Freedom of Speech and the Street Performer:
St. Louis v. the Constitution
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What major city would be complete without street performers? They add character, flavor, and color to the areas in which they perform, helping to define the cities they are a part of. To imagine a major city without such people is to imagine a deficit of communal culture and art. Of course, the quality of the work of individual street performers is a matter of opinion – though hopefully not only the opinion of a city bureaucrat. However, even those most annoyed by street performers and least inclined to enjoy their efforts must acknowledge that such performances, whether musical, magical, or otherwise, are a form of artistic expression protected by the First Amendment. Once that fact has been accepted, the question that remains is: To what extent may such expression be limited to suit the legitimate concerns of city government? That question is the subject of the dispute now occurring between the city of St. Louis and two put-upon but determined street performers represented by the American Civil Liberties Union.

Legislation enacted in 1997, Chapter 20.55 of the City of St. Louis Revised Code, requires all street performers to obtain a permit before giving any performances. Initially, the city charged individuals $25 for an annual permit; however, allegedly motivated by citizens' complaints to the Director of Streets about performers, the city increased the fee to $100 per person per year in June 2012. The Street Department has complete discretion to revoke these permits based on perceived violations, and performers have no way to appeal. Compl. for Decl. and Inj. Relief, *Pence v. City of St. Louis*, No. 4:13-cv-871 (8th Cir. argued July 12, 2013), at 3-4. In an additional wrinkle, for the last two years or more, the government has also been

requiring the performers to audition in front of a city official before they are granted their permits. The city claims to grant most of the permits after the auditions, though some applicants, such as a flame juggler, have had to change their acts in order to obtain a permit. However, among those arguing that the city's regulations affect more than just flame-jugglers, and in fact violate free speech rights, are Nick Pence and Frederick Walker, the ACLU's clients in its lawsuit against the city.

Nick Pence and Frederick Walker represent two very different generations of street performers, but they share a concern about the sudden cost of expressing oneself in St. Louis. Mr. Pence is a 21-year-old Webster University student and Kirkwood native who plays guitar and banjo with a group called The Thin Dimes, which has performed on sidewalks in various cities in Missouri. The six-person band does not make enough to live on from performing and would take months to make up the $600 annual cost of a permit. Because of the cost difficulties, Mr. Pence has not obtained a St. Louis permit and does not perform there, but he would do so if the cost were lower. Mr. Walker is a 70-year-old ex-marine from St. Louis who has been playing the saxophone since childhood and has been performing on St. Louis streets since 2011. This year, he waited for two weeks in March before re-applying for a permit and continuing performing because of the drastically-increased fee. When he requested information about the reason for the change, officials simply cited the need for revenue. Additionally, Mr. Walker was never told which areas of St. Louis he could not perform in even with a permit. To prevent fining or arrest, Mr. Walker later applied for a permit and paid the increased fee. His concern was justified; fines for violations can range from $50 to $500.

The ACLU's complaint on behalf of Mr. Pence and Mr. Walker raises both First Amendment and Fourteenth Amendment concerns. Count I alleges that the city's permitting and

auditioning policy violates Free Speech rights by significantly restricting the plaintiffs' expressive activity in a way that is "not narrowly tailored to advance a significant government interest" and gives city officials "undue discretion" to grant, deny, or revoke permits. Complaint at 7. In layman's terms, the city's fee requirement is too restrictive of free speech because the cost of the fee is not proportional to the cost for the city of administering the law. Also, the auditioning requirement and the power to summarily revoke the permits give the city an excessive amount of leeway in restricting free expression. Count II states that the policy violates the Due Process clause of the Fourteenth Amendment because the city does not give performers sufficient notice of which locations they can and cannot perform at with a permit. *Id.* at 8. Basically, the ACLU is saying that it is not fair, and not due process of law, for the city to expect performers to comply with the policy, and hold them accountable for complying with it, when they have not been told what their privileges are as permit holders.

On May 28th, U.S. District Judge Catherine Perry granted a preliminary injunction (an injunction orders somebody to do or not do something), agreed to temporarily by the parties, preventing St. Louis from charging more than $50 for an individual permit or $100 for a group permit and requiring the city to credit or to refund any performer who has paid more. A hearing on the issues was set for July 12th, with the ACLU planning to seek a preliminary injunction at that time. In anticipation of the hearing, the city sent the ACLU a proposed new bill that would have lowered the permit fees to $25 for a thirty-day individual permit, $50 for a yearly individual permit, $50 for a thirty-day group permit, and $100 for a yearly group permit. The new proposal would also have allowed performers to appeal revocation of permits to the Director of Streets. However, the ACLU remained concerned about the vagueness of the statute, its broad location restrictions, and the discretion given to the Director of Streets to revoke permits, subject only to

an appeal within the same department. In any case, the bill was not even introduced to the Board of Aldermen before the hearing, making the proposed revisions basically irrelevant to that hearing.

At the hearing, the ACLU presented three witnesses: Mr. Pence, Mr. Walker, and another street performer named Raymond Moore. Mr. Moore, a musician, testified that he had gone through the "auditioning" process, that he did not feel it was voluntary, and that the $100 fee was burdensome to him. Both plaintiffs likewise testified that the permit fee was a burden to them, with Mr. Walker adding that he eventually reluctantly paid the fee and Mr. Pence stating that he and his group, The Thin Dimes, would certainly perform in St. Louis were it not for the high fees. Mr. Walker also testified that he had not been told where he could and could not perform with a permit and had simply left locations whenever he was asked to. The city's only witness was Michael Hulsey, the Administrative Assistant to the Director of Streets, who was responsible for managing the permitting process and conducting the "auditions." Mr. Hulsey testified that the meetings he held with performers were not really auditions and were simply opportunities for him to find out what the performers would be doing. He acknowledged that he sometimes asked applicants to play or otherwise perform for him, but he asserted that he never rejected permits based on content or message. However, on cross examination, Mr. Hulsey admitted that he may have referred to the process as an audition during media interviews and professed ignorance of the basis for the banning of performers from certain wards. Also, although Mr. Hulsey seemed at one point to suggest that the list of banned areas really refers only to private property, he admitted that he usually simply handed performers the list, including entire wards, and told them the city did not want them going into those "hot areas."

In setting out their positions, the parties had to address the four factors weighed when deciding requests for preliminary injunctions: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). The city argued that the permit requirement applied only to performers accepting monetary contributions, that the acceptance of such contributions changes the character of the speech, and that the ordinance was necessary for the maintenance of public order. As such, the city's conclusion was that the ordinance did not cause an irreparable harm and was a correct balance of First Amendment rights against the public interest, making the plaintiffs unlikely to succeed on the merits. The ACLU countered that the statute was ambiguous regarding whether or not performers not accepting money had to have permits and that, even if the statute did say what the city claimed it did, it was still overbroad because speech with commercial aspects, such as that of journalists, is still protected. Also, the ACLU pointed out that case law established that denial of First Amendment rights for any length of time, even a moment, is an irreparable harm. On July 30th, Judge Perry granted the injunction, writing that the *Dataphase* factors weighed in favor of the plaintiffs because the plaintiffs were likely to succeed on the merits of their over-breadth claims, the infringement of First Amendment rights even briefly is an irreparable harm, and noise ordinances and other applicable laws precluded any harm to the city from the injunction. Judge Perry also ordered the parties to enter into mediation and stated that, if mediation had not succeeded by September 30th, the case would proceed to trial. Order Granting Mot. for Prelim. Inj., *Pence v. City of St. Louis*, No. 4:13-cv-871 (8th Cir. argued July 12, 2013), City officials now say they plan to repeal the law, but as of this writing, they have not yet done so.

The saga of the St. Louis street performers is not yet complete, but this much is clear: in the twenty-first century, even freedom of speech, the most sacrosanct of rights under the Constitution, is still in controversy and under threat from bureaucratic overreach. Restrictions on street performances may seem a small thing to some, but if those who support art and free expression of all kinds do not stand guard vigilantly in cases like this one, what other types of expression might one day be curtailed in the name of public order? Instead of vigorously enforcing its noise and disturbance ordinances, the government of St. Louis has chosen to implement this burdensome and confusing permit scheme, effectively banning impoverished performers and establishing huge areas of the city as expression-free zones. It has done this presumably to fend off complaints by citizens, but any legitimate complaints can and should be addressed by aggressive citation for violations of other existing ordinances, not by a clumsy law that excludes or heavily burdens talented and committed artists. Regardless of the outcome of this litigation, Volunteer Lawyers and Accountants for the Arts will always stand with the artists of St. Louis against any encroachment on their basic Constitutional rights and freedoms.