

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

Nick Pence, and )  
Frederick Walker, )  
Plaintiffs, )  
v. ) No. 4:13-cv-871  
City of Saint Louis, Missouri, )  
Defendant. )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

*Introduction*

1. This is a civil rights action filed by Nick Pence and Frederick Walker, both musicians who perform on public sidewalks, challenging the single-speaker pre-registration and approval scheme set forth in Chapter 20.55 of the City of St. Louis Revised Code and related policies and customs, including the restrictions placed upon and fees charged to pre-approved speakers. The ordinances require a permit be obtained and displayed before any person may act, sing, mime, juggle, do magic, dance, or play a musical instrument or radio at public places within the City of St. Louis. To secure a permit, an individual must pay \$100.00 for each calendar year, or portion of a calendar year, and survive an audition before an administrative assistant in the Street Department.

2. Plaintiffs assert that, taken together, the requirements and restrictions of Chapter 20.55 outlaw a substantial amount of expressive activity protected by the First Amendment. In addition, they claim that the requirement of an audition and the ability to summarily revoke permits provides government officials with undue discretion to deny a permit. Finally, Plaintiffs

aver that the City's restriction of locations where performances might be conducted with a permit is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

3. In this action, brought pursuant to 42 U.S.C. § 1983, Plaintiffs seek declaratory and prospective relief.

*Jurisdiction and Venue*

4. This action arises under the Constitution of the United States and the provisions of 42 U.S.C. § 1983. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§ 1331 and 1333(a), and pursuant to 42 U.S.C. § 1983.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1331(b)(1)-(2) because the only defendant is the City of Saint Louis and a substantial part of the events or omissions giving rise to the claims occurred in the City of Saint Louis.

6. Venue is proper in the Eastern Division pursuant to E.D.Mo. L.R. 2.07 (A)(1) and (B)(1).

*Parties*

7. Plaintiff Nick Pence is a resident of the State of Missouri.

8. Plaintiff Frederick Walker is a resident of the State of Missouri.

9. Defendant City of Saint Louis, Missouri, is a municipal corporation and political subdivision of the State of Missouri.

10. In enacting and enforcing the policies and customs at issue in this case, Defendant and its officials act under color of state law.

*Facts*

11. Plaintiff Nick Pence is a resident of Kirkwood. He has been publicly performing since the age of 15. At the start he played only the guitar although he has recently added the

banjo to his repertoire. He engages in street performances on public sidewalks, at times alone and at other times as part of a six-person group. They have done so in municipalities in Missouri, including Rocheport, Booneville, Sedalia, and Columbia. Pence plays blues and folk music.

12. Plaintiff Frederick Walker is a native of St. Louis. He began playing the saxophone in 1953, while a student at St. Leo's Elementary. Around the same time he started playing the bugle in the American Woodmen Cadets' Junior Drum and Bugle Corps. After serving in the United States Marine Corps, Walker studied jazz in Los Angeles before returning to St. Louis in 1964. Since 2011, Walker has performed at public places in the City of St. Louis. He does so weekly when the weather is good.

13. Through Chapter 20.55 of the City of St. Louis Revised Code and related policies and customs, Defendant regulates performance at public places.

14. For purpose of Chapter 20.55, a performance is defined as including, "but is not limited to, the following activities: acting, singing, pantomime, juggling, magic, dancing and playing musical instruments, radios or other machines or devices for the producing or reproducing of sound."

15. Public areas, at which any performance is regulated, "include any public sidewalk, alley, parkway, playgrounds or public way[.]"

16. Pursuant to Chapter 20.55, it is unlawful to perform in a public area without first obtaining a permit from the Street Department.

17. Pursuant to Chapter 20.55, it is unlawful to perform in a public area without displaying a permit.

18. Alleged violators of the Chapter 20.55 are subject to immediate arrest. *See Mo. Rev. Stat. § 544.216* (police officers “may arrest on view, and without a warrant, any person the officer sees violating or who such officer has reasonable grounds to believe ... has violated any ordinance over which such officer has jurisdiction.”).

19. Any person who performs at a public place without obtaining and displaying a permit “shall be subject to a fine of not less than \$50.00 nor more than \$500.00.”

20. In order to secure a permit under Chapter 20.55, an individual must apply at the Street Department; pay fee of \$100.00 per year, or any portion of a calendar year; and audition.

21. Prior to June 2012, the permit fee was \$25.00; however, it was increased three-hundred percent, effective immediately, by emergency legislation approved on June 5, 2012.

22. The City of Chicago, charges \$100.00 for a similar permit that is valid for two full years.

23. The City of Fargo, North Dakota, chargers \$50.00 for a similar permit valid for one year.

24. The City of New York only requires a permit if a sound amplification device is used and charges \$45.00 annually.

25. The City of Cambridge, Massachusetts, charges \$40.00 annually for a similar permit.

26. The City of Raleigh, North Carolina, charges \$40.00 annually for a similar permit.

27. The City of Traverse City, Michigan, charges \$40.00 annually for a similar permit.

28. The City of Santa Monica, California, charges \$37.00 annually for a similar permit.

29. The City of Baltimore, Maryland, charges one-time fee of \$25.00 for a similar permit.
30. The City of New Orleans, Louisiana, charges \$20.00 per year for an artist permit.
31. The City of Toledo, Ohio, charges \$20.00 annually for a similar permit.
32. The City of Madison, Wisconsin, charges \$15.00 annually for a similar permit.
33. The City of Holland, Michigan, charges \$10.00 annually for a similar permit.
34. Most municipalities do not require a permit, or any pre-registration, to engage in acting, singing, pantomime, juggling, magic, dancing or playing musical instruments or radios in public places.
35. Unlike the City of Saint Louis, most other municipalities that do require a permit generally limit the requirement to those seeking tips for their performances. *See, e.g.,* City of Fargo, “Street Performers” <http://www.cityoffargo.com/CityInfo/Downtown/Streetperformers/> (last visited May 7, 2013) (“Technically, you don’t need a permit to simply entertain downtown. However, if you’d like to receive tips for your efforts, a permit is required.”).
36. It is the policy and custom of the City of Saint Louis, and has been for at least two years, to require an audition before a government official before a permit is issued under Chapter 20.55.
37. It is the policy and custom of the City of Saint Louis to require each member of musical group participating in a performance to secure, and pay for, a permit.
38. Plaintiff Pence’s group, The Thin Dimes, consists of six members, so a permit for the group would cost \$600.00 for each calendar year or any portion of a calendar year.
39. It would take months for The Thin Dimes to recoup \$600.00 by engaging in performances.

40. The Street Department retains, and exercises, discretion to revoke permits without due process.

41. For more than two years, the auditions have been conducted by Mike Hulsey, an administrative assistant in the Street Department.

42. Upon information and belief, at least six applications for a permit have been rejected because of an unsuccessful audition.

43. Plaintiff Walker has applied for a permit and paid the requisite permit fees to avoid being arrested or imposition of a \$500.00 fine.

44. Plaintiff Walker refrained from re-applying and performing at public places for two weeks in March 2013 because of objections to the quadrupled permit fee.

45. During that two-week period, he attempted to ascertain the rationale for the fee increase by contacting City officials. The only response he received is that the City needs revenue.

46. At no time has Plaintiff Walker been provided any information about what locations within the City performances are prohibited even with a license.

47. He does not know how to ascertain at which locations performances are prohibited, or not. When he is told that he is performing at a location that is impermissible, he takes the word of whoever tells him, leaves, and does not return.

48. Plaintiff Pence regularly performs at public places within the State of Missouri but has refrained from engaging in expressive activity within the City of Saint Louis because of the challenged permit scheme. But for the challenge permit scheme, he would engage in expressive activities within the City of Saint Louis.

**COUNT I**

*Violation of Civil Rights - 42 U.S.C. §1983  
Claim for Declaratory and Injunctive Relief  
Free Speech Clause of the First Amendment*

49. Plaintiffs incorporate herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

50. Defendant's policies and customs that are the subject of this suit make unlawful a substantial amount of expressive activity protected by the First Amendment in relation to any substantial government interests served.

51. Defendant's policies and customs that are the subject of this suit are not narrowly tailored to advance a significant government interest.

52. Defendant's policies and customs that are the subject of this suit fail to leave open ample alternative challenges for Plaintiffs' expressive activity.

53. Defendant's policies and customs that are the subject of this suit vest undue discretion in government officials to grant, or reject, or revoke a permit.

54. Upon information and belief, Defendant's policies and customs that are the subject of this suit impose a permit fee that is not reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order.

WHEREFORE, Plaintiffs request relief as follows:

- A. Enter a declaration, pursuant to 42 U.S.C. § 1983, that Defendant's permit scheme violates the Constitution on its face and as-applied;
- B. Enter preliminary and permanent injunctions prohibiting Defendant and its officers, agents, servants, and employees, from enforcing the scheme set forth in Chapter 20.55 of the City of St. Louis Revised Code and related policies and customs;

- C. Award Plaintiff's costs, including reasonable attorneys' fees under 42 U.S.C. § 1988, and under other applicable law; and
- D. Allow such other or further relief as the Court deems just and equitable.

## **COUNT II**

### *Claim for Declaratory and Injunctive Relief Due Process Clause of the Fourteenth Amendment*

55. Plaintiffs incorporate herein by reference the allegations made in each preceding paragraph as if each were set forth here verbatim.

56. Defendant fails to provide adequate notice of those public places where performances are allowed with a permit.

WHEREFORE, Plaintiffs request relief as follows:

- A. Enter a declaration, pursuant to 42 U.S.C. § 1983, that Defendant's limitations on public places where individuals may perform with a permit violates the Constitution on its face and as-applied;
- B. Enter preliminary and permanent injunctions prohibiting Defendant and its officers, agents, servants, and employees, from enforcing any location restrictions forth in Chapter 20.55 of the City of St. Louis Revised Code and related policies and customs;
- C. Award Plaintiff's costs, including reasonable attorneys' fees under 42 U.S.C. § 1988, and under other applicable law; and
- D. Allow such other or further relief as the Court deems just and equitable.

Respectfully submitted,

/s/ Anthony E. Rothert  
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