other street musicians from performing.

85. For example, on June 27, 2014, Officer Bender told a guitarist to stop playing music for tips on a public sidewalk because doing so without a city permit violates Saugatuck Code § 111.25.

86. Similarly, on July 13, 2014, an officer approached two musicians who were playing their guitars on the sidewalk near the Saugatuck City Hall at the intersection of Butler Street and Cutler Street with their guitar cases open for tips.

87. The officer called Defendant Kirk Harrier, the Saugatuck City Manager, for instructions and Mr. Harrier advised the officer to inform the musicians that a permit was required to perform.

88. City Manager Kirk Harrier participated in the decision to enforce the licensing requirement of Saugatuck Code § 111.25 against street musicians.

89. The City Manager Kirk Harrier was aware of, approved of, and ratified the practice to enforce § 111.25 against street musicians.

90. The City of Saugatuck, Mr. Harrier and Mr. Clark maintained, and continue to maintain, a practice, policy or custom of applying the licensing requirement of § 111.25 to street musicians such as Mr. Waechter and Mr. Novak.

91. Defendants were acting under the color of state law at all times pertinent to this complaint.

Causes of Action

Count I

First Amendment – Free Speech Clause

42 U.S.C § 1983

92. The First Amendment to the United States Constitution guarantees individuals in this country the right to freedom of speech and expression. The First Amendment serves as a restriction on state and local government officials through the Fourteenth Amendment.

93. Persons violating the First Amendment under color of state law are liable at law and in equity under 42 U.S.C. § 1983.

94. Musical performance is expressive activity protected by the First Amendment.

95. A public sidewalk is a quintessential public forum where protection of First Amendment expression is strongest.

96. Criminalizing the act of playing music on a public sidewalk without a permit is a prior restraint on expression that violates the First Amendment.

97. Defendants violated, and continue to violate, Mr. Waechter and Mr. Novak's First Amendment rights by prohibiting them from expressing themselves through performing music on the public sidewalks of Saugatuck without first obtaining a permit.

98. Defendants violated, and continue to violate, Mr. Waechter and Mr. Novak's First Amendment rights by prohibiting them from expressing themselves by performing music on the

public sidewalks of Saugatuck without first obtaining a license pursuant to the Saugatuck public entertainment ordinance. Saugatuck Code §§ 111.25 -111.99.

99. Defendants violated, and continue to violate, Mr. Waechter and Mr. Novak's First Amendment rights by criminalizing the act of expressing themselves through musical performance on Saugatuck public sidewalks unless they seek a license 60 days prior to the dates they wish to perform.

100. The requirements that Mr. Waechter and Mr. Novak obtain public liability insurance, obtain a corporate surety bond, pay a licensing fee, provide toilet facilities, and provide off-street parking before playing music on the public sidewalks of Saugatuck each violated, and continue to violate, their First Amendment rights.

101. The failure for the Saugatuck Public Entertainment Ordinance to mandate that the city make a prompt decision on an application for a public entertainment license violated, and continues to violate, Mr. Waechter and Mr. Novak's First Amendment rights.

Count II
Fourteenth Amendment – Due Process Clause
42 U.S.C § 1983

102. The Due Process Clause of the Fourteenth Amendment bars government officials from enforcing criminal laws that do not define the offense with sufficient definiteness to provide ordinary people with notice that their conduct is criminal.

103. Persons violating the Fourteenth Amendment under color of state law are liable at law and in equity under 42 U.S.C. § 1983.

104. The Saugatuck Public Entertainment Ordinance, Saugatuck Code § 111.25 *et seq.*, does not provide street musicians such as Mr. Waechter and Mr. Novak fair notice that it is a crime to play music on the streets of Saugatuck without first complying with its provisions.

105. Rather, an ordinary reading of the plain language of the Public Entertainment Ordinance suggests that it applies only to businesses, not street musicians.

106. Defendants violated, and continue to violate, Mr. Waechter and Mr. Novak's Due Process rights by banning them from playing music on the public sidewalks, under the threat of criminal prosecution, unless they first attempt to comply with the numerous requirements of the Ordinance.

Relief Requested

For the reasons set forth above, Plaintiffs request that this Court:

- A. Enter judgment in favor of Plaintiffs and against Defendants;
- B. Declare that Defendants violated, and continue to violate, Mr. Waechter and Mr. Novak's First Amendment rights by applying the licensing requirements of the Saugatuck public entertainment ordinance to individual street performers;
- C. Declare that requiring individual street musicians to acquire a permit before expressing themselves through music on public sidewalks violates the First Amendment;
- D. Declare that Defendants violated, and continue to violate, Mr. Waechter and Mr. Novak's Due Process rights by applying the licensing requirements of the Saugatuck public entertainment ordinance to individual street performers;
- E. Enter preliminary and permanent injunctions forbidding Defendants from applying the licensing requirements of the public entertainment ordinance to individual street performers such as Mr. Waechter and Mr. Novak;
- F. Award Mr. Waechter compensatory damages for violation of his constitutional rights;
- G. Award Mr. Novak compensatory damages for the violation of his constitutional rights after July 23, 2014;
- H. Award Plaintiffs attorneys' fees and costs pursuant to 42 U.S.C. §1988; and
- I. Grant or award such other relief as the Court may deem just, equitable or appropriate under the circumstances.

Respectfully submitted,

/s/ Michael J. Steinberg

Michael J. Steinberg (P43085)

Kary L. Moss (49759)

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2966 Woodward Avenue

Detroit, Michigan 48201

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1514 Wealthy Street, SE, Suite 242

Grand Rapids, Michigan 49506

(616) 301-0930

mallen@aclumich.org

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