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

Traditionalist American Knights of the Ku Klux Klan, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:12-cv-151
City of Cape Girardeau, 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 at ¶ 1. One effective and efficient way Plaintiffs have found to spread their message is by distributing handbills on the windshields of vehicles parked on public streets. *Id.* at ¶ 2. They have done so throughout the country and in Missouri, including in the City of Park Hills, the City of Desloge, the City of Farmington, and the City of Leadwood. *Id.*

Plaintiff Frank Ancona and other members of the Traditionalist American Knights of the Ku Klux Klan plan to distribute handbills in the City of Cape Girardeau, Missouri, on September 28, 2012, and on future dates not yet determined. *Id.* at ¶ 3. In preparation for the September 28, 2012, activity, Plaintiffs have learned that the City of Cape Girardeau maintains an ordinance, Code of Ordinances § 22-82, which criminalizes their planned expressive conduct *Id.* at ¶ 4. Section 22-82 mandates that, "No person shall throw or deposit any handbill in or upon any vehicle; provided, however, that it shall not

be unlawful in any public place for a person to hand out or distribute a handbill to any occupant of a vehicle who is willing to accept it." *Id.* Those who violate the ordinance are subject to immediate arrest. *Id.* at ¶ 22. They also face imposition of a fine, imprisonment, or both. *Id.* at ¶ 21.

In light of *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998), Plaintiffs are likely to succeed on the merits of their First Amendment challenge to § 22-82. A preliminary injunction is appropriate to protect constitutionally secured rights while this case is decided on the merits.

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*, ____ F.3d ____, No. 10–3126, 2012 WL 3822216 (8th Cir. Sept. 5, 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). "If the First Amendment has any force, it prohibits [government] from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 904 (2010).

In *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998), the Eighth Circuit held that ordinances in four Arkansas cities were unconstitutional because they were not narrowly tailored to serve a significant government interest. The Court provided the text of one ordinance:

> It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill or other hand-distributed advertisement upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, [or] alley within the City of Van Buren, providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to the receiver therefor, any handbill to any occupant of the vehicle that is willing to accept it.

Id. at 1216 (internal citations omitted). The other ordinances were substantially the same. *Id.* at fn.3.

Analyzing the Arkansas city ordinances on overbreadth grounds, the Eighth Circuit "determined as a matter of law that the ordinances are facially invalid" because they "are not narrowly tailored to serve the governmental purpose asserted by defendants." *Krantz*, 160 F.3d at 1222. The governmental purpose in *Krantz*, as here,

was to prevent littering.[1] The Court's analysis is equally applicable to Cape Girardeau's ordinance:

> [T]he ordinances suppress considerably more speech than is necessary to serve the stated governmental purpose of preventing litter. The ordinances prohibit the placement of any handbill on any unattended vehicle, regardless of whether the driver, owner, or an occupant might wish to receive the handbill and notwithstanding the fact that some, if not most, people would not throw on the ground papers left on their cars. While we have no difficulty concluding that the inconvenience of having to dispose of unwanted paper "is an acceptable burden, at least so far as the Constitution is concerned," *Bolger* [*v. Youngs Drug Products Corp.*], 463 U.S. [60,] 72, 103 S. Ct. 2275 [(1983], that minor inconvenience is not even necessary in the present case because, like the householders in *Martin* and *Rowan* [*v. United States Post Office Dep't,* 397 U.S. 728, 90 S.Ct. 1484 (1970)], those who do not wish to be left with handbills can quite easily notify distributors of that fact. As the Supreme Court reasoned in *Martin* and *Schneider*, defendants' goal of preventing litter can be accomplished by punishing the handbill distributors who defy such notices, as well as the "litterbugs" who choose to throw papers on the ground. *See Martin* [*v. City of Struthers, Ohio*], 319 U.S. [141,] 147, 63 S. Ct. 862 [(1943)] ("A city can punish those who call at a home in defiance of the previously expressed will of the occupant."); occupant."); *Schneider* [*v. State of New Jersey, Town of Irvington*], 308 U.S. [147,] 162, 60 S. Ct. 146 [(1939)] ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street.").

Id. at 1221.

Closer to home, but in another circuit, the Seventh Circuit reached the same conclusion with respect to a Granite City, Illinois "ordinance prohibiting the 'indiscriminate' distribution of 'cards, circulars, handbills, samples of merchandise or any

[1] Section 22-82 is a part of the Cape Girardeau Anti-Litter Ordinance. Doc. #1 at ¶ 18.

advertising matter whatsoever on any public street or sidewalk'." *Horina v. City of Granite City, Ill.,* 538 F.3d 624, 627 (7th Cir. 2008). The ordinance was applied in the same way § 22-82 is applied:

> Horina is a retired teacher from St. Charles, Missouri. As part of what he believes to be his calling as a Christian to tell others about their need to be "born again," Horina regularly traveled across the Mississippi River to Granite City, Illinois, to distribute pro-life literature and Gospel tracts-small pamphlets that include Bible verses and short interpretations. … Horina would regularly place his literature on the windshields of cars parked on the city streets adjacent to the Hope Clinic, much to the chagrin of at least one individual: Nathan Lang, a security guard at the clinic.

Id.. The Seventh Circuit concluded: "[T]he Ordinance is not narrowly tailored. A restriction on hand-billing is narrowly tailored if it promotes a substantial government interest that would be achieved less effectively absent the restriction." *Id.* at 634 (internal citations, quotations, and alterations omitted).

More recently the Ninth Circuit found in the context of a preliminary injunction that Plaintiffs challenging an ordinance nearly identical to § 22-82 are likely to prevail on their claim that the ordinance is not narrowly tailored to serve a significant governmental interest. *See Klein v. City of San Clemente,* 584 F.3d 1196 (9th Cir. 2009).[2]

Section 22-82 is likely unconstitutional for the additional reason that it fails to leave open ample alternatives for Plaintiffs to convey their messages. Although the Eighth Circuit has not addressed whether an ordinance like § 22-82 leaves open ample

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[2] The Sixth Circuit disagrees with *Krantz*. *Jobe v. City of Catlettsburg*, 409 F.3d 261, 273-74 (6th Cir. 2005). However, given that Cape Girardeau is in the Eighth Circuit and that courts having considered both *Krantz* and *Jobe* have sided with the Eighth Circuit, the ordinance is likely unconstitutional.

alternative channels of communication, the Seventh Circuit addressed the issue and found that a complete ban on leafleting unoccupied cars fails to do to so. The court explained that the ordinance "fails to leave open ample alternative channels of communication to allow individuals handbilling other ways to convey their message." *Horina*, 538 F.3d at 635. While acknowledging that "[a]n adequate alternative does not have to be the speaker's first or best choice … or one that provides the same audience or impact for the speech …[,]" the court noted that "the alternative must be more than 'merely theoretically available'- 'it must be realistic as well.'" *Id.* (internal citations omitted). The Seventh Circuit also recognized that courts have "'shown special solicitude for forms of expression' that involve less cost and more autonomy for the speaker than the potentially feasible alternatives." *Id.* (internal citations omitted).

The Seventh Circuit's application of these legal principles is equally applicable to § 22-82:

> [W]e believe that the alternative methods of communication forwarded by Granite City simply are not feasible. Forcing an individual to limit handbilling activities to person-to-person solicitation is extremely time consuming and burdensome, particularly when the individual intends to convey a message to people who park their automobiles in a certain area of the city[.] … [T]he individual would not be able to leave literature on the windshields of automobiles …. Instead, the individual would be forced to distribute literature by hand to passersby [or] to people who are sitting in their parked automobiles when the individual happened upon them[.] … Because of these limitations, the time it would take the individual to convey the message to the intended audience would increase from perhaps under an hour to conceivably several days. And we cannot say that an alternative channel of communication is realistic when it requires a speaker significantly-and perhaps prohibitively-more time to reach the same audience.

Horina, 538 F.3d at 636 (internal citations omitted). The spreading of Plaintiffs' messages by placing handbills on parked vehicles is an efficient and cost-effective method of reaching a large number of persons living in, or found in, an area in short period of time for which no comparative alternative exists. Doc. # 1 at ¶ 33.

For these reasons, Plaintiffs are likely to succeed on the merits of their First Amendment challenge to the ordinance.

B. Plaintiffs will suffer irreparable harm without a preliminary injunction

Plaintiffs and others will suffer irreparable harm if an injunction does not issue. Absent an injunction that enjoins the enforcement of § 22-82's prohibition on the distribution of handbills on parked cars, Plaintiffs are chilled from engaging in speech activity because of the ordinance. Doc. # 1 at ¶ 35.

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).

C. The balance of harms favors an injunction

"The balance of equities… generally favors the constitutionally-protected freedom of expression." *Phelps-Roper*, 545 F.3d at 690. There is no harm to Defendant, who has no significant interest in the enforcement § 22-82 since it 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).

Respectfully submitted,

/s/ Anthony E. Rothert
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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2012, I mailed a copy of this motion, first-class postage pre-paid, to the following:

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Gayle Conrad, City Clerk
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Cape Girardeau, Missouri 63703

/s/ Anthony E. Rothert