IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Traditionalist American Knights of the Ku Klux Klan, et al.,	)	
Plaintiffs,	)	
v.	)	No. 4:12-cv-2085 FRB
City of Desloge, Missouri,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

Plaintiffs, an association and one of its members, aim to spread their message widely. Doc. # 1 (Verified Complaint) at ¶ 1. One effective and efficient way Plaintiffs have found to spread their message is by distributing handbills on public streets and sidewalks, including placing leaflets on the windshields of unoccupied vehicles. *Id.* at ¶ 2. They have done so throughout the country, including in Missouri. *Id.*

Plaintiff Frank Ancona and other members of Plaintiff Traditionalist American Knights of the Ku Klux Klan had planned to distribute handbills in the City of Desloge, Missouri, on October 27, 2012, and on future dates. *Id.* at ¶ 3. In preparation for the distribution of handbills in the City of Desloge, Ancona spoke to police officials and the City Administrator to discuss his plans to distribute literature within the City of Desloge. *Id.* at ¶ 4.

Police officials advised him that he could not stand and distribute literature on any street or sidewalk within the City of Desloge without violating a city ordinance. *Id.* The City Administrator confirmed the response of police officials. *Id.* As a result of the assertions of

police officials and the City Administrator, Plaintiffs canceled their plans to distribute literature on October 27, 2012, and rescheduled for November 3, 2012, to permit time for their attorney to contact the City. *Id.* at ¶ 5.

Plaintiffs' counsel wrote to the City Administrator explaining that prohibiting the distribution of literature on public streets and sidewalks violates the First Amendment. *Id.* at ¶ 6. On October 30, 2012, the City's attorney responded by letter. *Id.* at ¶ 7. The City's attorney opined that the ordinance reasonably restricts solicitation. *Id*. He included a copy of § 615.070 of the Code of Ordinances, which provides, "No peddler nor any other person, association, corporation or other entity shall be authorized to conduct any solicitation activities, or to occupy, use or operate in or upon any public highway, thoroughfare or street within the City of Desloge." *Id*. According to the attorney, solicitation applies to activities "other than selling" and includes the distribution of handbills. *Id.* The Code of Ordinances defines "street" to "mean and include any public way, highway, street, avenue, boulevard, parkway, alley or other public thoroughfare, and each of such words shall include all of them." *Id*.; City of Desloge Code of Ordinances §100.070. The definition of "public way" includes "any street, alley, boulevard, parkway, highway, sidewalk or other public thoroughfare." *Id.* As a result of the assertions in the letter by the City's attorney, Plaintiffs canceled their plans to distribute literature on November 3, 2012. *Id.* at ¶ 8.

A violation of the ordinance is punishable by a fine of up to $500.00, imprisonment of up to 90 days, or both. *Id.* at ¶ 27; City of Desloge Code of Ordinances § 100.210.A. An officer of the City of Desloge's police department "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." *Id.* at ¶ 28; MO. REV. STAT. § 544.216.

Because of § 615.070 and the assertions of City officials, Ancona and other members of TAK reasonably fear that they will be arrested, fined, and imprisoned for violating § 615.070 if they distribute handbills on public streets and sidewalks in the City of Desloge, they have canceled their plans to do so. *Id.* at ¶¶ 44-45.

II. Argument

In the Eighth Circuit, courts consider four factors in determining whether to issue a preliminary injunction:

> (1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the interest of the public.

Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). "'When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.'" *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (quoting *Phelps-Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011) (per curiam)).

A. Plaintiffs are likely to succeed on the merits

"The Free Speech Clause of the First Amendment provides that 'Congress shall make no law ... abridging the freedom of speech....'" *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) (quoting U.S. CONST. AMEND. I). The First Amendment applies to the states through the Fourteenth Amendment's due process clause. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

In the First Amendment context, "a law may be invalidated as overbroad if a 'substantial number of its applications are unconstitutional, judged in relation to the statute's plainly

legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010)(quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008)). An overbroad statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it. *City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 798 (1984)("[B]roadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected.").

A law restricting expressive activity is overbroad where it is "written so broadly that [it] may inhibit the constitutionally protected speech of third parties." *Taxpayers for Vincent,* 466 U.S. at 798. The overbreadth doctrine is one "under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him." *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 462, n. 20 (1978). Courts have "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks,* 539 U.S. 113, 119 (2003).

Plaintiffs are likely to prevail on the merits of their claim that § 615.070 of the City of Desloge Code of Ordinances is facially overbroad. Determining whether a law is substantially overbroad requires a two-step analysis. First, a court must "construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). Second, based on the first step, a court must determine whether the law "criminalizes a substantial amount of protected expressive activity." *Id.* at 297.

On its face, and as interpreted by Defendant's police officers, City Administrator, and Attorney, § 615.070 prohibits any distribution of handbills on the streets and sidewalks of the City of Desloge. The ordinance provides that no person may occupy, use, or operate upon any street. Doc. # 1 at ¶ 23. According to the definitions within the Code of Ordinances, "street" includes any "public way" and "public way" includes sidewalks. *Id.* at ¶¶ 24-26.

Section 615.070 criminalizes a substantial amount of protected expressive activity. The Supreme Court has repeatedly held that the public streets are a "quintessential public forum for expressive activity." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). As recently as last year, the Court remarked, "[W]e have repeatedly referred to public streets as the archetype of a traditional public forum," noting that "'[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011)(quoting *Frisby v. Schultz,* 487 U.S. 474, 480 (1988)).

Indeed, long before the public forum doctrine even developed as an analytic tool in First Amendment cases, the Supreme Court observed,

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939). There is no doubt that the liberty to use the public streets and sidewalks for expression includes the right to distribute handbills on

those streets and sidewalks. "[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison v. State of Tex.*, 318 U.S. 413, 416 (1943).

Given that § 615.070 prohibits any distribution of handbills (and by its plain language all expressive conduct) on public streets and sidewalks, it criminalizes a substantial amount of protected speech no matter what government interest it might advance. Accordingly, Plaintiffs are likely to succeed on their claim that § 615.070 is substantially overbroad.

In addition, or in the alternative, Plaintiffs are likely to succeed on their claim that § 615.070 is not narrowly tailored to serve a significant government interest. A law that regulates speech must be "narrowly tailored to serve a significant government interest." *Frisby*, 487 U.S. at 481. Plaintiffs' speech—handing out leaflets on public sidewalks and streets, including by placing them on the windshields of unoccupied vehicles—is protected by the First Amendment and the City's ban is not narrowly tailored to any significant government interest. *See Traditionalist Am. Knights of the Ku Klux Klan v. City of Cape Girardeau, Mo.*, 1:12CV0151JAR, 2012 WL 4464868 (E.D. Mo. Sept. 27, 2012)(plaintiffs likely to succeed on merits of challenge to ordinance prohibiting placement of handbills on unoccupied vehicles). Where, as here, the government is regulating expressive activity by means of a criminal sanction, it is the government that bears the burden of proving its actions pass constitutional muster. *Perry Ed. Ass'n.*, 460 U.S. at 45-6. "[W]hen a regulation allegedly infringes on the exercise of first amendment rights, the statute's proponent bears the burden of establishing the statute's constitutionality." *Ass'n of Cmty. Organizations for Reform Now v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)

(proponent "carries a heavy burden of showing justification" for restriction). The correctness of this statement can hardly be doubted. *See Clark v. Community for Creative Non Violence*, 468 U.S. 288, 293 fn.5 (1984); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 658 (1981)(Brennan, J., concurring). The burden is on the government to show that there is evidence supporting its proffered justification, including objective evidence showing that the restrictions serve the interests asserted. *See Horina v. City of Granite City, Ill.*, 538 F.3d 624, 633 (7th Cir. 2008). Here, there is no evidence supporting a claim that a ban on all distribution of handbills on public streets and sidewalks is narrowly tailored to serve a significant government interest. Plaintiffs are, thus, likely to succeed on the merits of their claim that § 615.070 is not narrowly tailored.

B. Plaintiffs will suffer irreparable harm without a preliminary injunction

Plaintiffs have already been harmed by being forced to cancel two planned efforts to distribute handbills in the City of Desloge. Plaintiffs and others will continue to suffer irreparable harm if an injunction does not issue. Absent an injunction that enjoins the enforcement of § 615.070's prohibition on the distribution of handbills on public streets and sidewalks, Plaintiffs are chilled from engaging in protected speech activity.

This restriction of protected speech constitutes irreparable harm. It is well-settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion). Because Plaintiffs have established they are likely to succeed on the merits, they have also established irreparable harm as the result of the deprivation. *See e.g., Marcus v. Iowa Pub. Television,* 97 F.3d 1137, 1140-41 (8th Cir.1996); *Beussink ex rel. Beussink v. Woodland R-IV*

Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998)(where it is "likely that [plaintiff] will be able to prove [violation of his] First Amendment rights[,]" there is irreparable harm).

C. The balance of harms favors an injunction

"The balance of equities… generally favors the constitutionally-protected freedom of expression." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) *overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012). There is no harm to Defendant, who has no significant interest in the enforcement of § 615.070 since it is likely unconstitutional.

D. An injunction will serve the public interest

"It is always in the public interest to protect constitutional rights." *Id.* at 689. The public interest is served by preventing the likely unconstitutional enforcement of the challenged ordinance while this case is considered on the merits. The public interest supports an injunction that is necessary to prevent a government entity from violating the Constitution. *Doe v. South Iron R-1 School Dist.*, 453 F.Supp.2d 1093, 1103 (E.D.Mo. 2006).

III. Conclusion

Based on the foregoing, Plaintiffs request this Court enter a preliminary injunction prohibiting Defendant, its officers, agents, servants, employees, and attorneys from enforcing City of Desloge Code of Ordinance § 615.070 while this case is resolved on the merits. Because there will be no demonstrable harm to Defendant from issuance of a preliminary injunction, bond should be waived or set at a nominal amount.

Respectfully submitted,

/s/ Anthony E. Rothert
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Certificate of Service

I hereby certify that on November 8, 2012, I mailed a copy of the foregoing by first class mail to:

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/s/ Anthony E. Rothert