

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

[Filed Electronically]

THE COURIER-JOURNAL, INC.)

PLAINTIFF,)

v.)

LOUISVILLE/JEFFERSON COUNTY)
METRO GOVERNMENT)

DEFENDANT.)

Serve: Michael J. O'Connell)
Jefferson County Attorney)
531 Court Place)
Suite 1001)
Louisville, Kentucky 40202)

CIVIL ACTION NO. 3:09cv-449-S

COMPLAINT AND DEMAND FOR
DECLARATORY AND INJUNCTIVE
RELIEF

Plaintiff The Courier-Journal, Inc. (the "Courier-Journal"), by counsel, for its Complaint and Demand for Declaratory and Injunctive Relief states as follows:

INTRODUCTION

1. This is an action to void a Louisville/Jefferson County Metro Government ("Metro Government") ordinance that illegally and unconstitutionally infringes on the freedom of speech and of the press. The law at issue is Ordinance No. 87, Series 2009 (O-63-04-09), "An Ordinance Requiring that the Delivery of Unsolicited Written Materials to a Premises Be Placed in a Distribution Box, on the Front Porch, Through a Mail Slot, Securely Attached to the Front Door, or Between the Exterior and Interior Front Door or Personally with the Owner." (Hereafter, "the Ordinance") (a copy of the Ordinance is attached as Exhibit A).

2. The Ordinance violates the rights of the Courier-Journal and also violates the rights of, among others, candidates for political office, individuals seeking to share their religious beliefs, community activists, and those who would otherwise receive written materials. The Ordinance places an unconstitutional burden on speech such that it acts as a prior restraint on speech; it is so vague that people cannot understand what it means and cannot reasonably conform their conduct to the law; it encourages arbitrary and selective enforcement by Code Enforcement Board ("CEB"); it imposes disproportionate penalties for the type of conduct it is attempting to curtail; and it lacks a rational relationship to the purported public purpose which it is addressed.

3. The Courier-Journal seeks a declaration that the Ordinance violates the First, Eighth, and Fourteenth Amendments to the United States Constitution. As such, Plaintiff asks this Court to declare the Ordinance unconstitutional, enjoin enforcement of the Ordinance, and void the Ordinance in its entirety.

THE PARTIES

4. Plaintiff, The Courier-Journal, is a Delaware corporation with its principal place of business at 525 West Broadway, Louisville, Kentucky 40202.

5. Defendant Louisville/Jefferson County Metro Government is a consolidated local government under KRS 67C.101. Enforcement of the Ordinance by Louisville/Jefferson County Metro Government is an act performed under color of the laws of Louisville/Jefferson County and the Commonwealth of Kentucky and therefore constitutes state action within the meaning of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

JURISDICTION AND VENUE

6. This action for compensatory damages, declaratory and injunctive relief arises under the First, Eighth, and Fourteenth Amendments to the United States Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction over the matters herein pursuant to the provisions of 28 U.S.C. § 1331.

7. Venue is appropriate in this District under 28 U.S.C. § 1400(b) because the events giving rise to this action took place within this District.

FACTUAL BACKGROUND

8. As a service to members of the community without a Courier-Journal newspaper subscription, the Courier-Journal periodically distributes written materials containing news on current events within the community, information, editorial and other noncommercial content, as well as advertisements, including advertisements for local businesses that cannot otherwise afford to advertise in the subscription-only version of the newspaper. The Courier-Journal distributes approximately 340,000 copies of these materials on a weekly basis.

9. The Courier-Journal's distribution practices take great care to prevent litter while maintaining the economic feasibility of distributing the written materials. For instance, the Courier-Journal maintains a "Do Not Deliver" list, of residents who request not to receive further delivery. Additionally, deliverers of the written materials agree to deliver the materials to boxes, tubes, or other receptacles designed for the materials whenever possible, deliver the materials in readable condition (usually effectuated by use of plastic bags) and to the satisfaction of the person receiving delivery.

10. Further, deliverers of the written materials attempt to place these materials near the front doors of residents, but economic and/or geographic restraints make it impracticable to do so in all cases.

11. On June 11, 2009, the Louisville/Jefferson County Metro Government, through its legislative council, the Louisville/Jefferson County Metro Council (the "Council"), passed the Ordinance. The Ordinance's primary sponsor was Councilman Brent Ackerson. The Ordinance was signed into law by the Mayor on June 25, 2009.

12. The Ordinance completely prohibits the distribution of all unsolicited written materials to private residences with only six narrow exceptions:

- (1) Unsolicited written materials delivered to a premises shall be placed:
 - (a) where permitted, in a distribution box located on or adjacent to the premises; or
 - (b) on a porch, if one exists, nearest the front door; or
 - (c) so such materials are securely attached to the front door; or
 - (d) through a mail slot on the front door or principal structure, if existent, as permitted by the United States Postal Service Domestic Mail Manual, Section 508 Recipient Services, Subsection 3.1.2; or
 - (e) between the exterior front door, if existent and unlocked, and the interior front door; or
 - (f) personally with the owner, occupant and/or lessee of the premises.

O-63-04-09, Section I(1).

13. This Ordinance prevents both commercial and noncommercial speech from being distributed. For instance, if the Courier-Journal wanted to provide a free newspaper to non-subscribers, the Ordinance would not allow it do so under any economically feasible distribution method.

14. Statements of Council members and testimony of others at Council hearings concerning the Ordinance demonstrate that the Ordinance was specifically targeted at the Courier-Journal. The Council failed to consider alternative measures prior to enacting the Ordinance, which effects a blanket restriction on unsolicited written materials. The Courier-Journal attempted prior to enactment of the Ordinance to propose less restrictive ways to address the Council's purported concerns (see May 28, 2009 Letter from Courier-Journal Counsel Jon L. Fleischaker to Councilman Brent Ackerson attached as Exhibit B). The Courier-Journal's proposals were ignored.

15. Given the breadth of expressive activity curtailed by the Ordinance and the heightened First Amendment protections, the Ordinance is not narrowly tailored to remedy the problem the Council sought to address.

16. Further, the Ordinance fails to leave open adequate alternative channels of communication, as none of the ostensible alternative channels can be utilized in an economically feasible manner, both for the Courier-Journal and a variety of other parties wishing to distribute expressive materials. In effect, the Ordinance operates as a prior restraint on unsolicited written materials distributed throughout the county.

17. The Ordinance purportedly attempts to combat "litter," "visual blight," and sewage and drainage backups but exclusively targets written materials that are expressive conduct protected by the First Amendment to the United States Constitution.

18. Prior to enacting the Ordinance, the Council performed no studies or other analysis of any nature regarding the effects of unsolicited written materials on any "littering" problem or any other problems that the Ordinance sought to address.

19. The Metro Government's interest in combating "litter," "visual blight," and sewage and drainage backups cannot justify the burden on broad expressive activity the Ordinance seeks to impose.

20. Further, the Ordinance violates the right of individual residents under the First Amendment to the United States Constitution to receive written materials, including expressive materials on matters of public or individual concern.

21. Section I(3) of the Ordinance states that, if offending materials are found on a premises, there is a "rebuttable presumption" that the "materials were placed at the premises by the owner, agent, manager, and/or authorized distributor of the business, product, good, service, message, or idea, which is being advertised promoted, endorsed or conveyed in such materials."

22. Section I(6) of the Ordinance provides that the "civil penalty shall be a minimum of \$100 and a maximum of \$200 for each violation." The Ordinance does not specify against whom the penalty may or will actually be enforced, nor does it specifically define "violation."

23. As a result, the provisions of the Ordinance are unconstitutionally vague because they lack sufficient definiteness such that ordinary people could understand their meaning and against whom they will be enforced, or because they are worded in such a vague manner as to encourage arbitrary or discriminatory enforcement.

24. Further, the Ordinance carries a maximum penalty of \$200 per violation. Under the Ordinance, the Courier-Journal may be fined up to \$68,000,000 per week for "littering" based on its current distribution numbers. This fine is punitive, grossly disproportionate, and not rationally related to the harm the Ordinance was designed to remedy. In addition, the penalties are not rationally related to a legitimate governmental purpose, and encourage arbitrary and selective enforcement. As such, the Ordinance violates both the Excessive Fines Clause of the

Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Count One - Violation of the First Amendment to the United States Constitution

25. The Courier-Journal reasserts paragraphs 1 through 24 of its Complaint as if fully set forth herein.

26. Some or all of the provisions of the Ordinance, on its face or as applied, or both, violate the First Amendment to the United States Constitution. The provisions attempt to restrict speech in a manner that does not directly advance a compelling government interest, nor does it leave adequate alternative channels of communication to distribute expressive materials.

27. Therefore, pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiff is entitled to declaratory and injunctive relief against the Defendant. Plaintiff is entitled to a declaration that some or all of the provisions of the Ordinance violate the United States Constitution and an injunction precluding the Defendant from enforcing those provisions. The Plaintiff is also entitled to an award of costs and reasonable attorneys' fees.

Count Two - Violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution

28. The Courier-Journal reasserts paragraphs 1 through 27 of its Complaint as if fully set forth herein.

29. The Ordinance's penalty provisions, singularly and in the aggregate, bear no relationship to the gravity of the conduct they purport to obviate.

30. The Ordinance's penalty provisions are punitive rather than remedial in nature.

31. The Ordinance's penalty provisions are grossly disproportionate to the "littering" offense it purports to address. Therefore, the Ordinance violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

32. Therefore, pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiff is entitled to declaratory and injunctive relief against the Defendant. Plaintiff is entitled to a declaration that some or all of the provisions of the Ordinance violate the United States Constitution and an injunction precluding the Defendant from enforcing those provisions. Plaintiff is also entitled to an award of costs and reasonable attorneys' fees.

Count Three - Vagueness

33. The Courier-Journal reasserts paragraphs 1 through 32 of the Complaint as if fully set forth herein.

34. Some or all of the provisions of the Ordinance are unconstitutionally vague because they lack sufficient definiteness such that ordinary people could understand their meaning and who they would be enforced against, or because they are worded in such a vague manner as to encourage arbitrary or discriminatory enforcement, in violation of the Fourteenth Amendment to the United States Constitution.

35. Therefore, pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiff is entitled to declaratory and injunctive relief against Defendant. Plaintiff is entitled to a declaration that some or all of the provisions of the Ordinance violate the United States Constitution and an injunction precluding the Defendant from enforcing those provisions. Plaintiff is also entitled to an award of costs and reasonable attorneys' fees.

Count Four - Violation of Substantive Due Process

36. The Courier-Journal reasserts paragraphs 1 through 35 of its Complaint as if fully set forth herein.

37. Under the Fourteenth Amendment to the United States Constitution, citizens have a substantive due process right not to be deprived of liberty or property by arbitrary or capricious

governmental action. A law violates this standard when the penalty is not rationally related to the harm it is attempting to remedy.

38. Some or all of the provisions of the Ordinance violate the Fourteenth Amendment to the United States Constitution.

39. Therefore, pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiff is entitled to declaratory and injunctive relief against Defendant. Plaintiff is entitled to a declaration that some or all of the provisions of the Ordinance violate the United States Constitution and an injunction precluding the Defendant from enforcing those provisions. Plaintiff is also entitled to an award of costs and reasonable attorneys' fees.

WHEREFORE, Plaintiff, the Courier-Journal, demands:

A. Judgment declaring and adjudicating that the Ordinance violates the United States Constitution;

B. A preliminary injunction enjoining Defendant and its officers, agents, and employees, and any person in active concert or participation with them, from enforcing the Ordinance, and ordering Defendant to conform its conduct to the requisites of the United States Constitution;

C. A permanent injunction enjoining Defendant and its officers, agents, and employees, and any person in active concert or participation with them, from enforcing the Ordinance, and ordering Defendant to conform its conduct to the requisites of the United States Constitution;

D. Actual damages in an amount to be determined by this Court;

E. An Order that Plaintiff recover its costs, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988 in connection with this action;

F. All other relief as this Court may deem necessary, just or appropriate under the circumstances of this case.

Respectfully Submitted,

s/ Jon L. Fleischaker

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