STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP1069

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

WILLIAM M. GRUBER,

Defendant-Respondent.

ON APPEAL FROM AN ORDER DISMISSING THE CASE ON CONSTITUTIONAL GROUNDS ENTERED BY THE DANE COUNTY CIRCUIT COURT, THE HONORABLE MARYANN SUMI PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUE

Is disorderly conduct under Wis. Admin. Code § Adm 2.14(2)(k) a constitutionally valid time, place, and manner regulation under the First Amendment?

The circuit court answered: no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs should fully present and meet the issue on appeal. *See* Wis. Stat. § 809.22(2)(b) (2011-12).

The State requests publication. A published decision will contribute to the development of time, place, and manner First Amendment doctrine, including the burden shifting standard applicable to a First Amendment challenge. Publication will answer a substantial question of continued public interest regarding the constitutionality of disorderly conduct. *See* Wis. Stat. § 809.23(1).

STATEMENT OF THE CASE

The constitutionality of code section 2.14(2)(k), prohibiting disorderly conduct, is the only issue in this appeal.

On five occasions in September to December 2012, the defendant, William M. Gruber, engaged in disorderly conduct according to a civil forfeiture summons filed by the State of Wisconsin. (R. 1:1-2, A-Ap. 101-02). The complaint alleges that Gruber engaged in his disorderly conduct in the Wisconsin State Capitol around the noon hour. (R. 2:2-9, A-Ap. 105-12). Officers with the Capitol Police Department observed Gruber's conduct, which the complaint described as boisterous, unreasonably loud, or otherwise disorderly conduct. (*Id.*).

The complaint relied upon officer accounts to describe Gruber's disorderly conduct in the Capitol rotunda. (*Id.*). An officer reported that, on September 24, Gruber shouted "extremely loud" followed by a shout "at the top of his voice." (*Id.* at 3, A-Ap. 106). The officer reported that Gruber's shouting "echoed loudly" through the Capitol and upset a couple in the building. (*Id.*). An officer told Gruber that his shouting was extremely loud and unacceptable in the building. (*Id.*). An officer reported that, on October 16, Gruber shouted "extremely loud" on many occasions over a one hour period in the Capitol. (*Id.* at 4; A-Ap. 107). The officer reported that "he had heard Gruber shout very loudly on many occasions (almost daily) in the Capitol," but he "had never heard Gruber shout this loud before." (*Id.*). An officer reported that, on November 29, he heard "Gruber shouting at the top of his lungs" in the Capitol. (*Id.* at 6, A-Ap. 109). The officer explained that Gruber's "voice could be heard throughout the Capitol building even inside rooms on the 4th floor of the Capitol." (*Id.*). An officer reported that, on December 4, he heard "Gruber shouting at the top of his lungs several times." (*Id.* at 7, A-Ap. 110). The officer stated that he "could hear Gruber yelling throughout the Capitol building." (*Id.*). An officer reported that, on December 13, he heard Gruber yelling when the Capitol rotunda "was filled with school children between the ages of 4 and 13 years old." (*Id.* at 9, A-Ap. 112). The officer explained that "Gruber's loud yelling cause[d] patrons to be startled"

and he observed patrons "having strange looks of disgust." (*Id*. at 8-9, A-Ap. 111-12). The officer stated that Gruber's yelling caused some patrons to leave the immediate area. (*Id*. at 9, A-Ap. 112).

Gruber received a civil summons and forfeiture complaint for engaging in disorderly conduct on these five occasions in September to December 2012. The complaint alleged that he violated an administrative code section that reads:

> (2) . . . [W]hoever does any of the following shall be subject to a forfeiture of not more than $500:
>
> . . . .
>
> (k) Engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances where the conduct tends to cause or provoke a disturbance in public places or private areas in those buildings and facilities managed or leased by the department, or on state properties surrounding those buildings.

Wis. Admin. Code § Adm 2.14(2)(k). Gruber never filed a motion to dismiss the complaint. Instead, the court dismissed the case sua sponte. (R. 8:1, A-Ap. 114).

The court relied upon a circuit court decision in *State v. Crute*, Dane County Case No. 13-FO-2108. (R. 8:1, A-Ap. 114). As described in the *Crute* decision, the factual record is "scant" given the procedural posture of the case. (R. 10:3, A-Ap. 115). The *Crute* decision, in turn, relied upon a recent federal district court decision for additional

facts. (*Id*. at 4, A-Ap. 116 (citing *Kissick v. Huebsch, et al*., 956 F. Supp. 2d 981 (W.D. Wis. 2013))). The *Kissick* decision provides additional relevant facts beyond those contained within the complaint.

The *Kissick* decision explained that, in February 2011, protests occurred at the Capitol regarding legislative changes to collective bargaining rights of public employees. *Id*. at 989. Thereafter, a sing-along emerged. *Id*. Known as the "Solidarity Sing Along," participants gathered in the Capitol rotunda at noon for an hour on most weekdays. *Id*., *see also id*. at 984. The sing-along event did not have a permit. *Id*. at 989. Although Gruber participated in the sing-along,[1] he was not cited in this case for participating in an unpermitted event that had been declared unlawful. Instead, Gruber was cited for boisterous, unreasonably loud, or otherwise disorderly conduct.

Michael W. Crute, a participant in the sing-along at the Capitol rotunda, received a citation under a different code section for participating in an unlawful event. (R. 10:7-8, A-Ap. 119-20). Crute received a citation when he refused to leave the unpermitted sing-along after the police had declared the event unlawful and repeatedly told participants to leave. (*Id*. at 5, A-Ap. 117). Crute received a

[1]This Court may take judicial notice of available records in other appeals, including Appeal Nos. 14-AP-1079 and 14-AP-1074. *See Perkins v. State*, 61 Wis. 2d 341, 346-47, 212 N.W.2d 141 (1973) (although a circuit court cannot take judicial notice of its own records in another case, an appellate court may take judicial notice of available records, such as those that are easily accessible).

citation for a violation under an administrative code section that reads:

> "(2) . . . [W]hoever does any of the following shall be subject to a forfeiture of not more than $500:
>
> . . . .
>
> (vm) Any participant or spectator within a group constituting an unlawful assembly, who intentionally fails or refuses to withdraw from the assembly after it has been declared unlawful, shall be subject to the penalties identified in sub. (2) (intro.). Any event may be declared unlawful if its participants:
>
> . . . .
>
> 5. Enter or occupy any building or facility managed or leased by the department, without authorization."

(R. 10:7-8, A-Ap. 119-20 (quoting Wis. Admin. Code § Adm 2.14(2)(vm)5.)). Crute filed a motion to dismiss his citation before a different branch of the Dane County Circuit Court, the Honorable John W. Markson presiding. (*Id*. at 6-8, A-Ap. 118-20). Crute alleged that code section 2.14(2)(vm)5. was facially unconstitutional. (*Id*.).

Judge Markson granted Crute's motion to dismiss the citation. (*Id*. at 3, A-Ap. 115). The court concluded that code section 2.14(2)(vm)5. was facially unconstitutional. (*Id*. at 25, A-Ap. 137). The court focused its decision on a permit regulation contained within the code applicable to a violation for participating in an unlawful event. (*Id*. at 3-26, A-Ap. 115-38). The court stated that the regulation was not

narrowly tailored under time, place, and manner doctrine. (*Id*. at 25, A-Ap. 137). The court dismissed Crute's case. (*Id*. at 25-26, A-Ap. 137-38).

Shortly after the *Crute* decision, the court, the Honorable Maryann Sumi presiding, dismissed Gruber's disorderly conduct case sua sponte. (R. 8:1, A-Ap. 114). The court summarily concluded that "the administrative rule sought to be enforced in this forfeiture actuion [sic] violates the First Amendment to the United States Constitution." (*Id*.). The court relied upon "the reasons well stated in State of Wisconsin v Michael W Crute" in the "Decision and Order of Dismissal." (*Id*.). Thus, the court concluded that code section 2.14(2)(k) was facially unconstitutional because it was not narrowly tailored under the time, place, and manner doctrine. (*Id*.; R. 10:25, A-Ap. 137). The permit regulation at issue in *Crute* did not apply to Gruber's disorderly conduct at issue in this case. The court declared disorderly conduct unconstitutional by relying on a circuit court decision that had declared as unconstitutional an unlawful event code section. (*Id*.; R. 10:7-26, A-Ap. 119-38). In the two-sentence dismissal order, the court provided no analysis to explain its application of the *Crute* decision to Gruber's case that involved different conduct and a different code section. Instead, the court summarily declared that the disorderly conduct regulation was facially unconstitutional. (R. 8:1, A-Ap. 114).

The State filed a timely notice of appeal. (R. 11:1-2). The State now appeals the circuit court's dismissal order. This appeal differs from the pending appeal in *State v. Crute*, Appeal No. 14-AP-0659.[2] The *Crute* appeal addresses the constitutionality of a code section related to participation in an unlawful event, whereas this appeal addresses the constitutionality of disorderly conduct. *Compare* Wis. Admin. Code § Adm 2.14(2)(vm)5. (participation in an unlawful event) *with id.* § Adm 2.14(2)(k) (disorderly conduct). While both appeals address time, place, and manner doctrine and include some of same statements summarizing the doctrine, these appeals address different facts and different code sections. This appeal in *Gruber* is separate and distinct from the appeal in *Crute*.

ARGUMENT

The government may prohibit disorderly conduct without violating the First Amendment. Here, the Department reasonably promulgated a disorderly conduct code section substantially similar to the disorderly conduct state statute. Yet, the circuit court struck down the regulation sua sponte after Gruber repeatedly engaged in disorderly conduct in the Capitol. The court erred when it summarily concluded that the code section prohibiting

[2]The State provides this distinction based upon an order in the *Crute* appeal, dated June 2, 2014, where this Court urged the State to provide a summary explaining the extent to which the arguments in a brief are duplicative to *Crute* or other appeals. *See Perkins*, 61 Wis. 2d at 346-47 (judicial notice of available records, including those that are easily accessible).

disorderly conduct was unconstitutional under the First Amendment. This Court should correct this error and find that disorderly conduct code section 2.14(2)(k) is constitutional.

I. The Constitutionality Of A Content Neutral Regulation Is A Question Of Law That An Appellate Court Reviews De Novo Under Intermediate Scrutiny.

The constitutionality of an administrative code presents a question of law that an appellate court reviews de novo without deference to the decision and conclusions of the circuit court. *See State v. Baron*, 2009 WI 58, ¶ 10, 318 Wis. 2d 60, 769 N.W.2d 34; *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328; *State v. Janssen*, 219 Wis. 2d 362, 370, 580 N.W.2d 260 (1998); *Brandmiller v. Arreola*, 199 Wis. 2d 528, 536-37, 544 N.W.2d 894 (1996); *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 446, 439 N.W.2d 562 (1989).

The appellate court begins its de novo review by applying the proper level of judicial scrutiny. Under strict scrutiny, an administrative code is upheld only when narrowly tailored to serve a compelling government interest. *In re Mental Commitment of Mary F.-R.*, 2013 WI 92, ¶ 35, 351 Wis. 2d 273, 839 N.W.2d 581. In contrast, an administrative code is presumed valid when it is rationally related to a legitimate government interest under rational basis. *Id.* Between these two extremes rests intermediate scrutiny. *Id.* at n.22. An administrative rule withstands

intermediate scrutiny when the rule is substantially related to its objective. *See Gerhardt v. Estate of Moore*, 150 Wis. 2d 563, 570-71, 441 N.W.2d 734 (1989); *see also State v. Pocian*, 2012 WI App 58, ¶ 14, 341 Wis. 2d 380, 814 N.W.2d 894.

This Court should review the constitutionality of disorderly conduct code section 2.14(2)(k) de novo. *See Baron*, 318 Wis. 2d 60, ¶ 10. Should this Court find that this code section regulates speech or expressive conduct, it should undertake its review under intermediate scrutiny. *See id.*, ¶ 14; *see also Lyttle v. Killackey*, 546 F. Supp. 2d 583, 591-93 (N.D. Ill. 2008) (applying intermediate scrutiny). The code section at issue is a content neutral regulation at a designated public forum. *See Kissick*, 956 F. Supp. 2d at 999, n.18 (noting disagreement between the parties as to whether the Capitol should be considered a traditional or designated public forum, but "the court need not decide that issue at this point, because the two are treated essentially the same"). Even when regulating speech or expressive conduct, such a content neutral regulation must survive only intermediate scrutiny. *Baron*, 318 Wis. 2d 60, ¶ 14. An appellate court conducts its review de novo. *Id.*, ¶ 10.

II. Gruber Has The Burden To Demonstrate That The Disorderly Conduct Code Section Implicates The First Amendment.

A regulation generally enjoys a presumption of constitutionality. *See State v. Robert T.*, 2008 WI App 22, ¶ 5, 307 Wis. 2d 488, 746 N.W.2d 564. Therefore, the party challenging the regulation has the burden to establish its unconstitutionality beyond a reasonable doubt. *Town of Wayne v. Bishop*, 210 Wis. 2d 218, 231, 565 N.W.2d 201 (Ct. App. 1997). However, the burden reverses when the regulation concerns the First Amendment. *Id.*; *see also State v. Stevenson*, 2000 WI 71, ¶ 10, 236 Wis. 2d 86, 613 N.W.2d 90. Before the burden shifts to the government, the party challenging a regulation has the initial burden to demonstrate that the conduct implicates the First Amendment. *City of Madison v. Baumann*, 162 Wis. 2d 660, 669, 470 N.W.2d 296 (1991).

A preliminary question to answer on appeal is which party bears the burden of proving the constitutionality of the regulation at issue. *See State v. Thiel*, 183 Wis. 2d 505, 522, 515 N.W.2d 847 (1994). To determine which party bears the burden, a court must decide whether the regulation governs speech or conduct. *Baron*, 318 Wis. 2d 60, ¶ 14. Speech includes expressive conduct, but not all conduct is protected speech. *See id.*, ¶ 14, n.6. First Amendment analysis does not apply when the regulation governs neither speech nor expressive conduct. *Id.*, ¶ 14. No burden shifting occurs

because the constitutional challenge does not implicate the First Amendment. *See id*.

In this case, disorderly conduct is the only regulation at issue. Disorderly conduct under the administrative code is substantially similar to disorderly conduct under the state statute. *Compare* Wis. Stat. § 947.01(1) *with* Wis. Admin. Code § Adm 2.14(2)(k). Courts generally review a forfeiture disorderly conduct regulation the same as it would review the disorderly conduct statute. *See*, *e.g.*, *City of Oak Creek v. King*, 148 Wis. 2d 532, 540, 436 N.W.2d 285 (1989); *Lane v. Collins*, 29 Wis. 2d 66, 71-72, 138 N.W.2d 264 (1965); *see also Braun v. Baldwin*, 346 F.3d 761, 764 (7th Cir. 2003). Therefore, the review of this disorderly conduct regulation generally should be the same as the review of the disorderly conduct statute. *See State v. Brownson*, 157 Wis. 2d 404, 408, 459 N.W.2d 877 (Ct. App. 1990) (stating that an administrative code is reviewed the same as a statute).

Gruber has the burden to demonstrate that the disorderly conduct regulation encroached upon constitutionally protected speech or expressive conduct. *See State v. Bagley*, 164 Wis. 2d 255, 264, 474 N.W.2d 761 (Ct. App. 1991). The circuit court invalidated the disorderly conduct regulation in its entirety because the court adopted a decision as to facial—as distinct from as-applied—unconstitutionality. *See AFSCME, Council 79 v. Scott*, 717 F.3d 851, 862-63 (11th Cir. 2013). Therefore, Gruber has the burden to show that the disorderly conduct

regulation facially implicates the First Amendment in a substantial number of instances. *See Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 696 n.9 (6th Cir. 2014) (citing *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988)).

The circuit court erred by finding the disorderly conduct regulation unconstitutional without first requiring Gruber to demonstrate that code section 2.14(2)(k) facially infringed on protected speech or expressive conduct. *See Bagley*, 164 Wis. 2d at 264. Gruber never facially challenged the disorderly conduct regulation, nor did he allege that the regulation encroached upon First Amendment rights as-applied to the sing-along. Instead, the court dismissed Gruber's disorderly conduct case sua sponte. (R. 8:1, A-Ap. 114). The court relied upon the *Crute* decision that found an entirely unrelated unlawful event regulation facially unconstitutional. (*Id.*; R. 10:3-26, A-Ap. 115-38). The fact that Gruber may have committed disorderly conduct at the same time as a sing-along did not give his speech or action any special protection under the First Amendment. *State v. Zwicker*, 41 Wis. 2d 497, 512-13, 164 N.W.2d 512 (1969). He still has the initial burden. *See Bagley*, 164 Wis. 2d at 264. The court erred by dismissing the complaint sua sponte and relieving Gruber of his burden to demonstrate that the disorderly conduct regulation could never be enforced. *See AFSCME, Council 79*, 717 F.3d at 862-63.

This Court should find that the circuit court erred when it bypassed the burden placed upon Gruber to demonstrate that disorderly conduct implicates the First Amendment. *See Baumann*, 162 Wis. 2d at 669. As a question of facial invalidity, Gruber had to show that a substantial number of instances existed where this code section implicated the First Amendment. *See Liberty Coins, LLC*, 748 F.3d at 696 n.9 (citing *New York State Club Ass'n, Inc.*, 487 U.S. at 14). Gruber cannot meet this burden—and made no effort to do so before the circuit court's sua sponte ruling—because the disorderly conduct regulation sanctions only categories of speech or expressive conduct beyond that protected by the First Amendment. *See In re A.S.*, 2001 WI 48, ¶ 16, 243 Wis. 2d 173, 626 N.W.2d 712; *see also State v. Schwebke*, 2002 WI 55, ¶ 38, 253 Wis. 2d 1, 644 N.W.2d 666; *State v. Doughlas D.*, 2001 WI 47, ¶ 17, 243 Wis. 2d 204, 626 N.W.2d 725; *Zwicker*, 41 Wis. 2d at 509-10. This Court should hold that Gruber did not meet his initial burden.

III. The Disorderly Conduct Code Section Is A Constitutionally Valid Time, Place, And Manner Regulation.

It is a long-recognized principle that freedom of speech is not absolute under all circumstances. *Doughlas D.*, 243 Wis. 2d 204, ¶ 17 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)); *see also State v. Becker*, 51 Wis. 2d 659, 664, 188 N.W.2d 449 (1971). The Wisconsin Supreme Court explained that "government

regulation of conduct that intermingles with freedom of speech is not per se unconstitutional." *Baumann*, 162 Wis. 2d at 675. The government may regulate speech through time, place, and manner restrictions without running afoul with the constitution. *Bagley*, 164 Wis. 2d at 265.

When a regulation imposes time, place, or manner restrictions on speech or expressive conduct, the regulation must satisfy four requirements: (1) It must be content neutral, (2) It must serve a legitimate governmental objective, (3) It must leave open ample alternative channels of communication, and (4) It must be narrowly tailored to serve the government objective. *City News and Novelty, Inc. v. City of Waukesha*, 170 Wis. 2d 14, 24, 487 N.W.2d 316 (Ct. App. 1992) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Courts have expressed these four requirements as only three by merging the second and fourth into a single requirement. *See, e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

A court only applies the four-part time, place, and manner analysis to a regulation that restricts speech or expressive conduct. *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1453 n.10 (W.D. Wash. 1994). Unprotected conduct does not receive the benefit of the inquiry because a regulation prohibiting such conduct does not run afoul with the First Amendment. *See id.*; *see also Bagley*, 164 Wis. 2d at 265.

Courts have consistently held that disorderly conduct does not regulate speech or expressive conduct. *See*, *e.g.*, *Zwicker v. Boll*, 270 F. Supp. 131, 135 (W.D. Wis. 1967), *aff'd*, 391 U.S. 353 (1968); *see also In re A.S.*, 243 Wis. 2d 173, ¶ 16. The Wisconsin Supreme Court concluded that "the disorderly conduct statute does not infringe on speech that is protected under the First Amendment because the statute sanctions only categories of speech that have been traditionally regarded as beyond the protection of the First Amendment." *Id.* The court explained that any speech or expressive conduct is incidental to the disorderly conduct. *Schwebke*, 253 Wis. 2d 1, ¶ 38. For example, unreasonably loud conduct is analogous to a noisy truck, making it an unprotected category of speech. *Doughlas D.*, 243 Wis. 2d 204, ¶ 17. Such "'unreasonably loud' speech—even if the words themselves are protected by the First Amendment—carries with it the nonspeech element of excessive volume." *Id.*, ¶ 24. Therefore, the First Amendment does not include the right to engage in disorderly conduct. *Teske v. State*, 256 Wis. 440, 445, 41 N.W.2d 642 (1950).

This Court should find that disorderly conduct code section 2.14(2)(k) is constitutional because it facially regulates conduct alone. *See Baron*, 318 Wis. 2d 60, ¶ 14. The Wisconsin Supreme Court already concluded that the language contained within disorderly conduct "does not proscribe activities intertwined with protected freedoms

unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud, or conduct similar thereto, and under circumstances in which such conduct tends to cause or provoke a disturbance." *Zwicker*, 41 Wis. 2d at 509. That is to say: "the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." *Cox v. Louisiana*, 379 U.S. 559, 564 (1965), quoted in *Soglin v. Kauffman*, 286 F. Supp. 851 (W.D. Wis. 1968) (finding that "the Wisconsin disorderly conduct statute is not void on its face"). Disorderly conduct falls outside the protection of the First Amendment because the regulation sanctions only unprotected categories of speech. *See Zwicker*, 41 Wis. 2d at 510; *see also In re A.S.*, 243 Wis. 2d 173, ¶ 16.

The four-part time, place, and manner test is inapplicable to disorderly conduct because disorderly conduct does not regulate protected speech or expressive conduct. *See Roulette*, 850 F. Supp. at 1453 n.10. Assuming for the sake of argument that this Court found the test applicable to disorderly conduct, then this Court must undertake its analysis with greater latitude in support of the regulation's constitutionality because the regulation imposes only a civil forfeiture. *See Baumann*, 162 Wis. 2d at 679 n.12 (applying greater latitude under vagueness analysis); *see also Stevenson*, 236 Wis. 2d 86, ¶ 30 (requiring greater statutory precision for a felony).

A. The disorderly conduct code section is content neutral.

A government regulation "is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293). Even when a regulation "has an incidental effect on some speakers or messages but not others," the regulation is content neutral when the regulation serves purposes unrelated to the content of expression. *Id.* A regulation distinguishing speech on the basis of ideas or views is content based. *Baron*, 318 Wis. 2d 60, ¶ 32. In contrast, a regulation that does not reference ideas or views is content neutral even when such a regulation confers benefits or imposes burdens on speech. *Id.*

Disorderly conduct code section 2.14(2)(k) is content neutral. The circuit court did not make a specific finding as to the content neutrality of the disorderly conduct regulation. (R. 8:1, A-Ap. 114). However, the plain language of the regulation demonstrates that it is content neutral. *See* Wis. Admin. Code § Adm 2.14(2)(k). Nothing within the regulation references the content of the prohibited conduct. *See Ward*, 491 U.S. at 791. Therefore, the disorderly conduct code section is content neutral. Insofar as this Court undertakes a time, place, and manner review of this code section, this Court should find that it is a content neutral regulation.

B. The disorderly conduct code section serves a legitimate government objective.

A regulation serves a government objective when the interest is legitimate. *City News and Novelty, Inc.*, 170 Wis. 2d at 24. A legitimate government interest need only be significant—not necessarily compelling. *Brandmiller*, 199 Wis. 2d at 541. Under the more stringent strict scrutiny doctrine, the regulation must serve a compelling interest. *See In re Mental Commitment of Mary F.-R.*, 351 Wis. 2d 273, ¶ 35. In contrast, a time, place, and manner review applies the more lax significant interest standard found in intermediate scrutiny doctrine. *Brandmiller*, 199 Wis. 2d at 541.

Many different government objectives properly serve a significant interest. The Supreme Court observed that "[r]egulations of the use of a public forum that ensure the safety and convenience of the people are not 'inconsistent with civil liberties but . . . [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.'" *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)). A regulation may directly or indirectly impact speech. But, "[t]here is no contention, nor can there be, that there does not exist a governmental interest that in some cases can justify some impingement upon freedom of expression." *Baumann*, 162 Wis. 2d at 674.

Disorderly conduct code section 2.14(2)(k) serves a legitimate government objective. In upholding the

constitutionality of the disorderly conduct statute, the Wisconsin Supreme Court noted the important interest in maintaining public order. *Zwicker*, 41 Wis. 2d at 509. The Supreme Court also observed that the absence of order is anarchy. *State v. Maker*, 48 Wis. 2d 612, 614, 180 N.W.2d 707 (1970). The Supreme Court explained: "To recognize the rights of freedom of speech and peaceable assembly as absolutes would be to recognize the rule of force; the rights of other individuals and of the public would vanish." *Zwicker*, 41 Wis. 2d at 509. The government has a legitimate interest to maintain order by prohibiting disorderly conduct. Insofar as this Court undertakes a time, place, and manner review of this code section, this Court should find that it serves a legitimate government objective.

C. The disorderly conduct code section leaves ample alternative channels for communication.

A government regulation must leave open ample alternative channels for communication. *Ward*, 491 U.S. at 791. The regulation must allow alternative channels, but "it is not fatal that the regulation diminishes the total quantity of speech." *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547 (7th Cir. 1986). The ample alternative requirement is "satisfied even if the alternative channels of communication may be less effective than one would prefer." *Sauk County v. Gumz*, 2003 WI App 165, ¶ 68, 266 Wis. 2d 758, 669 N.W.2d 509.

Disorderly conduct code section 2.14(2)(k) leaves ample alternative channels for communication. As the Wisconsin Supreme Court explained in upholding the constitutionality of the disorderly conduct statute, "[t]he right to demonstrate (even peaceably) in pursuance of our constitutional rights of freedom of speech, freedom of assembly and freedom to petition for redress of grievances might be appropriate in one place and not in another." *State v. Givens*, 28 Wis. 2d 109, 121, 135 N.W.2d 780 (1965). Although conduct may not be disorderly in one circumstance, it may be disorderly in another because of the location or manner of conduct. *State v. Werstein*, 60 Wis. 2d 668, 673, 211 N.W.2d 437 (1973). A person has alternate means to convey his or her message because "[w]hat is proper under one set of circumstances may be improper under other circumstances." Wis. J.I.–Criminal 1900 (2012). Therefore, a person has alternate channels to convey his or her message without engaging in disorderly conduct. Insofar as this Court undertakes a time, place, and manner review of this code section, this Court should find that it leaves ample alternative channels for communication.

D. The disorderly conduct code section is narrowly tailored.

A government regulation must be narrowly tailored to serve its objective. *City News and Novelty, Inc.*, 170 Wis. 2d at 24. Narrow tailoring does not require that the regulation be the least restrictive or intrusive means for effectuating

the objective. *Green v. City of Raleigh*, 523 F.3d 293, 300-01 (4th Cir. 2008). So long as the regulation chosen is "'not substantially broader than necessary to achieve the government's interest, . . . 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 alterative.'" *Gumz*, 266 Wis. 2d 758, ¶ 27 (quoting *Ward*, 491 U.S. at 800). The Supreme Court reminded: "Lest any confusion on the point remain, we reaffirm today that a regulation . . . need not be the least restrictive or least intrusive." *Ward*, 491 U.S. at 798. Therefore, the government "need only write a narrowly tailored ordinance, not the least restrictive ordinance." *Brandmiller*, 199 Wis. 2d at 545.

Disorderly conduct code section 2.14(2)(k) is narrowly tailored. The Wisconsin Supreme Court already has concluded: "The language of the disorderly conduct statute is not so broad that its sanctions may apply to conduct protected by the constitution." *Zwicker*, 41 Wis. 2d at 509. In upholding the constitutionality of the disorderly conduct statute, the Supreme Court was satisfied that conviction cannot be based upon "hypercritical or supersensitive grounds." *Givens*, 28 Wis. 2d at 122. Disorderly conduct is narrowly tailored because "[i]t does not include conduct that is generally tolerated by the community at large but that might disturb an oversensitive person." Wis. J.I.–Criminal 1900. The disorderly conduct regulation is narrowly tailored

because the "reasonableness" component prevents a person "from being at the mercy of the hypercritical." *Baumann*, 162 Wis. 2d at 680. Thus, the disorderly conduct regulation is narrowly tailored. Insofar as this Court undertakes a time, place, and manner review of this code section, this Court should find that it is narrowly tailored.

IV. The Disorderly Conduct Code Section Does Not Require A Remedy Because It Is Constitutional.

A court has two remedies available to save an otherwise unconstitutional regulation. *Robert T.*, 307 Wis. 2d 488, ¶ 7; *see also Janssen*, 219 Wis. 2d 362, ¶ 48. First, a court must apply a narrowing or limiting construction when available. *Robert T.*, 307 Wis. 2d 488, ¶ 7. Second, a court may sever the unconstitutional portion of the regulation. *Id.* Proper application of these remedies ensures that courts do not strike down regulations lightly. *See State v. Hemmingway*, 2012 WI App 133, ¶ 11, 345 Wis. 2d 297, 825 N.W.2d 303.

This Court should hold that code section 2.14(2)(k) is constitutional and does not require a remedy. Striking down the disorderly conduct code section as unconstitutional is "strong medicine" and it "should not be done lightly." *Hemmingway*, 345 Wis. 2d 297, ¶ 11, quoting *Robert T.*, 307 Wis. 2d 488, ¶ 7. The circuit court erroneously struck down the disorderly conduct regulation summarily through a two sentence written order. (R. 8:1, A-Ap. 114). This Court should not replicate this error. The code section at issue in

this case is constitutional and, even upon an initial finding of unconstitutionality, a court should preserve its ultimate constitutionality in accordance with well-established remedies rather than striking it down.

CONCLUSION

Disorderly conduct does not run afoul of the First Amendment. The disorderly conduct code section promulgated by the Department of Administration is substantially similar to the disorderly conduct state statute. Numerous appellate decisions have upheld the constitutionality of the disorderly conduct statute. The circuit court striking down disorderly conduct sua sponte in a two sentence order ignored decades of legal precedent. The court erred when it summarily found disorderly conduct unconstitutional under the First Amendment. This Court

should overturn the order of the circuit court and find that code section 2.14(2)(k) is constitutional.

Dated this 14th day of July, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,271 words.

Dated this 14th day of July, 2014.

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WINN S. COLLINS
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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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WINN S. COLLINS
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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